NOVA SCOTIA COURT OF APPEAL

Citation: *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64

Date: 20221026
Docket: CA 507668
Registry: Halifax

Between:

The Canadian Civil Liberties Association

Appellant

v.

The Attorney General of Nova Scotia representing
His Majesty the King in Right of the Province of Nova Scotia,
the Department of Health and Wellness, and the Chief Medical
Officer of Health, and Freedom Nova Scotia, John Doe(s), Jane Doe(s),
Amy Brown, Tasha Everett, and Dena Churchill

Respondents

Reasons for Judgment: Beveridge J.A.
(paras. 1 to 10)
Reasons for Judgment: Bryson J.A.
(paras. 11 to 171)
Reasons for Judgment: Fichaud J.A.
(paras. 172 to 355)

Appeal Heard:
April 11, 2022, in Halifax, Nova Scotia

Subject:
Ex Parte Injunctions – *Quia Timet* Injunctions – Permanent or Interlocutory – Moot Appeals – Disclosure – Expert Evidence – *Charter* Rights in Context of Interim Injunctions.

Summary:
The Attorney General and the Chief Medical Officer of Nova Scotia (the "Province") obtained an *ex parte* injunction enjoining illegal public gatherings prohibited by a Public Health Order issued by the Chief Medical Officer. The

Canadian Civil Liberties Association ("CCLA") was granted intervenor status and sought an *inter partes* hearing. The Province successfully applied to have the injunction dissolved as no longer necessary and the Supreme Court refused to consider an *inter partes* because the matter was moot. The CCLA then successfully applied to extend time to appeal the original *ex parte* injunction.

Issues:

1. Should the Court hear an appeal of an *ex parte* order?

2. Should the Court entertain a moot appeal?

3. Did the judge err by:

a) Granting an injunction order without the applicants having advanced any common law cause of action, statutory authority, or other right to a remedy;

b) Applying the test for an interlocutory injunction to the applicants' request for a permanent injunction;

c) Stating and applying the wrong test for a *quia timet* injunction;

d) Granting an Injunction Order against all Nova Scotians without requiring evidence that such a remedy was needed against all Nova Scotians;

e) Granting an injunction order without considering that the order infringed the *Charter* rights of all Nova Scotians and that this infringement may not be justified in circumstances;

f) Accepting the evidence of a named applicant as independent expert evidence, without compliance with *Rule* 55 or the common law requirements for independent expert evidence.

Result:

Appeal allowed.

***per* Bryson J.A.**

(a) The Court should hear the appeal of the *ex parte* Order;

(b) Although moot, the Court should entertain this appeal owing to the public interests engaged;

(c) The application judge issued an *ex parte* final injunction to which the injunction test described in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 did not apply. *RJR* is the proper test for an interim injunction for which the Province should have applied;

(d) The application should not have been heard *ex parte*.

(e) The application judge did not misstate the test for obtaining a *quia timet* injunction;

(f) The application judge did not err by failing to identify a cause of action because a breach of statute was a potential basis for seeking injunctive relief; however, the court erred in issuing either a permanent or interim injunction because the Province did not establish:

(i) The inadequacies of the statutory remedies under the *Health Protection Act*, S.N.S. 2004, c. 4 ("Act");

(ii) That there was a "very high probability" of serious or irreparable harm by outdoor transmission of COVID-19 at the proposed public gatherings;

(g) In any event, the Order should not have been indefinite with respect to person, place or duration, but confined to the contemplated gatherings. Provision should have been made for a full *inter partes* hearing on notice to the named respondents at the earliest opportunity;

(h) The *Charter* rights infringed by the Order should have been identified and considered in the balance of convenience in the injunction analysis;

(i) The Chief Medical Officer should not have been qualified as his own expert in a case initiated by him to enforce orders authorized and issued by him.

per **Beveridge J.A.**

Beveridge J.A. concurs with Bryson J.A. except on whether the Attorney General's expert possessed the requisite degree of independence and impartiality to gain admission as expert opinion evidence. That should be left to another day.

per **Fichaud J.A.**

Fichaud J.A. dissented on four bases: (1) Dr. Strang's opinion was admissible as narrative; (2) though Dr. Strang's opinion failed to comply with *Rule* 55, and was inadmissible as expert evidence on that basis, the nature and extent of Dr. Strang's connection to the matter did not offend the requirement of independence for an expert witness; (3) the statutory remedy was inadequate to avert imminent harm, so an injunction was appropriate; and (4) the duty of full and fair disclosure was not infringed.

Cases Cited

By Bryson J.A.

RJR – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; *Chedrawy v. Chedrawy*, 2021 NSCA 73; *Thompson v. Procrane Inc. (Sterling Crane)*, 2016 ABCA 71; *Society of Lloyd's v. Partridge*, 2000 NSCA 84; *Burton v. Howlett* (1998), 172 N.S.R. (2d) 342; *Lawton's Drug Stores Ltd. v. Zinck*, 2009 NSSC 208; *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46; *526901 B.C. Ltd. v. Dairy Queen Canada Inc.*, 2018 BCSC 1092; *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5; *Saskatchewan (Environmental Assessment Act, Minister) v. Kelvington Super Swine Inc.* (1997), 161 Sask.R. 111 (SK QB); *North Pender Island Local Trust Committee v. Conconi*, 2009 BCSC 328, aff'd 2010 BCCA 494; *Township of King v. 2424155 Ontario Inc.*, 2018 ONSC 1415; *Vancouver (City) v. O'Flynn-Magee*, 2011 BCSC 1647; *Attorney General v. Ashbourne Recreation Ground Company*, [1903] 1 Ch. 101; *Cooney v. Ku-ring-gai Corporation* (1963), 114 C.R.R. 582 (Australia High Court); *Ontario (Attorney General) v. Dieleman* (1994), 20 O.R. (3d) 229; *Alberta (Attorney General) v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R. (3d) 741, rev'd [1985] 1 S.C.R. 366; *Ontario (Chicken Farmers of Ontario) v. Drost* (2005), 204 OAC 17 (Div Ct); *Attorney General v. Chaudry*, [1971] 3 All E.R. 938; *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396; *Beaudoin v. British Columbia*, 2021 BCSC 248; *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26; *Ontario v. Criminal Lawyers' Association of Ontario,* 2013 SCC 43; *Boucher v. The Queen*, [1955] S.C.R. 16; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75; *United States of America v. Friedland*, [1996] O.J. No. 4399; *MTS*

Allstream Inc. v. Bell Mobility Inc., 2008 MBQB 103; *Forestwood Co-operative Homes Inc. v. Pritz* (2002), 31 C.B.R. (4th) 243 (Ont. Div. Ct.); *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997), 150 Nfld & PEIR 203 (NLCA); *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Giesbrecht* (1993), 91 C.C.C. (3d) 230 (Man. C.A.), aff'd [1994] 2 S.C.R. 482; *R. v. J.-L.J.*, 2000 SCC 51; *Inkster v. Manitoba (Workers Compensation Board)*, 2021 MBCA 14; *R. v. Abadom*, [1983] 1 All E.R. 364, leave to appeal ref'd [1983] 1 W.L.R. 405 (H.L.); *Hudson Bay Mining & Smelting Co. v. Dumas*, 2014 MBCA 6; *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers* (1977), 80 D.L.R. (3d) 634; *Re Brake; Anderson v. Nalcor Energy*, 2019 NLCA 1; *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34; *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100; *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395; *Automotive Parts Manufacturers' Association v. Boak*, 2022 ONSC 100; *Li v. Barber*, 2022 ONSC 1037; *R. v. Sharpe*, 2001 SCC 2; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23; *Layes v. Bowes*, 2021 NSCA 50; *Silzer v. Saskatchewan Government Insurance*, 2021 SKCA 59; *IPL Plastics Ltd. v. New Brunswick (Executive Director of Assessment)* (1994), 150 N.B.R. (2d) 267; *Homco Realty Fund (20) Ltd. (Re)*, 2005 NSUARB 16, aff'd 2006 NSCA 66; *Ocean v. Economical Mutual Insurance Company*, 2010 NSSC 315; *Handley v. Punnett*, 2003 BCSC 294; *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9.

By Fichaud J.A. (concurring but by disparate reasons)

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182; *People's Holding Co. v. Attorney General of Quebec*, [1931] S.C.R. 452; *Brotherhood of Maintenance of Way Employees Canadian Pacific System. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paperworkers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission),* 2010 BCCA 396; *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26; *Attorney General v. Chaudry*, [1971] 3 All E.R. 938 (Ch. D.); *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *526901 BC Limited v. Dairy Queen Canada*, 2018 BCSC 1092; *Robinson v. Canada (Attorney General)*, 2019 FC 876; *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R.

824; *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3; *1711811 Ontario Ltd. (Adline) v. Buckley Insurance Brokers*, 2014 ONCA 125; *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers* (1977), 80 D.L.R. (3d) 634 (M.C.A.); *United States of America v. Friedland*, [1996] O.J. No. 4399 (Ct. of J., Gen. Div.); *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997), 150 Nfld & PEIR 203 (NLCA).

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Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Thomson Reuters, 2021); Dicey, An Introduction to the Study of the Law of the Constitution, 9th ed (London, U.K.: MacMillan 1945); Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 5th ed; The Right Hon. Lord Woolf, *DeSmith's Judicial Review*, 8th ed. (London: Sweet & Maxwell, 2018); Spry, *The Principles of Equitable Remedies*, 9th ed. (London: Sweet & Maxwell, 2014).

Statutes and Regulations Cited

Health Protection Act, S.N.S. 2004, c. 4; *Civil Procedure Rule* 2.03, 5.01, 5.02, 22.03(2), 22.05, 31.01, 41, 41.01, 55, 55.04, 75; *Canadian Charter of Rights and Freedoms*, s. 2(b); *Emergency Management Act*, S.N.S. 1990, c. 8, *Communicable Diseases Regulations*, N.S. Reg. 196/2005 (O.I.C. 2005-457).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 110 pages.

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Appellant

v.

The Attorney General of Nova Scotia representing His Majesty the King in Right of the Province of Nova Scotia, the Department of Health and Wellness, and the Chief Medical Officer of Health, and Freedom Nova Scotia, John Doe(s), Jane Doe(s), Amy Brown, Tasha Everett, and Dena Churchill

Respondents

Judges:	Beveridge, Fichaud and Bryson JJ.A.
Appeal Heard:	April 11, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Bryson J.A.; Beveridge J.A. concurring in part; and *per* Fichaud J.A. in separate partially disparate reasons.
Counsel:	Benjamin Perryman and Nasha Nijhawan, for the appellant Duane Eddy, for the Attorney General of Nova Scotia and Chief Medical Officer of Health

Beveridge J.A. –

[1] I have had the privilege of reading the comprehensive and insightful draft reasons of both of my colleagues, Justices Fichaud and Bryson.

[2] At the end of the day, the Court is unanimously of the view the appeal must be allowed. My colleagues agree, as do I:

- The Attorney General's application should not have been *ex parte*;
- The Court should hear this moot appeal;
- Dr. Strang's expert opinion was not admissible;
- The Nova Scotia Supreme Court had the jurisdiction to issue a *quia timet* injunction to enjoin apprehended breaches of the Public Health Order made pursuant to the *Health Protection Act*;
- The motion judge erred when he employed the test for an interlocutory injunction when he actually was asked for and did issue a permanent injunction;
- The motion judge erred by not considering the impact on *Charter* rights when considering if he should issue the requested injunctive relief;
- The motion judge erred by issuing injunctive relief that was far too broad.

[3] I write brief concurring reasons because of the points of disagreement. As I see it, they are:

- The AGNS failed in its duty to provide full disclosure of information in its possession on the *ex parte* application;
- The motion judge erred in law in finding the prerequisites for a permanent *quia timet* injunction had been made out;
- Dr. Strang's opinion about the risk of outdoor transmission should not have been accepted because he lacked the necessary independence and impartiality as set out in *White Burgess*.

[4] I agree with Justice Bryson that the prerequisites for a permanent *quia timet* injunction were not met and the AGNS did not fulfill its duty to ensure full disclosure on an *ex parte* application.

[5] With respect to both of my colleagues, not only is there no need to weigh in on the issue of Dr. Strang's independence and impartiality, it is preferable not to do so.

[6] Trial judges are to act as the gatekeepers with respect to expert opinion evidence. There are two steps that could preclude admission. At the first step, the judge must be satisfied the evidence is necessary, relevant, does not offend an exclusionary rule, and the expert is properly qualified to offer the opinion (*White Burgess* at para. 23). The second engages a cost-benefit analysis (*White Burgess* at para. 24).

[7] As part of the inquiry whether the proposed expert is properly qualified, the judge must be satisfied the expert is independent and impartial (*White Burgess* at paras. 45 and 53). The issue of independence and impartiality can also play a role at the second step (*White Burgess* at para. 54).

[8] Here, the motion judge failed to address this issue. This is likely the product of the Attorney General's request and the motion judge's agreement to hear the injunction application *ex parte*.

[9] In any event, as pointed out by Cromwell J. in *White Burgess*, whether an expert should be permitted to give opinion evidence despite having an interest or connection with the litigation is a matter of fact and degree (para. 50). We do not have a decision by a judge who should have had the benefit of hearing the proposed expert and making findings of fact or of mixed law or fact on this issue.

[10] In these circumstances, it is preferable to leave this issue to another day. In all other respects, I concur with the reasons of Bryson J.A.

Beveridge J.A.

Bryson J.A. –

Introduction

[11] On May 14, 2021, the Attorney General of Nova Scotia and the Province's Chief Medical Officer of Health obtained a sweeping *ex parte* Injunction Order binding all Nova Scotians, preventing them from organizing, promoting or attending public gatherings that would be contrary to public health orders issued by the Chief Medical Officer (unless otherwise described, the Attorney General and the Chief Medical Officer will be collectively referred to as the "Province"). The Injunction Order ("Order") followed the decision of the Honourable Justice Scott C. Norton (2021 NSSC 170).

[12] Amy Brown, Tasha Everett, and Dena Churchill, as well as "Freedom Nova Scotia", "John Doe(s)" and "Jane Doe(s)" were named as respondents. Because the application was *ex parte,* none of the respondents were told of the hearing. They did not attend the hearing, so they could not give evidence or make submissions themselves. They could not challenge the Province's evidence or cross-examine the Province's witnesses.

[13] The Order was granted indefinitely in time and extent. There was no return date for an *inter partes* hearing for the respondents to be heard. The Order did permit application to vary or discharge the Order, but otherwise it would remain in effect.

[14] The Canadian Civil Liberties Association ("CCLA") appeals the "unprecedented" Order, involving a "misuse" of government power, "unjustified" resort to the courts, and alleged procedural and substantive improprieties in obtaining the Injunction Order.

[15] The CCLA argues the Chief Medical Officer's own opinion should not have been admitted as "expert evidence". The CCLA says the court applied the wrong test when issuing a "final injunction", failed to identify a proper cause of action, and misstated the test for a *quia timet* injunction.

[16] The CCLA challenges the need for any injunction and questions the breadth of the Order granted. They add the injunction flouted *Charter* rights which the judge failed to properly consider.

[17] The Province opposes the appeal and rejects all of the CCLA's arguments as detailed further below.

[18] Two preliminary matters arise. First, should this Court hear an appeal from the *ex parte* Order when no *inter partes* hearing took place? Second, since there is no longer a live issue between the parties, because the Order has been discharged, should this Court exercise its discretion to hear the appeal?

[19] A further potential preliminary question is whether this is an interlocutory appeal, for which leave is required. Assuming the appeal is interlocutory, the CCLA must show there are "arguable issues". As the following discussion reveals, the appeal raises arguable issues for which leave, if necessary, should be granted.

[20] For reasons elaborated on below:

(a) The Court should hear the appeal of the *ex parte* Order;

(b) Although moot, the Court should entertain this appeal owing to the public interests engaged;

(c) The application judge issued an *ex parte* final injunction to which the injunction test described in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 did not apply. *RJR* is the proper test for an interim injunction for which the Province should have applied;

(d) The application judge did not misstate the test for obtaining a *quia timet* injunction;

(e) The application judge did not err by failing to identify a cause of action because a breach of statute was a potential basis for seeking injunctive relief; however, the court erred in issuing either a permanent or interim injunction because the Province did not establish:

  (i) The inadequacies of the statutory remedies under the *Health Protection Act*, S.N.S. 2004, c. 4 ("*Act*");

  (ii) That there was a "very high probability" of serious or irreparable harm by outdoor transmission of COVID-19 at the proposed public gatherings;

(f) In any event, the Order should not have been indefinite with respect to person, place or duration, but confined to the contemplated gatherings.

Provision should have been made for a full *inter partes* hearing on notice to the named respondents at the earliest opportunity;

(g) The *Charter* rights infringed by the Order should have been identified and considered in the balance of convenience in the injunction analysis;

(h) The Chief Medical Officer should not have been qualified as his own expert in a case initiated by him to enforce orders authorized and issued by him.

[21] The preliminary issues will be addressed first, followed by an overview, a list of the issues, and an analysis of the issues.

Appeals from interim e*x parte* orders

[22] As a general rule, courts of appeal do not typically hear appeals from *ex parte* orders because the appropriate procedure is to apply for an *inter partes* hearing. As this Court explained in *Chedrawy v. Chedrawy*, 2021 NSCA 73:

> [13] Barring exceptional circumstances, appellate courts do not hear appeals from interim *ex parte* orders because the procedural remedy is to seek *an inter partes* hearing before the first instance judge or another judge of that court, as A.C.J. O'Neil's *ex p*arte order contemplated and *Rule* 22.06 permits (see *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2017 ABCA 316 at paras. 52-55). An attempted appeal following an executed *ex parte* order may even be an abuse of process when the applicant has made no effort to have an *inter partes* hearing: *WEA Records Ltd. v. Visions Channel 4 Ltd.*, [1983] 2 All E.R. 589 (C.A.).

[23] In *Thompson v. Procrane Inc. (Sterling Crane)*, 2016 ABCA 71, the Alberta Court of Appeal denied permission to appeal an *ex parte* order partly because the order had already been reviewed and upheld. In this case, the injunction under appeal has not been reviewed by any court. Moreover, as discussed below, the CCLA made efforts to have an *inter partes* hearing but was denied that on the basis of mootness. Appeal of the *ex parte* Order should be heard in this case because the circumstances are exceptional, and, as discussed by Fichaud J.A., involve matters of public interest and importance from both public and private law perspectives.

Is it in the public interest that the appeal should be heard?

[24] For the reasons given by Justice Fichaud in his consideration of estoppel and mootness, the Court should hear this appeal.

Overview

[25] On May 12, 2021, the Province filed an *ex parte* Application seeking a *quia timet* injunction in anticipation of pending protests against COVID-19 public health restrictions. The application was supported by affidavits from Dr. Robert Strang, Chief Medical Officer of the Province, and Hayley Crichton, Director of Public Safety and Investigations for the Department of Justice for the Province.

[26] *Quia timet* literally means "because one fears". *Quia timet* injunctions respond to an anticipated event, not to existing circumstances. They are hard to get.

[27] The protests were scheduled for May 15, 2021, on Citadel Hill in the City of Halifax, Alderney Landing in Dartmouth, and the baseball field in Barrington. The Public Health Order then in force, dated May 13, 2021, prohibited "illegal public gatherings" defined as:

> [13.5] … a gathering that does not comply with the requirements of this Order including
>
> (a) attendance limits applicable to gatherings, whether indoors or outdoors;
>
> (b) physical distancing; and
>
> (c) masking requirements.

[28] The Province sought to enjoin all persons in Nova Scotia from organizing, promoting or attending "illegal public gatherings". Subject to exceptions not relevant in this case, any public gathering was illegal.

[29] On May 14, 2021, the Injunction Order was granted prohibiting all persons in 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*.

[30] Section 5 of the Order made any violation of the Order punishable by civil contempt and granted law enforcement a wide range of enforcement powers. Section 9 authorized the Respondents and any person with notice of the Order to "apply to the court at any time to vary or discharge the Order" and the Order was not made returnable for an *inter partes* hearing at a later time.

[31] On May 27, 2021, the CCLA filed a Notice of Motion seeking public interest standing for the purpose of requesting a rehearing pursuant to s. 9 of the Order. By consent on June 4, 2021, Justice Timothy Gabriel granted the CCLA public interest standing. The rehearing was scheduled for June 30, 2021.

[32] On June 14, 2021, the Province filed a motion to discharge the Injunction Order because it was "no longer necessary". The only evidence for the Province's sudden change of heart was cited in the Province's factum, referring to a solicitor's affidavit filed in support of the motion to discharge the injunction:

> 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 [*sic*] 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."

The CCLA opposed the motion on procedural grounds but raised no objection to discharge of the Order on the merits.

[33] The Order was discharged by Justice Gail Gatchalian on June 22, 2021. On June 30, 2021, Justice James Chipman determined the *de novo* hearing of the application was moot and refused to allow it to proceed.

[34] The CCLA then filed a motion for extension of time to file an appeal of Justice Norton's decision. The Province opposed the motion on grounds of mootness and lack of standing. On August 31, 2021, Justice Cindy A. Bourgeois granted an extension authorizing CCLA to file an appeal, finding that it was in the interests of justice to allow the appeal to be heard.

[35] The Notice of Appeal alleges the following errors:

1. Granting an injunction order without the applicants having advanced any common law cause of action, statutory authority, or other right to a remedy;
2. Applying the test for an interlocutory injunction to the applicants' request for a permanent injunction;
3. Stating and applying the wrong test for a *quia timet* injunction;
4. Granting an Injunction Order against all Nova Scotians without requiring evidence that such a remedy was needed against all Nova Scotians;
5. Granting an injunction order without considering that the order infringed the *Charter* rights of all Nova Scotians and that this infringement may not be justified in circumstances;
6. Accepting the evidence of a named applicant as independent expert evidence, without compliance with *Rule* 55 or the common law requirements for independent expert evidence.

[36] In its factum, the CCLA argues (a), (b), and (c) together. Accordingly, the first issue to be addressed is whether the correct injunction test was applied. Because the relevant injunction test relates to the procedural steps undertaken by the Province in obtaining the injunction, sub-ground (b) will be considered first, followed by (c) and (a).

Was the correct injunction test applied?

Injunction – Interlocutory or Permanent?

[37] The CCLA maintains the judge granted what was in effect a permanent injunction, not an interlocutory injunction, and accordingly the interlocutory injunction test should not have applied. The CCLA says the three-part test for an interlocutory injunction is set out in *RJR – MacDonald*:

(a) a serious issue to be tried;

(b) irreparable harm if the injunction is not granted; and

(c) the balance of convenience favours the injunctive relief.

The CCLA adds that the *RJR – MacDonald* test does not apply to permanent injunctions and is designed instead for situations where the court has not finally determined the merits.

[38] In its factum, the Province insists it obtained an interlocutory injunction, properly relying on the *RJR – MacDonald* test. It says the interlocutory character of the Order is reflected in the judge's decision, his discussion with counsel in court and s. 9 of the Order permitting application to vary or discharge the Order. Alternatively, the Province claims it does not matter because the test for a permanent injunction was met.

[39] The Province's *Ex Parte* Application begins:

> **Order applied for**
>
> The Applicant is applying for an Order granting a *quia timet* injunction which:
>
> 1. Orders compliance with the provisions of the *Health Protection Act* 2004, c. 4, s. 1;
> 2. Enjoins the Respondents, and any other person acting under their instructions or in concert with them, from organizing in-person public gatherings: and
> 3. Authorizes law enforcement to engage in enforcement measures to ensure compliance with the *Health Protection Act* and any Order issued under section 32 of the *Health Protection Act*, or in accordance with the *Health Protection Act*.

[40] Section 9 of the Application describes the legislation and points of law on which the Province relies:

> 9. The Applicant relies on the following legislation and points of law:
>
>   a. *Health Protection Act* 2004, c. 4, s. 1.S 9
>
>   b. *Judicature Act*.
>
>   c. Nova Scotia Civil Procedure Rule 5.02.
>
>   d. Nova Scotia Civil Procedure Rule. 2.03

[41] Neither the legislation nor points of law refer to injunctions. The Province did not specify under what rule it was seeking an *ex parte* injunction. *Rule* 2.03 discusses a judge's procedural discretion in applying the *Civil Procedure Rules*, and *Rule* 5.02 which refers to an "*ex parte* application in chambers". The application does not mention *Rule* 41 which addresses interlocutory injunctions or *Rule* 75 which refers to permanent injunctions.

[42] An application is a proceeding which contemplates a decision on the merits whereas an interlocutory proceeding is an intermediate step prior to a final determination on the merits. *Rule* 5.01 describes an application as originating a proceeding and a motion as an interlocutory step in a proceeding. *Rule* 5.02 authorizes an *ex parte* application in chambers, not as an interlocutory step but as a final step:

> **5.02 *Ex parte* application in chambers**
>
> (1) A person may apply for an *ex p*arte order, ***if it is appropriate to seek the order without notice to another person***.
>
> (2) The person may apply for an *ex parte* order in chambers by filing an *ex parte* application.
>
> (3) The *ex parte* application must contain a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled "*Ex parte* Application", be dated and signed, and include all of the following:
>
> (a) a description of the order applied for;
>
> (b) ***a statement explaining why it would be appropriate for the judge to grant the order without notice to other persons***;
>
> (c) a concise statement of the grounds for the order, including the material facts the applicant seeks to establish and a reference to legislation relied on by the applicant;
>
> (d) a reference to each affidavit relied on by the applicant, identified by the name of the witness and the date the affidavit is sworn or affirmed;
>
> (e) the time, date, and the place for the application
>
> (f) if there is only one applicant, a designation of an address for delivery of documents to the applicant, and if there is more than one applicant, a designation of one address for delivery to all applicants or a separate address for each applicant;
>
> (g) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.
>
> (4) The *ex parte* application may be in Form 5.02.
>
> (5) The applicant must file the *ex parte* application, and the referenced affidavit, and deliver a brief for the judge hearing the application, at least two days before the day of the hearing of the application.
>
> [Emphasis added.]

[43] An *ex parte* application requires the applicant to state why it is appropriate not to give notice of the application (*Rule* 5.02). In this case, this was all the Province offered:

> **Ex parte**
>
> This Application is made without notice to any other person because injunctive relief is necessary to prevent or reduce the spread of SARS-CoV-2 which causes Covid-19 within the Province of Nova Scotia.

[44] This does not say why it was necessary to go to court without notifying the respondents. It did not comply with *Rule* 5.02(3)(b).

The Province should not have proceeded ex parte

[45] In general, notice should always be given to persons who may be affected by a proceeding directed against them (*Society of Lloyd's v. Partridge*, 2000 NSCA 84; *Burton v. Howlett* (1998), 172 N.S.R. (2d) 342). In this case, the *Rule* specifically permits proceeding *ex parte*, but requires the applicant to explain why it is appropriate not to give notice. Since no such explanation was given, it was inappropriate to proceed *ex parte*.

[46] Although the *Rules* allow for *ex parte* injunctions, *Rule* 41.02 specifically says, "Nothing in this Rule alters the general law about obtaining an interim or interlocutory injunction before a dispute is heard and determined on the merits" (see *Lawton's Drug Stores Ltd. v. Zinck*, 2009 NSSC 208).

[47] Typically, there are only two situations where giving no notice whatsoever for an injunction is justified:

1. When it is virtually impossible to give notice to the respondent before serious irreparable injury occurs;
2. When the act of giving notice *itself* may trigger the damage which it is sought to avoid.[1]

[48] Examples of the latter include *Anton Piller* and *Mareva* injunctions.

[1] The Honourable Mr. Justice Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Thomson Reuters, 2021), ch. 2:2, p. 2-6, 2-7.

[49] *Rule* 22.03(2) gives other examples of when notice may be unnecessary, including the risk of triggering violence, destruction of evidence or serious property loss.

[50] The Province was monitoring the named respondents on social media. There was no reason why notice could not have been given to them. Moreover, notice to those unnamed could have been given by publication or social media.

[51] The failure to give notice has an impact on the disclosure obligations of the Province. More will be said about these obligations when addressing whether the injunction test was met in this case.

The court granted a permanent injunction

[52] In its factum, the CCLA argues the distinction between an interim and permanent injunction:

> 47. At common law, injunctive relief is available on either an interim, interlocutory or permanent basis, as a civil remedy. In *Adline v. Buckley Insurance Brokers*, Gillese JA of the Court of Appeal for Ontario provided clarity on these different remedies:
>
> a. Both interim and interlocutory injunctions are granted on a pre-trial basis, prior to the determination of the final issues between the parties in the main proceeding.34
>
> i. An interim injunction can be granted on an *ex parte* basis, and is usually granted on limited argument, for a brief, specified period of time, and can only be continued by further motion;
>
> ii. An interlocutory injunction is usually granted based on more thorough argument by both parties, and is usually for a longer duration than an interim injunction.
>
> b. Permanent injunctions are imposed only after a final adjudication of rights, and once it has been established that an injunction is an appropriate remedy.

The foregoing is a correct summary of the law respecting interim, interlocutory and permanent injunctions. In this case, there was no final adjudication of rights, including *Charter* rights which the CCLA says were ignored.

[53] The appropriate test for a permanent injunction is described in *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 at ¶72 as a "helpful summary" for deciding the availability of permanent injunctions:

> [72] I will conclude this analysis by saying that the proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:
>
> > (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
> >
> > (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);
> >
> > (iii) ***Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong?*** (If yes, the claimant should be left to reliance on that alternate remedy);
> >
> > (iv) ***If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship)*** affecting the claimant's *prima facie* entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
> >
> > (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
> >
> > (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?
>
> [Emphasis added.]

[54] The Province chose a final process but argued law respecting an interlocutory or interim injunction on which the judge relied in granting the injunction. The Order has the character of permanency, although the urgency alleged and the immediate relief sought related to the pending public rallies on May 15, 2021. The Province wanted to prevent those rallies from taking place.

The Order itself did not provide a return date but it did contemplate a return date on notice.

[55] *Rule* 41.01 defines an interim injunction as an injunction order *before* an interlocutory injunction is heard. An interlocutory injunction is heard on notice. The judge did not provide for an *inter partes* hearing. Unless someone applied to set aside or vary the Order, it was permanent.

[56] The judge granted a permanent *ex parte* injunction, although the requirements for seeking that relief *ex parte* were not met by the Province (¶31-33 above). Additionally, the wrong injunction test was applied for a permanent injunction.

[57] The Province submits that it can meet the permanent injunction test because:

1. The Public Health Order was not an adequate alternative remedy to deter and prevent public gatherings; and
2. Restraining public gatherings was not worse than the spread of COVID-19 infections.

[58] These points correspond to points (iii) and (iv) of the foregoing *Nalcor* criteria (adequacy of remedy and hardship).

[59] The Province's argument that it could meet either the interlocutory or permanent tests for an injunction will be considered further below.

[60] The Province should have sought an interlocutory injunction. The correct test for that relief was the *RJR* test applied by the judge.

Did the judge misstate the *quia timet* injunction test?

[61] The CCLA complains the Province cited the wrong test to the judge who adopted it:

> 71. The Province offered the following test for consideration by the Court, without any attribution or authority:
>
> > In order to grant a quia timet injunction, the Province submits that the court must find the following:

1. The harm that is anticipated is imminent.
2. The harm is irreparable.
3. Damages would not be an adequate remedy.

[62] The CCLA says it was also necessary to find "… that there is a high degree of probability the alleged harm will in fact occur …" (*526901 B.C. Ltd. v. Dairy Queen Canada Inc.*, 2018 BCSC 1092). Assuming that this finding is an additional requirement that must be met, the judge did consider it when he said there was a "high probability that the harm will occur …" (*Decision*, ¶20).

[63] The judge did not misstate the correct *quia timet* injunction test.

Was the injunction granted without identifying a cause of action?

[64] The CCLA says that no cause of action was identified before the application judge and therefore there was no "serious issue" to be tried. The CCLA refers to the Supreme Court of Canada's comment in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at ¶25, that, "An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy."

[65] The Province replies that public gatherings in breach of public health orders are "the cause of action" which satisfies the "serious issue" criterion of *RJR – MacDonald's* tripartite test. A cause of action is equally necessary for a party seeking a permanent injunction.

[66] The CCLA rightly says that the statute itself did not authorize an injunction order which some statutes occasionally do for a breach (*Saskatchewan (Environmental Assessment Act, Minister) v. Kelvington Super Swine Inc.* (1997), 161 Sask.R. 111 (SK QB); *North Pender Island Local Trust Committee v. Conconi*, 2009 BCSC 328, aff'd 2010 BCCA 494; *Township of King v. 2424155 Ontario Inc.*, 2018 ONSC 1415; *Vancouver (City) v. O'Flynn-Magee*, 2011 BCSC 1647).

[67] The court retains an inherent jurisdiction to grant injunctive relief unless the legislature clearly intends to exclude it by statute (*Attorney General v. Ashbourne Recreation Ground Company*, [1903] 1 Ch. 101). The court's inherent jurisdiction includes the power to protect public health (*Cooney v. Ku-ring-gai Corporation* (1963), 114 C.R.R. 582 (Australia High Court); *Ontario (Attorney General) v. Dieleman* (1994), 20 O.R. (3d) 229).

[68] The CCLA acknowledges the court has a limited jurisdiction to grant injunctions to enforce statutory obligations, even in the absence of explicit statutory power but says this authority is "sparingly exercised".

[69] The Province responds that the breach of statute, together with the high probability of irreparable harm and a balance of convenience favourable to the Province, establishes the right to an injunction.

May breach of a statute afford injunctive relief?

[70] While there is no question that, in appropriate circumstances, courts have the power to grant injunctions against those breaching statutes, it does not follow that they will routinely do so. The equitable character of injunctive relief is supplementary to the law and is typically unavailable to a party with an effective legal remedy (*Nalcor*, ¶67). Injunctions have been granted in support of legislative requirements when the statutory penalties were unavailable or ineffective because prior convictions did not deter the defendant (*Alberta (Attorney General) v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R. (3d) 741, rev'd on other grounds [1985] 1 S.C.R. 366; or where the judge treated the applicant as a private litigant and overlooked the statutory power to award an injunction: *Ontario (Chicken Farmers of Ontario) v. Drost* (2005), 204 OAC 17 (Div Ct)).

[71] In the context of public safety, Sharpe refers to *Attorney General v. Chaudry*, [1971] 3 All E.R. 938 at p. 3-18, in which an injunction was granted to restrain a dangerous breach of fire and safety regulations, in part because the statutory remedies were inadequate to compel compliance by the defendants in a timely manner that would avoid risk to the building's occupants.[2]

[72] In this case, the *Act* authorizes enforcement in the following ways:

- Subsection 26(4)(c) allows an order to pay issued by the Chief Medical Officer to be enforced in the same manner as the judgment of the Supreme Court in civil proceedings;
- Section 27 permits a court to order compliance where a person has violated an order made under s. 22(5). Subsection 22(5) requires that a person who is served with an order comply with it

[2] *Ibid* at pp. 3-18.

forthwith or within any period of compliance specified in the order.

- Section 38 permits a judge of the Provincial Court, upon application by a medical officer, to order that a person who has failed to comply with an order made under s. 32 of the *Act*:
  - be taken into custody and be admitted to and detained in a quarantine facility named in the order;
  - be taken into custody and be admitted to, detained and treated in an isolation facility named in the order;
  - be examined by a physician who is acceptable to the medical officer to ascertain whether the person is infected with an agent of a communicable disease; or
  - where found on examination to be infected with an agent of a communicable disease, be treated for the disease.

[73] Section 27 only applies to orders made under s. 22(5) of the *Act*. The Public Health Order in this case was made under s. 32. Sections 27 and 38 only apply to persons who have failed to comply with an order.

[74] While the foregoing do not permit a forward-looking remedy like an injunction, there is no evidence that these enforcement provisions had been invoked and proved ineffective against the named respondents.

[75] In *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, the British Columbia Court of Appeal overturned a permanent injunction obtained by the Province for alleged breaches of the *Medical Protection Act* in part because the Province failed to establish the inadequacy of the statutory remedies:

> [33] On the face of it, the Commission established that it was legally entitled to conduct an audit under s. 36 of the *Act*. The first part of the test for the granting of a final injunction was, therefore, made out. Nonetheless, it is my view that, for reasons that follow, the court ought not to have granted injunctive relief in this case.
>
> [34] ***While courts have jurisdiction to grant injunctions to enforce statutory obligations, the jurisdiction must be exercised carefully. Where, as here, there is a clear method of enforcement set out in the statute, the court should not***

> ***grant injunctive relief unless the statutory provision is shown to be inadequate in some respect.***
>
> [35] There are a number of respects in which a statutory regime may be inadequate. For example, the penalty for breach of the statute may be so limited that a party chooses to treat it as a cost of doing business, and therefore flout the law (see Robert J. Sharpe, *Injunctions and Specific Performance* (Looseleaf Edition, Toronto: Canada Law Book, 1998-2009) §3.210; *A.G. v. Harris*, [1961] 1 Q.B. 74 (C.A.); *Alberta (Attorney General) v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R.(3d) 741 (Alta. C.A.), rev'd on other grounds [1985] 1 S.C.R. 366; *Attorney-General for Ontario v. Grabarchuk* (1976), 67 D.L.R. (3d) 31 (Ont. Div. Ct.).
>
> [36] A statutory provision may also prove inadequate where a party who suffers harm is unable to invoke the provision (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048), ***or where serious danger or harm would result from the delay inherent in invoking a statutory remedy***. There are, undoubtedly, other situations in which deficiencies in a statutory remedy militate in favour of the granting of an injunction.
>
> [Emphasis added.]

[76] The Province contends it can meet the emphasized criteria.

[77] We shall see.

[78] *Cambie* supports the CCLA's summary of when injunctions may be granted in support of legislation:

1. Whether the penalty for breach of a statute is so limited that a party chooses to treat it as a cost of doing business, and therefore flouts the law;
2. Whether a party who suffers harm as a result of a breach is unable to invoke the provisions; or
3. Where serious danger or harm would result from the delay inherent in invoking the statutory remedy.

[79] *Cambie* is a case of a permanent injunction and does not speak to "irreparable harm", although, unlike here, it was an *inter partes* case. Even so, the availability of injunctive relief depended upon a finding of "a serious danger or harm". In a *quia timet* context, there must be a high probability of either serious danger or irreparable harm for permanent or interim relief, respectively.

[80] The CCLA relies upon the availability of alternative remedies described in *Beaudoin v. British Columbia*, 2021 BCSC 248, in which Chief Justice Hinkson said:

> [52] The respondents differ from many litigants who seek injunctive relief. In particular, they do not necessarily require the assistance of the Court to enforce their legislation. The alternate remedies available to the respondents are a factor to be considered in the exercise of my discretion. The challenged orders remain extant unless and until set aside or overturned by this Court.

[81] The Province replies that *Beaudoin* can be distinguished because the British Columbia Court of Appeal in *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26 at ¶40, leave to appeal ref'd [2022] S.C.C.A. No. 168, overturned a trial decision declining an injunction where the judge had given too little weight to the "public interest in upholding the rule of law".

[82] Respectfully, *Teal* is unhelpful to the Province because the private plaintiff in that case had no access to the alternative remedies available to a public plaintiff like the Province here. In this case, there is a statutory enforcement scheme available to the Province (and unavailable in *Teal*) which could be engaged to compel compliance with the *Act*.

[83] To add – the "rule of law" referred to by the British Columbia Court of Appeal in *Teal* is an expression usually attributed to A. V. Dicey, Vinerian Professor of Law at Oxford, who described the right of public meetings as a general principle of the unwritten English constitution.[3] Plainly, both at common law and under the *Charter*, the rule of law embraces more than legislation.

[84] The Province failed to prove the statutory remedies had been inadequate to compel the respondents' compliance with the Public Health Order.

[85] In this case, the activity which the Province sought to enjoin was already expressly prohibited by the Public Health Order made under the authority of the *Act* for which both fine and imprisonment are available remedies. The Province did not say in its application that the statutory remedies available under the *Act* were insufficient, nor did the Province tender any evidence to show that its attempts to enforce the *Act* had been unsuccessful. Indeed, with respect to the named respondents, no evidence of past enforcement steps was placed before the court.

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[3] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 9th ed (London, U.K.: MacMillan 1945).

[86] The Province relies on the judge's finding that the Public Health Order "proved ineffective". In fact, the judge made no such finding. The paragraphs cited in support of this submission relate to the issuance of the injunction, not the ineffectiveness of the Public Health Order. In any event, the question is not whether the Public Health Order proved ineffective in restraining public gatherings. The question is whether the remedies provided for in the legislation proved ineffective. No such evidence was led concerning any effort to enforce the orders successfully or otherwise.

[87] In her affidavit, Ms. Crichton describes three examples of ticketing at private residences for breaches of the Public Health Order, unconnected with the impugned activities of the named respondents. Ms. Crichton describes four prior dates when "Freedom Nova Scotia" organized public rallies. No mention of ticketing or enforcement efforts appear in the affidavits regarding those rallies.

[88] Alternatively, the Province contends that the application judge found that the proposed May 15, 2021, public gatherings risked irreparable harm, owing to the potential transmission of COVID-19 at those gatherings. The Province refers to Dr. Strang's opinion that "… there is a substantial risk of COVID-19 transmission among attendees", on which the judge relied to find a "high probability" of harm. The Province says these findings justified the Injunction Order.

[89] The injunction was intended to prevent outdoor gatherings in wide, open spaces. Crucial to the risk involved, and therefore the availability of injunctive relief requested, was the danger to those gathering – and to the wider public – posed by these outdoor events. How likely was COVID-19 to be transmitted outdoors? The decision does not ask or answer that question.

[90] At the time that the injunction application was sought, the Province had been monitoring COVID-19 transmission by contact tracing for many months. Yet no examples of outdoor transmission from this monitoring were described in the affidavit evidence. The affidavit of Hayley Critchton details a number of previous "illegal" outdoor gatherings, but does not ascribe any infection or transmission of COVID-19 to these gatherings. In other words, there was no actual evidence of outdoor transmission presented by the Province. Instead, the Province relies on an opinion from the Chief Medical Officer.

[91] The Chief Medical Officer deposed:

> [28] Nova Scotia has attempted to control the spread of the SARS-CoV-2 virus by implementing a number of public health requirements under the Public Health Order. Restrictions on how people interact with others outside of their households in public places, whether indoors or outdoors, are necessary to prevent the transmission of SARS-CoV-2 and are effective in reducing cases of COVID-19.

[92] The only point at which a distinction is made between indoor and outdoor transmission appears in a fleeting phrase in Dr. Strang's affidavit where he says:

> [31] […] 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.
>
> [Emphasis added.]

[93] Although Dr. Strang refers to recent evidence of outdoor transmission, his affidavit neither describes that evidence nor is that evidence attached as had been done to support a number of his other assertions.

[94] It is plain and obvious from this language that there is a distinction between indoor and outdoor transmission because the Chief Medical Officer uses the qualifier "even". Unidentified evidence is cited to support this view. No supporting documentation for this statement is attached as an exhibit to the affidavit. What does the evidence say the risk of outdoor transmission is? One percent? Ten percent? Fifty percent? We do not know. But we do know that evidence was material to the opinion expressed on which the judge relied for his finding of irreparable harm.

[95] The lack of evidentiary detail is particularly concerning because:

1. This was an *ex parte* application requiring full disclosure of all relevant and material facts by the Province;
2. COVID-19 is a novel disease about which our knowledge was rapidly evolving;
3. The Province failed to provide a single example of outdoor transmission of COVID-19.

[96] As the CCLA submits when arguing its *Charter* point:

> 93. Counsel for the Attorney General acknowledged during the *ex p*arte hearing that constitutional rights were engaged, but failed to make detailed submissions on this position in advance of the hearing. ***It is well-established that***

> ***parties appearing before the court on an ex parte basis are under a duty of utmost good faith in the representations that they make, including a duty to not present only their side of the case***. The Attorney General is not an "ordinary party", and agents of the Attorney General have even broader responsibilities to the court.
>
> [Emphasis added.]

[97] *Rule* 22.05 describes the disclosure obligations on an *ex parte* motion:

> 22.05 Full and fair disclosure on an *ex parte* motion
>
> (1) The party who makes an *ex parte* motion must include, in an affidavit filed for the motion, any evidence known to the party, personally or by information, that weighs against granting the order.
>
> (2) A party who makes a motion for an *ex parte* order must advise the judge hearing the motion of any fact that may weigh against granting the order.
>
> (3) A judge who is satisfied that an *ex parte* order was obtained without full and fair disclosure may set aside the order.

[98] *Rule* 22.05 merely reflects the general law on the obligation for disclosure. As the CCLA points out in its factum, the Attorney General is not an "ordinary party" and has a broader responsibility to the court than a private litigant, citing *Ontario v. Criminal Lawyers' Association of Ontario,* 2013 SCC 43 at ¶37. In that case, the Court referred to its earlier decisions in *Boucher v. The Queen*, [1955] S.C.R. 16 at pp. 23-24 and *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at pp. 191-192, regarding the fairness obligations of the Attorney General and her agents. Although the foregoing principles are expressed in the context of criminal law, the public obligations of the Attorney General to the Court and to a civil respondent do not diminish simply because the Attorney General is seeking to enforce a statute by injunction.

[99] A party applying for an *ex parte* order is required to make full and frank disclosure of all material facts (*Ruby v. Canada (Solicitor General)*, 2002 SCC 75 at ¶27). The rationale for doing so should be obvious but is explained by Sharpe J. in *United States of America v. Friedland*, [1996] O.J. No. 4399:

> [26] It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. ***The Judge hearing an ex parte motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are***

> ***not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party*** in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. […]
>
> [27] [The moving] party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and ***must inform the Court of any points of fact or law known to it which favour the other side***. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.
>
> [Emphasis added.]

[100] Materiality is key to the obligation, whether the undisclosed evidence is unfavourable or not. As the Supreme Court said in *Ruby*:

> [27] […] The evidence presented must be ***complete and thorough*** and no relevant information adverse to the interest of that party may be withheld […]
>
> [Emphasis added.]

[101] A fact is material if it would have been "weighed or considered … in deciding the issues, regardless of whether its disclosure would have changed the outcome" (*MTS Allstream Inc. v. Bell Mobility Inc.*, 2008 MBQB 103 at ¶29, quoting *Forestwood Co-operative Homes Inc. v. Pritz* (2002), 31 C.B.R. (4th) 243 (Ont. Div. Ct.) at ¶26; see generally Sharpe at pp. 2-7, 2-8, 2-9).

[102] The obligation for full disclosure is especially acute in a case like this with a new and emerging disease about which our knowledge is incomplete and developing. Any failure by the Attorney General to fulfil this obligation of full and frank disclosure would affect both the type and extent of potential relief available to the applicants.

[103] In *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997), 150 Nfld & PEIR 203 (NLCA), the Court of Appeal of Newfoundland and Labrador described the obligation in *ex parte* applications to ensure grounds of consideration of the issue as a "super-added" duty:

> [18] On any *ex parte* application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or

counsel that could reasonably be expected to have a bearing on the outcome of the application. ***Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty*** to the court and the other parties to ensure that as ***balanced a consideration*** of the issue is undertaken as is consonant with the circumstances.

[Emphasis added.]

[104] Justice Fichaud disagrees that there was a want of full and frank disclosure:

> [347] Citing para. 31's "recent evidence", Justice Bryson says Dr. Strang "neither describes that evidence nor is that evidence attached as had been done to support a number of his other assertions". My colleague does not suggest any concealment. Rather, he points out the degree of disclosure from the "recent evidence" does not match that from Dr. Strang's other exhibits. From this, he concludes there is an infringement of the duty of full and fair disclosure.
>
> [348] With respect, the conclusion is based on a misunderstanding of Dr. Strang's affidavit. The affidavit attaches only two exhibits. Exhibit "A" is the Public Health Order that Dr. Strang authored. Exhibit "B" is the table of COVID-19 statistics in Nova Scotia that Dr. Strang's office compiled. The affidavit attached the exhibits of which Dr. Strang had personal knowledge. It did not attach studies that were authored outside Dr. Strang's office. Personal knowledge, or lack of it, is a proper distinction to govern the attachment and omission of exhibits. It underlies the hearsay rule.

[105] Hearsay may be exhibited to an expert opinion (¶107 below). The test for disclosure is an objective one, related to the importance of the evidence at issue. This is plain from *Rule* 22.05 and *Friedland* on which both Justice Fichaud and I rely:

> [36] It is also clear from the authorities that the test of materiality is an objective one. Again to quote the Gee text at page 98:
>
> > ... The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. ***The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question;*** hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. ***All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.***
>
> [Emphasis added.]

[106] Nothing could be more crucial to the weighing operation than knowing the real risk of outdoor transmission when one seeks an injunction to prevent an outdoor event.

[107] The unrevealed "recent evidence" of outdoor transmission is hearsay. But that does not necessarily make the opinion inadmissible. In *R. v. Lavallee*, [1990] 1 S.C.R. 852, Justice Wilson commented on the treatment of expert evidence relying on hearsay evidence:

> [66] For present purposes I think the ratio of *Abbey* can be distilled into the following propositions:
>
> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. ***Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.***
>
> [Emphasis added.]

(Also see: *R. v. Giesbrecht* (1993), 91 C.C.C. (3d) 230 (Man. C.A.) at p. 235, aff'd [1994] 2 S.C.R. 482; *R. v. J.-L.J.*, 2000 SCC 51 at ¶59. The fourth criterion from Justice Wilson's list in *Lavallee* was more recently applied in *Inkster v. Manitoba (Workers Compensation Board)*, 2021 MBCA 14 at ¶49).

[108] Justice Fichaud says I would exclude Dr. Strang's opinion or deny its weight for infringing the duty of full disclosure. That is incorrect. I would do so because, in the absence of evidence of outdoor transmission, the failure to disclose means his opinion lacks a factual foundation (¶90, 94, 104 above;110, 113, 116 below). Then Justice Fichaud says I would "overturn" Norton J.'s finding respecting "a risk of COVID-19 transmission at Freedom Nova Scotia's outdoor rallies". First, it is not a question of a risk but of a "very high probability" of irreparable harm if not enjoined. Second, I would not purport to overturn a factual finding. I point out the factual finding is based on an opinion which lacks the evidentiary foundation to sustain it. The finding is therefore erroneous in law.

[109] Justice Fichaud adds that a failure to disclose and outdoor transmission of COVID-19 were not raised as grounds of appeal. But the CCLA appealed the awarding of an injunction to enforce the Public Health Order because the Province did not meet the criteria for that relief. Both the failure to disclose and outdoor transmission are relevant to the Province's alternative argument that it was entitled to an injunction to enforce the Public Health Order because it had proved "irreparable harm" through Dr. Strang's evidence. That evidence—and what is omitted—cannot escape judicial scrutiny when so prominently relied upon to resist CCLA's claim that no injunction should have been granted.

[110] Justice Fichaud would dismiss the absence of the evidence of outdoor transmission on which Dr. Strang relies for his opinion that there "is a substantial risk of COVID-19 transmission" at the planned outdoor gatherings, because it "supports the injunction". We do not know that. The legal question is whether there was a high probability of irreparable harm. To repeat—the Province led no evidence of outdoor transmission of COVID-19 in Nova Scotia or anywhere else. Not only is Dr. Strang's opinion on this point inadmissible, it is not factually grounded and cannot supply the evidentiary deficiency. Evidence that COVID-19 was "even" transmissible out-of-doors does not support a finding of a high probability of irreparable harm unless the risk of outdoor transmission was significant. The burden of proving this rested with the Province.

[111] Justice Fichaud concludes his response on non-disclosure:

> [342] Justices Sharpe and Green found, *based on evidence*, that the *ex parte* applicant had withheld facts or evidence that weighed against the applicant's position to the *ex parte* judge. This behaviour was incompatible with what Justice Sharpe termed the required "balanced presentation".

[112] Justice Fichaud adds that:

> [345] In Nova Scotia, the test is whether the applicant was aware of any fact or evidence that "weighed against" the granting of the injunction. […]

[113] Disclosure under *Rule* 22.05 is not so limited. Disclosure is not confined to evidence weighing against the relief sought. *Rule* 22.05(3) requires "full and fair disclosure":

> A judge who is satisfied that an *ex parte* order was obtained without full and fair disclosure may set aside the order.

[114] To similar effect is Sharpe, 2:2 at p. 2-7, citing the cases in ¶93 above:

> More important is the obligation on counsel to see that full and frank disclosure is made of all material facts. A fact may be material even if not determinative: "any fact that would have been weighed or considered by the motion's justice in deciding the issues, regardless of whether its disclosure would have changed the outcome, is material."

[115] The duty of full disclosure is not limited to adverse facts. The test is objective. The Attorney General cannot be coy about material facts. Moving parties who proceed without notice control the record because they invite no one else to court. It was not "balanced" or "accurate" to allude to but not describe crucial evidence necessary to weigh whether an injunction was justified. Incomplete disclosure is not full disclosure. One cannot be "accurate" by omission.

[116] If the "recent evidence" in question had been provided, there may have been a factual foundation for the opinion expressed regarding the transmissibility of COVID-19 outdoors. Without that evidence, either the opinion cannot be admitted or it can be given no weight. Either way, it is an error of law to give effect to an opinion unsupported by facts material to the opinion expressed.

[117] Justice Fichaud excuses non-disclosure of the "recent evidence" of out-of-door "transmission" because supporting hearsay evidence need not be disclosed and indeed could be criticized. Respectfully, this misses the point. Dr. Strang relies on the undisclosed hearsay evidence to express his opinion, but then denies the court the foundation for that opinion.

[118] In *The Law of Evidence in Canada*, 5th ed at ¶12.201-12.203, Sopinka, Lederman and Bryant discuss the English case of *R. v. Abadom*, [1983] 1 All E.R. 364, leave to appeal ref'd [1983] 1 W.L.R. 405 (H.L.). An expert was expressing an opinion on whether glass fragments found embedded in the accused's shoes had come from a window which had been smashed during a robbery. The expert relied upon statistics compiled by the Home Office and found that the refractive index of the glass occurred in only four percent of all glass sampled by the Home Office. The expert testified there was a strong likelihood the glass fragments originated from the smashed window.

[119] The English Court of Appeal accepted that the expert could rely on secondary facts consisting of generally available material produced by others in the field in which her or his expertise lay. But the court went on to say that experts should refer to the material in their evidence so that the cogency and probative value of their conclusion could be tested and evaluated by reference to it.

[120] From the foregoing, it is plain that no conclusion can be drawn from evidence referred to but not quoted in Dr. Strang's affidavit because the basis of the opinion expressed cannot be tested.

[121] In this case, three important principles converge respecting the Province's incomplete disclosure:

(1) The obligation on an *ex parte* applicant to make full and frank disclosure;

(2) The requirements of impartiality and independence of an expert witness;

(3) The obligation that material evidence supporting an expert opinion be disclosed.

[122] To conclude in response to Justice Fichaud's comments on my analysis, the following apposite concession in the Court of Appeal by the Attorney General warrants quotation:

> **Justice Bryson:** Mr. Eddy, just to follow up on Dr. Strang's impartiality and objectivity about which you've been speaking. I'd like to just first of all refer you to a passage in the submissions of CCLA, it's paragraph 93, on page 30, and it's talking about the obligations at an *ex parte* hearing. I'll just wait until you turn that up. Just to be clear, I'll read this out, it's the second sentence, "It is well established that parties appearing before the court on an ex parte basis [that means without notice to anyone else] are under a duty of utmost good faith in the representations that they make including the duty to not present only their side of the case". And I take it that's a statement of law that the Attorney General would endorse.
>
> **Mr. Eddy:** That's correct.
>
> **Justice Bryson:** Okay. Now, can we just have a look then at Dr. Strang's affidavit, paragraph 31 again, and I just, I referred to this earlier, but I'll read out the sentence in question once you get there. Do you have his affidavit, sir?
>
> **Mr. Eddy:** (Inaudible).

> **Justice Bryson:** Okay. So paragraph 31, last sentence, he says, "Recent evidence also shows that even outdoors [and that's my emphasis] even outdoors, if people are not distanced from each other or masked, transmission can happen from an infectious person to someone else". He uses the modifier "even outdoors" to contrast it, I take it, from indoors. And he refers to recent evidence. ***Do you think it would be appropriate for an expert who is being impartial and objective to disclose the evidence on which he relies to express an opinion.***
>
> **Mr. Eddy:** ***Yes.***
>
> **Justice Bryson:** But he ***did not do that*** in this case, did he?
>
> **Mr. Eddy:** ***No, he did not.***
>
> [Emphasis added.]

[123] I hasten to emphasize that I attribute no personal fault to Dr. Strang. The usual practice is that lawyers draft the affidavits of their clients on the basis of information given to them by the client. To repeat the admonition to counsel by the Court of Appeal for Newfoundland and Labrador in *Canadian Paraplegic Association (Newfoundland and Labrador) Inc.*:

> [18] […] Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances.

[124] Dr. Strang would have naturally relied on the advice of the Attorney General. It is the lawyer's obligation to ensure compliance with the law and the Rules of court.

[125] In this case, the Province apparently possessed evidence concerning the actual risk of outdoor transmission but failed to produce that evidence. That risk was material to the outcome because the events the Province wished to prohibit were to take place outdoors.

[126] The unspecified evidence on which the Chief Medical Officer relied to say transmission could occur "even" outdoors was clearly a material fact that should have been disclosed, because in the absence of any examples of outdoor transmission, it was vital to any finding of probable irreparable harm. In the absence of admissible evidence about the "high probability of irreparable harm", the Province was not entitled to an injunction.

Scope of the order

[127] Injunctions should impose only the restraint necessary to prevent the alleged mischief and in interlocutory cases preserve the *status quo*. Interlocutory injunctions should be tailored to the specific conduct that is alleged to give rise to that mischief (*Hudson Bay Mining & Smelting Co. v. Dumas*, 2014 MBCA 6 at ¶81). Permanent injunctions must also be limited to the circumstances of the case (*Cambie* at ¶39; *Nalcor* at ¶72-73).

[128] *Ex parte* injunctions should only be given for a very brief time in order to allow the respondents to appear in court and reply to the *ex parte* order (Sharpe, pp. 2-4, 2-5). In *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers* (1977), 80 D.L.R. (3d) 634 at p. 640, the Manitoba Court of Appeal said, "In no case should an *ex parte* injunction be given for an indefinite period. It should be limited until the shortest possible time so that notice can be given to the parties affected by it."

[129] In *Cambie*, the British Columbia Court of Appeal set aside an injunction commenting that:

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

[130] In *Nalcor*, the court explained that the focus of an injunction is not to protect an applicant's core rights but to prevent the behaviour breaching those rights:

> [94] The purpose of an injunction is not to protect a claimant's core rights but to enjoin only the *behavior* which has led to the breach of those rights. It was not appropriate to provide a blanket protection to all of the rights of Nalcor flowing

> from the authorizations and permits it received, only those portions of those rights that had been wrongfully interfered with. [Original emphasis.]

[131] The Newfoundland Court of Appeal elaborated on the circumscribed character of interlocutory injunctions in *Re Brake; Anderson v. Nalcor Energy*, 2019 NLCA 17:

> [28] The point being made in *Nunatukavut Community Council* was that the establishment of a cause of action leading to the decision to grant an injunction is not a free ticket to protection by injunction of every legal and proprietary right held by the injunction-seeker. ***Only those rights which the claimant has asserted have been interfered with in the lawsuit are eligible for protection by injunction and the consequent contempt power, and then only if the court decides to exercise its discretion to grant an injunction and only to the extent they have been interfered with or threatened to be interfered with.*** Other rights, especially proprietary rights, that are not in issue in the lawsuit should not be protected. The protection of those rights should be left to separate action and the justification for issuance of an injunction (as opposed to some other remedy) in those circumstances.
>
> [29] The court considering granting an injunction should therefore be cautious to ensure that the language employed in the injunction prohibition does not extend to enjoining activities that are not being complained about. To do otherwise risks dragging persons and activities under the umbrella of injunction protection that cannot be justified by the claims that have been advanced.
>
> [Emphasis added.]

[132] *Ex parte* injunctions should be for a strictly limited time and do the minimum necessary to prevent the irreparable harm anticipated. In this case, the Province sought to prevent anticipated rallies at Citadel Hill, Alderney Landing, and the Barrington baseball field. The *ex parte* Order should have been confined to those events.

[133] In *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36, the British Columbia Court of Appeal explained why *ex parte* orders should be time-constrained:

> [20] When no notice is given to protestors of an application for injunctive relief, it seems to me that even where extraordinary urgency can be made out by the applicant, the granting of a short, time-limited injunction would be a preferable form of order. Granting an injunction for a short period limits the risk of irreparable harm to the plaintiff while ensuring that notice can be given to the protestors and others who may be affected by the order. Preparation of material and a contested hearing are then possible. Among other matters that can be heard

> at the contested hearing, submissions can then be directed at how the lawful exercise of the right of freedom of expression, which includes protest, is to be taken into account in weighing the balance of convenience and, if an interlocutory order is required, how freedom of expression can be minimally impaired.

[134] In describing the balancing act involved in granting such injunctions, Green J.A. in *Re Brake*, explained:

> [1] The use of injunctions, especially those granted on an *ex parte* basis, against individuals involved in or present at social protests brings into focus the tension that exists between the need to protect property rights and economic interests and the importance of avoiding interference with other important societal and legal values.

[135] Courts have the broad discretion to grant injunctions on terms and conditions that the court thinks just (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at ¶28). Unknown persons may be bound by injunctions (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048). But the risks of broadly-drawn "John Doe" injunctions were expanded upon later in *Re Brake*:

> [31] Related to this problem is the concern over use of injunctions against "Persons Unknown" or a fictional "John Doe". See generally on this subject Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998), 56 U.T.Fac.L.Rev 101. ***The use of such terminology to extend the potential reach of an injunction risks wrapping within its strictures people who may not be within its intended ambit and will not have had an opportunity to contest its application***. It also risks ensnaring unnamed third parties in subsequent contempt proceedings in circumstances that place them at disadvantage.
>
> [Emphasis added.]

[136] The CCLA emphasizes that the Injunction Order greatly increased the law enforcement power of the *Act*, criminalized breaches of the Public Health Order by exposing citizens to arrest and charges by specifically authorizing police action. The CCLA points out that the Order does not define prohibited conduct except by reference to the Public Health Order which is subject to amendment by the Chief Medical Officer.

[137] The CCLA also says the judge erred by granting an injunction that applied to all Nova Scotians in the absence of any evidence that established a wide-spread threat of contravention of the Public Health Order. The Province replies that the injunction should apply to all Nova Scotians since the Public Health Order did so.

[138] The Province's reply that the injunction should track the Public Health Order is untenable. It would result in the granting of injunctions to enforce public statutes against all persons in the Province when no threat of breach of those statutes had been established beyond the small group complained of here. It would have the effect of giving to legislation the super-added remedial prospect of contempt proceedings with potentially criminal consequences against everyone in Nova Scotia.

[139] The injunction not only applied to those who were anticipated to contravene the Public Health Order on May 15, 2021, but also to everyone in the Province at any time in the future. As previously described, the grounds for the injunction specifically refer to public gatherings on Citadel Hill, Alderney Landing in Dartmouth, and the Barrington ball field organized by Freedom Nova Scotia. The grounds do not list any threat of noncompliance from any other individual or organization or any immediate threat of irreparable harm from anyone else. Yet the Injunction Order applied to everyone indefinitely in the absence of any evidence showing that such a broad application was necessary to prevent breaches of the Public Health Order. And as set out above, there was no evidence to suggest the existing enforcement mechanisms were ineffective to prevent breaches of the Public Health Order at previous gatherings organized by Freedom Nova Scotia or the individual respondents. The affidavit of Hayley Crichton merely notes that those gatherings took place. There is no mention of enforcement attempts, if any, on those days, or any adverse consequences beyond breaches of the order.

[140] The Province was seeking an order against all Nova Scotians, unlimited in time or geographical extent. Moreover, the need for this extraordinary relief – never sought before or since – was open air meetings of citizens protesting COVID-19 restrictions. Accordingly, the evidence should have demonstrated a very high likelihood of serious harm by outdoor transmission of COVID-19 in the circumstances sought to be enjoined. It did not.

Should a judge on an *ex parte* injunction application consider whether the order would unjustifiably infringe the *Charter* when *Charter* rights are engaged?

[141] The CCLA alleges that the application judge erred by failing to identify the *Charter* rights engaged by the Injunction Order, assess the extent to which they were infringed, and determine whether the degree of infringement was demonstrably justified under s. 1 of the *Charter*. The Province replies the CCLA alleges *Charter* breaches without supporting analysis.

[142] The caselaw suggests that at least an attenuated *Charter* analysis should be undertaken when an injunction affecting *Charter* rights is involved. In *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, the appellant challenged an *ex parte* interlocutory injunction requiring several Canadian internet service providers, including the appellant, to block access to certain websites by their customers. The appellant argued the order unjustifiably infringed upon freedom of expression by denying the appellant's customers access to certain services. At the beginning of his balance of convenience analysis, the motions judge observed that "site blocking" risks inadvertently stifling free expression. Later, he noted that the Injunction Order would have a negative impact on freedom of expression rights of internet service providers' customers. Finally, the judge concluded that the freedom of expression concerns did not tip the balance of convenience against granting the injunctive relief requested. Locke J.A. commented on the motions judge's decision as follows:

> [53] In my view, it is not necessary to decide whether the *Charter* is engaged and, if so, whether freedom of expression is infringed. In considering the issue of freedom of expression in the context of a particular equitable remedy, it was not necessary for the Judge to engage in a detailed *Charter* rights analysis separate and distinct from the balance of convenience analysis that is already to be considered. This is clear from the decision in *Equustek* in which the majority engaged in no such separate *Charter* rights analysis.
>
> […]
>
> [56] Though Teksavvy might have wished for a different result, or at least a more fulsome analysis of freedom of expression, I cannot agree that the Judge's analysis on this issue was inadequate. ***That analysis noted Teksavvy's concerns for ISPs' customers' freedom of expression rights, and concluded that, in view of the undisputed, ongoing infringement and measures to limit over-blocking, those concerns did not tip the balance against the Order***.
>
> [Emphasis added.]

[143] The court in *Teksavvy* relied upon the Supreme Court of Canada's decision in *Google Inc.* In that case, the Court noted that freedom of expression was not "engaged in any way that tips the balance of convenience towards Google in this case" (at ¶45). The Court concluded that even if the injunction engaged freedom of expression, any infringement was outweighed by the need to prevent irreparable harm that would result from Google facilitating a breach of court orders.

[144] These cases suggest that in a time-limited *ex parte* injunction no separate *Charter* analysis need be considered. It can be addressed in the balance of convenience criterion. However, the motions judge in *Teksavvy* and the Supreme Court of Canada in *Google Inc.* decided whether or not the *Charter* was engaged. Both decisions considered and determined whether the *Charter* concerns tipped the balance of convenience against granting injunctive relief. The judge did neither in this case, although he noted the possibility of interference with *Charter* protected rights. He was prepared to postpone that consideration to a rehearing if the Order were challenged.

[145] While a separate *Charter* analysis should be taken on any *inter partes* hearing, that does not relieve the obligation to consider the *Charter* on an *ex parte* motion. Otherwise, as happened here, those *Charter* rights may never be considered because no *inter partes* hearing occurred.

[146] In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, the plaintiff was granted an interlocutory injunction restraining the defendants from publishing certain segments of a documentary video about the plaintiff's aquarium. On appeal, the defendants alleged that the judge failed to consider the right to freedom of expression under s. 2(b) of the *Charter*. The British Columbia Court of Appeal agreed, finding that the balance of convenience analysis was inadequate specifically because s. 2(b) of the *Charter* was not considered. The court referred to its earlier decision in *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36:

> [58] When injunctive relief is being sought in a case such as this, it seems to me to be essential that the potential for "harm" to our constitutionally entrenched right to freedom of expression must be taken into account as part of the familiar balance of convenience test referred to in the case authorities.

[147] More recently, courts have considered *Charter* breaches in the balance of convenience analysis (*Automotive Parts Manufacturers' Association v. Boak*, 2022 ONSC 100 at ¶50-54; *Li v. Barber*, 2022 ONSC 1037).

[148] As the Supreme Court of Canada noted in *R. v. Sharpe*, 2001 SCC 2 at ¶22, any attempt to restrict the right to freedom of expression "must be subjected to the most careful scrutiny". The *Charter* infringements in this case should have been considered in the balance of convenience analysis. They were not. This constitutes legal error which is particularly concerning in light of the indefinite duration of the order.

Should Dr. Strang have been qualified as an independent expert in this case?

[149] The CCLA submits that the judge should not have qualified the Chief Medical Officer of Health as an expert witness because he was a party to the injunction application and could not be independent. Moreover, his “opinion” does not comply with *Rule* 55 respecting expert witnesses. Nor did the judge apply the *Mohan* test for admissibility of expert evidence. The Province replies that Dr. Strang’s status as a party should not prevent his qualification as an expert or prevent the admission of his evidence.

[150] As author of the Public Health Order, Dr. Strang could give factual evidence, including opinion evidence, of why he did what he did as Chief Medical Officer in implementing the Public Health Order—but offering an opinion on future risk flowing from disregard of the Public Health Order, on which the judge relied for an “irreparable harm” finding, was a bridge too far. Dr. Strang should not have been qualified to offer an opinion on that risk, irrespective of non-compliance with *Rule* 55.

[151] Expert witnesses owe a duty to the court to give their evidence impartially, independently and without bias. The Supreme Court of Canada put it this way in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23:

> [32] Underlying the various formulations of the duty are three related concepts: ***impartiality*, *independence*** and absence of bias. The expert’s opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert’s independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party’s position over another. The acid test is whether the expert’s opinion would not change regardless of which party retained him or her […]
>
> [Emphasis added.]

[152] An expert’s independence and impartiality must be considered: (1) in determining whether the witness is properly qualified as a threshold requirement; (2) in weighing the prejudicial effects of the evidence against its probative value at the gatekeeping stage of the analysis; and (3) in weighing the evidence once it has been admitted.[4]

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[4] David M. Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at pp. 262-263

[153] The appearance of impartiality plays no role in the test for admissibility (*White Burgess* at ¶36, 57). So the question is not the appearance of a lack of independence, but whether lack of independence renders the expert incapable of giving an impartial opinion in the specific circumstances of the case (*White Burgess* at ¶36). Simply because an expert has an interest in or connection with the litigation or a party will not necessarily render their evidence inadmissible. Rather, the court must assess the nature and extent of the proposed expert's relation to the litigation or to a party (*Layes v. Bowes*, 2021 NSCA 50 at ¶17, citing *White Burgess* at ¶49).

[154] Experts associated with one of the parties have been qualified to give opinion evidence in a variety of cases. In *Silzer v. Saskatchewan Government Insurance*, 2021 SKCA 59, the expert had a contractual relationship with the respondent government insurance fund to provide services as an independent consultant. The Saskatchewan Court of Appeal found that it was open to the Commission to consider the expert's connection with the government insurance agency, but did not find that connection alone compromised the expert's independence.

[155] Assessment and planning cases provide similar results where courts and tribunals have occasionally admitted the opinions of assessors or planners employed by government to give expert evidence (*IPL Plastics Ltd. v. New Brunswick (Executive Director of Assessment)* (1994), 150 N.B.R. (2d) 267; *Homco Realty Fund (20) Ltd. (Re)*, 2005 NSUARB 16, aff'd 2006 NSCA 66).

[156] The distinction in this case is that Dr. Strang is not simply employed by the government, but he is a party to the litigation as Chief Medical Officer.

[157] In *Ocean v. Economical Mutual Insurance Company*, 2010 NSSC 315, the court refused to admit expert reports authored by the plaintiff because as a party to the litigation it was impossible for the plaintiff to be impartial:

> [22] An expert witness is expected to be objective and independent of the litigation. Ms. Ocean is the Plaintiff in this action. In my view, ***it is impossible for her to be objective and independent while also being the Plaintiff.***
>
> [Emphasis added.]

[158] The court in *Ocean* relied on the British Columbia Supreme Court in *Handley v. Punnett*, 2003 BCSC 294, where the court refused to admit the evidence of a dentist wishing to provide an opinion in his own case:

> [19] Fourth, I can not be satisfied that it would be appropriate to hear the opinion that Dr. Punnett wishes to give. ***It can not be said that a party can provide an objective opinion to the Court.*** It is highly unlikely that a party could stop being an advocate for a particular conclusion and become an unbiased observer who is entitled to express an expert opinion. In *B(W.R.) V. Plint* (1998), 56 B.C.L.R. (3d) 214 (B.C.S.C.), the Court refused to allow a report to be admitted into evidence partially on the basis that there were serious questions as to whether the report had "... the objectivity the Courts insist be displayed by expert witnesses ...". (at para. 14). I have the same reservations here. ***I am satisfied that it would be an almost insurmountable barrier for a party to be in a position to express an expert opinion***.
>
> [Emphasis added.]

[159] It could be said that Dr. Strang is not a private litigant pursuing a private interest. He is the Chief Medical Officer and acts in the public interest. In principle, that argument could always be made by a government litigant. But in this case, there is an actual conflict of interest because:

1. first, the public health orders in question have been drafted and signed by the Chief Medical Officer;
2. second, as a party to the litigation, the Chief Medical Officer has taken a public position before court advocating for the specific enforcement of his own orders;
3. third, as an expert, the Chief Medical Officer is expected to be objective about the necessity of an injunction to enforce his own orders in the circumstances of outdoor gatherings– but he has already taken a position on that question before giving an opinion – so he can do no other than support himself.

[160] The Chief Medical Officer could not have an impartial view independently of the opinion he formed in drafting and attempting to enforce his public health orders.

[161] An expert who "… assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court" (*White Burgess* at ¶49).

[162] In *White Burgess*, the Supreme Court of Canada said that an expert should not assume the role of an advocate. Dr. Strang cannot help being an advocate in his own case because he is advocating for the legal enforcement of his own public health orders.

[163] The Supreme Court of Canada, quoting Beveridge, J.A. in *White Burgess*, outlined the concerns about independence and impartiality of experts:

> [12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid*., at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

[164] This Court referred to challenges to impartiality of an expert witness in *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9:

> [464] Mr. Colpitts argues Mr. Evans fell into various forms of bias described in a 2009 *Canadian Criminal Law Review* article by then Professor David Paciocco (now of the Ontario Court of Appeal) and referenced in *R. v. France*:
>
> > ... Professor Paciocco stresses the importance of the expert maintaining an "open mind to a broad range of possibilities" and notes that bias can often be unconscious. He refers to a number of forms of bias: ***lack of independence*** (because of a connection to the party calling the expert); "***adversarial***" or "selection" bias (where the witness has been selected to fit the needs of the litigant); "***association bias***" (the natural bias to do something serviceable for those who employ or remunerate you); ***professional credibility*** bias (***where an expert has a professional interest in maintaining their own credibility after having taken a position***); "noble cause distortion" (***the belief that a particular outcome is the right one to achieve***); and, a related form of bias, "***confirmation bias***" (the phenomenon that when a person is attracted to a particular outcome, there is a tendency to search for evidence that supports the desired conclusion or to interpret the evidence in a way that supports it).Confirmation bias was a particular problem identified in the Goudge Report as Dr. Smith and other pathologists and coroners at the time approached their investigations with a "think dirty" policy, an approach "inspired by the noble cause of redressing the long history of inaction in protecting abused children," and designed to "help ferret it out and address it." Unfortunately, as

> commented on by the Goudge Report and by Professor Paciocco, such an approach raises a serious risk of confirmation bias. [Footnotes omitted]
>
> [Emphasis added.]

[165] Professor (now Justice of Appeal) Paciocco's article was also quoted with approval by the Supreme Court in *White Burgess*.

[166] While no one suggests intentional bias by the Chief Medical Officer, all of the emphasized passages above show the risks of unconscious bias, even for well-intentioned professionals.

[167] In this case, the concern about the independence and impartiality of the Chief Medical Officer's evidence is exacerbated by two other factors. First, the motion proceeded *ex parte*. So there was nobody to oppose the Chief Medical Officer's evidence or cross-examine him on the basis of his opinions. Second, the evidence provided in support of the opinion that there was a "substantial risk" of outdoor transmission of COVID-19 at the proposed gatherings relied on undisclosed "recent evidence" and lacked evidentiary detail (¶68 and following).

[168] For all of these reasons, the Chief Medical Officer should not have been qualified as an expert.

Conclusion

[169] The Province incorrectly applied for a permanent *ex parte* injunction, but argued the test for an interim injunction described in *RJR*. The Province should have sought an interlocutory injunction on notice to which the *RJR* test properly applied. The *Charter* rights engaged should have been considered in the balance of convenience step of the *RJR* test.

[170] The Province did not establish a basis for granting either an interlocutory or permanent injunction because it did not tender admissible evidence of outdoor transmission of COVID-19 on which a finding of "high probability" of serious or irreparable harm could be grounded. The Chief Medical Officer should not have been qualified as an expert. In any event, the Order granted should not have been indefinite as to time, place and person.

[171] I would allow the appeal without costs.

Bryson J.A.

Fichaud J.A. –

[172] In April and May 2021, COVID-19's third wave surged in Nova Scotia. The six weeks beginning April 1, 2021 saw 58% of this Province's total reported cases since March 1, 2020, the outset of the pandemic.

[173] In March 2020, under Nova Scotia's *Health Protection Act*, the Province's Chief Medical Officer of Health ordered public health restrictions for mask-wearing, social distancing and gathering limits, indoors and outdoors. The restrictions were legally binding. In early 2021, the organization Freedom Nova Scotia arranged rallies across Nova Scotia to protest the restrictions. By May 2021, some rallies had occurred and had flouted the restrictions. Three others were imminent. The Chief Medical Officer feared the upcoming gatherings would spread the infectious and potentially lethal virus. The Attorney General and Chief Medical Officer applied *ex parte* for a *quia timet* injunction to prevent gatherings that would offend the public health restrictions. On May 14, 2021, a Supreme Court judge issued the Injunction Order. The injunction applied to everyone in the province, gathering for any purpose.

[174] In late May 2021, the Canadian Civil Liberties Association (CCLA) intervened and sought a rehearing of the injunction application. In mid-June the Attorney General moved to discharge the injunction. The Attorney General said the injunction was no longer necessary given the phased reopening underway, the continued easing of restrictions and the current data of COVID-19 epidemiology. On June 22, 2021, a judge discharged the Injunction Order. In September 2021, the CCLA appealed from the Injunction Order.

[175] Normally an appeal from a discharged order would be moot. The CCLA asks that the appeal proceed anyway, in the interests of justice, to establish legal guidelines for like controversies. Its factum raises four issues respecting (1) the acceptance of an expert opinion, (2) the test for a *quia timet* injunction to prevent

infringement of a statute, (3) the scope of the Injunction Order and (4) the approach to the *Charter of Rights* on an *ex parte* application.

COVID-19 in Nova Scotia in May 2021

[176] The following are findings of fact by Justice Scott Norton in the decision under appeal, dated May 14, 2021 (2021 NSSC 170). They depict the state of COVID-19 in May 2021. The findings are taken *verbatim* from the affidavit of May 12, 2021 by Dr. Robert Strang, Nova Scotia's Chief Medical Officer of Health, paras. 6-34, filed for the Attorney General's application. There was no contrary evidence in the Supreme Court. No fresh evidence was offered in the Court of Appeal.

[177] Justice Norton's decision said (para. 9):

> Based on the evidence of Dr. Strang, I make the following findings of fact:
>
> *COVID-19*
>
> 1. COVID-19 is a new disease which can cause adverse health outcomes, including death in individuals with pre-existing medical conditions and in individuals over 65 years of age. People not in a high-risk group can also experience adverse health outcomes after contacting the SARS-CoV-2 virus which causes COVID-19.
>
> 2. In addition, SARS-CoV-2 is a new strain of coronavirus for which there is no underlying immunity and therefore wide spread of the virus can create a significant burden of disease and negative impacts on health systems, communities and economies.
>
> 3. There are at present no drug therapies to cure COVID-19 nor its various strains. Accordingly, the only available resources to prevent or reduce the spread of the virus, aside from vaccination, involve the use of public health requirements, including physical distancing measures, limiting the size of gatherings and mandatory mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.
>
> 4. Nova Scotia's public health requires that people maintain a distance of two meters from one another. This physical distance requirement is based on current knowledge regarding the virus' spreading mechanisms.
>
> 5. If left unchecked, SARS-Cov-2 can spread exponentially, for this reason, it is critical that public health requirements are followed in order to minimize the spread of the virus, reduce long-term consequences, and reduce the number of hospitalizations and deaths. It is therefore imperative to reduce the number of contacts an individual has with others to reduce the risk of spread of the virus.

6. Due to the virus' transmissibility patterns, restrictions on how people interact with others outside of their households are necessary to prevent the transmission of SARS-CoV-2 and its variants, which in turn can effectively reduce cases of COVID-19. This includes mandating the use of mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.

7. The current Public Health Order outlines measures directed toward preventing or reducing the transmission of COVID-19 among the population of Nova Scotia.

8. Transmission of SARS-CoV-2 can occur even when infected people are asymptomatic. SARS-CoV-2 is spread primarily from close person to person contact. The virus may be transmitted by respiratory droplets or droplet nuclei (aerosols) produced when an infected person breathes, coughs, sneezes, talks or sings. The virus may also be transmitted by touching a surface or object contaminated with the virus and then touching the eyes, nose or mouth.

9. Risk of SARS-Co-V-2 transmission depends on many variables, such as location (indoors versus outdoors), quality of ventilation, and activity. The Public Health Order requires that people maintain a distance of two meters (six feet) from one another. This physical distance requirement is based on current knowledge of droplet spread which is the main way the virus spreads between people.

10. These requirements are designed to be implemented together as no one measure alone will prevent all SARS-CoV-2 person-to-person transmission.

11. The time from infection with SARS-CoV-2 until the development of observable symptoms is called the incubation period. The incubation period can last 14 days or very rarely longer. Unfortunately, infected people can transmit SARS-CoV-2 to others beginning about 48 hours before symptoms are present (pre-symptomatic transmission) until at least 10 days after, longer if symptoms continue past 10 days.

12. Not all people infected with SARS-CoV-2 develop symptoms but, even without symptoms, an infected person can transmit the virus to others. This is called asymptomatic transmission.

13. SARS-CoV-2 can be spread through direct or indirect (surfaces) contact with an infected person. Community spread refers to the spreading of a disease from person to person within the community. Community spread can occur when the source is known or unknown. The latter form of spread poses a serious threat to the community. The effectiveness of contact tracing is greatly reduced in cases of unknown community spread.

14. COVID-19 testing is available in Nova Scotia for both asymptomatic and symptomatic people, people in outbreak settings, and people identified as a close contact of a case. A COVID-19 test result only reflects a snapshot of a moment in time. A negative result does not necessarily mean that the person is not infected.

A person infected with SARS-CoV-2 could have 13 days of negative results and a positive test on day 14.

Nova Scotia's Current COVID-19 Situation

The Spread of COVID-19

15. Since March 1, 2020, there have been a total of 4152 confirmed cases of COVID-19 and 71 reported deaths.

16. During Wave 3 (April 1, 2021 - present), there have been 2410 confirmed cases and 5 deaths have been reported. The cases reported in Wave 3 constitute 58% of the total cases reported in Nova Scotia since March 1, 2020. In addition, there have been 103 hospitalizations (non-ICU and ICU) compared to 12 during Wave 2, 54% of hospitalizations occurred in individuals <60 years of age and 13.7% of contacts became cases, compared to 7.6% in Wave 2 suggesting that the virus is more transmissible.

17. SARS-CoV-2 can spread exponentially if left unchecked. It is critical that Nova Scotians follow public health requirements and protocols to minimize the spread of the virus and its variants, reduce the long-term consequences, and reduce the number of hospitalizations and deaths.

18. Left unchecked SARS-CoV-2 virus will spread within a population resulting in an exponential growth in the number of people infected. Public health measures put in place in December 2020 brought cases down. When public health measures were eased in March 2021, cases plateaued but began to rise again in late April. Even with increased public health requirements in place, the number of recognized SARS-CoV-2 infections (COVID-19 cases) continued to grow dramatically in the past 3 weeks.

Nova Scotia's COVID Health Care Capacity

Related to COVID-19

19. When this capacity is exceeded, non-COVID-19 patients will experience cancelled treatments for non-urgent conditions. The cancellation of these non-urgent, but necessary, surgeries can have health impacts, such as ongoing pain and mobility issues.

20. If Nova Scotia's COVID-19 hospitalization capacity is significantly exceeded, it could result in the need to ration acute care resources. This may mean that some patients, who are in need of critical care supports, may be unable to receive those supports.

21. In Nova Scotia, as of May 11, 2021, there were 1591 active cases of people with COVID-19, 64 people in the hospital due to COVID-19. There were 10 patients in the ICU, 54 patients in non-ICU beds due to COVID-19 and 71 people have died from COVID-19 or associated complications since the first Public Health Order was issued on March 23, 2020. This high level of hospitalization will result in continued cancellation of non-urgent surgical treatments. If the

requirements for in hospital care continue to escalate, a need to triage access to care supports, especially supports in intensive care, may be required. This could require doctors and nurses to make decisions between which patients live and which die.

Nova Scotia's COVID-19 Public Health Measures

22. Nova Scotia has attempted to control the spread of the SARS-CoV-2 virus by implementing a number of public health requirements under the Public Health Order. Restrictions on how people interact with others outside of their households in public places, whether indoors or outdoors, are necessary to prevent the transmission of SARS-CoV-2 and are effective in reducing cases of COVID-19.

23. Nova Scotia's approach has been to attempt to protect Nova Scotians and control the spread of the virus through the enactment of Public Health restrictions on gathering limits, physical distancing and mandatory masking, no greater than reasonably required, considering the circumstances of the global pandemic and risk mitigation strategies required to respond to this communicable disease and its negative impact on Nova Scotians' lives. As the number of COVID-19 cases and related hospitalizations, ICU stays, and deaths have increased, public health measures have also evolved.

24. One of the health measures that Nova Scotia has employed to control the spread is to implement mandatory masking. Masks, when worn properly, are a valuable tool in reducing the transmission of SARS-CoV-2. The use of masking can prevent an infected person from transmitting the virus to others and use of masks, especially medical masks, can help protect a healthy individual from infection in public places, whether indoor or outdoor settings. Masking, on its own, is not sufficient to control the spread of COVID-19.

25. In response to the number of COVID-19 cases with no identifiable source, Nova Scotia implemented additional public health measures, aimed at limiting the spread in high-risk settings or in settings with high-risk activities. High risk activities are activities that have more expulsions of air than ordinary activities. With increased expulsions of air, there is an increased risk of respiratory droplets or aerosols. For example, singing, shouting, and activities that result in heavy breathing are higher risk activities. These activities also may occur in higher risk settings, such as in indoor settings or settings where individuals will remain for prolonged periods of time. Reducing time spent indoors with large groups of people and reducing the time spent indoors engaging in high-risk activities can reduce the risk of the spread of COVID-19. Recent evidence also shows that even outdoors, if people are not distanced from each other or masked, transmission can happen from an infectious person to someone else.

26. The available evidence shows that widespread public masking, in addition to other public health measures, such as reducing time spent indoors with large groups of people (relative to the size of the room and the spacing of people within the room) while engaging in high-risk activities, can contribute to controlling the

overall transmission of SARS-CoV-2. In addition, outdoor gatherings must also include measures such as restricted gatherings, and physical distancing and masking in order to prevent COVID-19 transmission.

27. In Dr. Robert Strang's medical opinion if the scheduled social gathering is held on or about May 15, 2021 at Citadel Hill, in Halifax, Nova Scotia then there is a substantial risk of Covid-19 transmission among the attendees.

28. It is also Dr. Strang's medical opinion that social gatherings similar to the one intended to be held by Freedom Nova Scotia on May 15, 2021 should not occur anywhere in the Province of Nova Scotia because there is a substantial risk of Covid-19 transmission among the attendees.

Nova Scotia's Public Health Measures for COVID-19

[178] On March 22, 2020, under the *Emergency Management Act*, S.N.S. 1990, c. 8, the Government of Nova Scotia declared a state of emergency to contain COVID-19. The state of emergency remained through the period relevant to these proceedings.

[179] The *Health Protection Act*, S.N.S. 2004, c. 4 prescribes measures to safeguard the public health. They are mainly public health orders to be issued by medical officers, including the Chief Medical Officer of Health. The *Act* says those orders are based on the medical officers' opinions. The key public health order in this case was issued under s. 32(1). The orders are legally binding and the courts are directed to enforce them with sanctions and penalties. The *Act* includes:

3 In this Act,

…

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

…

PART I - DISEASES AND HEALTH HAZARDS

…

Medical officers to protect public health

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

…

(3) A medical officer may investigate any situation and take such actions as the medical officer considers appropriate to prevent, eliminate or decrease a risk to the public health if the medical officer is of the opinion that a situation exists anywhere in the Province that constitutes or may constitute a risk to the public health.

…

HEALTH HAZARDS

…

Orders respecting health hazards

20(1) Where a medical officer reasonably believes that

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

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

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

…

Requirements respecting orders

…

22(5) Where an order is served on a person to whom it is directed, that person shall comply with the order forthwith or, where a period of compliance is specified in the order, within the time period specified.

…

Power to ensure compliance

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

…

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

(c) cannot be readily identified or located and as a result the order would not be carried out promptly;

…

the medical officer may take whatever action the medical officer considers necessary, including providing authority for such persons, materials and

equipment to enter premises and to use such force the medical officer considers necessary to carry out the terms of the order, and the Chief Medical Officer may order the person who failed to comply to pay the costs of taking that action.

…

Court may order compliance

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

…

Appeal

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

…

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

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

…

COMMUNICABLE DISEASES

Powers respecting communicable diseases

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

- **(a) communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease;**
- **(b) the communicable disease presents a risk to the public health; and**
- **(c) the requirements specified in the order are necessary in order to decrease or eliminate the risk to the public health presented by the communicable disease,**

the medical officer may by written order require a person to take or refrain from taking any action that is specified in the order in respect of a communicable disease.

…

Power to ensure compliance

37(1) Where a medical officer has grounds to issue an order pursuant to subsection 32(1) and has reasonable and probable grounds to believe that the person to whom an order is or would be directed under subsection 33(2)

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

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

(c) cannot be readily identified or located and as a result the order would not be carried out promptly; or

(d) has requested the assistance of the medical officer in eliminating or decreasing the risk to health presented by the communicable disease,

the medical officer may take whatever action the medical officer considers necessary, including providing authority for such persons, materials and equipment to enter upon any premises and to use such force as the medical officer considers necessary to carry out the terms of the order, and the Chief Medical Officer may order a person who fails to comply to pay the costs of taking any actions necessary to comply with clauses 32(3)(a), (b), (e) or (f).

…

Court may ensure compliance

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

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

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

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

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

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

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

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

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

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

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

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

…

Apprehension and detention where disease dangerous

46 A medical officer may apprehend and detain an individual where that individual has failed to comply with an order that was issued in relation to a dangerous disease and the medical officer reasonably believes that the individual poses a significant and imminent threat to the public health if not apprehended and detained.

…

PUBLIC HEALTH EMERGENCIES

Declaration of emergency

53(1) Where the Chief Medical Officer reasonably believes that a public health emergency exists in the Province, and reasonably believes that the public health emergency cannot be mitigated or remedied without the implementation of special measures pursuant to this Section, the Chief Medical Officer shall recommend to the Minister that a public health emergency be declared for all or part of the Province and the Minister may declare a public health emergency for all or part of the Province.

(2) Where the Minister has declared a public health emergency, the Chief Medical Officer may implement special measures to mitigate or remedy the emergency including

…

(d) prohibiting or limiting access to certain areas of the Province or evacuating persons from an area of the Province;

…

(i) any other measure the Chief Medical Officer reasonably believes is necessary for the protection of public health during the public health emergency.

…

GENERAL

66(1) No person shall hinder or obstruct a medical officer, public health nurse or public health inspector in the exercise of powers or carrying out of duties or functions under this Part and the regulations.

…

71(1) Every person who fails to comply with this Part or the regulations or with an order made pursuant to this Part or the regulations is guilty of an offence and is liable on summary conviction to

(a) in the case of a corporation, a fine not exceeding ten thousand dollars; or

(b) in the case of an individual, a fine not exceeding two thousand dollars or to imprisonment for a term of not more than six months, or both.

…

PART III - GENERAL

Regulations

106(1) The Governor in Council may make regulations

…

(d) respecting any matter that the Governor in Council considers necessary to carry out effectively the intent and purpose of this Act.

[bolding added]

[180] The *Communicable Diseases Regulations*, N.S. Reg. 196/2005 (O.I.C. 2005-457) under the *Health Protection Act*, include:

Medical officer may prohibit public gatherings

8. In addition to the requirements that a medical officer may include in an order under clause 32(3)(a) of the *Act*, a medical officer may prohibit public gatherings for the purpose of controlling the transmission of a communicable disease for such period of time as the medical officer believes to be necessary or advisable.

Procedure for medical officer upon hearing of outbreak

9. Upon learning of an outbreak, a medical officer must inquire into the causes and circumstances of the outbreak, and if the medical officer is not satisfied that all due precautions are being taken, the medical officer must advise the persons competent to act of the measures that the medical officer believes to be necessary or advisable to prevent the transmission of the disease and must assist with the preventative measures.

[181] On March 23, 2020, under s. 32 of the *Health Protection Act*, the Chief Medical Officer of Health issued the first Order to reduce the risk to the public from COVID-19. It prescribed restrictions, indoors and outdoors, for gathering limits, social distancing and mask-wearing. Afterward, the Order was amended to

ease restrictions when the virus abated and tighten them when the virus regained virulence. On May 13, 2021, under s. 32, the Chief Medical Officer issued a "Restated Order #2", with some revisions to the earlier Order. I will term the May 13, 2021 version the "Public Health Order". It included:

> TO: 1.) All persons residing in or present in the Province of Nova Scotia;
>
> 2.) All not-for-profit and for-profit businesses and organizations operating or carrying on business in Nova Scotia;
>
> 3.) Such other persons or entities as may be identified by the Chief Medical Officer of Health or otherwise as set out in this Order.
>
> ORDER made pursuant to Section 32 of the *Health Protection Act* (Nova Scotia)
>
> AND WHEREAS section 32 of the *Health Protection Act* states:
>
> 32(1) Where a medical officer is of the opinion, upon reasonable and probable grounds, that:
>
> (a) a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease;
>
> (b) the communicable disease presents a risk to the public health; and
>
> (c) the requirements specified in the order are necessary in order to decrease or eliminate the risk to the public health presented by the communicable disease.
>
> the medical officer may by written order require a person to take or refrain from taking any action that is specified in the order in respect of a communicable disease.
>
> WHEREAS COVID-19 has been identified as a communicable disease that presents a risk to public health as defined under s. 4(b) of the *Health Protection Act*, and:
>
> WHEREAS I am of the Chief Medical Officer of Health for the Province of Nova Scotia and am of the opinion, upon reasonable and probable grounds, that:
>
> (a) a communicable disease (COVID-19) exists; and that there is an immediate risk of an outbreak of the communicable disease;
>
> (b) the communicable disease presents a risk to the public health; and
>
> (c) the requirements specified in the order are necessary to decrease or eliminate the risk to the public health presented by the communicable disease, and:
>
> WHEREAS as the Chief Medical Officer of Health, I have determined it necessary to issue this Order to the Class of Persons to decrease the risk to public health presented by COVID-19.

Please be advised that:

I, Dr. Robert Strang, Chief Medical Officer of Health, order the following:

…

PART II

PHYSICAL DISTANCING,

GATHERING LIMITS,

MASKS AND FACE COVERINGS

13A Effective 8:00 a.m. May 14, 2021, except where otherwise stated in this Order, the requirements for physical distancing, gathering limits, masks and face coverings apply to all persons present and residing in Nova Scotia.

13. All persons present and residing in Nova Scotia must maintain physical distancing of 2 metres (6 feet).

13.1 All persons present and residing in Nova Scotia must not participate in any gatherings, whether indoors or outdoors, unless subject to a specific exception set out in this Order.

…

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;

(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.

…

18.1 For the purpose of section 18.2, a “public place” means the part of the following places accessible to the public,

insofar as it is enclosed:

…

> and insofar as it is outdoors:
>
> > (p) all serviced areas of a restaurant or a liquor licensed establishment, including their patios but excluding holes on the golf course that are licensed; and
> >
> > (q) organized outdoors gatherings such as special or temporary events where 2 metres (6 feet) physical distancing cannot be consistently maintained;
> >
> > (r) outdoors where physical distancing cannot be maintained such as playgrounds and parks.
>
> 18.2 All persons must wear a mask that covers their nose and mouth while present in a public place.

[182] The Public Health Order concluded:

> 34. Failure to comply with this health protection order may be considered a breach of this Order issued under the *Health Protection Act* and may result in penalties under the *Act*.

[183] The Public Health Order listed exceptions to the restrictions. These included: persons in the same household or associated households, parties to a child sharing arrangement, outdoor fitness and recreation activities, weddings or funerals, virtually-held events where five physically-distanced persons could gather in one location for the event, mental health and addictions support meetings, safety meetings, hospitals, gatherings respecting children in care, homes for special care, persons with disabilities, homeless shelters, child care, correctional facilities, judicial or quasi judicial tribunals, emergency medical care; community transportation; food production; fishing vessels, fire, police and utilities, public transit, waste and garbage collection and disposal, certain municipal and provincial government activities, and exceptions for identified classes of persons. The exceptions are immaterial to this proceeding.

The Gatherings in March-May 2021

[184] For the injunction application, the Attorney General filed an affidavit dated May 12, 2021 of Hayley Crichton, Executive Director of Public Safety and Investigations with the Province's Department of Justice. Her affidavit listed recent gatherings that had contravened the earlier version of the Public Health Order and cited evidence of three gatherings planned for May 15, 2021, at Citadel Hill in Halifax, Alderney Landing in Dartmouth and a baseball field in Barrington. These

events were being arranged by an unincorporated organization called Freedom Nova Scotia:

> 6. On April 23, 2021, Halifax Regional Police attended a large gathering at a private residence. 22 fines were issued as a result of this gathering as it was in contravention of the Public Health Order.
>
> 7. On April 25, 2021, RCMP attended a residence in Wolfville, Nova Scotia, at which 30 people were gathered in contravention of the Public Health Order for a party. 4 fines were issued as a result of this gathering.
>
> 8. On May 3, 2021, New Glasgow police attended a private residence in Trenton, Nova Scotia. Eight people were gathered in contravention of the Public Health Order and were subsequently ticketed.
>
> 9. Worldwide Rally for Freedom and Democracy is a global movement and organizer that has developed with the explicit objective of spreading anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.
>
> 10. Worldwide Rally for Freedom and Democracy has planned a global event entitled, The Worldwide Demonstration May 15, 2021. The associated open Facebook event page has a total of 31,000 followers.
>
> 11. In Nova Scotia, participation in the Worldwide Rally for Freedom and Democracy events are organized by the local Facebook group "Freedom Nova Scotia". The Freedom Nova Scotia Facebook open group has a total of 896 followers and the related Instagram account has 100 followers.
>
> 12. On March 20, 2021, Freedom Nova Scotia organized an open event on Facebook to rally against mask wearing and restrictions on Citadel Hill in Halifax. Attendees gathered in a large group of approximately 100 people, the attendees were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order. The event drew media attention.
>
> 13. A picture of the event derived from CTV News is attached hereto as Exhibit "B".
>
> 14. Exhibit "B" shows a large gathering of people who can be observed to not be wearing masks, nor maintaining a distance of six feet from one another.
>
> 15. On March 20, 2021, Freedom Nova Scotia also organized an open event on Facebook to rally against mask wearing and restrictions at Alderney Landing. 25 people responded as "going" and 45 responded as "interested".
>
> 16. Freedom Nova Scotia has also organized rallies in the greater Halifax area on March 28, 2021 (Spring Garden Road), April 1, 2021 (Alderney Landing) and May 1, 2021 (Halifax). The rallies were in contravention of the Public Health Order.

17. Freedom Nova Scotia has scheduled an event for Saturday May 15, 2021, at 1:00 pm entitled "Worldwide Rally for Freedom – Halifax" in support of anti-mask rhetoric. The event is open and there are 261 commitments on the event page, with 88 people listed as "interested" and 66 people listed as "going".

18. During the week of May 3rd, 2021, Halifax Regional Police were contacted by Freedom Nova Scotia event participant Jane Doe via telephone. Jane Doe requested protection for the rally participants who will attend Citadel Hill to protest the COVID-19 lockdown restrictions. I am advised by Halifax Regional Police and do verily believe that the Halifax Regional Police advised Jane Doe that any such gathering would contravene of [*sic*] the Public Health Order, and potentially the Travel Directive issued under the *Emergency Measures Act* 1990, c. 8, s. 1; 2005, c. 48, s. 1 (should people travel in from outside HRM).

19. The Halifax Regional Police provided the Province with information pertaining to Freedom Nova Scotia, Worldwide Rally for Freedom and Democracy, and the related social media posts advertising the event scheduled for Saturday May 15, 2021, at 1:00 pm entitled "Worldwide Rally for Freedom – Halifax".

20. The information provided by the Halifax Regional Police to the Province references multiple rallies hosted by Freedom Nova Scotia. The information provided by the Halifax Regional Police contains photographs depicting attendees gathering without masks and in large groups in direct contravention of the Public Health Order. This is supplemented by screenshots of the open group in which commenters have requested Halifax Regional Police and Government intervention. A true copy of the information set out above in this my sworn affidavit provided by the Halifax Regional Police is attached hereto as Exhibit "C".

21. On May 11, 2021, the Freedom Nova Scotia open Facebook page included the following post, "Here is our daily update. Thank you all for the amazing support and shares people! We have already beat the highest amount of shares previous rallies had! We were at 77 last night – let's make it to 100 today! And don't forget to let your fellow freedom fighters know they can invite their people from the event page and the guest list in private. Four more sleeps until we climb the hill!!!". A screenshot of this post is attached hereto as Exhibit "D".

22. A Worldwide Freedom Rally is also scheduled for Barrington, Nova Scotia on May 15, 2021 at 6 pm at the Barrington baseball field. A true copy of the social media post for the Barrington event is attached hereto as Exhibit "E".

23. A Worldwide Freedom Rally is also scheduled for Dartmouth, Nova Scotia (Alderney Landing) on May 15, 2021 at 1 pm. A true copy of the social media post for the Dartmouth event is attached hereto as Exhibit "F".

24. Similar anti-mask, anti-vaccine, anti-restriction protests have taken place across Nova Scotia that have included gatherings of people who [*sic*] not wearing

masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order.

25. On April 24, 2021, an event was planned at the New Brunswick and Nova Scotia border to protest COVID-19 restrictions including border closures and mask requirements by disrupting traffic on Hwy 104. The event organizer Tasha Everett posted the following to her open Facebook page, "12PM tomorrow! Be there! It's time to make more noise than ever before! Truckers have our backs, and are planning to block the highways with us. United we stand, Divided we fall. [*sic* – should be end of quotation] A screenshot of this post is attached hereto as Exhibit "G".

26. On May 9, 2021, Kings District RCMP were called to Western Christian Fellowship Church in Weston, Nova Scotia. 26 people were gathered at the church in contravention of the Public Health Order. 26 fines were laid against individuals and a larger fine was laid against the organizer.

27. On May 12, 2021 I received information from the Royal Canadian Mounted Police (RCMP) regarding a rally held on May 9, 2021, and do verily believe the following:

> PURPOSE: To update the Attorney General of a protest, in relation to the continued border restrictions between Nova Scotia and New Brunswick that occurred on May 9, 2021.
>
> BACKGROUND:
>
> A group on Facebook, identified as "Support to OPEN The NS/NB Border", organized a protest for May 9, 2021 at 12:00 pm, at the NS Tourism Centre along Hwy 104, immediately as you enter Nova Scotia.
>
> Organizers indicated that this was strictly about the border closure and the impact it is having on everyday lives.
>
> CURRENT STATUS:
>
> An assembly took place as scheduled on May 9, at 12:00 pm.
>
> Approximately 20 protesters assembled along the Nova Scotia side of the Provincial border, Highway 104 Eastbound lane.
>
> At approximately 12:30 pm, a passenger from a vehicle involved in the protest was seen throwing traffic cones into the ditch which had been positioned to block off exit 1.
>
> The interaction between the RCMP and the vehicle passenger was met with hostility from the occupants of the vehicle.
>
> Shortly after, a hostile crowd of 15-20 people formed around the police officer.
>
> Protesters were recording police and expressed negative comments.

> Protesters were not wearing masks or social distancing.
>
> All attendees left by 2:30 pm.
>
> Commentary from attendees suggests protests will be a weekly occurrence.

28. On May 10, 2021, Dena Churchill posted an advertisement for the May 15, 2021 [*sic*] on her facebook page, among other anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.

29. Historical public gatherings organized by Freedom Nova Scotia and others 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 and outdoor gatherings; and
>
> c. minimum physical distancing requirements.

The Judicial Proceedings

[185] On May 11, 2021, counsel for the Attorney General requested from the Supreme Court of Nova Scotia permission to file an application under Civil Procedure Rules 2.03 and 5.02. Rule 2.03 allows a judge the discretion to abridge time limits. Rule 5.02(1) permits a judge to hear an application *ex parte* "if it is appropriate to seek the order without notice to another person". On the afternoon of May 11, Justice Norton of the Supreme Court granted the request and the Prothonotary notified counsel for the Attorney General that the hearing was set for May 14, 2021 at 9:30 a.m. Justice Norton's decision under appeal recited the exchange:

> [4] By a letter dated May 11, 2021, the Attorney General wrote to the Court requesting permission to file the Application on an expedited basis pursuant to *Civil Procedure Rules* 2.03 and 5.02. As designated Chambers Judge, I granted the request allowing the filing deadlines to be abridged and scheduled a virtual hearing for May 14, 2021 at 9:30 a.m.

[186] On May 12, 2021, the Attorney General, the Department of Health and Wellness and the Chief Medical Officer of Health filed a Notice of *Ex parte* Application. The Notice named as Respondents Freedom Nova Scotia, Amy Brown, Tasha Everett, Dena Churchill, "John Doe(s)" and "Jane Doe(s)". The Notice requested an order that "enjoins the Respondents, and any other person acting under their instructions or in concert with them, from organizing in-person

public gatherings”. That was the only requested injunction. There was no motion for an interlocutory injunction pending the court’s ruling on the principal claim. Supporting the application were the affidavits of Dr. Strang and Ms. Crichton, mentioned earlier, the Public Health Order and a memorandum of argument.

[187] On Friday, May 14, 2021, at a brief virtual hearing, Justice Norton heard oral submissions from counsel for the Attorney General.

[188] On May 14, 2021, Justice Norton issued the Decision under appeal. He held the injunction was warranted and said:

> [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.
>
> …
>
> [28] Having regard to the affidavit of Dr. Robert Strang, the Court finds that the harm that is anticipated if the anti-mask rally is permitted, *i.e.* the continued spread of COVID-19, is imminent.
>
> …
>
> Conclusion
>
> [33] The intensive care units at our hospitals are filling with COVID patients. The health care workers in this Province have been working tirelessly for more than 14 months to manage this crisis. Schools have had to close. Businesses have had to close. Many Nova Scotians are unemployed as a result. Yet, Nova Scotia has done better than many other provinces because its public health officials have taken an aggressive approach based on science, medicine and common sense. The vast majority of Nova Scotians have and continue to support and follow the public health recommendations with a view to returning to pre-COVID activity and enjoyment of life as quickly and as safely as possible.
>
> [34] The Respondents and those who would support them by attending the planned or other in-person gatherings, without following public health recommendations and orders, are uninformed or willfully blind to the scientific and medical evidence that support those measures. Their plan to gather in-person in large numbers, without social distancing and without masks, in contravention of the public health recommendations and orders shows a callous and shameful disregard for the health and safety of their fellow citizens.
>
> [35] The Applicants are entitled to the injunction sought to:

> 1. prevent further transmission of COVID-19;
>
> 2. ensure the continued functioning of the health-care system; and
>
> 3. limit the amount of future deaths due to the virus.
>
> [36] It is appropriate that the order includes clear language that law enforcement officers and other law enforcement agencies will enforce the prohibitions. It is appropriate to include notice that law enforcement officers will arrest and charge anyone in breach of the prohibitions. [quotation from *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, paras. 41-42 omitted]
>
> [37] The Province advises that it is its intention to serve the Respondents personally if possible and to post the Court's Order on the Government's COVID-19 internet website. That will form part of the Order. In addition, the Order will provide that the Order is to be posted if possible on all social media platforms associated with the Respondents and those of "Worldwide Rally for Freedom and Democracy".
>
> [38] The Order herein was granted on an *ex parte* basis. It is important that the Respondents, or anyone else effected [*sic*] by this Order, have an opportunity to apply to the Court to vary or challenge the Order or so much of it as effects [*sic*] that person. Accordingly the Order will contain a provision giving notice that any such person may apply to the Court, in accordance with the procedures set out in the *Civil Procedure Rules*, to challenge or vary the Court's Order.

[189] The Order, dated May 14, 2021, named as Respondents "Freedom Nova Scotia, John Doe(s), Jane Doe(s), Amy Brown, Tasha Everett and Dena Churchill", and enjoined the following actions:

> 2. For the purposes of this Order an "Illegal Public Gathering" has the same meaning and definition as set out in the Public Health Order titled "Restated Order #2 of the Chief Medical Officer of Health Under Section 32 of the *Health Protection Act*, 2004, c. 4, s. 1" dated May 13, 2021, issued by Dr. Robert Strang.
>
> 3. The Respondent [*sic*] and any other person acting under their instruction or in concert with the Respondent [*sic*] or 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*.

[190] The Injunction Order described how it would be served and its effect. It provided for a motion to vary or discharge the Order:

> 6. Service of the Order shall be made upon the individual named Respondents via posting copies of the Order to their respective email addresses and on-line social media accounts. In addition, a copy of this Order shall be posted as is possible on all social media platforms associated with the Respondent Freedom Nova Scotia and Worldwide Rally for Freedom and Democracy. A person shall be deemed to have Notice of this Order upon the Order being published on the Government of Nova Scotia's COVID-19 internet website: https://novascotia.ca/coronavirus/, the Order is published in a public forum by the Government of Nova Scotia, or if it is read to them.
>
> 7. The provisions of this Order are additional to and do not limit, exclude, or derogate from:
>
> a. any powers of Law Enforcement, including but not limited to their powers under the *Criminal Code* and/or applicable provincial legislation; and
>
> b. any powers under the *Health Protection Act* and Public Health Orders issued under the *Health Protection Act*.
>
> 8. This Order shall remain in force until varied or discharged by a further Order of the Court.
>
> 9. The Respondents and anyone with notice of this Order may apply to the Court at any time to vary or discharge this Order or so much of it as affects such person, in accordance with the process provided in the *Civil Procedure Rules* but no such motion shall in any way excuse that person from compliance with the terms of this Order.

[191] The Injunction Order said a peace officer could use reasonable force to arrest and remove anyone with notice of the Order who acts in contravention of the Order.

[192] No one applied to vary, discharge or challenge the Injunction Order until May 27, 2021. Then the CCLA filed with the Supreme Court a notice of motion seeking an order "[g]ranting the CCLA public interest standing in this proceeding as a party for the purpose of requesting a rehearing of the Application in Chambers, seeking to set aside or vary the Injunction Order obtained *ex parte* by the Applicant".

[193] The motion was scheduled for June 4, 2021. On June 1, 2021, the Attorney General notified the Court that it consented to the CCLA's standing. On June 4, 2021, Supreme Court Justice Gabriel granted the CCLA public interest standing as

a party for the purpose of rehearing the *ex parte* application. The rehearing was scheduled for June 22, 2021.

[194] On June 14, 2021, the Attorney General filed a motion to discharge the Injunction Order. The Attorney General said the injunction was no longer needed.

[195] On June 22, 2021, Supreme Court Justice Gatchalian issued an Order that discharged the Injunction Order. On that day, the Attorney General submitted that, as the Injunction Order no longer existed, the anticipated submissions of the CCLA were moot and the rehearing should be cancelled. Justice Gatchalian declined to cancel the rehearing. Rather, the rehearing and mootness issues were scheduled for a later date before Justice Chipman of the Supreme Court.

[196] After reviewing the materials filed, Justice Chipman decided he would hear the mootness motion on June 30, 2021.

[197] The CCLA filed affidavit evidence and both parties filed briefs on whether the matter was moot, given the Injunction Order had been discharged, and if it was moot whether the matter should proceed in the interests of justice. Justice Chipman issued a Decision dated June 30, 2021 (2021 NSSC 217). He declined to conduct a re-hearing. Under the tests in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, para. 17, and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, p. 353, Justice Chipman ruled that: (1) given the discharge of the Injunction Order, there was no live controversy, meaning the issues were moot, and (2) this was not a case where, in the "interests of justice", he should exercise his discretion to hear the CCLA's motion for a re-hearing. Later, when I discuss mootness, I will refer to Justice Chipman's reasons.

[198] There is no appeal from the rulings of Justices Gatchalian or Chipman.

[199] On August 31, 2021, Court of Appeal Justice Bourgeois, in chambers, issued an Order extending the time for the CCLA to file a notice of appeal. On September 2, 2021, the CCLA filed its Notice of Appeal from Justice Norton's Injunction Order of May 14, 2021.

Mootness

[200] First – is the appeal moot? Before the appeal hearing, the Court wrote to counsel and asked that they be prepared to address mootness. At the hearing, counsel spoke to the issue.

[201] The CCLA's Notice of Appeal says:

> **Appellant appeals**
>
> The appellant appeals from the whole of the judgment dated May 14, 2021, in the proceedings in the Supreme Court of Nova Scotia (Hfx. No. 506040) by the Honourable Justice Scott Norton.
>
> …
>
> **Order requested**
>
> The appellant says that the court should allow the appeal and that the judgment appealed from be reversed and set aside.

[202] The CCLA's factum concludes:

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

[203] An appeal is from the judgment, *i.e.* the Order, not the reasons. The judgment appealed from was the Injunction Order of May 14, 2021, signed by Justice Norton.

[204] On June 22, 2021, Justice Gatchalian issued an order that the Injunction Order be discharged, subject to the Supreme Court's ruling on the mootness issue to be considered at a later date. On June 30, 2021, Justice Chipman dismissed the CCLA's submissions on the mootness issue. Neither decision has been appealed.

[205] The CCLA requests the Court to set aside an Order that no longer exists.

[206] In *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3, Justices Iacobucci and Arbour for the majority (the dissenting judges agreeing on this point – see para. 95), said:

> 17 The doctrine of mootness reflects the principle that **courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard** (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), at p. 353). In our view, the instant appeal is moot. …
>
> 18 Although this appeal is moot, the considerations in *Borowski*, *supra*, suggest that it should be heard. Writing for the Court, Sopinka J. outlined the

> following criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63):
>
> (1) the presence of an adversarial context;
>
> (2) the concern for judicial economy;
>
> (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.
>
> 19 In this case, the appropriate adversarial context persists. The litigants have continued to argue their respective sides vigorously.
>
> 20 As to the concern for conserving scarce judicial resources, this Court has many times noted that such an expenditure is warranted in cases that raise important issues but are evasive of review [citations omitted]. The present appeal raises an important question about the jurisdiction of superior courts to order what may be an effective remedy in some classes of cases. To the extent that the reporting order is effective, it will tend to evade review since parties may rapidly comply with orders before an appeal is heard.
>
> …
>
> 22 Finally, the Court is neither departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere by deciding to hear this case (*Borowski*, *supra*, at p. 362). …
>
> [bolding added]

[207] This Court cannot overturn a discharged Order. That request does not speak to a live controversy and is moot. However, as to the three criteria for the exercise of this Court's residual discretion:

- an adversarial context exists;
- the issues raised by the CCLA involve important legal issues concerning the process to avoid imminent harm while respecting freedoms of expression and assembly under *Charter of Rights and Freedoms*;
- the Court is not asked to either depart from its role as an adjudicator or enter the legislative or executive sphere.

[208] For example, in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, the Court, without mentioning mootness, considered significant legal issues respecting the interim injunction notwithstanding that

> MacMillan Bloedel has not brought the main action on for trial. Its counsel did not suggest that it ever would. The government policy has changed and the protests have died down. The injunctions have long since expired. [para. 9]

[209] Subject to the matter of issue estoppel I will discuss next, I agree that, in the interests of justice as prescribed by *Borowski* and *Doucet-Boudreau*, this Court should address the legal issues arising from the CCLA's grounds.

[210] On June 30, 2021, the CCLA submitted to Justice Chipman that, in the interests of justice as prescribed by *Borowski* and *Doucet-Boudreau*, the Supreme Court should re-hear the injunction motion. The CCLA's proposed issues to be considered on the rehearing largely replicated the CCLA's contentions now advanced in the Court of Appeal.

[211] Justice Chipman rejected the CCLA's submission and declined to hold a re-hearing (2021 NSSC 217). His reasons included:

> [34] The record reflects that the Court upon hearing evidence inclusive of the expert evidence of Dr. Robert Strang, Chief Medical Officer of Health, issued a *quia timet* injunction. The burden of proof on a *quia timet* injunction is much higher than a regular injunction. The Province met the burden required to obtain a pre-emptive injunction in this matter. The Province set out the law pertaining to *quia timet* injunctions in its written submission to the Court, which the Court then referenced in its written decision. The Province also provided the evidentiary foundation supporting the *quia timet* injunction. The evidentiary foundation for the *quia timet* injunction was accepted as set out in the Court's written decision. I am mindful of the CCLA's arguments that the decision is lacking in these areas. While the decision may not be perfect, to my mind it represents timely, thorough written reasons in the context of an urgent situation. The reader is given a clear understanding as to why the Judge felt the Injunction Order was required as referenced herein at para. 8 and continuing at paras. 33-37 of the decision.
>
> …
>
> [37] … **I am not prepared to exercise my discretion to allow the CCLA's requested rehearing to occur.** The Injunction Order was granted in markedly different circumstances which existed six weeks ago. Who knows what another six weeks will bring. The mind contemplates anything from an extinguished pandemic to a raging variant fueled fourth wave.
>
> [38] The Injunction Order was lifted just over a week ago. I am not persuaded that a lengthy hearing is now necessary. **There will be no Order setting aside the May 14, 2021 decision of this Court. The CCLA's issues, while interesting and thought-provoking, do not necessitate a lengthy hearing (or rehearing) at this time.** This is a courtroom not a classroom. Should it become necessary, the Court will be well-placed to make a decision based on the circumstances which exist at that time.
>
> [bolding added]

[212] In the Court of Appeal, the question arises whether Justice Chipman's refusal to exercise his discretion in the interests of justice, under the second test from *Borowski* and *Doucet-Boudreau*, raises issue estoppel. May this Court exercise that discretion without an appeal from Justice Chipman's decision?

[213] In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, Justice Binnie for the Court stated a two-fold test for issue estoppel:

- Has a question of fact, law or mixed fact and law been determined by a final judicial decision in a proceeding between the same parties or their privies? (*Danyluk*, paras. 24-25, 54-60).
- If so, should the court exercise its discretion to decline the application of issue estoppel? As issue estoppel is an "implement of justice", the discretion should be exercised to promote justice in the circumstances of each case. (*Danyluk*, paras. 33, 62-67).

[214] Justice Chipman's un-appealed ruling answers *Danyluk*'s first question – Yes.

[215] To *Danyluk*'s second question, the CCLA replies that Justice Chipman's decision focused on whether there should be a re-hearing of the evidence from May 2021. The CCLA distinguishes Justice Chipman's ruling by noting the CCLA's appeal has a different perspective – *i.e.* the establishment of legal precedent to govern a future controversy with its own facts. The CCLA says that such an appellate ruling would be in the interests of justice under *Borowski*, *Doucet-Boudreau* and *Danyluk*'s residual test.

[216] The Attorney General takes no position on the issues of mootness and issue estoppel.

[217] I accept the CCLA's submission. As I will discuss, the process here involved errors that need not recur. It is in the interests of justice that the Court addresses the CCLA's four legal issues.

[218] The response to the mootness issue frames this Court's function. This appeal is limited to precedential guidance under the "interests of justice" exception from *Borowski* and *Doucet-Boudreau* and *Danyluk*'s second test. Justice Norton's factual findings are not precedential. As the CCLA pointed out in its *Danyluk* submission, in a future controversy, the court's findings will turn on the evidence in that case, not on what happened in May 2021. This Court should confine itself to

the CCLA's identified legal issues and not wade into Justice Norton's findings of fact.

Issues

[219] The CCLA's factum identifies four issues. To quote:

> 28. The CCLA raises the following issues on appeal:
>
> **Issue #1:** The judge below erred in accepting the evidence of a named party as independent expert evidence.
>
> **Issue #2:** The judge below erred in granting a final *quia timet* injunction, in the absence of any legal authority and on the basis of the wrong legal test.
>
> **Issue #3:** The judge below erred in granting an injunction order against all Nova Scotians without any evidence that such a remedy was warranted.
>
> **Issue #4:** The judge below erred by failing to consider whether the Injunction Order infringed the *Charter* rights of all Nova Scotians in a manner that was justified.

First Issue: The Chief Medical Officer's Evidence

[220] On the application to Justice Norton, the Attorney General did not expressly ask that Dr. Strang's affidavit be taken as expert opinion. Nonetheless, Justice Norton's Decision, para. 7, qualified Dr. Strang "as an expert witness capable of giving expert opinion evidence in the field of Public Health and Preventative Medicine, the assessment and interpretation of evidence in public health matters and in particular those related to SARS-CoV-2 and COVID-19".

[221] The CCLA challenges the judge's acceptance of Dr. Strang's opinion as expert evidence on three bases:

- Dr. Strang's affidavit did not follow procedural requirements of *Civil Procedure Rule* 55 for expert opinions.
- Justice Norton did not address the two-step gatekeeping inquiry directed by *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182.
- Dr. Strang was a party and the CCLA says (factum, para. 37) parties "cannot be seen to be independent" and "cannot fulfill the duty to the Court required of an expert witness".

[222] My views are these.

[223] **Admissible as narrative:** One of the basic issues was whether the Freedom Nova Scotia rallies would offend the Public Health Order.

[224] Section 32(1) of the *Health Protection Act* says the Chief Medical Officer's "opinion" is the basis for the Public Health Order. Dr. Strang's affidavit evidenced the precondition and the rationale for the Public Health Order under s. 32. He explained why he chose to draft the Public Health Order to restrict gatherings and to require social distancing and masking.

[225] The *Act* does not say a medical officer must be an "expert" under the common law of evidence before the medical officer can issue a public health order under s. 32. To be admissible, it was unnecessary that Dr. Strang's opinion be formally termed "expert". It sufficed that the opinion was, in fact, that of a "medical officer" who was authorized by the statute to draft the Public Health Order based on his "opinion". His opinion was admissible as a step in the narrative.

[226] Central to that opinion were Dr. Strang's reasons for the restrictions in the Public Health Order of May 13, 2021 – *i.e.* the transmission risks of COVID-19. Justice Norton was entitled to weigh Dr. Strang's opinion on the transmission risks of COVID-19.

[227] To the CCLA's three submissions on the admission of an expert opinion, I comment as follows.

[228] **Rule 55:** *Civil Procedure Rule* 55 says an expert opinion must be either offered by a party or from an expert appointed by court order. Oddly, nowhere did the Attorney General's pleading (the Application), written brief and transcribed oral submissions to Justice Norton say that Dr. Strang's affidavit was offered as expert opinion. I will ascribe this omission to the urgency of the moment. Dr. Strang's affidavit listed his qualifications and gave his opinions, which I will treat as implicitly offering Dr. Strang's affidavit as expert evidence.

[229] However, there is another more serious omission. Dr. Strang's Affidavit did not contain the representations that Rule 55.04, titled "Content of expert's report", says "must" be included.

[230] Rule 55.02 states:

> 55.02 A party may not offer an expert opinion at the trial of an action or hearing of an application in court unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule.

As Dr. Strang's affidavit did not comply with Rule 55.04, the judge erred in law by accepting his opinion as expert evidence.

[231] Nonetheless, as I have explained, Dr. Strang's opinion, including his opinion of the transmission risks of COVID-19, was admissible as narrative to explain why he drafted the Public Health Order of May 13, 2021 as he did.

[232] **The gatekeeping criteria:** An expert opinion must satisfy the threshold requirements from *White Burgess*. Justice Cromwell described the twofold test:

> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* [*R. v. Mohan*, [1994] 2 S.C.R. 9] factors (relevance, necessity, absence of an exclusionary rule ands a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: [citations omitted]. Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. …
>
> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.* [2000 SCC 51], Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey* [*R. v. Abbey*, 2009 ONCA 624] stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert's evidence": para. 76.

[233] Justice Norton's Decision did not address *White Burgess*' gatekeeping criteria. Neither did the Attorney General's submissions to Justice Norton raise the point. In my view, Dr. Strang's affidavit would satisfy those criteria. In any case, as I have discussed, Dr. Strang's opinion was admissible as narrative of the statutory precondition.

[234] **Independence:** The CCLA says because the "Chief Medical Officer of Health" was a party, Dr. Strang lacked the independence required of an expert

witness. Justice Bryson agrees. As I have discussed, because Dr. Strang's affidavit did not comply with Rule 55, his evidence should not have been admitted as expert opinion. That means it is unnecessary to discuss the issue of independence. Nonetheless, given the CCLA's forceful submission and Justice Bryson's conclusion on the point, I will offer my views.

[235] In *White Burgess*, Justice Cromwell described how to approach the issue:

> [46] **I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan.** As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law concept has come to accept … that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": [citation omitted]. The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.
>
> …
>
> [49] **This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it.** The trial judge must determine, having regard to both the **particular circumstances** of the proposed expert and the **substance of the proposed evidence**, whether the expert is able and willing to carry out his or her primary duty to the court. For example, **it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection**; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. **I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence.** Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
>
> [50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with

> the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, **the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.**
>
> [bolding added]

[236] Justice Cromwell stated "it is the nature and extent of the interest or connection with the party thereto that matters, not the mere fact of the interest or connection". It is insufficient to just say, in effect: "Dr. Strang is a party, so he can't be independent." Rather, one must answer the question: "What is the nature and extent of Dr. Strang's interest or connection?"

[237] Dr. Strang personally is not a party. The "Chief Medical Officer of Health" is the party. As Dr. Strang has been appointed to that office under the *Health Protection Act*, his interest or connection is occupational.

[238] What is the interest or connection of a Chief Medical Officer of Health?

[239] The *Health Protection Act* answers that question. The *Act* directs the Chief Medical Officer of Health to protect public health by issuing public health orders that are based on his opinions:

- Sections 8(1) and 8(3) direct medical officers to "take such reasonable actions as **they consider necessary** in the circumstances to protect the public health" and "take such actions as the medical officer **considers appropriate** to prevent, eliminate or decrease a risk to the public health if the medical officer is **of the opinion** that a situation exists anywhere in the Province that constitutes or may constitute a risk to the public health".
- Section 20(1) says "where a medical officer **reasonably believes** that … a health hazard exists …" the medical officer may make any order "to prevent, remedy, mitigate or otherwise deal with the health hazard".
- Section 24(1) says when the medical officer has "**reasonable and probable grounds to believe** a health hazard exists" and someone "is not likely to comply promptly with the order", the medical officer "may take whatever action the medical officer **considers necessary**".

- Section 32(1), the source of the Public Health Order in this case, says where a "medical officer is **of the opinion**, upon reasonable and probable grounds", that "a communicable disease exists" which "presents a risk to the public health", the medical officer may issue an order with restrictions to decrease the risk to the public health.

- Section 37(1)(b), with s. 33(2), says when a medical officer "has **reasonable and probable grounds to believe**" that a person to whom the Public Health Order is directed will engage in an activity that "is not likely to comply with the order", the medical officer " may take whatever action the medical officer **considers necessary**".

- Regulation 8 of the *Communicable Diseases Regulations* under the *Health Protection Act* says the medical officer may "prohibit public gatherings" to control transmission of a communicable disease for such period of time as the medical officer "**believes to be necessary or advisable**". Regulation 9 says, if the medical officer is "**not satisfied**" that all due precautions are being taken, the medical officer "must" advise the persons competent to act of the measures that the medical officer "**believes to be necessary or advisable**" and he "must assist" with the preventative measures.

[bolding added]

[240] The *Health Protection Act* does not authorize the courts to re-assess the wisdom of a Public Health Order issued under s. 32(1). Rather, the courts are to enforce it:

- Section 38(1) says when a judge of the provincial court is satisfied that a person "has failed to comply with" a medical officer's order under s. 32, such as the Public Health Order in this case, the Provincial Court judge may order various sanctions, including that the person be detained, isolated and treated.

- Section 71(1) says "every person who fails to comply with … an order made pursuant to this Part … is guilty of an offence" and subject to a fine or incarceration.

[241] When a witness exercises legislated power, an analysis of the "nature or extent of [the witness'] interest or connection" to the matter starts with the statutory context, a factor to which the CCLA's submission pays little regard.

[242] The *Health Protection Act*, in particular s. 32(1), makes it clear that the "opinion" of a medical officer, not a judge, marshals the strategic response to a public health crisis involving communicable disease. As to enforcement, under s. 37(1)(b), if the Chief Medical Officer had reasonable and probable "grounds to believe" that someone to whom the Public Health Order is directed will engage in activity that infringes the Order, the Chief Medical Officer "may take whatever action [the Chief Medical Officer] considers necessary". Clearly the *Act* intends that the Chief Medical Officer's "opinion" and "grounds to believe" have legal status, *i.e.* at least be admissible, in proceedings to enforce the Public Health Order.

[243] Justice Norton was not hearing an appeal from the Public Health Order or the Chief Medical Officer of Health's opinion that generated it. His function was not to weigh conflicting expert opinions on whether the restrictions in the Public Health Order should be varied. His mandate was to decide whether to enjoin infringements of the Public Health Order.

[244] The Chief Medical Officer of Health's opinion and the court's function align and synchronize in a manner that does not exist in the typical case. By law, the Chief Medical Officer of Health's "opinion" generates the Public Health Order which by law the court enforces. Both the Chief Medical Officer of Health's opinion and the court's function are grounded in the *Health Protection Act*'s standards for the public health. The court is better equipped to perform its enforcement task by having the rationale for the Order than by groping in a contextual vacuum.

[245] It was unnecessary that the Chief Medical Officer of Health be named as a party. The Attorney General may apply for an injunction to enforce a public health enactment, as I will discuss under the Second Issue.

[246] Nonetheless, here the Chief Medical Officer of Health was named. Under the test in *White Burgess*, para. 50, the Chief Medical Officer of Health's "interest and connection" would not result in Dr. Strang being "unable or unwilling to carry out his primary duty to the court of providing fair, non-partisan and objective assistance". This is not what Justice Cromwell termed one of the "quite rare" cases where the opinion would be inadmissible.

[247] I respectfully disagree with the CCLA's submission and with the conclusion of Justice Bryson on this point.

Second Issue: Test for the Injunction

[248] The CCLA has three concerns.

[249] **First – the underlying legal basis:** The CCLA's factum states:

> 40. The Province brought an Application in Chambers for an injunction to aid in the enforcement of the Public Health Order, without advancing any underlying cause of action, statutory authority or other legal authority which would justify relief. …
>
> …
>
> 52. Establishing a cause of action or statutory or other legal authority for action is a precondition to obtaining injunctive relief, whether on an interim, interlocutory or final basis. The judge below erred by granting injunctive relief despite the Province's failure to advance any legal basis for its entitlement to a remedy.

[250] The Attorney General says the legal basis was that the imminent gatherings would offend the Public Health Order and thereby infringe the *Health Protection Act*, an infringement that the superior court has inherent power to enjoin.

[251] The CCLA replies by citing s. 71(1) of the *Health Protection Act*: "[e]very person who fails to comply with this Part or the regulations is guilty of an offence and is liable on summary conviction" to (for an individual) a fine of $2,000 or six months imprisonment. The CCLA says s. 71(1) is an adequate statutory remedy that excludes the superior court's inherent power to enjoin an infringement of the statute.

[252] What are the principles? Generally, unless the statute expresses a contrary intent, the Attorney General can apply to enjoin an infringement of a public statute. The power traces its provenance to the sovereign's *parens patriae* jurisdiction to participate in legal proceedings for the protection of the public: The Right Hon. Lord Woolf, *et. al.*, *DeSmith's Judicial Review* (London: Sweet & Maxwell, 2018), 8th ed., pp. 897-99.

[253] The Honourable Robert J., Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, looseleaf ed.), summarizes the authorities:

CHAPTER 3 – INJUNCTIONS TO ENFORCE PUBLIC RIGHTS

…

II Injunctions at the Suit of the Attorney General

…

3:2 Introduction

There is a well-established jurisdiction to award injunctions at the suit of the Attorney General to enjoin public wrongs. The Attorney General is said to invoke the *parens patriae* jurisdiction when suing in the public interest.

…

3:3 Public nuisance

The role of the Attorney General in suing in the public interest to enjoin public nuisance is of great antiquity and continues to have importance. Definition of what constitutes a public nuisance is a difficult aspect of substantive law. Lord Denning's explanation has been quoted with approval by Canadian courts:

> The classic statement of the difference [between public and private nuisances] [*Sharpe*'s brackets] is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much … I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large. [*A.G. ex rel. Glamorgan County Council and Pontardawe Rural District Council v. P.Y.A. Quarries Ltd.*, [1957] 1 All E.R. 894 (C.A.), at p. 908]

The term has been used to describe a **wide variety of public wrongs ranging** from interference with uses of land similar to private nuisance but affecting many people **to cases involving** a more general interference with public convenience, **health or safety** …

…

3.4 Discretion

…

The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. **It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds.** In one case, it was held that "the general rule no longer operates, the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing

> to abide by the law of the land.". In another case, Devlin J. held that although the court retains a discretion, once the Attorney General has determined that injunctive relief is the most appropriate mode of enforcing the law, "this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances".
>
> …
>
> 3.6 Enjoining "flouters"
>
> Although English cases are more common, there are also many Canadian decisions in which **injunctions have been granted to enforce penal legislation.** The most common situation is one **where the law has been "flouted"** and the statutory penalty has proved to be an inadequate sanction.
>
> …
>
> The rationale in this type of case seems clear: despite the absence of actual or threatened injury to persons or property, the public's interest in seeing the law obeyed justifies equitable intervention where the defendant is a persistent offender who will not be stopped by penalties imposed by statute.
>
> …
>
> 3.7 Danger to public safety
>
> Injunctions have also been granted where there is an **immediate threat or danger to public safety which would not be met by the ordinary process or procedure prescribed by statute.**
>
> [bolding added]

[254] The Supreme Court of Canada has affirmed that (1) the Attorney General may apply to enjoin the infringement of a statute further to the Crown's *parens patriae* jurisdiction and, (2) unless there is an "adequate" alternative remedy, the superior court has discretion to enjoin an illegality, statutory or civil, in the exercise of the court's inherent jurisdiction to maintain the rule of law: *People's Holding Co. v. Attorney General of Quebec*, [1931] S.C.R. 452, at p. 458, per Rinfret J. for the Court (respecting the *parens patriae* jurisdiction); *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, paras. 15, 20-21, 33, per McLachlin J. (as she then was) for the Court; *Brotherhood of Maintenance of Way Employees Canadian Pacific System. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495, paras. 5-9, 16, per McLachlin J. (as she then was) for the Court; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paperworkers Union, Local 219*, [1986] 1 S.C.R. 704, paras. 28-30, 34, per Estey J. for the Court; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, paras. 57, 67, per McLachlin J. (as she then was) for the Court; *New*

Brunswick v. O'Leary, [1995] 2 S.C.R. 967, para. 3, per McLachlin J. (as she then was) for the Court.

[255] To the extent the delay to enforce the alternative statutory remedy risks interim harm, the statutory remedy inadequately serves the interim period and the court may enjoin the illegal activity. This proposition is supported by the following authorities.

[256] In *Brotherhood of Maintenance Way Employees*, *supra*, Justice McLachlin explained why there was "no adequate alternative remedy" and the injunction was appropriate:

> 6 … I can put it no better than Hutcheon J.A. in the Court of Appeal (at pp. 182-83 B.C.L.R.):
>
> > The important circumstances in the present case are that there is no forum for interlocutory injunctions available through the *Canada Labour Code*; the work of the track crews is seasonal and from approximately March to the end of October; **the arbitration proceeding was not finished until March 1994, several months after the 1993 work season; and without a restraining order there would be no way to remedy the loss of Sunday rest days**.
>
> **There was, in the words of this Court in *St. Anne Nackawic*, "no adequate alternative remedy".** The British Columbia Supreme Court, by contrast, was empowered to grant interlocutory injunctions such as that which the union sought in the exercise of its inherent jurisdiction: *Law and Equity Act*, s. 36. It would appear to follow that the court had the power to grant an injunction against imposition of the new schedule for the interim period pending a decision from the arbitrator appointed under the *Code*.
>
> [bolding added]

[257] In *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission),* 2010 BCCA 396, Justice Groberman for the Court said:

> [36] A statutory provision may also prove inadequate where a party who suffers harm is unable to invoke the provision [citation omitted], **or where serious danger or harm would result from the delay inherent in invoking a statutory remedy**. There are, undoubtedly, other situations in which deficiencies in a statutory remedy militate in favour of the granting of an injunction.
>
> [bolding added]

[258] In *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26, the Court extended an interlocutory injunction to restrain interference with lawful logging operations. The *per curiam* decision said an injunction to address imminent harm is more pragmatic than awaiting the outcome of a prosecution:

> 35 … Teal's concern is **to stop the unlawful activity** so that it can get on with exercising its rights. As this Court observed in *Simm* [*Interfor v. Simm*, 2000 BCCA 500], an injunction and the use of contempt powers to enforce it are a **more effective, relatively expeditious remedy,** devoid of legal requirements and added process burdens of trying to enforce sections of the *Criminal Code*: at paras. 22-23.
>
> 36 An injunction, unlike the criminal law, **can be tailored to the facts of a given situation.** It can be time-limited, geographically limited, and varied on application. As the judge noted in an earlier ruling, it can serve a valuable educational and informational purpose, providing greater clarity to both the public and the police regarding the limits of permissible activities and police enforcement [citation omitted]. In contrast, **the criminal law is a blunt instrument that moves more slowly and may be less effective in solving the immediate problem** of blockades that interfere with lawful activity. …
>
> [bolding added]

[259] A leading English authority is *Attorney General v. Chaudry*, [1971] 3 All E.R. 938 (Ch. D.), per Plowman J., affirmed by the Court of Appeal [same citation, p. 946]. Justice Plowman (pp. 941-45) reviewed the principle from English authorities that, barring exceptional circumstances, the Attorney General may obtain an injunction to prevent an infringement of a public statute. The defendant had submitted the injunction should be refused because the statutory remedy was "adequate". Plowman J. disagreed (pp. 945-46):

> Then in regard to the question of there being an adequate remedy elsewhere, counsel for the defendants referred to the provisions of s. 34(5), which I have already read, and he refers to the proceedings in a court of summary jurisdiction under which such a court may impose a fine and can make an order prohibiting the occupation of the building. Counsel says that is a perfectly adequate remedy, and he says that the question whether the remedy is immediately available or not is irrelevant to the question of whether the remedy is an adequate remedy or not. He says that s. 34(5) remedy is an adequate remedy notwithstanding that the case **cannot be heard in magistrates' court before 1st September 1971**. If counsel is right in his submissions, what it means is this: that at least for one month, which is the minimum period of time it is going to take to satisfy the Greater London Council in regard to fire precautions, the defendants will be free to subject hotel guests to the risk of losing their lives as a result of fire in the premises. That may

> sound dramatic, but it is literally true, and **in my judgment this court is not so powerless as to be unable to prevent that state of affairs existing.**
>
> In my judgment, I have jurisdiction to grant the injunction for which the Attorney General is asking and I have come to the conclusion that as a matter of discretion my duty is to grant the injunction, and I propose to do so accordingly.
>
> [bolding added]

[260] In *Chaudry*, the Court of Appeal agreed with Justice Plowman. Lord Denning had no doubt on the matter (pp. 946-47):

> It is quite plain that the defendants are breaking the law. …
>
> But what is the remedy for the breach? Counsel for the defendants submits that the only remedy is by taking proceedings in the magistrates' court… In pursuance of the Act, summonses have been issued against Mr. and Mrs. Chaudry in the Marylebone Magistrates' Court. They are criminal proceedings. The date for hearing is 1st September. So there are some eight weeks to go. …
>
> There are many statutes which provide penalties for breach of them – penalties which are enforceable by means of a fine – or even imprisonment – but this has never stood in the way of the High Court granting an injunction. … Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless the High Court always has reserve power to enforce the law so enacted by way of an injunction or declaration or other suitable remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do.
>
> In this particular case it is plain that the magistrates' court has not sufficient powers at its command. **It cannot act for several weeks. It cannot make any order until there is a conviction. I ask, what is to happen in the meanwhile?** Is the law to be defied? Is this house to be occupied when there is a serious fire risk? If a fire should catch hold, it may mean serious loss of life. **This risk must not be allowed. The High Court must act to stop it.**
>
> …
>
> I think the judge was quite right. I would dismiss the appeal accordingly.
>
> [bolding added]

[261] I.C.F. Spry, *The Principles of Equitable Remedies* (London: Sweet & Maxwell Ltd., 2014), 9th ed. offers a helpful explanation on when the superior court's inherent power to enjoin will be restricted. According to *Spry*, the adequacy of the statutory remedy turns on statutory interpretation:

- **The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited**.

  [p. 333]

- Where in England and in other jurisdictions, the superior courts now exercise the powers of the former Court of Chancery, whether or not they are also able to grant legal injunctions or are affected by special Judicature Act provisions, their powers of granting injunctions are unlimited, provided that they have jurisdiction over the defendant in the circumstances in question. These powers are, however, exercised in accordance with the principles set out hereunder.

  First, an injunction may issue in the protection of any legal right whatever, save where an applicable statutory provision provides to the contrary.

  [p. 342]

- Statutory Exclusions of Relief by Injunction

  A question arises whether or not a right to an injunction that is otherwise established has been taken away by a statutory provision which provides for the imposition of a penalty or which confers a special remedy on the person who would otherwise be entitled to the injunction or on some other person. Whilst it must be borne in mind that the answer to this question **depends entirely on the proper construction of the material statutory provisions**, it is desirable to consider separately several distinct classes of cases that have been analyzed by the courts.

  In the first place there are cases where, even in the absence of a statutory provision that purports to render the particular acts in question unlawful and sets out a penalty or special private remedy, an injunction might, according to general equitable principles, have otherwise been obtained by the plaintiff. Ordinarily the passage of the provision in these circumstances is found not to have been intended to abrogate the principles by which an in injunction would otherwise have been granted. …

  In the second place, a different position arises when the precise right that is sought to establish by injunction did not exist before the passage of the material statutory instrument and it appears that that instrument has both created the material right and also sets out a remedy or procedure by which it may be established. If it is sought, not to rely on the statutory procedure that has been set out, but rather to obtain the issue of an injunction, it must first be shown that the new right created by the statute is sufficiently similar to other rights that are enforced by injunctions for it to be possible to regard that new right as susceptible of equitable protection. **Prima facie any statutory right should be regarded as susceptible of equitable protection or enforcement**

> **unless it has a special characteristic that on recognized principles induces a court with equitable jurisdiction to relegate plaintiffs to legal remedies**, such as where they merely seek to enforce an obligation for which damages are an adequate remedy. Secondly, if it is shown that the right asserted is otherwise susceptible of protection by injunction, **it must be asked whether, as a matter of statutory interpretation, the right to an injunction is excluded.** There have been suggestions that, whatever may be the position as to other remedies, the remedy of injunction is merely prospective and ancillary, so that hence it should never be regarded as excluded. Nonetheless these suggestions are too general, and **the proper question is one of construction, that is, whether or not the intention has been shown that the material statutory remedy or procedure should be exclusive in this respect.** …
>
> Accordingly, although it has sometimes been suggested that provisions creating a special statutory remedy in respect of a new statutory right should ordinarily be regarded as exclusive, **the better view now is that, where the right in question is of such a nature as to be inherently susceptible of enforcement by injunction, the statutory remedy is not exclusive unless there is a clear indication that it should be so regarded.** …
>
> It is important to note that although it is often asked generally whether the statutory procedure that is in question is exclusive, **it is in truth necessary to ask more precisely whether there has been an exclusion or denial of the particular remedy that is sought**. It may be that some remedies are, whilst others are not, left open. … Further, it may be found that a particular statutory provision sets out a remedy which is exclusive so far as one possible plaintiff is concerned, but which **is not exclusive so far as a different plaintiff is concerned, such as the Attorney General**. Nonetheless, it should be stressed generally that when **once a plaintiff is able to establish a statutory right of a kind that is ordinarily regarded as appropriate for protection by injunction, it is only very rarely found that there is a statutory intention to deny a right to injunctive relief that is otherwise appropriate.**
>
> [pp. 377-80]
>
> [bolding added]

[262] With those principles in mind, I will turn to this case.

[263] The Public Health Order prescribed restrictions for gathering limits, mask-wearing and social distancing. The Order issued further to s. 32 of the *Health Protection Act*. The *Act* made the Public Health Order legally binding. Past gatherings organized by Freedom Nova Scotia and its adherents had openly violated those restrictions. They had planned similar gatherings for May 15, 2021.

[264] Justice Norton found that Freedom Nova Scotia and its adherents would infringe the Public Health Order on May 15 (Decision, para. 34). The facts recited in Ms. Crichton's affidavit support Justice Norton's finding. The infringement would violate the *Health Protection Act*.

[265] The remaining question is – does the *Health Protection Act* preclude an injunction by providing an adequate statutory remedy?

[266] Section 71(1) of the *Health Protection Act*, upon which the CCLA relies, says "every person who fails to comply" with Part I of the *Act* or with a public health order commits an offence and may be fined or incarcerated. Further, section 38(1) says where a provincial court judge "is satisfied that … a person has failed to comply with an order by a medical officer made under Section 32", the judge may order that the person be quarantined, examined by a physician and treated.

[267] The remedies in sections 71(1) and 38(1) take effect only after the Provincial Court has found a failure to comply. The trial in the Provincial Court would not occur for several months at the earliest.

[268] Here, the Chief Medical Officer's concern was that the gatherings on May 15, 2021 would spread the infectious and potentially lethal virus on that day. An adequate remedy would seek to prevent the risk from happening on May 15. A Provincial Court trial would close the barn door after the horse had escaped. Under the case authorities I have cited, including the Supreme Court of Canada's ruling in *Canadian Brotherhood of Maintenance Way Employees*, the risk of interim harm supports the injunction.

[269] Further to *Spry*'s interpretive approach, what is the statutory intent? The *Health Protection Act* directs medical officers to do what they feel is appropriate to "protect" against and "prevent" the spread of communicable disease:

- Section 8(1) says medical officers "may take such reasonable actions as they consider necessary in the circumstances to **protect** the public health…".
- Section 8(3) says a medical officer "may … take such actions as the medical officer considers appropriate to **prevent**, eliminate or decrease a risk to the public health …".
- Section 20(1)(b) says a medical officer may make any order the officer "considers necessary to **prevent** … the medical hazard".

- Section 24(1)(b) says, where a medical officer reasonably believes someone “is **not likely to comply**” with the public health order, the medical officer “may take whatever action the medical officer considers necessary…”
- Section 37(1)(b) says where a medical officer reasonably believes someone “**is not likely to comply** with the order [issued under s. 32] promptly … the medical officer may take **whatever action the medical officer considers necessary** to carry out the terms of the order …”
- Regulation 9 of the *Communicable Diseases Regulations* under the *Act* says, if the medical officer “is not satisfied that all due precautions are being taken, the medical officer **must** advise the persons competent to act of the measures the medical officer believes to be necessary or advisable to **prevent** the transmission of the disease, and **must assist** with the **preventative** measures”.

[bolding added]

[270] These provisions direct medical officers to act prospectively to prevent an anticipated infringement of the Public Health Order. That was the point of this injunction application. For instance, further to s. 37(1)(b), if the medical officer reasonably believes that someone to whom a Public Health Order is directed “is not likely to comply with the order promptly”, then “the medical officer may take whatever action the medical officer considers necessary”. In my view, “whatever action” includes an injunction application, should the medical officer consider that necessary. Under *Spry*’s test, the injunction applied the statutory intent.

[271] For those reasons, the after-the-fact remedies under ss. 71(1) and 38(1) would have been “inadequate” to prevent the potential viral spread on May 15, 2021. On this point, I respectfully part ways with Justice Bryson. The Supreme Court of Nova Scotia had a legal basis to issue the injunction.

[272] **Second – the test for a *quia timet* injunction:** The Attorney General’s Application expressly sought a *quia timet* injunction. The CCLA says Justice Norton misapplied the test.

[273] In *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, paras. 34-35, Justice Dickson (as he then was) for the majority cited the earlier edition of Justice Sharpe’s *Injunctions and Specific Performance* and said, of *quia timet* injunctions:

> The general principle with respect to such injunctions appears to be that "**there must be a high probability that the harm will in fact occur**": Sharpe, *supra*, at p. 31.
>
> [bolding added]

[274] The current edition of Sharpe, *Injunctions and Specific Performance*, *supra*, explains the function of *quia timet* injunctions:

> **1:20 Quia timet injunctions**
>
> All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered. When the plaintiff has already suffered harm, although the remedial focus is often on the future, what has happened in the past provides the basis for assessing the appropriateness of the remedy. The court is able to see from what has already happened the nature and extent of the future threat posed by the defendant's conduct, and is able to assess the appropriateness of injunctive relief on the basis of that experience. The situation has crystallized in the sense that the defendant's course of conduct is settled, its effect upon the plaintiff is known, and the relative benefits to the plaintiff, and the burdens an injunction would impose on the defendant, can be assessed.
>
> **Where the harm to the plaintiff has yet to occur the problems of prediction are encountered.** Here, the plaintiff sues *quia timet* – because he or she fears – and the judgement as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm that will occur in the future and that the harm is of a type that ought to be prevented by injunction. Thus, while all injunctions involve predicting the future, the label *quia timet* and the problem of prematurity relate to the situation where the difficulties of prediction are more acute in that the plaintiff is asking for injunctive relief before he has suffered any of the harm to be prevented by the injunction has been suffered.
>
> …
>
> … the courts have adopted a cautious approach when asked to award an injunction prior to actual harm being suffered and have said that **there must be a high degree of probability that the harm will in fact occur** [citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, and many decisions of lower courts].
>
> [bolding added]

[275] Here, the Attorney General sought an injunction against innumerable unidentified individuals who might attend future gatherings anywhere in Nova Scotia. The potential harm from viral spread at those events was a future risk of

unsettled magnitude. The Attorney General's application involved the "problems of prediction" cited in the passage from Justice Sharpe's text. The *quia timet* test applied.

[276] For the *quia timet* criteria, Justice Norton (paras. 15-16) quoted *526901 BC Limited v. Dairy Queen Canada*, 2018 BCSC 1092, para. 71 and *Robinson v. Canada (Attorney General)*, 2019 FC 876, paras 87-91. Those decisions adopted the basic test from Justice Sharpe's text and *Operation Dismantle* set out above. *Robinson* cited several Federal Court rulings that had extrapolated a temporal requirement of imminence into the basic test. Justice Norton (para. 16) underlined for emphasis the following extract from *Robinson*:

> 88 … To assess prospective harm for *quia timet* injunctions, the courts have adopted a cautious approach generally requiring two elements; a high probability that the alleged harm will occur; and the presence of harm that is about to occur imminently or in the near future, thus adding a temporal dimension to the feared harm.

Then Justice Norton summarized the test:

> [17] In the present case, the Court must assess the propriety of the injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. The courts have adopted a cautious approach generally requiring two elements: the presence of harm that is about to occur imminently or in the near future; and, a high probability that the alleged harm will occur.

[277] Justice Norton found the harm was imminent, highly probable and satisfied the test:

> a. the presence of harm that is about to occur imminently
>
> [18] In Nova Scotia, the presence and spread of COVID-19 and its variants among the public is irrefutable.
>
> [19] The harm is the continued spread of COVID-19 within the Province if the anti-mask rally or other rallies and public gatherings in violation of the Health Orders are permitted to proceed as scheduled on May 15, 2021, or otherwise.
>
> b. high probability that the alleged harm will occur
>
> [20] The Court finds that there is a high probability that the harm will occur because the correlation between social gatherings and the spread of COVID-19 can reasonably be inferred from the evidence of Dr. Robert Strang.
>
> [21] Based on the foregoing, the Court finds that there is clear, convincing and non-speculative evidence allowing the Court to infer that irreparable harm will

> result if the injunction is not granted. The Province has met the test for a *quia timet* injunction on the evidence.

See also paras. 28 and 33-35 of Justice Norton's Decision, quoted earlier.

[278] Justice Norton did not misstate the legal criteria for a *quia timet* injunction. Whether the evidence from May 2021 satisfied the criteria is a factual issue that, as discussed earlier under mootness, is not contestable on this appeal.

[279] My comments here relate to the injunction against the named Respondents and others "acting under their instructions or in concert with them" as set out in para. 2 of the "order applied for" in the Application. Under the Third Issue, I will discuss whether the judge erred in law by also enjoining persons who act "independently" of the named Respondents.

[280] **Third – application of the tests for an interlocutory injunction:** The CCLA submits the judge erred by applying the tests for an interlocutory injunction (serious question to be tried, irreparable harm and balance of convenience) to what was pleaded as a final injunction. The CCLA says the judge should have considered the full merits. This point is particularly germane to Justice Norton's treatment of the *Charter of Rights*. I will discuss the submission under the Fourth Issue respecting the *Charter*.

Third Issue: Scope of the Injunction

[281] The CCLA submits the Injunction Order was too broad. I will discuss three aspects of this issue.

[282] **First – "or independently":** The Attorney General's *ex parte* Application said:

> **Order applied for**
>
> The Applicant is applying for an Order granting a *quia timet* injunction which:
>
> 1. Orders compliance with the provisions of the *Health Protection Act* 2004 c. 4, s. 1;
> 2. **Enjoins the Respondents, and any other person acting under their instructions or in concert with them,** from organizing in-person public gatherings; and
> 3. Authorizes law enforcement to engage in enforcement measures to ensure compliance with the *Health Protection Act* and any Order

> issued under section 32 of the *Health Protection Act*, or in accordance with the *Health Protection Act*.
>
> [bolding added]

[283] Only clause 2 spoke of a remedy that "enjoins". That clause said the requested order would enjoin the Respondents, and others "acting under their instructions or in concert with them". The impression was that the requested order would enjoin only the identified Respondents and their acolytes, designated as "John Doe(s)" and "Jane Doe(s)".

[284] However, that is not what the Injunction Order said. Clause 3 of the Order said:

> the Respondent and any other person acting under their instruction or in concert with the Respondent **or independently** to like effect and with Notice of this Order, shall be restrained anywhere in the Province of Nova Scotia from: … organizing … promoting … or attending an Illegal Public Gathering …
>
> [bolding added]

Clause 6 then said "[a] person shall be deemed to have Notice of this order upon the Order being published on the Government of Nova Scotia's Covid-19 internet website".

[285] The Order's insertion of "or independently" enjoined persons with no connection to the named Respondents. That meant, once the Order was posted to the Government's COVID-19 website, everyone in Nova Scotia. The Application's qualifier "acting under their instructions or in concert with them" lost its significance.

[286] The Court was not misled by the broadened request. At the hearing on May 14, 2021, the Attorney General's counsel clearly informed the judge that the Attorney General sought a plenary injunction. Counsel and Justice Norton had the following exchange:

> **JUSTICE NORTON:** The wording there [referring to the Attorney General's brief] just appears to me to be a little awkward. It says:
>
> > "The harm by the province is the continued spread of Covid-19 to the province if the anti-mask rallies are to proceed as scheduled on May 15, 2021, inclusive of other rallies and public gatherings."

> So, you would – just to be clear, what you're saying is the harm is any public gathering or rally that – and presumably, one that is not in accordance with the Department of Health order.
>
> **Mr. EDDY:** That's correct, My Lord. The purpose of this injunction is to prohibit illegal public gatherings and activities that cause illegal public gatherings to occur. The affidavit of Dr. Strang evidences that illegal public gatherings put all Nova Scotians at risk of contracting Covid-19, not just the attendees, and the illegal public gatherings are, in effect, detrimental to public health.
>
> So, yes, you're correct that it's not just the rally schedules this Saturday but all future gatherings that would contravene the Department of Public Health order, made in respect of yesterday, May 13th.

[287] The judge must determine whether the scope of the requested order satisfies the legal criteria for an injunction. The criteria for this *quia timet* injunction, issued *ex parte*, were an immediate need to avoid highly probable and imminent harm (see above, paras. 273-278 and below, paras. 310-312).

[288] As to Freedom Nova Scotia and its adherents, Ms. Crichton's affidavit evidenced that Freedom Nova Scotia was planning specific gatherings for May 15 at Citadel Hill in Halifax, Alderney Gate in Dartmouth and a baseball field in Barrington, for which Dr. Strang's affidavit explained the risk to public health. Justice Norton found that the evidence satisfied the criteria. That finding of fact is moot and is unchallengeable on this appeal (see above, para. 218).

[289] Ms. Crichton's affidavit cited several past offending gatherings by persons unassociated with the named Respondents. However, there was only a vague and unattributed suggestion of future gatherings that would be independent of Freedom Nova Scotia. Ms. Crichton's Affidavit, para. 27, last sentence says:

> Commentary from attendees suggests protests will be a weekly occurrence.

[290] Justice Norton's Decision, para. 3, tracks the words in the Application, citing the request for an injunction against the "Respondents and any other person acting under their instructions or in concert with them". The judge's reasoning, para. 34, says "[t]he Respondents, and those who would support them" disregard public health, justifying the injunction.

[291] However, the Decision does not mention a request for an injunction against persons acting "independently". Neither does it address whether any evidence of impending "independent" gatherings, by persons unassociated with the named Respondents, displayed an immediate need to avoid highly probable and imminent

harm. The failure to consider that point, for an Order applying to persons acting "independently", was an error of law.

[292] The court must follow established procedures, including notice save in rare cases, and apply binding criteria to admissible evidence. These imperatives may impede the Attorney General's procession to a summary injunctive remedy against everyone in the Province. Targeting the criteria for an injunction to one million people gathering for any purpose is a daunting endeavour on the best of days. It may be unworkable in the haste of an urgent *ex parte* application.

[293] **Second – naming "John Doe(s) and "Jane Doe(s)":** The Respondents named in the Application and Injunction Order included "John Doe(s)" and "Jane Doe(s)". The appellations cover unknown persons who are neither identified nor served. Is that approach permissible?

[294] In *MacMillan Bloedel Limited v. Simpson*, *supra*, the Supreme Court of Canada resolved the point.

[295] MacMillan Bloedel had obtained an *ex parte* injunction to restrain protesters from impeding logging roads. The injunction named "John Doe(s)" and "Jane Doe(s)" as respondents. The injunction applied to "all persons having notice of the Order". On further motions, the proceeding was *inter partes*, and the injunction became interlocutory, then interim and was appealed to the Supreme Court of Canada.

[296] Justice McLachlin (as she then was), for the Court said:

> 1 … Can the courts make orders against unidentified persons not named in the action or named only in proxy as "Jane Doe" and "John Doe"? Or must the persons enjoined be sued and named before an order is enforceable against them?
>
> …
>
> 7 … The evidence establishes that before arresting a protester, the police followed the practice of handing the injunction to the protester and then reading its contents to him or her. Upon this being done, most protesters peacefully left the blockade.
>
> …
>
> A) *Do the Courts Have Jurisdiction to Make Binding Orders on Non-Parties?*
>
> …

(2) The problem of Unidentified Persons

22 The second jurisdictional attack on the interim injunction is the assertion that the courts do not have the jurisdiction to make orders binding on non-parties. …

23 … I conclude that while the relevant principles have been articulated somewhat differently in England and in Canada, the practical effect is the same: in both countries, non-parties who violate injunctions may be found in contempt of court. Hence, non-parties may be seen as being, if not technically bound by the order, bound to obey the order. The same rule, it will be seen, has been accepted in other countries with legal systems similar to our own. [underlining in SCC's Decision]

…

31 It may be confidently asserted, therefore, that both English and Canadian authorities support the view that non-parties are bound by injunctions: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey. The only issue – and one which has preoccupied courts both in England and, to a lesser extent, here – is whether the wording of the injunction should warn non-parties that they, too, may be affected by including language enjoining the public, or classes of the public, from committing prohibited acts. On this point I share the view of Tysoe J.A. in *Bartle & Gibson*, *supra* [*Bartle & Gibson Co. v. Retail, Wholesale and Department Store Union, Local 580*, [1971] 2 W.W.R. 449 (B.C.C.A.)] and Estey J. in *International Longshoremen's Association*, *supra* [*International Longshoremen's Association, Local 273 v. Maritime Employers' Association*, [1979] 1 S.C.R. 120]: if members of the public may be bound to respect court orders in private suits on pain of being held in contempt, it seems appropriate that the order apprise them of that fact.

32 … The interlocutory injunctions obtained against the named defendants for blocking the logging roads also bound members of the public at large. There is nothing new in this. Canadian courts have for decades followed the practice of issuing orders directed at prohibiting interference with private property rights, which orders may affect not only the named parties but also the general public.

…

36 … It is fundamental that no state founded on the rule of law can permit members of the public to be detained and punished for violating an order of which they are ignorant. **If members of the public are to be charged with obstruction of justice for having disobeyed an injunction, they must first be apprised of the existence and terms of the order and be given an opportunity to comply. That is precisely what was done in enforcing the injunctions here. Before a protester was arrested, he or she was handed a copy of the order and its terms were read to him or her.** The protester was then asked to quit the

> blockade. Most complied. Only those who refused were arrested. It is also desirable, as this Court suggested in *International Longshoremen*, *supra*, that the order's terms speak of the duty of non-parties to respect it. …
>
> …
>
> B) *Suing Unnamed Persons*
>
> 38 The second issue is whether the use of terminology such as "John Doe", "Jane Doe" and "Persons Unknown" in the style of cause invalidates the order. …
>
> …
>
> 40 In fact, the use of "John Doe, Jane Doe and Persons Unknown" in the present action appears to be surplusage. As discussed above, a person who is not a party to an action is bound to respect an order made in the action, on pain of being found in contempt of court. …
>
> …
>
> V. Conclusion
>
> 42 I conclude that the British Columbia Supreme Court has jurisdiction to make orders enjoining unknown persons from violating court orders. **Such orders are enforceable on the long-standing principle that persons who are not parties to the action, but who violate an order of the court, may be found guilty of contempt for interfering with justice. Provided that contempt is the only remedy sought, it is not necessary to join all unknown persons in the action under the designation, "John Doe, Jane Doe and Persons Unknown". Nor, strictly speaking, is it essential that the order refer to unknown persons at all. However, the long-standing practice of doing so is commendable because it brings to the attention of such persons the fact that the order may constrain their conduct.** Similarly to be commended is the practice followed by the courts in this case of ensuring the wording of the orders is clear and that their effect is properly circumscribed.
>
> [bolding added]

[297] In *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R. 824, paras. 28-29, Abella J. for the majority reiterated the principles from *MacMillan Bloedel*.

[298] The propriety of naming "John/Jane Doe(s)" arises when it is impossible in advance to identify who may offend the injunction. Justice McLachlin's comments address that situation. Briefly: (1) naming respondents as "John Doe(s)" and "Jane Doe(s)" does not make unnamed persons parties to the injunction; however, (2) unnamed persons who offend an injunction, after being "apprised" of it, are subject to contempt proceedings, despite that they were not formal parties; and (3) naming "John Doe(s)" and "Jane Doe(s)" was a "commendable" effort to at least assist with apprising the public.

[299] **Third – how to "apprise" before enforcement:** In *Macmillan Bloedel*, para. 36, Justice McLachlin said before persons who are not named respondents may be sanctioned for offending an injunction, "they must first be apprised of the existence and terms of the order and given a chance to comply". Adding "John Doe(s)" and "Jane Doe(s)" to the style of cause assists, but in itself is insufficient to "apprise" an unnamed offender. Justice McLachlin approved the police practice of handing the injunction order to protesters and having it read to them, with an opportunity to comply, before an arrest was made or a sanction invoked.

[300] In our case, clause 6 of the Injunction Order says "a person shall be deemed to have Notice of this Order upon the Order being published to the Government of Nova Scotia's COVID-19 internet website, the Order is published in a public forum by the Government of Nova Scotia **or** if it is read to them" [bolding added].

[301] It is counter-intuitive that an order from a notice-less application could oust the need for actual notice before an arrest. Moreover, it is unnecessary given that, before any arrest, police will have personal contact at the scene with an opportunity to deliver actual notice of the injunction.

[302] This Order's wording, deeming constructive notice merely from posting on a website, would not sufficiently apprise an unnamed and unserved offender to support a conviction for contempt of court. The Order's assumption that it would was an error of law.

[303] Before an arrest and the institution of a contempt proceeding, the un-named and unserved "John/Jane Doe" offender should be personally, not just constructively, apprised of the injunction and given an opportunity to comply, for example in the manner approved by the Court in *MacMillan Bloedel*.

Fourth Issue: Approach to Charter Issues

[304] Clearly an injunction against public gatherings engages issues of expression, peaceful assembly and liberty under ss. 2(b), 2(c) and 7 of the *Charter* and, if there is an infringement, demonstrable justification under s. 1.

[305] Justice Norton's Decision acknowledged the issues but did not squarely address them. Rather, his reasons subsumed them under the criteria of irreparable harm and balance of convenience for interlocutory injunctions. Citing *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, Justice Norton held (paras. 22-32) that, with the public interest at stake, irreparable harm

to the public is assumed and the balance of convenience presumptively favours the injunction. Those findings dispatched the *Charter*.

[306] The CCLA's concern is this. An interlocutory or interim motion uses *RJR MacDonald*'s diluted criteria only because later the court will have the opportunity to thoroughly analyze the merits. Here, the Attorney General had not applied for an interlocutory injunction and the Application sought only a final injunction. Consequently, says the CCLA, Justice Norton erroneously applied *RJR MacDonald*'s attenuated interlocutory tests to a final injunction. The CCLA submits the judge should have fully determined the merits of the *Charter* issues, both infringement and justification, on the *ex parte* hearing. Its factum states:

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

[307] The CCLA did not ask this Court to decide whether the Injunction Order of May 14, 2021 infringed the *Charter*. Nonetheless, the Attorney General submitted that any infringement was demonstrably justified under s. 1. The CCLA declined to respond to the Attorney General's section 1 submission because the CCLA had not placed the *Charter* merits before this Court. Rather, the CCLA requested procedural guidance on how an impending *Charter* issue should be approached in future cases.

[308] I will limit my comments to the point of procedural guidance raised by the CCLA. In the absence of full submissions from both parties, this is not the case to rule on the merits of a *Charter* infringement or demonstrable justification.

[309] I will preface my comments by summarizing the principles that govern *ex parte* injunctions.

[310] The choice between an *ex parte* or *inter partes* application is contextual and depends on the nature of any impending harm, its immediacy and degree of urgency and the accessibility of the respondent for service. There is no bright line sorting test. In *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, Chief Justice Dickson for the majority upheld an *ex parte* injunction to enjoin picketing at courthouses. The Chief Justice summarized the criteria:

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

[311] In *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, Justice Arbour for the Court said:

> 25 … The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which **the delay associated with notice would result in harm** or where there is fear that the other party will act improperly or irrevocably if notice were given ….
>
> [bolding added]

[312] An *ex parte* applicant chooses to follow strict ground-rules. Justice Sharpe's *Injunctions and Specific Performance*, *supra*, summarizes the authorities:

> 2.2 **Ex parte injunctions**
>
> In cases of **urgency**, an injunction may be granted *ex parte* to restrain the defendant from committing the alleged violation of the plaintiff's rights for a **stated period to allow for notice**, filing of material and a contested application. …
>
> ***Ex parte* injunctions are typically made for a strictly limited time**. As stated by the Manitoba Court of Appeal, "in no case should an *ex parte* injunction be given for an indefinite period. It should be limited until the shortest possible time so that notice can be given to the parties affected by it … [E]very *ex parte* injunction should be interim" [citing *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers* (1977), 80 D.L.R. (3d) 634, at p. 640]. **The moving party is required to notify the affected party and to bring a further motion to have the injunction continued.** …
>
> **Notice of an application for an interim injunction must be given as a matter of "elementary justice" and exceptional circumstances are required to warrant making an order without notice. To justify an *ex parte* injunction, there must be such urgency that the delay necessary to give notice might entail serious and irreparable injury to the plaintiff.** Granting an injunction before the plaintiff's right has been established at trial entails a serious risk of infringing the rights of the defendant. The risk is significantly heightened if an injunction is granted without even giving the defendant notice and an opportunity

> to be heard. For this reason, the courts are especially cautious in granting *ex parte* injunctions. There are two categories of extraordinary urgency where courts are willing to order *ex parte* injunctions. The first is where urgency arises because there is reason to believe that the defendants, if given notice, will act to frustrate the process of justice before the motion is decided. This category includes *Anton Pillar* orders and *Mareva* injunctions. The second is where there is **such exigency that any delay will defeat the plaintiff's claim and there is simply no time to provide notice**. The second category must be applied **with caution**. As Lord Hoffman stated [citing *National Commercial Bank Jamaica Limited v. Olint Corp. Ltd. (Jamaica)*, [2009] UKPC 16 (J.C.P.C.), para. 13], **cases in the latter category will be "rare, because even in cases where there was not time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none." The need for notice is especially important where an *ex parte* injunction would interfere with freedom of expression. …**
>
> A party seeking an *ex parte* order is required to **make full and frank disclosure of all material facts.** A fact may be material even if not determinative: "any fact that would have been weighed or considered by the motions justice in deciding the issues, regardless of whether its disclosure would have changed the outcome, is material."
>
> [bolding added]

[313] With respect, I do not share the CCLA's view that the judge on an *ex parte* application should consider the full merits of what would be a contested *Charter* issue, including demonstrable justification under s. 1.

[314] In this case, much of the *Charter* evidence and submissions would focus on demonstrable justification under s. 1.

[315] A fair determination of the merits must afford an opportunity for thorough input from both sides. This is especially so for a *Charter* issue, with its broad precedential impact, and demonstrable justification which involves evidential groundwork. Some delay of the merits ruling is preferable to a hasty but unsound outcome. In this respect, in *RJR MacDonald*, Justices Sopinka and Cory for the Court said:

> The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that **a motions court will rarely have the time to engage in the requisite**

> **extensive analysis of the merits of the applicant's claim**. This is true of any application for interlocutory relief whether or not a trial has been conducted.
>
> [page 337]
>
> … Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that **a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding**.
>
> [page 340]
>
> [bolding added]

[316] Justices Sopinka and Cory expressed that view for an *inter partes* motion. It is even more apt to this hurried application where the judge heard only one side of the argument the day before the event to be enjoined. This decision lists several legal errors that, in my view, were attributable to the rushed environment of May 14, 2021. Missteps should not be countenanced for a precedent-setting *Charter* ruling.

[317] The *RJR MacDonald* tests are designed to preserve the *status quo* until both sides may fully participate: *Cambie Surgeries* (BCCA), *supra*, paras. 27-28; *1711811 Ontario Ltd. (Adline) v. Buckley Insurance Brokers*, 2014 ONCA 125, paras. 78-80. The initial hearing should find an avenue to *properly* apply *RJR MacDonald*'s criteria for a temporary (*i.e.* interlocutory or interim) injunction while plotting a course for an *inter partes* hearing of the merits to precede any final injunction. Two avenues are open. Neither involves a final injunction issued *ex parte*.

[318] **First – an *inter partes* application and interlocutory motion after substituted notice:** In *B.C.G.E.U.*, *supra*, Chief Justice Dickson said an *ex parte* process was required because "the delay necessary to give notice to the party sought to be enjoined … entail[ed] the irreparable loss of rights".

[319] The "notice" need not be personal service. Before proceeding *ex parte*, the applicant and judge could explore the feasibility of an *inter partes* application after substituted notice under *Civil Procedure Rule* 31.10. As noted in Justice Sharpe's text, "[a]ny notice is better than none" and there may be "no reason why the applicant should not have given shorter notice or even made a telephone call". Ms. Crichton's Affidavit acknowledged that the Attorney General had email and social

media addresses for some of the Respondents. There was an opportunity for substituted notice without a delay of the May 14, 2021 hearing. I will explain.

[320] To recapitulate:

- on May 11, the Attorney General's counsel wrote to the Court and Justice Norton approved the *ex parte* process;
- on May 12, the Attorney General filed its Application;
- on May 14, the *ex parte* hearing occurred and the Injunction Order issued;
- the gatherings were scheduled for May 15.

[321] On May 11, instead of requesting an *ex parte* hearing for May 14, the Attorney General could have sought the chambers judge's approval of substituted notice for an *inter partes* hearing on May 14. For instance:

- The substituted notice or service could have been accomplished by the methods we see in para. 6 of the Injunction Order. Ms. Crichton's affidavit refers to the Respondents' Facebook or social media accounts. Justice Norton's Decision says:

  > [37] The Province advises that it is its intention to serve the Respondents personally if possible and to post the Court's Order on the Government's COVID-19 internet website. That will form part of the Order. In addition, the Order will provide that the Order is to be posted if possible on all social media platforms associated with the Respondents and those of "Worldwide Rally for Freedom and Democracy".

  Paragraph 6 of the Injunction Order says "service … shall be made" by posting on the Respondents' social media accounts and email addresses and "a person shall be deemed to have notice of this Order upon the Order being published on the Government of Nova Scotia's COVID-19 internet website".
- The Injunction Order issued on May 14, 2021 to enjoin three gatherings in Halifax, Dartmouth and Barrington on May 15. The Attorney General was able to accomplish the prescribed electronic service of the Order within that 24 hour interval.
- If, on May 11, the chambers judge had approved the same electronic substituted notice of the Application documents with the same abridged time

limit, one may assume that service could have been accomplished just as expeditiously for a hearing on May 14.

- Then an *inter partes* application for an injunction could have proceeded on May 14 against the respondents who were substitutionally served.
- The application could also have named "John Does" and "Jane Does", being unidentified (and unserved) co-respondents, as the Supreme Court commended in *MacMillan Bloedel v. Simpson*, *supra*.

[322] Had substituted notice been approved and undertaken, the substitutionally served respondents would have had the opportunity to appear on May 14, 2021 for an *inter partes* hearing. Then the judge and parties, including any respondents who appeared, could either deal with the *Charter* issues or, if that was not feasible, schedule a later *inter partes* merits hearing on the *Charter* issues.

[323] At an *inter partes* hearing on May 14, 2021, the public health authorities would have maintained their view that an immediate restraining order was needed to forestall the risk of transmission at the May 15 gatherings. The Attorney General could have accompanied its originating *inter partes* Application with an *inter partes* motion for an interlocutory injunction. With the chambers judge's approval, the notice and supporting documents could have been served simultaneously with the originating Application, by the same substituted notice with the same abridgement of time limits. A chambers judge could have heard the *inter partes* interlocutory motion on May 14, 2021. The infringement of the Order by an unserved "John/Jane Doe", who was apprised and given an opportunity to comply, would be sanctionable as discussed in *MacMillan Bloedel*.

[324] An *inter partes* hearing is better for everyone. The court has input from both sides. The respondents have an opportunity to participate. The moving party has a simpler path because *RJR MacDonald*'s criteria (serious question to be tried, irreparable harm, balance of convenience) govern an interlocutory injunction, while the "exceptional" standard of "immediate" "urgency" and strict rules for an *ex parte* injunction, stated in *B.C.G.E.U.*, *Ruby* and Justice Sharpe's text, do not apply.

[325] Here, nothing indicates that the judge considered whether to schedule an *inter partes* hearing, after substituted notice, for May 14, 2021.

[326] **Second – an *ex parte* injunction should be interim:** If an *inter partes* application after substituted notice is not feasible to avert immediate harm, then the *ex parte* injunction should be "for a strictly limited time" and the moving party should be "required to … bring a further motion to have the injunction continued" after notice is given, as stated in Justice Sharpe's text. To similar effect: *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers* (1977), 80 D.L.R. (3d) 634 (M.C.A.), at p. 640. These terms would make the *ex parte* order an interim injunction. Interim injunctions are governed by *RJR MacDonald*'s threefold test: *RJR MacDonald*, page 334, per Sopinka and Cory JJ. After notice, the full merits, including any *Charter* issues, would proceed *inter partes* on the motion for continuation.

[327] That is not what happened here. The Injunction Order was not returnable to a fixed date, nor was the Attorney General required to move for continuation. Rather, the injunction continued indefinitely until the Attorney General informed the Court it was no longer needed, after which the court discharged it on the Attorney General's motion. Those are not features of an interim injunction. As it was pleaded in the Application and as it turned out, the *ex parte* Order was the final, *i.e.* one and only injunction. Yet, to issue it, the judge applied *RJR MacDonald*'s diluted interlocutory/interim tests that were not meant for a final injunction. Meanwhile, the merits of the *Charter* issues passively dispersed from inattention.

[328] In my respectful view, the failure to include in this *ex parte* Injunction Order both (1) a fixed expiry date (as soon as practicable after a reasonable interval for notice to the respondents) and (2) a requirement that the Attorney General move for any continuation after that date, was an error of law.

Is COVID-19 Transmissible Outdoors?

[329] Justice Norton accepted Dr. Strang's evidence and found there was a risk of COVID-19 transmission at Freedom Nova Scotia's outdoor rallies scheduled for May 15, 2021 (see Decision, paras. 9 and 34, quoted above). Justice Bryson would exclude Dr. Strang's opinion, or deny it any weight, for infringing the duty of full disclosure, and then overturn Justice Norton's finding for lack of evidential support. I respectfully disagree for the following reasons.

[330] **“No actual evidence” and “fleeting” evidence:** Justice Bryson’s reasons state “there was no actual evidence of outdoor transmission presented by the Province” except “a fleeting phrase” in Dr. Strang’s para. 31.

[331] Dr. Strang’s affidavit says the following about the risks of COVID-19:

> 5. As a part of my training and experience, I have expertise in assessing and interpreting evidence on public health matters, and my personal assessment of the facts in this affidavit based on my experience and expertise is that **these facts represent the best currently available evidence** related to SARS-CoV-2 and Covid-19.
>
> 6. Covid-19 is a new disease which **can cause adverse health outcomes, including death** in individuals with pre-existing medical conditions and in individuals over 65 years of age. People not in a high-risk group can also experience adverse health outcomes after contacting the SARS-CoV-2virus which causes Covid-19.
>
> …
>
> 8. There are at present no drug therapies to cure Covid-19 nor its various strains. Accordingly, **the only available resources** to prevent or reduce the spread of the virus, aside from vaccination, involve the use of **public health requirements, including physical distancing, limiting the size of gatherings and mandatory mask wearing in public places, whether indoors or outdoors,** particularly where physical distancing cannot be maintained.
>
> 9. Nova Scotia public health requires that people maintain a distance of **two meters** from one another. This physical distance requirement is **based on current knowledge** regarding the virus’ spreading mechanisms.
>
> 10. If left unchecked, SARS-Cov-2 **can spread exponentially**, for this reason **it is critical that public health requirements are followed** in order to minimize the spread of the virus, reduce long-term consequences, and reduce the number of hospitalizations and deaths. It is therefore **imperative to reduce the number of contacts** an individual has with others to reduce the risk of spread of the virus.
>
> 11. Due to the virus’ transmissibility patterns, **restrictions on how people interact with others outside of their households are necessary** to prevent the transmission of SARS-CoV-2 and its variants, which in turn can effectively reduce cases of Covid-19. This includes mandating the use of mask wearing in public places, **whether indoors or outdoors**, particularly where physical distancing cannot be maintained.
>
> …
>
> 13. SARS-CoV-2 is spread primarily from close person to person contact. The virus may be transmitted by respiratory droplets or droplet nuclei

(aerosols) produced w**hen an infected person breathes, coughs, sneezes, talks, or sings.** The virus may also be transmitted by **touching a surface** or object contaminated with the virus and then touching the eyes, nose, or mouth.

14. Risk of SARS-Co V-2 transmission **depends on many variables**, **such as location (indoors versus outdoors), quality of ventilation, and activity.** The Public Health Order requires that people maintain a distance of two meters (six feet) from one another. This physical distance requirement is **based on current knowledge** of droplet spread which is the main way the virus spreads between people.

15. These requirements **are designed to be implemented together** as no one measure alone will prevent all SARS-CoV-2 person-to-person transmission.

…

24. Left unchecked SARS-CoV-2 virus will spread within a population in an exponential growth in the number of people infected. Public health measures put in place in December 2020 brought cases down**. When public health measures were eased in March 2021, cases plateaued but began to rise again in April and have continued into May**. Even with increased public health requirements in place, the number of recognized SARS-CoV-2 infections (COVID-19 cases) has continued to grow dramatically in [*sic*] since April 1, 2021, as set out in Exhibit “B”.

…

28. Nova Scotia has attempted to control the spread of the SARS-CoV-2 virus by implementing a number of public health requirements under the Public Health Order. **Restrictions on how people interact with others of their households in public places, whether indoors or outdoors, are necessary to prevent the transmission of SARS-CoV-2 and are effective in reducing cases of COVID-19**.

…

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 may also occur in higher risk settings,** such as 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 spread of CCVID-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 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.**
>
> [bolding added]

[332] According to this evidence, COVID-19 presents the following risks:

- COVID-19's transmissibility depends on variables, including ventilation, nature of the activity and location (indoors versus outdoors). Dr. Strang makes it clear COVID-19 is more transmissible in a confined indoor space than outdoors.
- "High-risk activities" elevate the risk of transmission generally. High-risk activities include large numbers of people remaining at close quarters for extended periods of time, unmasked and not physically distanced, shouting, breathing heavily, talking, coughing, thus expectorating droplets, or touching the same surface. One would expect such activities at the Freedom Nova Scotia protest rallies scheduled for May 15.
- Once transmitted, COVID-19 can spread exponentially through the community and, in vulnerable people, cause severe health outcomes, hospitalization and sometimes death.

The critical evidence is that high-risk activities, as would occur at Freedom Nova Scotia's rallies, elevate the risk.

[333] Dr. Strang's affidavit supplies ample evidence to support Justice Norton's finding that Freedom Nova Scotia's outdoor rallies risked the potentially dangerous spread of COVID-19. The judge made no palpable and overriding error.

[334] **Duty of full disclosure:** Dr. Strang's affidavit, para. 31, states:

> … 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.

[335] Justice Bryson's point is that Dr. Strang did not attach or elaborate on this "recent evidence" which my colleague says offends the *ex parte* applicant's duty of full and frank disclosure. From this, my colleague concludes that Dr. Strang's evidence is either inadmissible or worthy of no weight.

[336] Respectfully, I cannot agree. In my view, there has been no infringement of the duty of full and frank disclosure.

[337] The Supreme Court of Canada has recognized the *ex parte* applicant's duty of full and frank disclosure: *Ruby v. Canada*, *supra*, para. 27.

[338] To explain the application of the duty, Justice Bryson quotes from *United States of America v. Friedland*, [1996] O.J. No. 4399 (Ct. of J., Gen. Div.), per Sharpe J. (as he then was) and *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997), 150 Nfld & PEIR 203 (NLCA), per Green J.A (later Chief Justice).

[339] It is helpful to examine how Justices Sharpe and Green analyzed whether the duty was infringed.

[340] In *USA v. Friedland*, Justice Sharpe said:

> 27. Rather, it is incumbent on the moving party to make a **balanced presentation** of the facts and law. The moving party must state its own case fairly and **must inform the Court of any points of fact or law known to it which favour the other side**. …
>
> …
>
> 60 In my view, **there is a material difference between the description of the applicable legal test contained in the material before the *ex parte* Judge and the candid opinions offered in the Referral Document,** The *ex parte* material describes a general control test. **The candid opinion describes a more precise, more stringent test** requiring proof of actual participation in the operations or management of the facility or its hazardous waste disposal practices.
>
> …

62 … I find this was a material fact which went to the heart of the case and that **the failure to disclose her opinion** that the District Court in Colorado **could well apply a stricter test constituted a failure to disclose a material fact** bearing on the entitlement of the U.S.A. to the injunction it sought.

…

73 In my view, the picture painted by this material offered by the United States was **a misleading one**. It suggests that Robert Friedland was effectively a one-man operation making all crucial decisions relating to the mine and its operations, and **this is plainly not the case.**

…

88 … Given the significance of the Mangone affidavit and the case that the United States attaches to the problems with the leach pad liner, this is a central and critical allegation against Robert Friedland and, in my view, constituted a **material misstatement of the facts**.

89 Moreover, **there is evidence to the contrary on this point that was not revealed** by the Plaintiff and by Ms Mangone. …

…

92 In addition to those misstatements, there is, in my view, **a failure** on the part of Mangone **to disclose certain contrary evidence in her possession** regarding the nature of Mr. Friedland's involvement at Summerville. Again, **this emerges from privileged documents which have been produced**. …

…

145 … In my view, it was **a serious distortion** to characterize this exchange as simply a denial of liability, suggesting Mr. Friedland was totally unwilling to cooperate in any way with the EWPA in resolving the problems that had arisen.

…

147 … The United States **presented this as a fact to the *ex parte* judge and I find that that was a material misrepresentation of the facts**.

[bolding added]

[341] In *Canadian Paraplegic Association*, Justice Green said:

[21] In the instant case, **Slaney, through his solicitor knew**:

(i) the respondent was **not consenting and in fact intended to oppose** the application;

(ii) the respondent had **expressly asked** on more than one occasion in writing to be given notice of any application;

> (iii) the respondent had **expressed concern** about the length of time it was taking to bring the matter to trial;
>
> (iv) the respondent had prepared a draft certificate of readiness thereby **representing its readiness for trial and had asked the other parties to join** in a joint filing under Rule 40.05;
>
> (v) the respondent **was intending to set down** an application under Rule 40.06 to have the case set down for trial.
>
> **None of this information was disclosed in the application or the affidavit accompanying it. I have no doubt that had it been, the applications judge would have required counsel for Slaney to give notice to the plaintiff and defendant before dealing with the application**. The failure of Slaney's counsel to apprise the judge of this information constituted a material nondisclosure and not only demonstrated a myopic discourtesy to a fellow solicitor but amounted to a breach of his duty of utmost good faith to the court.
>
> [bolding added]

[342] Justices Sharpe and Green found, *based on evidence*, that the *ex parte* applicant had withheld facts or evidence that weighed against the applicant's position to the *ex parte* judge. This behaviour was incompatible with what Justice Sharpe termed the required "balanced presentation".

[343] In Nova Scotia, the *ex parte* applicant's duty of full and fair disclosure is enacted by Civil Procedure Rule 22.05:

> **Full and fair disclosure on an *ex parte* motion**
>
> 22.05(1) The party who makes an *ex parte* motion must include, in an affidavit filed for the motion, any evidence known to the party, personally or by information, that **weighs against** granting the order.
>
> (2) A party who makes a motion for an *ex parte* order must advise the judge hearing the motion of any fact that **may weigh against** granting the order.
>
> (3) A judge who is satisfied that an *ex parte* order was obtained without full and fair disclosure may set aside the order.
>
> [bolding added]

[344] All three subsections, not just subsection (3), relate to the duty of full and fair disclosure. This is apparent from the heading. Subsections (1) and (2) define the scope of the duty. Subsection (3) prescribes the sanction for infringement.

[345] In Nova Scotia, the test is whether the applicant was aware of any fact or evidence that "weighed against" the granting of the injunction. Dr. Strang's

affidavit said COVID-19 was transmissible outdoors. Is there evidence that the Attorney General or the Chief Medical Officer of Health knew of any undisclosed fact or evidence that COVID-19 was not transmissible outdoors?

[346] Clearly the answer is – No:

- There is not a particle of evidence that Dr. Strang's statement of the risks of COVID-19, outdoors or indoors, is anything but accurate and balanced. There was no other evidence in the Supreme Court. No Respondent applied to challenge the Injunction Order or offered evidence. The CCLA intervened and appealed but offered no fresh evidence in the Court of Appeal. Nothing suggests that the Chief Medical Officer of Health's office possessed evidence that COVID-19 was un-transmissible outdoors and withheld it from Justice Norton.
- The CCLA's grounds of appeal and issues identified in its factum, quoted earlier, neither challenged Justice Norton's finding that COVID-19 was transmissible outdoors nor contended that Dr. Strang's para. 31 offended the duty of full disclosure respecting outdoor transmissibility. In its *Danyluk* submission to this Court, the CCLA acknowledged it does not seek to re-try the facts from May 2021.
- Dr. Strang's affidavit makes it clear that lack of ventilation is a risk factor meaning COVID-19 is more transmissible in confined indoor spaces. But he also said transmissibility, indoors or outdoors, depends on whether there are "high risk" factors, of which ventilation is just one. Nothing suggests that the Chief Medical Officer of Health's Office possessed evidence that derogated from this view.
- Dr. Strang's para. 31 says the recent evidence shows COVID-19 *is* transmissible outdoors, not the opposite. The recent evidence does not "weigh against" granting this injunction under Rule 22.05. To the contrary, it supports the injunction.

[347] Citing para. 31's "recent evidence", Justice Bryson says Dr. Strang "neither describes that evidence nor is that evidence attached as had been done to support a number of his other assertions". My colleague does not suggest any concealment. Rather, he points out the degree of disclosure from the "recent evidence" does not match that from Dr. Strang's other exhibits. From this, he concludes there is an infringement of the duty of full and fair disclosure.

[348] With respect, the conclusion is based on a misunderstanding of Dr. Strang's affidavit. The affidavit attaches only two exhibits. Exhibit "A" is the Public Health Order that Dr. Strang authored. Exhibit "B" is the table of COVID-19 statistics in Nova Scotia that Dr. Strang's office compiled. The affidavit attached the exhibits of which Dr. Strang had personal knowledge. It did not attach studies that were authored outside Dr. Strang's office. Personal knowledge, or lack of it, is a proper distinction to govern the attachment and omission of exhibits. It underlies the hearsay rule.

[349] Rule 22.05(1) requires the disclosure of evidence "known to the party, personally or by information", *i.e.* hearsay, that "weighs against" the order sought. Notably, the Rule does not require the disclosure of hearsay evidence that weighs in favour of the *ex parte* applicant's position. This is for good reason: the absent respondent would not have the opportunity to raise a hearsay objection to the damaging evidence.

[350] The duty of full and frank disclosure stems from the underlying good faith principle that the applicant may not unfairly capitalize on the *ex parte* process (*Ruby*, *supra*, para. 27). The duty cannot require, as a condition of admissibility, that the applicant's affidavit must exploit the *ex parte* process by giving judge a compilation of *supportive* studies authored by non-affiants, to which the absent respondent has no opportunity to raise a hearsay objection. Such a requirement would offend the underlying principle, not uphold it.

Conclusion

[351] The Notice of Appeal asks that the Injunction Order "be reversed and set aside". The Court cannot set aside a discharged Order.

[352] In the Court of Appeal, the CCLA challenged the Injunction Order on four bases to which the Attorney General joined issue. I have identified several errors of law and, in those respects, I would allow the appeal.

[353] To summarize my reasoning path:

- The Chief Medical Officer of Health was concerned about the spread of a serious virus. The *Health Protection Act* directed the Chief Medical Officer to act preventively to protect public health. The Attorney General properly did so by seeking an injunction. The Attorney General has *parens patriae* authority to seek an injunction to protect public health.

- The Supreme Court has inherent jurisdiction to maintain the rule of law by enjoining the infringement of a public statute. Freedom Nova Scotia's rallies would infringe the Public Health Order and the *Health Protection Act*. The Supreme Court may exercise that jurisdiction unless there is an "adequate" statutory remedy. Here, there was no adequate statutory remedy to prevent imminent harm.

- As the population of potential offenders was mostly unknown, the Order rightly included "John Doe(s)" and "Jane Doe(s)" as respondents, as approved by the Supreme Court of Canada in *MacMillan Bloedel*.

- As narrative of the statutory precondition, Dr. Strang's opinion was admissible to explain the restrictions he drafted in the Public Health Order of May 13, 2021. Justice Norton was entitled to consider and weigh that opinion, including Dr. Strang's view of the transmission risks of COVID-19.

- Justice Norton's finding that COVID-19 was transmissible outdoors was supported by Dr. Strang's evidence with no palpable and overriding error by Justice Norton. The point has not been appealed and, in any case, is a moot finding of fact. There was no infringement of an *ex parte* applicant's duty of full disclosure.

[354] However, the process stumbled in five respects:

- As Dr. Strang's affidavit did not comply with Rule 55, it was not admissible as an expert opinion.

- An *ex parte* application is appropriate when some form of notice is not feasible before the imminent harm occurs. The "notice" includes substituted notice. A judge who decides whether an *ex parte* application is "appropriate" under Rule 5.02 should first consider the option of substituted notice. If substituted notice is feasible to some respondents before harm occurs, but not to others among an indefinite group of possible offenders, the application may proceed *inter partes* to the substitutionally notified respondents, with 'John/Jane Doe" designations for the others. Here, the option of an *inter partes* application, after substituted notice to some respondents' known email and social media addresses, was not considered.

- A "John/Jane Doe" application for an injunction cannot be served on an unknown potential offender. As explained in *MacMillan Bloedel*, notice occurs by "apprising" that person at the scene, when the offender actually is

informed of the Order and give an opportunity to comply before suffering a sanction. This safeguard cannot be circumvented by a deemed constructive notice in the *ex parte* order.

- An *ex parte* injunction should be an interim order. It should have both a fixed expiry date and a requirement that, after a reasonable period for notice, the moving party must re-apply *inter partes* for any continuation. An *ex parte* injunction should not linger indefinitely by inertia until the moving party decides its utility has expired and applies to discharge it.

- In *MacMillan Bloedel* and *B.C.G.E.U.*, the *ex parte* injunctions applied respectively to persons impeding a logging road and picketing at courthouses. Each order had a defined scope to which the issuing court could manage the criteria for an injunction. In our case, under the wording in the Application, the judge could have focused on whether the respondents "and any other person acting under their instruction or in concert with them" met the criteria for an *ex parte* and *quia timet* injunction. That was a manageable task, as Justice Norton's reasons demonstrated. However, the Attorney General widened the injunction's requested scope to include everyone in Nova Scotia gathering for any purpose. The judge did not address whether the evidence satisfied the criteria for an injunction of that unlimited breadth.

[355] The parties should bear their own costs.

Fichaud J.A.