2021 **Hfx. No. 506040**

Supreme Court of Nova Scotia

Between:

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

Applicant

and

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

and

The Canadian Civil Liberties Association

Respondents

BRIEF OF THE ATTORNEY GENERAL OF NOVA SCOTIA
MOTION FOR RE-HEARING

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Executive Summary

1. My Lord, please accept the following submissions on behalf of the Applicant, the Attorney General of Nova Scotia in response to the Canadian Civil Liberties Association of Canada's motion for re-hearing of the Province's *quia timet* injunction application. The *quia timet* injunction granted by Justice Norton on May 14, 2021, prohibits "Illegal Public Gatherings" and the activities that cause these gatherings to occur within the Province.

2. The court accepted Dr. Strang's evidence and expert opinion that illegal public gatherings put all Nova Scotians at risk of contracting COVID-19, not just the Respondents, and are determinantal to public health. Nova Scotia's approach to combating the COVID-19 global pandemic 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 to mitigate the risk that this communicable disease poses to everyone residing within provincial borders. The injunction is another tool to ensure that those objectives are met.

3. Individuals who contravene the Public Health Order are liable on summary conviction and subject to fines and in the case of individuals imprisonment, pursuant to s. 71 of the *Health Protection Act*.[1] The Injunction Order provides for those same penalties to be imposed in proceedings for contempt of court. The power of the court in contempt proceedings also permit a tailored approach for deterrence that may be directed to each offender on a case-by-case basis. In addition to fines and imprisonment the court may impose conditions against the offender to ensure that future breaches of the Public Health Order that endanger public health are prevented. As set out in the Province's Notice of Application in Chambers (*Ex Parte*) the grounds submitted by the Province for the injunction are to ensure compliance with the provisions of the *Health Protection Act* and to authorize law enforcement to engage in enforcement measures to ensure compliance with the Public Health Order

4. The Canadian Civil Liberties Association (hereinafter "the CCLA") asserts that the Injunction Order is unlawful and violates the *Charter*, namely freedom of expression, assembly, and liberty. The CCLA also claims that the Injunction Order is overbroad and is not supported by the evidence.

[1] Restated Order, dated May 31, 2021, Supplemental Affidavit of Dr. Strang, Exhibit "A".

5. The Attorney General opposes the CCLA's motion in its entirety. The Injunction Order is not overbroad or unlawful and does not infringe *Charter* rights. The Injunction Order makes individuals who breach the Public Health Order in relation to gathering limits and activities that cause illegal public gatherings to occur liable for contempt of court. Prohibiting illegal public gatherings is rationally connected to its purpose of preventing or reducing the transmission of COVID-19, a deadly communicable disease. The harm that the Injunction Order prevents or reduces is "death".

6. In the alternative, the Injunction Order minimally impairs the right to freedom of expression, peaceful assembly, and liberty because persons are permitted to protest, engage in expression, and assemble so long as that activity complies with the Public Health Order. For instance, persons may protest while keeping six feet apart and wearing masks. If the Injunction Order infringes *Charter* rights, as alleged by the CCLA, the infringement is saved by s. 1. Freedom of expression, peaceful assembly, and liberty may be limited through government action in the present case because the alleged infringement prevents harm to vulnerable groups and Nova Scotians. Stopping the spread of COVID-19 is a pressing and substantial objective and any limitation of *Charter* rights is proportional to that objective.[2] The Province agrees COVID-19 cannot be used as blanket to trample the *Charter*. However, COVID-19 is a disease that can kill Nova Scotians. Reasonable measures have been implemented to protect all Nova Scotians and Nova Scotia's vulnerable populations from the risks and harms connected to this deadly disease. This is not the time to disregard public health measures in favour carrying out acts causing gathering limits to be exceeded further hampering recovery and reopening efforts and causing needless COVID-19 related health complications and deaths.

7. Furthermore, the restraints outlined in the Injunction Order in paragraph 3 (a) (b) and (c) are a mirror image of the prohibitions set out in s. 13.5 and s. 13.6 of the Public Health Order (effective date May 13, 2021) issued under s. 32 of the *Health Protection Act*. The underlying Public Health Order is unchallenged by the CCLA, it has not been struck down and remains valid law. In the present case, the Injunction Order is a valid Court Order in furtherance of a valid statutory scheme intended to protect public health. A validly issued Court Order must be obeyed. How the Injunction Order is enforced and its validity will withstand *Charter* scrutiny until the underlying

[2] *R v. Oakes*; Threats of violence and harm -see: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraphs 107-108; R v. Kawaja, 2012 SCC 69; *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 3, at para. 28. *R v. Sharpe* 2001 SCC 2 at para. 22: Nevertheless, freedom of expression is not absolute. Our Constitution recognizes that Parliament or a provincial legislature can sometimes limit some forms of expression. Overarching considerations, like the prevention of hate that divides society as in *Keegstra*, supra, **or the prevention of harm that threatens vulnerable members of our society as in *Butler*, supra, may justify prohibitions on some kinds of expression in some circumstances.** Because of the importance of the guarantee of free expression, however, any attempt to restrict the right must be subjected to the most careful scrutiny.

statutory scheme or the Public Health Order is declared unconstitutional. The Supreme Court has concurrent jurisdiction in this matter. The court's inherent jurisdiction pertaining to public safety and matters related thereto do not conflict with the provisions of the *Health Protection Act*. The court's inherent jurisdiction in regard to all matters pertaining to the *quia timet* injunction application have not been removed by the *Health Protection Act* or by any other statute.

8. The CCLA's motion should be dismissed with costs.

Part. I. Evidence Intended to be Proven at the Re-Hearing

COVID-19

9. 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.

[Dr. Strang, Affidavit]

10. 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.

[Dr. Strang, Affidavit]

11. 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.

[Dr. Strang, Affidavit]

12. 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.

[Dr. Strang, Affidavit]

13. 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.

[Dr. Strang, Affidavit]

14. 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.

[Dr. Strang, Affidavit]

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

[Dr. Strang, Affidavit]

16. 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.

[Dr. Strang, Affidavit]

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

[Dr. Strang, Affidavit]

18. 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.

[Dr. Strang, Affidavit]

19. 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.

[Dr. Strang, Affidavit]

20. SARS-CoV-2 can be spread through direct or indirect (surfaces) contact with an infected person. Community spread refers to the spreading of a disease from person to person in the community.

Community spread can occur when the source is known or unknown. The latter form of spread poses a serious threat to the community. The effectiveness of contact tracing is greatly reduced in cases of unknown community spread.

[Dr. Strang, Affidavit]

21. 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.

[Dr. Strang, Affidavit]

Nova Scotia's Current COVID-19 Situation (as of May 12, 2021 and June 15, 2021)

- ***The Spread of COVID-19***

22. Between March 1, 2020 and May 12, 2021, there had been a total of 4152 confirmed cases of COVID-19 and 71 deaths reported.

[Dr. Strang, Affidavit]

23. 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.

[Dr. Strang, Affidavit]

24. 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) had continued to grow dramatically (as of May 12, 2021).

25. During Wave 3 (April 1, 2021 – June 15, 2021), there have been 3987 confirmed cases and 23 deaths have been reported. The cases reported in Wave 3 constitute 70% of the total cases reported in Nova Scotia since March 1, 2020. In addition, there have been 236 hospitalizations (non-ICU and ICU) compared to 12 during Wave 2, 61% of hospitalizations occurred in

individuals <60 years of age and 18.2% of contacts became cases, compared to 7.6% in Wave 2 suggesting that the virus is more transmissible.

[Dr. Strang, Supplemental Affidavit]

Nova Scotia's COVID Health Care Capacity related to COVID-19

26. 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.

[Dr. Strang, Affidavit]

27. 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.

[Dr. Strang, Affidavit]

28. 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.

[Dr. Strang, Affidavit]

29. In Nova Scotia, between March 1, 2020 and June 15, 2021, there have been a total of 5729 confirmed cases of COVID-19 and 89 deaths reported.

[Dr. Strang, Supplemental Affidavit]

30. In Nova Scotia, as of June 11, 2021, there were 143 active cases of people with COVID-19, 10 people in the hospital due to COVID-19. There were 6 patients in the ICU, 4 patients in non-ICU beds due to COVID-19 and 89 people have died from COVID-19 or associated complications since the first Public Health Order was issued on March 23, 2020. This level of hospitalization has resulted in increased capacity due to the reduction of COVID-19 cases and viral infection

caused by the risk mitigation strategies incorporated into the public health measures set out in the Restated Order #2, dated May 13, 2021.

[Dr. Strang, Supplemental Affidavit]

Nova Scotia's COVID-19 Public Health Measures

31. 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.

[Dr. Strang, Affidavit]

32. 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.

[Dr. Strang, Affidavit]

33. 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.

[Dr. Strang, Affidavit]

34. 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.

[Dr. Strang, Affidavit]

35. 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.

[Dr. Strang, Affidavit]

36. 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.

[Dr. Strang, Supplemental Affidavit]

37. Risk of SARS-Co V-2 transmission continues to depend 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.

[Dr. Strang, Supplemental Affidavit]

38. 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 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) grew dramatically in since April 1, 2021, but has decreased exponentially with the implementation of additional public health measures commencing on April 28, 2021.

[Dr. Strang, Supplemental Affidavit]

Anti-Mask, Anti-Lockdown, Anti-Restrictions

39. Worldwide Rally for Freedom and Democracy is a global movement and organizer that has been developed with the explicit objective of spreading anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.

[Hayley Crichton, Affidavit]

40. In the Nova Scotia context, mask requirements and adherence to restrictions are set out in the Public Health Order.

[Hayley Crichton, Affidavit]

41. The Restated Public Health Order issued by Dr. Robert Strang under section 32 of the *Health Protection Act* 2004, c. 4, s. 1, that was in effect when the Injunction Order was granted by the Supreme Court, on May 14, 2021, is the Public Health Order dated May 13, 2021. (hereinafter, the "Public Health Order"). A true copy of the Public Health Order is marked Exhibit "G" of Hayley Crichton's Supplemental Affidavit.

42. On April 23, 2021, Halifax Regional Police attended a large gathering at a private residence. Twenty-Two (22) fines were issued as a result of this gathering as it was in contravention of the Public Health Order.

[Hayley Crichton, Affidavit]

43. 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. Four (4) fines were issued as a result of this gathering.

[Hayley Crichton, Affidavit]

44. On May 3, 2021, New Glasgow Police attended a private residence in Trenton, Nova Scotia. Eight (8) people were gathered in contravention of the Public Health Order and were subsequently ticketed.

[Hayley Crichton, Affidavit]

45. Worldwide Rally for Freedom and Democracy planned a global event entitled, "The Worldwide Demonstration May 15, 2021". The associated open Facebook event page has a total of 31,000 followers.

[Hayley Crichton, Affidavit]

46. In Nova Scotia, participation in the Worldwide Rally for Freedom and Democracy global events is 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.

[Hayley Crichton, Affidavit]

47. On March 20, 2021, Freedom Nova Scotia organized an open event on Facebook to rally against mask wearing and restrictions. Attendees gathered in a large group of approximately 100 people, the attendees were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order. The event drew media attention.

[Hayley Crichton, Affidavit]

48. A picture of the event derived from CTV News is marked Exhibit “B” of Hayley Crichton’s affidavit. The picture shows a large gathering of people who can be observed to not be wearing masks, nor maintaining a distance of six feet from one another.

49. Freedom Nova Scotia 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.

[Hayley Crichton, Affidavit]

Anti-Mask Rally

50. Freedom Nova Scotia 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 comments on the event page, with 88 people listed as “interested” and 66 people listed as “going” as of May 12, 2021.

51. Historical public gatherings organized by Freedom Nova Scotia have not complied with the requirements of COVID-19 Emergency Health Orders issued under section 32 of the *Health Protection Act*, including but not limited to:

    a. masking requirements;

    b. attendance limits applicable to indoor or outdoor gatherings; and

    c. minimum physical distancing requirements.

[Hayley Crichton, Affidavit]

52. During the week of May 3rd, 2021, Halifax Regional Police Inspector David Boon was contacted by Freedom Nova Scotia event participant Amy Brown via telephone. Ms. Brown requested protection for the rally participants who will attend Citadel Hill to protest the COVID-19 lockdown and restrictions.

[Hayley Crichton, Affidavit]

53. Halifax Regional Police advised Ms. Brown that any such gathering would contravene the Public Health Order, and potentially the Travel Directive issued under the *Emergency Measures Act* 1990, c. 8, s. 1; 2005, c. 48, s. 1. (should people travel in from outside HRM).

[Hayley Crichton, Affidavit]

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

[Hayley Crichton, Affidavit]

55. 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.

[Hayley Crichton, Affidavit]

56. A Worldwide Freedom Rally was also being scheduled for Barrington, Nova Scotia on May 15, 2021 at 6 pm at the Barrington baseball field. A Worldwide Freedom Rally was also scheduled for Dartmouth, Nova Scotia (Alderney Landing) on May 15, 2021 at 1 pm.

57. Similar anti-mask, anti-vaccine, anti-restriction protests have taken place across Nova Scotia that have included gatherings of people who were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order.

[Hayley Crichton, Affidavit]

58. On April 24, 2021, an event was planned at the New Brunswick and Nova Scotia border to protest COVID-19 restrictions, including border closures and mask requirements, by disrupting traffic on Hwy 104. The event organizer Tasha Everett posted the following to her open Facebook page,

"12PM tomorrow! Be there! Its time to make more noise than ever before! Truckers have our backs and are planning to block the highways with us. United we stand, Divided we fall." A screenshot of this post is marked Exhibit "G" of Hayley Crichton's affidavit.

[Hayley Crichton, Affidavit]

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

60. On May 12, 2021, the Province received the following information from the RCMP regarding a rally held on May 9, 2021:

> **PURPOSE:**
>
> To update the Attorney General of a protest, in relation to the continued border restrictions between Nova Scotia and New Brunswick that occurred on May 9, 2021.
>
> **BACKGROUND:**
>
> A group on Facebook, identified as "Support to OPEN The NS/NB Border", organized a protest for May 9, 2021 at 12:00 pm, at the NS Tourism Centre along Hwy 104, immediately as you enter Nova Scotia.
>
> Organizers indicated that this was strictly about the border closure and the impact it is having on everyday lives.
>
> **CURRENT STATUS**:
>
> An assembly took place as scheduled on May 9, at 12:00 pm.
>
> Approximately 20 protesters assembled along the Nova Scotia side of the Provincial border, Highway 104 Eastbound lane.
>
> At approximately 12:30 pm, a passenger from a vehicle involved in the protest was seen throwing traffic cones into the ditch which had been positioned to block off exit 1.
>
> The interaction between the RCMP and the vehicle passenger was met with hostility from the occupants of the vehicle.
>
> Shorty after, a hostile crowd of 15-20 people formed around the police officer.
>
> Protesters were recording police and expressed negative comments.
>
> Protesters were not wearing masks or social distancing.
>
> All attendees left by 2:30 pm.
>
> Commentary from attendees suggests protests will be a weekly occurrence.

[Hayley Crichton, Affidavit]

61. On May 10, 2021, Dena Churchill posted an advertisement for the May 15,2021 social gathering on her Facebook page, among other anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.

Application for Quia Timet Injunction

62. On May 12, 2021, the Attorney General of Nova Scotia filed a Notice of Application in Chambers (*Ex Parte*) for an Injunction Order restraining the Respondents from attending and carrying out activities that cause illegal public gatherings to occur in Nova Scotia.

63. The grounds for the injunction application are set out in the Notice of Application as follows:

> (a) Orders compliance with the provisions of the *Health Protection Act* 2004, c. 4, s. 1;
>
> (b) Enjoins the Respondents, and any other person acting under their instructions or in concert with them, from organizing in-person public gatherings: and
>
> (c) 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*.

64. The Injunction Order was granted on May 14, 2021 by the Supreme Court of Nova Scotia.

65. After the Injunction Order was issued by the Nova Scotia Supreme Court the Attorney General received information from law enforcement regarding enforcement activities and incidents in relation to the Injunction Order and Public Health Order.

66. On May 18, 2021, the Attorney General through Hayley Crichton received a situation report from Royal Canadian Mounted Police (RCMP) Officer Jessica Cogswell pertaining to an illegal public gathering that occurred on or about May 23, 2021. The Attorney General was advised by the situation report of the following:

> *On behalf of Chief Superintendent Chris Leather, Officer in Charge of Criminal Operations – "H" Division, the following Situation Report is being provided for your awareness.*
>
> PURPOSE:
> • To update the Attorney General of a number of Summary Office Tickets issued under the Health Protection Act (HPA) in relation to a religious gathering.
>
> BACKGROUND:
> • On May 2, 2021, Kingston RCMP received several calls about a large gathering taking place at a church in [redacted], Nova Scotia.
> • RCMP members attended, explained the HPA. Clients on site refused to disperse, a formal warning was issued to the church.

• On May 9, 2021, Kingston RCMP received several calls about a large gathering taking place at the same church in [redacted]. RCMP members attended, explained the HPA and advised all to disperse. Clients on site refused to disperse, 26 Summary Offence Tickets were issued under the HPA.
• On May 15, 2021, the leader of the church was contacted by Kingston RCMP and was warned that a gathering at the church would result in enforcement action.
• On May 16, 2021, Kingston RCMP attended the church, a service was in progress.

CURRENT STATUS:
• Police remained on scene until the end of the service.
• 7 Summary Offence Tickets were issued to clients under the HPA.
• 1 Summary Offence Ticket was issued to the church.
• The clients of the church indicated that they are planning on returning the following Sunday.

STRATEGIC CONSIDERATIONS:
• The Officer in Charge of Southwest Nova District is aware.
• The Officer in Charge of Criminal Operations is aware.

STRATEGIC COMMUNICATIONS:
• "H" Division Strategic Communication Section is engaged.

RECOMMENDATIONS:
• NIL

67. On May 27, 2021, the Attorney General through Hayley Crichton received a situation report from Royal Canadian Mounted Police (RCMP) Officer Jessica Cogswell pertaining to an illegal public gathering that occurred on or about May 23, 2021. The Attorney General was advised by the situation report of the following:

On behalf of Chief Superintendent Chris Leather, Officer in Charge of Criminal Operations – "H" Division, the following Situation Report is being provided for your awareness.

PURPOSE:
• To update the Attorney General of an illegal gathering and summary offence tickets (SOTS) issued under the Public Health Act.

BACKGROUND:
• On May 23, 2021, Cole Harbour RCMP responded to a report of a large house party at a residence in Cole Harbour.
• Upon arrival, loud music was heard coming from the home and a disco ball could be seen from a distance.
• RCMP members were refused entry into the home and the music and lights were turned off.
• Seventeen vehicles were located at the property.

• Members queried all license plates, two vehicles were registered to the residence and the remaining were registered to owners residing within, and outside of Halifax Regional Municipality.
• Members conducted traffic stops throughout the night on vehicles leaving the property.

CURRENT STATUS:
• Nine SOTS have been issued to date, totaling $21,798.00.
• A Summary Offence Ticket will be issued to the home owner.
• The investigation continues to identify the remaining persons in attendance.

STRATEGIC CONSIDERATIONS:
• None at this time.

STRATEGIC COMMUNICATIONS:
• "H" Division Strategic Communications is engaged.

RECCOMMENDATIONS
• Nil.

68. On May 28, 2021, the Attorney General through Hayley Crichton, Director of Public Safety and Investigations, received a situation report from Dan Kinsella, Chief of Police for the Halifax Regional Police. The Attorney General was advised by the situation report of the following:

COVID-19
Response May 15
Background:

On Saturday, May 15, 2021, two events took place in Halifax involving various COVID-19 fractions, at which Halifax Regional Police officers used enforcement actions, including summary offence tickets andarrests.

HRP had reached out to the organizers of both events in advance to make them aware of the currentpublic health restrictions, including, a recent court order issued on Friday. The events proceeded anyway.

Detailed overview:

May 15, 2021

1) Anti-mask Freedom Rally - Anti-mask Freedom Rally - scheduled from 1300-1500 hours on Citadel Hill. Court injunction led to organizers of this event announcing cancellation of same via social media, however attendees (sic) still arrived to partake, in violation of court order, *Health Protection* and*Emergency Management Acts.* Arrests and summary offence tickets issued. Approximately 50 people in attendance

Enforcement stats:

- **Health Protection Act (HPA): 9** in total (Five of the nine people that were issued SOTs had to be arrested before they would provide identification).
- **Emergency Management Act (EMA): 2**
- **Arrest: 5** in total, no criminal charges and all released with SOT as stated above
- **File under Investigation:** one ran away and has yet to be identified

2) Palestine Freedom Rally - scheduled from 1300-1500 hours at Saint Mary's University parking lot on Inglis Street/Tower Road. Initially only 20 vehicles involved, however event escalated to more than 200 vehicles involved with over 500 people, causing multiple violations under the Health *Protection, Emergency Management* and *Motor Vehicle Acts*. Arrests and summary offence tickets issued. Central members tied up for several hours, clearing out the backlog of traffic.

Enforcement stats:

- **Health Protection Act (HPA): 9**
- **Emergency Management Act (EMA): 2**
- **MVA: 6**
- **Arrest: 1** (One male arrested then released with no criminal charges but was issued 4 SOTS).

Strategic Communications:

- Three news releases were issued following the events, as information became available.
- Social media posts were completed in conjunction with the news release.

69. As of June 25, 2021, law enforcement continue to engage in enforcement measures with respect to the Public Health Order issued under s. 32 of the *Health Protection Act*.

[Hayley Crichton, Supplemental Affidavit]

Phased Reopening of the Province

70. Nova Scotia began implementing a phased reopening of the Province consisting of five phases.

71. Nova Scotia's reopening plan takes a phased approach to safely easing restrictions. The 5-phase plan is based on ongoing progress of provincewide vaccination rates and improvements of public health and healthcare indicators like COVID-19 activity and hospitalizations.

[Dr. Strang Supplemental Affidavit]

72. The reopening plan safely eases restrictions over 5 phases as vaccination targets are reached and case numbers and hospitalizations decline. This allows Nova Scotians to safely enjoy summer with public health measures in place while we get most of our population fully

vaccinated. Once that happens, we should be able to further ease restrictions and move in to a new normal of living during COVID-19.

[Dr. Strang Supplemental Affidavit]

73. The 5-phase reopening plan outlines how restrictions will ease while protecting the healthcare system and increasing vaccination rates throughout the province. COVID-19 transmission will continue to be monitored. If required, a phase may be paused to respond to trends at county or provincial levels. Additional plan details will be released to the public as each phase starts.

[Dr. Strang Supplemental Affidavit]

74. Each phase is based on COVID-19 activity, hospitalizations and vaccination rates. Phases are expected to last between 2 to 4 weeks if targets are met in each phase. Testing continues and is monitored throughout all phases.

[Dr. Strang Supplemental Affidavit]

Exceptions During Phase 1

75. During Phase 1, Dr. Strang received a request to grant an exception to the gathering limits in accordance with Section 32 of the Public Health Order. The United Muslim Community of Canada requested approval to gather for in memory and support of the June 6th tragic deaths of the Muslim Pakistani Canadian family.

[Dr. Strang Supplemental Affidavit]

76. Dr. Strang granted the aforementioned exception based on his consideration of the following criteria:

a.) Importance on the activity for which the request is being made;
b.) Level of risk (usually has to be a qualitative determination) of this activity, including risk mitigation strategies;
c.) Level of trust in requester in terms of information provided and adherence to any required protocols;
d.) Availability of other options to achieve the desired outcome; and
e.) Precedents – prior exceptions and/or implications of this one

[Dr. Strang Supplemental Affidavit]

77. Notwithstanding the granting of the foregoing exception, it is Dr. Strang's medical opinion that if gathering limits and public health measures are not complied with then that increases the risk of Covid-19 transmission and infection within the population.

[Dr. Strang Supplemental Affidavit]

78. For instance, it was Dr. Robert Strang's medical opinion, as of May 12, 2021, that if the scheduled social gathering was held on or about May 15, 2021 at Citadel Hill, in Halifax, Nova Scotia then there was a substantial risk of Covid-19 transmission among the attendees.

[Dr. Strang, Affidavit]

79. It was also Dr. Strang's medical opinion, as of May 12, 2021, 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.

[Dr. Strang, Affidavit]

80. Dr. Strang continues to maintain that it his medical opinion that illegal public gatherings or the activities that incite illegal gatherings to occur should be prohibited in the Province of Nova Scotia because illegal public gatherings creates a substantial risk of Covid-19 transmission and viral infections occurring within the Province.

[Dr. Strang Supplemental Affidavit]

81. As stated above the Injunction Order was granted on May 14, 2021.

82. On June 22, 2021, the Applicant obtained an Order discharging the Injunction Order.

83. On June 22, 2021, the Province obtained an Order discharging the injunction because it is no longer necessary to continue with the injunction given the phased reopening of the Province, the continued easing of restrictions, and the current COVID-19 epidemiology data.

84. Before the injunction was discharged no person in Nova Scotia had proceedings for a Contempt Order in relation to the Injunction Order brought against them.

[Hayley Crichton, Supplemental Affidavit]

85. The Attorney General will rely on all other evidence presented during the *ex parte* hearing on May 14, 2021 and the supplemental affidavits of Dr. Robert Strang and Hayley Crichton.

PART II. ISSUES

86. The re-hearing raises the following three issues:

ISSUE 1: Is the *quia timet* Injunction Order supported by the evidence, pursuant to Rule 22.06?

ISSUE 2: Does the Injunction Order infringe *Charter* rights under ss. 2 (b) , 2 (c) or 7?

ISSUE 3: If the Injunction Order violates ss. 2 (b), 2 (c) or 7 of the *Charter*, is the infringement saved by s. 1?

87. Connected to the three issues noted above the CCLA raises the following issues in its written submissions:

> **ISSUE 1:** The untested evidence presented to the Court does not support either the *quia timet* relief or the scope of the relief obtained in the Injunction Order.
>
> **ISSUE 2:** The Injunction Order incorporates by reference a definition of prohibited activity ("Illegal Public Gathering") contained in an Order under s. 32 of the *Health Protection Act*, which is subject to change by the Chief Medical Officer at his discretion, at any time. This discretion has been exercised no less than five times in the last 30 days.
>
> **ISSUE 3:** The Injunction Order applies until varied by the Court, without limitation.
>
> **ISSUE 4:** The Injunction Order violates the fundamental rights of all Nova Scotians, specifically the rights to freedom of expression, freedom of assembly, and liberty protected by sections 2 (b), 2 (c), and 7 of the *Canadian Charter of Rights and Freedoms*, ss 2 (a), 2 (b), 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11.
>
> **ISSUE 5:** The Injunction Order is arbitrary because the definition of "Illegal Public Gathering" permits some outdoor activities and prohibits other outdoor activities without consideration of the risk of each activity.
>
> **ISSUE 6:** The Injunction Order is overbroad in its scope because it applies regardless of whether persons are making best-efforts to comply with public health orders.
>
> **ISSUE 7:** The Injunction Order is also grossly disproportionate insofar as it applies to online activities that have no public health risk and outdoor activities where the public health risk is low.
>
> **ISSUE 8:** The Injunction Order's interference with the constitutionally-protected rights of Nova Scotians cannot be demonstrably justified in a free and democratic society.

PART III. Argument/Law

A. Law/Argument

ISSUE 1: The untested evidence presented to the Court does not support either the *quia timet* relief or the scope of the relief obtained in the Injunction Order.

88. The Attorney General relies on his arguments, submissions, and the law pertaining to the *quia timet* injunction set out in the Attorney General's brief filed on May 12, 2021, in support of the injunction application.

89. In response to the CCLA's motion, the Attorney General disagrees with the CCLA's submissions in their entirety.

90. The test for a *quia timet* injunction is set out beginning at paragraph 72 of the Attorney General's brief filed on May 12, 2021:

> 72. In order to grant a *quia timet* inunction, 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.
>
> 73. Having regard to the affidavit of Dr. Robert Strang, the harm that is anticipated (continued spread of COVID-19) if the anti- mask rally is permitted is imminent.
>
> 74. In the present case, damages are not an adequate remedy because the harm associated with contracting COVID-19 is death. There are also serious medical and health complications that occur in individuals who contract the virus. The associated impact on public health care systems, communities, and economies is immeasurable.
>
> 75. In the context of interlocutory injunctions, the balance of convenience analysis requires the court to consider which of the parties would suffer greater harm if the injunction was not granted: *Laurent v. Fort McKay First Nation*, 2008 ABQB 84 (Alta. Q.B.) at para. 10.
>
> 76. The Province submits that the balance of convenience does not favour permitting the anti-mask rally to proceed on May 15, 2021. The balance of convenience also does not favour permitting similar events to be held within the Province at any point in the future.
>
> 77. There is a greater public interest in maintaining integrity of the current Public Health Order **and the restrictions set out within that Order** than permitting the rally to be carried out as planned.
>
> [Emphasis Added]

91. The Public Health Order, effective May 13, 2021, set out the following restrictions pertaining to illegal public gatherings:

> 13.4 For the purpose of section 13.6, an "illegal public gathering" is defined as a gathering that does not comply with the requirements of this Order, including:
>
> (a) the attendance limits applicable to gatherings, whether indoors or outdoors;
>
> (b) physical distancing requirements; and
>
> (c) masking requirements.
>
> 13.5 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

92. The restrictions contained in the Public Health Order (as amended) serve a pressing and substantial objective of reducing or preventing the spread of COVID-19. The evidence of Dr. Strang establishes that he considered how setting social gathering limits reduce the transmissibility of COVD-19 within the population of Nova Scotia.[3]

93. The purpose of the injunction was set out at paragraph 78 of the Attorney General's brief filed May 12, 2021 as follows:

- prevent further transmission of Covid-19;
- ensure the continued functioning of the health-care system; and
- limit the amount of future deaths due to the virus.

94. With respect to issue number one (1) the Attorney General submits that the CCLA misunderstands the test for a *quia timet* injunction and the evidence required to obtain the injunction. To apply for a *quia timet* injunction to prevent or reduce the risk of future harm/spread of COVID-19 caused by illegal public gatherings, the Province needed to establish an evidentiary foundation that illegal public gatherings have occurred within the Province. If there was no evidence that illegal public gatherings posed a risk of harm than that would have been fatal to the Province's application. The evidence of Hayley Crichton evidenced the fact that persons within Nova Scotia have attended illegal public gatherings, and caused other persons to attend illegal public gatherings within the Province through online communications (Facebook) and other communication mediums in different locations and times since March 2021.[4]

[3] Affidavit of Dr. Robert Strang, sworn May 12, 2021.
[4] Affidavit of Hayley Critchton, sworn May 12, 2021.

95. Having established the occurrence of illegal public gatherings, the Province was then required to present evidence relevant to the following:

    (a) the presence of harm;

    (b) the probability that the harm will occur is not "*de minus"*; and

    (c) the balance of convenience is in favor of prohibiting illegal public gatherings.

96. Justice Norton accepted the Attorney General's evidence pertaining to the harm sought to be prevented by the injunction.

97. The harm alleged by the Province in its injunction application continues to be the risk of COVID-19 spreading within the Province if illegal public gatherings and the activities that cause these gatherings to occur are not prohibited.

98. There currently still exists a high probability that the harm (spread of COVID-19) will occur because the correlation between illegal public gatherings and the spread of COVID-19 is established in evidence and contained in Dr. Strang's affidavit sworn on May 12, 2021:

> 30. One of the health measures that Nova Scotia has employed to control the spread is to implement mandatory masking. Masks, when worn properly, are a valuable tool in reducing the transmission of SARS-CoV-2. The use of masking can prevent an infected person from transmitting the virus to others and use of masks, especially medical masks, can help protect a healthy individual from infection in public places, whether indoor or outdoor settings. Masking, on its own, is not sufficient to control the spread of COVID-19.
>
> 31. In response to the number of COVID-19 cases with no identifiable source, Nova Scotia implemented additional public health measures, aimed at limiting the spread in high-risk settings or in settings with high-risk activities. High risk activities are activities that have more expulsions of air than ordinary activities. With increased expulsions of air, there is an increased risk of respiratory droplets or aerosols. For example, singing, shouting, and activities that result in heavy breathing are higher risk activities. These activities also may occur in higher risk settings, such as in indoor settings or settings where individuals will remain for prolonged periods of time. Reducing time spent indoors with large groups of people and reducing the time spent indoors engaging in high-risk activities can reduce the risk of the spread of COVID-19. Recent evidence also shows that even outdoors, if people are not distanced from each other or masked, transmission can happen from an infectious person to someone else.
>
> 32. The available evidence shows that widespread public masking, in addition to other public health measures, such as reducing time spent indoors with large groups of people (relative to the size of the room and the spacing of people within the room) while engaging in high risk activities, can contribute to controlling the overall transmission of SARS-CoV-2. **In addition, outdoor gatherings must also include measures such as restricted gatherings, and physical distancing and masking in order to prevent COVID-19 transmission**.
>
> **Freedom Nova Scotia Rally**

> 33. It is my medical opinion that if the scheduled social gathering is held on or about May 15, 2021 at Citadel Hill, in Halifax, Nova Scotia that there is a substantial risk of Covid-19 transmission among the attendees.
>
> 34. It is also my medical opinion that social gatherings similar to the one intended to be held by Freedom Nova Scotia on May 15, 2021 should not occur anywhere in the Province of Nova Scotia because there is a substantial risk of Covid-19 transmission among the attendees.

[Dr. Strang, Affidavit]

99. The Injunction Order restrained Freedom Nova Scotia, John Doe (s), Jane Doe (s), Amy Brown, Tasha Everett, Dena Churchill and any person acting under the direction or in concert with them independently to like effect from attending illegal public gatherings and engaging in any of the activities set out in the Injunction Order, which the Province proved through the evidence of Hayley Crichton, causes or materially contributes to illegal public gatherings occurring within the Province.

100. Jane Doe(s) and John Doe(s) were named as Respondents to account for the fact that the identities of individuals who may choose to attend illegal public gatherings or engage in activities that cause or materially contribute to illegal public gatherings occurring are unknown and cannot be known. Freedom Nova Scotia had, at all material times, an open facebook group page and on that page Freedom Nova Scotia organized rally's against mask wearing and the restrictions set out in the Public Health Order. Attendees of the rally's were observed not wearing masks and were not maintaining six feet of physical distance in contravention of the Public Health Order. It is that activity and similar activity that poses a direct risk of COVID-19 spread. The fact that Freedom Nova Scotia is not a legal entity is irrelevant. It is the occurrence of illegal public gatherings traced back to Freedom Nova Scotia's advertisements of anti-mask rally's which cause and creates the risk of harm (COVID-19 spread).

101. In addition to all persons residing in Nova Scotia being liable under the Public Health Order if they breach the Order, the naming of Jane Doe(s) and John Doe (s) as Respondents in this proceeding also makes anyone residing in the Province liable under the Injunction Order for attending illegal public gatherings and engaging in activities that cause the gatherings to occur - as set out in paragraphs 3 (a) (b) and (c) of the Injunction Order.

102. The restrictions contained in the Injunction Order incorporate section 13.5 and 13.6 of the Public Health Order by reference. The Injunction Order does not expand the scope of compliance requirements that already exist under the Public Health Order.

103. Since the Public Health Order applies to all persons residing within Nova Scotia it cannot be the case, as suggested by the CCLA, that the intent of the Injunction Order was intended only to apply to the Respondents. The intent as set out in the Province's Notice of Application was to ensure compliance with the Public Health Order and authorize law enforcement to engage in enforcement measures to ensure compliance with the Public Health Order.

104. If individuals contravene the Public Health Order they are liable to a fine or imprisonment under s. 71 of the *Health Protection Act*. Individuals are also subject to a fine or imprisonment for being found in contempt of court for breaching the injunction order. The Injunction Order also permits a tailoring of penalties to be imposed against offenders who ignore the Public Health Order where measures imposed under the Public Health Order prove ineffective at deterring further breaches, for example. The Injunction Order is another tool to be used to combat the spread of COVID-19 and another wave of COVID-19 community spread and possible deaths.

105. In the original application hearing, the court found that the Province met the balance of convenience criteria at paragraphs 26 to 32 of the court's written decision. The court found that there was a greater public interest in maintaining integrity of the Public Health Order rather than permitting the illegal gathering to occur.[5] The Injunction Order appropriately applied to anyone who breached the Public Health Order. The CCLA's position that the injunction shouldn't have applied to all Nova Scotians is without merit nor is it supported by evidence or epidemiology data.

106. As your Lordship is well aware, superior courts possess "inherent jurisdiction" and have original jurisdiction in any matter unless jurisdiction is clearly taken away by statute.[6]

107. The Supreme Court of Nova Scotia's inherent jurisdiction to grant *quia timet* injunctive relief in the present case does not conflict with the provisions of the *Health Protection Act*. Therefore, the Attorney General submits that the Supreme Court has concurrent jurisdiction in this matter and may grant a *quia timet* injunction on the same terms or conditions as set out in an unchallenged statutory scheme and Public Health Order.

108. The case of *Beaudoin v. British Columbia*, 2021 BCSC 248 referred to by the CCLA in its written submissions at paragraph 33 is distinguishable. In *Beaudoin*, the provincial government brought a motion for injunctive relief in the context of a *Charter* challenge to the underlying public health order commenced by religious groups. *Beaudoin* was not an application for a *quia timet*

[5] Justice Norton's written Decision at para. 32.
[6] *MacMillan Bloedel Ltd. v. Simpson* 1995 CarswellBC 974, at paragraph 38.

injunction. Also, unlike in the present case in *Beaudoin* the court found the balance of convenience favoured the religious groups. The court in *Beaudoin* stated:

> 68 I am left to wonder what would be achieved by the issuance of an injunction in this case. If it were granted and not adhered to, would the administration of justice yet again be brought into disrepute because the B.C. Prosecution Service considers that it would not be in the public interest to prosecute those who refused to adhere to the orders sought from this Court?
>
> 69 When asked, counsel for the respondents said that the respondents accept that the petitioners' beliefs are deeply held, but in response to my question as to why an injunction was sought, responded that while the petitioners and others like them are not dissuaded from their beliefs and practices by the impugned orders, an order from this Court is more likely to accomplish their compliance.
>
> 70 Given the other remedies available to the respondents, **I have reservations that an injunction alone, without enforcement by the B.C. Prosecution Service, would overcome the deeply held beliefs of the petitioners and their devotees**. Taking into account the decision in *Sager*, and the other means of enforcement open to the respondents, I find that the balance of convenience does not favour the respondents in this case, and dismiss their application for an injunction.

109. In the case presently before your Lordship, Justice Norton found that the balance of convenience favoured the Province.[7] The Supreme Court's original finding must be afforded deference and was supported by the evidence presented to the court on May 14, 2021. No evidence has been provided by the CCLA that could cause your Lordship on a re-hearing to overturn Justice Norton's finding of fact. It is not this court's role on a re-hearing to replace judicial findings absent new evidence or a clear and palpable defect in the original proceeding when viewed objectively would likely have changed the outcome of the original application.

110. Also, unlike *Beaudoin* contempt proceedings in Nova Scotia would not be brought by the Public Prosecution Service in this Province because it is a civil matter. Contempt proceedings would be brought by the Nova Scotia Department of Justice and initiated by a civil litigator on behalf of the Attorney General of Nova Scotia. In the civil context, whether a Court Order has been breached is a matter of evidence - policy pertaining to when criminal proceedings may be initiated do not apply. Moreover, in the Attorney General's respectful submission whether the *quia timet* injunction would be enforced if it were issued is irrelevant to whether the Attorney General met the legal test for a *quia timet* injunction in the circumstances of Nova Scotia's battle against the COVID-19 pandemic.

[7] See paras. 26 to 32 of Justice Norton's written Decision.

111. Issue number one of the CCLA's motion is unsustainable. The CCLA has not demonstrated that the Injunction Order was not supported by the evidence and the CCLA has not established that the court exceeded its jurisdiction in granting the injunction.

ISSUE 2: The Injunction Order incorporates by reference a definition of prohibited activity ("Illegal Public Gathering") contained in an Order under s. 32 of the Health Protection Act, which is subject to change by the Chief Medical Officer at his discretion, at any time. This discretion has been exercised no less than five times in the last 30 days.

ISSUE 3: The Injunction Order applies until varied by the Court, without limitation.

112. In response to issues number two (2) and three (3) the Province submits that Dr. Strang has jurisdiction to issue Public Health Orders under s. 32 of the *Health Protection Act* and amend the conditions or restrictions contained in the Public Health Orders.

113. Dr. Strang may exercise his discretion at any time and amend the Public Health Order based on the relevant epidemiology data pertaining to COVID-19, which could include data pertaining to the number of active COVID-19 cases, hospitalizations, the number of people currently in hospital due to COVID-19, or the number of vaccinations administered to Nova Scotians.

Public Gathering Restrictions

114. The *Communicable Diseases Regulations* made under the *Health Protection Act* permit the Chief Medical Officer of Health ("CMOH") to limit settings in which a person may attend and permits the CMOH to limit public gatherings. Section 6 and 8 of the *Communicable Diseases Regulations* set out the following:

> **Medical officer may restrict person from certain settings**
>
> 6. If a medical officer has reason to believe that a person has or may have a communicable disease, the medical officer may restrict the person from being in settings where they may place others at risk of infection.
>
> **Medical officer may prohibit public gatherings**
>
> 8. In addition to the requirements that a medical officer may include in an order under clause 32 93) (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.**
>
> [*Communicable Diseases Regulations* made under s. 74 and 106 of the *Health Protection Act*]

115. As indicated earlier in these submissions a reopening plan has begun to be implemented and was announced by the Province on May 28, 2021. The plan will be implemented in Five (5) Phases and the Public Health Order will be amended from time to time to reflect the change of restrictions inclusive of gathering limits. The Attorney General submits that amending the Public Health Order to reflect changing COVID-19 conditions to lift restrictions while managing the risk to health posed by COVID-19 to Nova Scotians is lawful, authorized under statute, reasonable, and necessary in the context of the current pandemic. The incorporation of a statutory authorized power into a Court Order is not unlawful or in excess of the Supreme Court of Nova Scotia's inherent jurisdiction.

116. Furthermore, issue number two, with respect to Dr. Strang's authorized discretionary powers, does not provide a basis to vary or discharge the Injunction Order prohibiting illegal public gatherings and the activities that cause illegal gatherings to occur within the Province. 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.[8]

117. Dr. Strang ought to be afforded deference, as the Chief Medical Officer of Health ("CMOH") for the Province, with respect to his decisions pertaining to what measures should be contained in the Public Health Order to protect public health. It is not the role of this Honourable Court to second guess or replace what it views as adequate health measures. The court is not the public health expert, Dr. Strang is.

118. With respect to issue number three (3) any person may apply to vary the injunction order without limitation, pursuant to paragraph nine (9) of the Injunction Order. An injunction is an equitable remedy and the Supreme Court's inherent jurisdiction permits flexibility to vary or discharge the injunction on evidence accordingly. Issue number three (3) fails to disclose a basis to vary or discharge the injunction, as alleged by the CCLA, or otherwise.

ISSUE 4. The Injunction Order violates the fundamental rights of all Nova Scotians, specifically the rights to freedom of expression, freedom of assembly, and liberty protected by sections 2(b), 2(c), and 7 of the *Canadian Charter of Rights and Freedoms*, ss 2(a), 2(b), 7, Part I of the *Constitution Act*, 1982, being Schedule B. to the Canada Act 1982 (UK), 1982, c 11

[8] Dr. Strang affidavit (paras. 13 to 19 in particular) and supplemental affidavit (paras. 18 to 45 in particular).

Constitutional and Legislative Framework

119. Sections 24(1) and 52(1) of the *Constitution Act* read as follows:

> **Enforcement of guaranteed rights and freedoms**
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> **Primacy of Constitution of Canada**
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

120. Under authority of the *Emergency Management Act*, the Government of Nova Scotia declared a state of emergency on March, 22, 2020 to help contain the spread of COVID-19. The provincial state of emergency continues to be in effect and may be renewed, pursuant to section 19 of the *Emergency Management Act*:

> **Termination within fourteen days and renewal:**
>
> 19 (1) A state of emergency terminates fourteen days after the day on which it was declared unless it is renewed or terminated by the Minister.

121. State of emergency measures are precautionary, preventative steps, made in the best interests of Nova Scotians. The state of emergency gives government the powers and flexibility it needs to help protect people and enforce self-isolation and social distancing measures. The *Health Protection Act* authorizes police to enforce state of emergency orders, inclusive of Public Health Orders issued under the *Health Protection Act*.[9]

122. Dr. Strang's duties as the Chief Medical Officer of Health ("CMOH") include implementing measures necessary to protect the public health. The duties and powers of the CMOH are outlined in section 14 of the *Health Protection Act* (hereinafter, the "*HPA*"). The duty imposed on all medical officers to protect public health is set out in section 8:

> 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.

[9] *Health Protection Act* – see sections 24, 37, 58, 60, 95, and 96 in particular "enforcement powers" and section 6 and 8 of the *Communicable Diseases Regulations* made under s. 74 and 106 of the *Health Protection Act*.

123. Section 32 (1) of the *HPA* authorizes the CMOH to issue Public Health Orders as follows:

> 32 (1) Where a medical officer is of the opinion, upon reasonable and probable grounds, that:
>
> (a) a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease;
>
> (b) the communicable disease presents a risk to the public health; and
>
> (c) the requirements specified in the order are necessary in order to decrease or eliminate the risk to the public health presented by the communicable disease, the medical officer may by written order require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease.

124. With respect to restrictions contained in Public Health Orders section 2 of the *HPA* sets out the following:

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

125. As the CMOH, Dr, Strang may exercise direction to grant an exception to any term and condition of the Public Health Order and the Public Health Order remains in effect until notice is provided by Dr. Strang under the authority of the *HPA*.

126. In order to prevent the spread of COVID -19 in Nova Scotia, the CMOH issued Public Health Orders that restricted indoor and outdoor gatherings, as well as those in private residences, and mandated the wearing of masks.

127. The Public Health Order (effective May 13, 2021) established requirements for physical distancing, gathering limits, mask and face coverings in Part II: [10]

> **PART II**
> **PHYSICAL DISTANCING,**
> **GATHERING LIMITS,**
> **MASKS AND FACE COVERINGS**
>
> 13A Effective 8:00a.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).

[10] Part II Physical Distancing, Gathering Limits, Masks and Face Coverings; Public Health Order, effective May 13, 2021 – See Hayley Critchton's Supplemental Affidavit, Exhibit "G".

> 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.
>
> 13.2 Notwithstanding sections 13 and section 13.1:
>
> (a) persons living in the same household may gather together, whether indoors or outdoors, up to the maximum of the number of immediate family members residing same the household, and are not required to practice physical distancing and masking; and
>
> (b) where the number of persons living in the same household is 2 persons or less, they may gather together indoors with up to a maximum of 2 additional persons, who shall be 2 consistent persons, and they are not required to practice physical distancing and masking; and
>
> 13.3 Notwithstanding section 13.1, persons from one household may gather outdoors with persons from another household to engage in an outdoor activity such as a walk or play but must adhere to the physical distancing requirements of section 13.
>
> 13.4 Notwithstanding sections 13.1 and 13.2 and for greater certainty, parties to a child sharing arrangement, or an order or agreement providing for joint custody:
>
> (a) may facilitate and participate in such child sharing or custody arrangements between households,
>
> but
>
> (b) must adhere to the self-quarantine requirements established by the Chief Medical Officer of Health located at:
>
> https;//novascotia.ca/coronavirus/docs/COVID-19-Protocol-for-child-custoday.pdf
>
> If a parent or child develops symptoms or tests positive for COVID-19.
>
> 13.5 For the purpose of section 13.6, an “illegal public gathering” is defined as a gathering that does not comply with the requirements of this Order, including:
>
> (a) the attendance limits applicable to gatherings, whether indoors or outdoors;
>
> (b) physical distancing requirements; and
>
> (c) masking requirements.
>
> 13.6 For greater certainty, persons are prohibited from:
>
> (a) organizing an in-person gathering, including requesting, inciting, or inviting others to attend an illegal public gathering;
>
> (b) promoting an illegal public gathering via social media or otherwise; or
>
> (c) attending an illegal public gathering of any nature, whether indoors or outdoors.

128. In the present case, the CCLA has not challenged the legislative competence of the Province to enact the HPA. The CCLA has also not challenged the constitutional validity of the Public Health Order and the restrictions set out in the Public Health Order regarding illegal public gatherings,

the definition of illegal public gatherings, and the prohibitions contained in s. 13.6, which are contained in paragraph 3 (a) (b) and (c) of the impugned Injunction Order.

129. My Lord, the Injunction Order is an Order issued by the Supreme Court of Nova Scotia. The Province applied to court for a *quia timet* injunction intended to prevent the spread of COVID-19, reduce the number of deaths from COVID-19, and to ensure compliance with the Public Health Order.

130. Pursuant to paragraph seven (9) a person may apply to court to vary or discharge the Injunction Order.

131. The CCLA has applied to court, on a re-hearing under Rule 22.06, to discharge the Injunction Order and set aside Justice Norton's decision because the CCLA contends the restrictions set out in paragraph s. 3 (a) (b) and (c) of the Injunction Order are unlawful and infringe freedom of expression, freedom of assembly, and liberty.

132. It appears that the CCLA position is that the Nova Scotia Supreme Court issued an illegal injunction which is in effect a government order and, as such *Charter* scrutiny applies. Because the Inunction Order may qualify as government action attracting *Charter* scrutiny, the Attorney General's response to issue number four is organized in reference to the following headings and questions:

- **What is Freedom of Speech?**
- **Section 2 (b) of the *Charter* – "The Law"**
- **Does paragraph 3 (a) and (b) violate s. 2 (b) of the Charter?**
- **Does paragraph 3 (c) violate s. 2 (c)**
- **Is the Injunction Order overbroad and violate s. 7 of the Charter?**

What is Freedom of Speech?

133. Freedom of speech is a principle that supports the freedom of an individual or a community to articulate their opinions and ideas without fear of retaliation, censorship, or legal sanction. The term freedom of expression is usually used synonymously but, in the legal sense, includes any activity of seeking, receiving, and imparting information or ideas, regardless of the medium used.

134. The right to freedom of expression is recognized as a human right under article 19 of the *Universal Declaration of Human Rights* (UDHR) and recognized in international human rights law in the *International Covenant on Civil and Political Rights* (ICCPR). Article 19 of the UDHR states that "everyone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". The version of Article 19 in the ICCPR later amends this by stating that the exercise of these rights carries "special duties and responsibilities" and may "therefore be subject to certain restrictions" when necessary "[f]or respect of the rights or reputation of others" or "[f]or the protection of national security or of public order (order public), or of public health or morals".[11]

135. Based on the foregoing, freedom of speech and expression may not be recognized as being absolute. Common limitations or boundaries to freedom of speech relate to libel, slander, obscenity, pornography, sedition, incitement, fighting words, classified information, copyright violation, trade secrets, food labeling, non-disclosure agreements, the right to privacy, dignity, public security, and perjury. Justifications for such limitations include the harm principle, proposed which suggests that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[12]

136. Under international law, Canada is compelled to protect the freedom of expression of its citizens. Section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". Freedom of speech is also stated as a human right and fundamental freedom in the *Canadian Bill of Rights*, sections 1(d) and (f).

137. In addition, article 20 (2) of the ICCPR requires states to prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Thus, many countries (including Canada) have enacted laws that limit certain types of expression, including speech that incites violence and hatred.

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[11] Article 19(3) of the ICCPR allows certain restrictions on freedom of expression:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (order public), or of public health or morals.

[12] *On Liberty*, by John Stuart Mill Fourth Edition, London Longmans, Green, Reader and Dyer, 1869.

138. In Canada, freedom of expression is fundamental but not absolute, particularly when there are legitimate pressing and substantial concerns that may justify its inhibition. The meaning of a right or freedom guaranteed by the *Charter* must be understood in light of the interests it was meant to protect. When words intend to inflict harm to others, especially those belonging to minority groups, it is obvious that hate speech is incompatible to the purposive spirit of the *Charter*.

139. My Lord, the Attorney General submits that the Injunction Order engages the harm principle by prohibiting activity that causes illegal public gatherings to occur. Due to the correlation of COVID-19 transmission and close contact between individuals, the occurrence of illegal gatherings put vulnerable populations and all Nova Scotians at risk of contracting COVID-19.[13] My Lord, Nova Scotians should be free from the harm or apprehension of harm that illegal gatherings cause and the Injunction Order is one tool that serves to minimize that harm.

Section 2 (b) of the *Charter* – "The Law"

140. Even though the CCLA has not challenged the constitutionality validity of the underlying Public Health Order and *HPA*, the Attorney General submits that for freedom of expression not to be subject to *Charter* scrutiny it usually only requires the government refrain from interfering with the exercise of the right. The traditional view, in colloquial terms, is that freedom of expression contained in section 2 (b) prohibits gags, but does not compel the distribution of "megaphones" (*Haig v. Canada*, [1993] 2 S.C.R. 995). In general, it is up to government to determine which forms of expression are entitled to special support and where the government chooses to provide a platform for expression, it must do so in a manner consistent with the *Charter*.

141. Section 2 of the *Charter* which is part of Canada's Constitution, stipulates the following:

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

142. Freedom of expression is understood in Canadian law as all non-violent activity intended to communicate a meaning. Any law or government action that has the purpose or effect of interfering with such an activity is a *prima facie* breach of freedom of expression. Although it is usually referred to simply as "freedom of expression", s. 2(b) of the *Charter* guarantees freedom of thought, belief, opinion and expression. While restrictions on gatherings do not have the purpose of restricting communication of meaning, they can have that effect.

[13] Dr. Strang affidavit, sworn May 12, 2021; Dr. Strang supplemental affidavit, sworn June 15, 2021.

143. Section 2(b) also protects the right to receive expression. It protects listeners as well as speakers: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 41.

144. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 the Supreme Court of Canada established several key principles that guides the understanding of freedom of expression in Canada:

- "Expression" has both a content and a form.
- Content is the meaning that is being conveyed by any expressive activity.
- Expressive activities can come in many forms including through verbal speech, writings, music, or physical gestures. Even the act of being silent can convey meaning.

145. If the activity conveys meaning, it is considered expression under the *Charter*.

146. The Supreme Court of Canada continues to interpret freedom of expression broadly. However, section 1 of the *Charter* establishes that reasonable limits can be placed on the right if those limits are prescribed by law and can be demonstrably justified in a free and democratic society.

147. The protection of freedom of expression is premised upon fundamental principles and values that promote the search for and attainment of truth, participation in social and political decision-making and the opportunity for individual self-fulfillment through expression – see *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at 976.

148. The Supreme Court of Canada has maintained that the connection between freedom of expression and the political process is "perhaps the linchpin" of section 2(b) protection (*R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827).

149. Free expression is valued above all as being instrumental to democratic governance. The two other rationales for protecting freedom of expression — encouraging the search for truth through the open exchange of ideas, and fostering individual self-actualization, thus directly engaging individual human dignity — are also key values that form part of the section 2(b) analysis.[14]

Harmful and offensive content

150. Some views are illegal to express because it can cause harm to others. This category often includes speech that is both false and dangerous, such as falsely shouting "Fire!" in a theatre

[14] Department of Justice, Charterpedia: Section 2(b) – Freedom of Expression, (last updated June 17, 2019).

and causing a panic. Justifications for limitations to freedom of speech often reference the "harm principle" or the "offence principle".

151. As previously stated when words intend to inflict harm to others, especially those belonging to minority groups, it is obvious that hate speech is incompatible to the purposive spirit of the *Charter*.

152. The ***Charter's*** guarantee of freedom of expression is not absolute. Restrictions on forms of expression that it has deemed to run contrary to the spirit of the *Charter*, such as hate speech, have been upheld given that the purpose of such expression is to prevent the free exercise of another group's rights.

Test for Infringement

153. The Supreme Court has adopted the following three-part test for analyzing freedom of expression cases under section 2(b) of the *Charter*:

> 1) Does the activity in question have expressive content, thereby bringing it within section 2(b) protection?;
>
> 2) Does the method or location of this expression remove that protection?; and
>
> 3) If the expression is protected by section 2(b), does the government action in question infringe that protection, either in purpose or effect? (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141; *Irwin Toy Ltd.,* supra.)

Scope of Protection

154. The Supreme Court of Canada has long instructed that courts are to take a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter*. The Supreme Court of Canada's purposive approach and "large and liberal" orientation to *Charter* guarantees ensures that all manner of expressive activities qualified for constitutional protection. Therefore, Canadian courts often find "a prima facie breach easily" due to its broad interpretative approach to section 2(b). For instance, the Supreme Court of Canada stated in *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, the following at paragraph 27:

> 27 This Court has long taken a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charte*r... It has not departed from this general principle in the context of s. 2(b)... An activity by which

> one conveys or attempts to convey meaning will prima facie be protected by s. 2(b). Furthermore, the Court has recognized that s. 2(b) protects an individual's right to express him or herself in certain public places (*Comité pour la République du Canada-Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.) (airports); *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 (S.C.C.) (utility poles); and *City of Montréal*, at para. 61 (city streets)). Therefore, not only is expressive activity prima facie protected, but so too is the right to such activity in certain public locations (*City of Montréal*, at para. 61).

(i) Expressive Content

155. Expression protected by section 2(b) has been defined as "any activity or communication that conveys or attempts to convey meaning" (*Thomson Newspapers Co.*, supra; *Irwin Toy Ltd.*, supra). The courts have applied the principle of content neutrality in defining the scope of section 2(b), such that the content of expression, no matter how offensive, unpopular or disturbing, cannot deprive it of section 2(b) protection (*Keegstra*, supra). Being content-neutral, the *Charter* also protects the expression of both truths and falsehoods (*Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 at paragraph 60).

156. Freedom of expression also protects the right not to express oneself. "[F]reedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do" (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at paragraph 95).

(ii) Method of expression

157. Expression that takes the form of violence is not protected by the *Charter* (*Irwin Toy Ltd.*, supra at paragraph 43). The Supreme Court has held that whether or not physical violence is expressive, it will not be protected by section 2(b) (*Keegstra*, supra; *Irwin Toy Ltd.*, supra). Threats of harm also fall outside the scope of section 2(b) protection – see *Greater Vancouver Transportation Authority*, supra, at para. 28. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraphs 107-108; *R v Khawaja*, 2012 SCC 69 at paragraph 70). In other respects, the form or medium used to convey a message is generally considered part and parcel of the message and included within section 2(b) protection (*Weisfeld v. R*, [1995] 1 F.C. 68, at paragraph 41).

(ii) Location of expression

158. Section 2(b) protection does not extend to all places. Private property, for example, will fall outside the protected sphere of section 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Charter*.[15]

Does the law or government action at issue, in purpose or effect, restrict freedom of expression?

(i) Purpose

159. Where the purpose of a government action is to restrict the content of expression, to control access to a certain message, or to limit the ability of a person who attempts to convey a message to express him or herself, that purpose will infringe section 2(b) (*Irwin Toy Ltd.*, supra; *Keegstra*, supra).

(ii) Effect

160. Even if a purpose is compatible with section 2(b), an individual may be able to demonstrate that the effect of the government action infringes his or her section 2(b) right. In this situation, the individual must show that his or her expression advances one or more of the values underlying section 2(b), e.g., participation in social and political decision making, the search for truth and individual self-fulfillment (*Irwin Toy Ltd.*, supra at para. 54). While more recent Supreme Court decisions still refer to this principle of showing the effect of government action, the Supreme Court of Canada does not appear to apply with a great deal of vigor the requirement that an individual show an advancement of values, tending instead to easily find a restriction of section 2(b).

161. My Lord, in the case at bar, the Attorney General submits that being able to express promote, attend, organize, incite, request, or invite illegal public gatherings contrary to the Injunction Order, causing actual, threatened, or an apprehension of harm to vulnerable groups and Nova Scotians, is contrary to the values section 2(b) of the *Charter* is meant to be protect (ie. fostering self-actualization engaging human dignity etc.).[16] Also, such expression prevents the free exercise

[15] Ibid (note 6) Department of Justice, Charterpedia: Section 2(b) – Freedom of Expression, (last updated June 17, 2019).
[16] Affidavit of Hayley Critchley:
Worldwide Rally for Freedom and Democracy is a global movement and organizer that has been developed with the explicit objective of spreading anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric (Hayley Crichton's affidavit, para. 1).
In Nova Scotia, participation in the Worldwide Rally for Freedom and Democracy global events are organized by the local Facebook group "Freedom Nova Scotia". The Freedom Nova Scotia Facebook open group has a total of 896 followers and the related Instagram account has 100 followers (Hayley Crichton's affidavit para 8).
On March 20, 2021, Freedom Nova Scotia organized an open event on Facebook to rally against mask wearing and restrictions. Attendees gathered in a large group of approximately 100 people, the attendees were not wearing masks and were not maintaining

of another group's rights such as Nova Scotians wanting to be free of lockdowns and restrictions caused by increased rates of COVID-19 community spread and transmission.

162. As set out in the Province's Notice of Application in Chambers (*Ex Parte*) the grounds submitted by the Province for the injunction is to ensure compliance with the provisions of the *HPA* and to authorize law enforcement to engage in enforcement measures to ensure compliance with the provisions of the Public Health Order made under s. 32 of the *HPA*. For the reasons set out above the Supreme Court had jurisdiction to grant the *quia timet* injunction as a matter of public safety and pursuant to the court's inherent jurisdiction that was not removed by the *Health Protection Act* or by any other statute. Moreover, the Attorney General submits that the Injunction Order serves a pressing and substantial objective of reducing the risk of COVID-19 spread; flattening the curve and moving out of the third wave of COVID-19 in Nova Scotia.

163. My Lord, if the Injunction Order infringes. 2 (b) it is clearly saved by section one (1) of the *Charter* for the reasons that follow below.

Section 1 and section 2 (b) of the Charter

164. Section one (1) of the *Charter* stipulates the following:

> **Rights and freedoms in Canada**
>
> 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

165. As part of the section 1 analysis, courts must determine whether the limit on the right is "prescribed by law," "reasonable," and "demonstrably justified" (applying the test the Supreme Court of Canada established in *R. v. Oakes*, and the law must have a pressing and substantial objective.[22] Section 1 considerations in relation to s. 2 (b) of the *Charter* have been accurately described as follows:

> The broad scope of section 2(b) means that in most cases the constitutionality of the legislation or the government action will depend on the section 1 analysis. Generally speaking, because of the importance of the right to free expression, "any attempt to restrict the right must be subjected to the most careful scrutiny" (*R v. Sharpe* 2001 SCC

six feet of physical distance, in direct contravention of the Public Health Order. The event drew media attention (Hayley Crichton affidavit para. 9).
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 (Hayley Crichton affidavit para. 11).
Historical public gatherings organized by Freedom Nova Scotia have not complied with the requirements of COVID-19 Emergency Health Orders issued under section 32 of the *Health Protection Act* (Hayley Crichton affidavit para. 13).

> 2, supra at paragraph 22). However, the "degree of constitutional protection may vary depending on the nature of the expression at issue . . . the low value of the expression may be more easily outweighed by the government objective" (*Thomson Newspapers Co*., [1998] 1 S.C.R. 877 at para. 91; *R. v. Lucas*, [1998] 1 S.C.R. 439, at paragraphs 116 and 121; *Sharpe*, at paragraph 181; *Whatcott*, 2013 SCC 11 supra at paragraphs 147-148; *R v. Butler*, [1992] 1 S.C.R. 452 at page 1150)). For example, limits are easier to justify where the expressive activity only tenuously furthers section 2(b) values, such as in the case of hate speech, pornography or marketing of a harmful product (*Keegstra* [1990] 3 S.C.R. 697; *Whatcott*, supra; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 ; *JTI MacDonald Corp*, [2007] 2 S.C.R. 610 supra). Limits on political speech will generally be the most difficult to justify (*Thomson Newspapers Co* [1998] 1 S.C.R. 877 ; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827). Restrictions will also be more difficult to justify where they capture expression that furthers artistic, scientific, educational or other useful social purposes (*Butler*, [1992] 1 S.C.R. 452).
>
> Whether the limit minimally impairs the right to freedom of expression is often the deciding factor in section 2(b) cases. A total prohibition on a form of expression will be more difficult to justify than a partial prohibition (*RJR-MacDonald Inc*., [1995] 3 S.C.R. 199 ; *JTI-MacDonald Corp*. supra, *Toronto Star Newspapers Ltd*., supra). A restriction on expression backed by a civil penalty rather than a criminal sanction such as imprisonment will be considered a less impairing alternative (*R. v. Zundel*, [1992] 2 S.C.R. 731; *Taylor v. Canada (Human Rights Commission)*, [1990] 3 S.C.R. 892). Where the limit on freedom of expression is minimal, the court may, in certain circumstances like elections advertising, accept section 1 justifications for this limit based on logic and reason without supporting social science evidence (B.C. Freedom of Information and *Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6).

166. In Canada, freedom of expression is fundamental but not absolute, particularly when there are legitimate pressing and substantial concerns that may justify its inhibition.

167. If a violation by the government or other institution of the *Charter* takes place, the courts have to decide whether this violation has a rationale. In order to do so, the courts have to look into the objectives and actions of the government, or other institution, against the interests of the individual who is claiming the violation. Under section 52 of the *Constitution*, a law may be found to be unconstitutional and declared invalid, or may be found to be constitutional, and a person's *Charter* right may therefore be restricted by it.

168. In the present case, the incorporation of section 1 in the *Charter* proves that freedom of expression, which is a basic right, may be limited when its exercise causes harm to the public interest or the rights of others.

Does the Injunction Order infringe s. 2 (b) of the *Charter*?

169. In answering this question the Attorney General submits the following questions must be considered:

> 1. Does organizing an in person gathering, including requesting, inciting, or inviting others to attend an “Illegal Public Gathering” have expressive content bringing them within the s. 2 (b) protection?
>
> 2. Does promoting an Illegal Public Gathering via social media or otherwise have expressive content bringing these activities within the s. 2 (b) protection?

170. The Attorney General maintains that the right of expression to express anti-lockdown rhetoric, organize, request, incite, promote, or invite others to breach gathering limits in contravention of the Public Health Order causes harm (actual or threatened) to vulnerable groups and Nova Scotians generally. The harm was established through the evidence of Dr. Strang who was qualified as an expert in the field of Public Health and Preventative Medicine relative to Sars CoV2 and COVID-19 by Justice Norton, at paragraph seven (7) of his written decision.

171. The Attorney General acknowledges that the freedom to exchange ideas, express religious beliefs, and speak out against government action is an integral factor enabling citizens to be active participants in a healthy and vibrant democracy. However, when that expression incites people to break the law, increases the risk of spread of a deadly disease and creates an apprehension among Nova Scotians that COVID-19 may spread into their communities, it is not protected expression. The Attorney General reiterates that while the global pandemic is still with us this is not the time to disregard public health in favour carrying out acts and omissions that increase the risk of harm (spread of COVID-19) within the population.

172. Furthermore, the Attorney General would disagree that the expressive form and location in the present case is protected under s. 2 (b).

173. As the majority said in *Montreal City v. 2952-1366 Quebec Inc*., [2005] 3 S.C.R. 141, the first two questions relate to whether the expression at issue falls within the protection of s. 2 (b). The court said expressive content is always protected but the form or location may not be protected:

> 57 The first two questions relate to whether the expression at issue in this case falls within the protected sphere of s. 2(b). They are premised on the distinction made in *Irwin Toy* between content (which is always protected) and “form” (which may not be protected). While this distinction may sometimes be blurred (see, e.g. *Irwin Toy*, p. 968; *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.), at p. 748), it is useful in cases such as this, where method and location are central to determining whether the prohibited expression is protected by the guarantee of free expression.

174. In relation to the first question, of whether anti-lockdown rhetoric, organizing, requesting, inciting, promoting, inviting, or attending illegal public gatherings in contravention of the Injunction Order, contains expressive content, the answer is yes. This is not in issue.

175. The message and activity of expressing anti-lockdown rhetoric, organizing, requesting, inciting, promoting, inviting, or attending illegal public gatherings in contravention of the Injunction Order can be expressive activity. This is not disputed by the Attorney General. The question is whether the expression is excluded from s. 2(b) protection, due to its form or location, despite the presumptive protection, as the Supreme Court of Canada noted in *Montreal City (supra)*:

> 58 ... The fact that the message may not, in the view of some, have been particularly valuable, or may even have been offensive, does not deprive it of s. 2(b) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(b): see *Irwin Toy*, at p. 969; *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), at p. 729.

Location

176. In *Montreal City (supra)*, the Supreme Court of Canada discussed the decision in the prior Supreme Court of Canada case of *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, commenting that it contained two countervailing arguments regarding expression on public property. It then noted that a majority of judges supported the general approach that some government-owned property has never been viewed as available space for public expression and that it cannot have been the intention of the drafters of the *Charter* to confer a *prima facie* right of free expression in these essentially private spaces:

> 64 The argument against s. 2(*b*) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business, have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.
>
> 65 In *Committee for the Commonwealth of Canada*, six of seven judges endorsed the second general approach, although they adopted different tests for determining whether the government-owned property at issue was public or private in nature. Lamer C.J., supported by Sopinka and Cory JJ., advocated a test based on whether the primary

> function of the space was compatible with free expression. McLachlin J., supported by La Forest and Gonthier JJ., proposed a test based on whether expression in the place at issue served the values underlying the s. 2(*b*) free speech guarantee. L'Heureux-Dubé J. opted for the first approach and went directly to s. 1.
>
> [Emphasis added]

177. While unnecessary to determine the outcome of the merits of the case in *Montreal City*, the court agreed with the majority in *Committee for the Commonwealth of Canada*, and stated **that the application of s. 2(b) is not attracted by the mere fact of government ownership of the place in question but that there must be a further enquiry to determine if this is a type of property that attracts s. 2(b) protection (para. 71**). The majority took a broad categorical approach, focusing on the character of the location or place and its suitability for expression. The court adopted a principled basis for "method" or "location" based exclusion from s. 2(b) protection, noting that the onus is on the claimant:

> 74 The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

178. In *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, the court again adopted the analytical framework developed in *Montreal City (supra),* for determining whether the expression should be denied s. 2(b) protection on the basis of location.

179. The Attorney General submits that the primary method of organizing, inciting, requesting, promoting illegal public gatherings has been through the internet, specifically Freedom Nova Scotia's Facebook page. In assessing whether a method or location conflicts with the values protected by s. 2(b), being self-fulfillment, democratic discourse and truth-finding, the majority in *CBC v. Canada*, 2011 SCC 2 at para. 37, stated that in deciding whether a location is excluded from *Charter* protection, in keeping with the analytical framework from *Montreal City*, and *Canadian Federation of Students*, the court must consider the historical or actual function of the location of the activity or the method of expression, and whether other aspects of the location or the method suggest that expression at that location or using that method would undermine the values underlying free expression.

180. The Attorney General will now turn to the analytical framework set out by the Supreme Court of Canada. The Attorney General will first address the historical or actual function of the place and then whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

Historical or Actual Function and Other Aspects of the Space

181. The majority in *Montreal City (supra)*, highlighted the importance of addressing the historical or actual function of the space:

> 75 The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(*b*). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.
>
> **76 Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space — the activity going on there — compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity?** Many government functions, from cabinet meetings to minor clerical functions, require privacy. **To extend a right of free expression to such venues might well undermine democracy and efficient governance.**
>
> 77 Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. **Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.**
>
> 78 The markers of historical and actual functions will provide ready answers in most cases. However, we must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. As some scholars point out, the public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations: see, e.g. R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 148 *et seq*. **This said, the historical and actual functions of a place is something that can be established by evidence. As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression**.
>
> [Emphasis added]

182. There are a number of cases that address the question of whether the location in question has been historically used as an arena or forum for public discussion or political debate. The British

Columbia Court of Appeal in *R. v. Breeden*, 2009 BCCA 463, considered whether s. 2(b) was applicable to protest signs at a fire station, a courthouse, and a municipal hall. The majority noted that the relevant considerations include the historic use of the area where the activity is occurring and whether the activity in question interferes with the proper functioning of the facility (para. 19). In concluding that these were not locations protected by s. 2(b), the court said:

> 20 What appears to me a key feature of the present case is that there is no evidence in the record suggestive of the use of the locations in question as forums for advertising (commercial speech) or places of debate (political speech). Accordingly, unlike *Canadian Federation of Students*, here this Court must decide whether to afford access for expressive activities in locations where a government entity has never previously recognized such a right. See *Canadian Federation of Students*, para. 45. The Fire Station premises are clearly not amenable to or suitable for such activities and if the appellant does not acknowledge this in argument, he but faintly submits anything to the contrary.
>
> 21 That leaves for consideration the other two venues, the courthouse and the municipal hall. **While it is clear that council chambers in municipal halls are utilized from time to time for public hearings and debate, the evidence in this case does not furnish support for the proposition that the foyer area of the West Vancouver municipal hall has been utilized for purposes of discussion and debate**. It was open to the trial judge on the evidence to conclude that the sort of activity sought to be engaged in by the appellant was out of accord with the historic use of the space and that the continuance of such activity would tend to undermine the use of the premises by staff and members of the public for the orderly conduct of public business.
>
> 22 Courthouses have a vital role to play in the operation and furtherance of the rule of law: see *B.C.G.E.U., Re*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 (S.C.C.); and *Société Radio-Canada c. Québec (Procureur général)*, 2008 QCCA 1910, 62 C.R. (6th) 99 (Que. C.A.), leave to appeal to S.C.C. granted, (S.C.C.). **As was the case concerning the municipal hall, the evidence before the trial judge did not afford support for the proposition that advertising or political debate has historically occurred in the public areas of courthouses**. I should say that there is debate and discussion in the courtrooms of courthouses but such location is a very structured and specialized forum to allow courts to perform their historic function of deciding legal controversies**. The activities of the appellant were out of accord with the historical use of courthouse premises and, as the trial judge found, would interfere with the effective functioning of the courts as an institution.** At bottom, the appellant seeks to engage in a polemical or political type of protest to further his aims or objects. That is wholly at odds with the historic function and operation of court premises which are dedicated to the resolution of disputes between parties by legal process.
>
> [Emphasis added]

183. The majority in *R. v. Breeden*, 2009 BCCA 463 (*supra*), placed considerable significance on the historical function of the locations and particularly whether they had previously been used "as open forums for public discussion and debate". A similar conclusion was reached by the Québec Court of Appeal in *Société de transport de la Communauté urbaine de Montréal v. Robichaud*, 1997 CarswellQue 186, where Justice Fish (as he then was) for the majority expressed serious

doubts whether freedom of expression is constitutionally protected in the corridors and transit areas of a subway station:

> 28 These subway facilities can in my view not be assimilated, either by analogy or extension, to the 'arenas' or 'forums' traditionally open to private petition or public debate. **They are built and maintained for the exclusive benefit of those who have paid a fare to secure a service. Their purpose is to provide a pedestrian passageway for travelers only. These defining characteristics are in my view sufficient to exclude them from the ambit of public property upon which freedom of expression is constitutionally protected.**

184. The Ontario Divisional Court in *Vietnamese Association of Toronto v. Toronto*, [2007] O.J. No. 1510, reached a similar conclusion in finding that a flagpole in Nathan Phillips Square was not public property to which the public historically had access, even though the City's Flag Policy allowed use of the flagpole by community and non-profit groups to mark important events.

> 19 The flagpole is not like an airport or a public street **to which the public has unimpeded access** as in *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.) or the *Montreal* case above. **The flagpole is of a different nature, and its use is regulated, because the flags flown can and without question are perceived, rightly or wrongly, as the expression of the City's perspective and approval**.

[Emphasis added]

185. In the present case, any argument that the prohibition of promotion on social media infringes individual rights of freedom of expression under the *Charter* – s. 2 (b), is unsustainable. As set above, part of the legal analysis is that the court must determine if the method of expression is a public space or a private space. Typically, only government owned public property is afforded freedom of expression protection under the *Charter*. There are exceptions but the Attorney General submits that none apply in this case.

186. The Supreme Court of Canada has found corridors and transit areas of a subway station to be private because you have to pay a fare, and the flag pole in Nathan Phillips Square in Toronto was found to be private since the municipal government regulates what may be placed on the pole. If the method of expression is **private or exclusive** it may not be afforded protection under s. 2(b). The Attorney General submits that the internet in the context of this case (Facebook/social media) is private and exclusive. More often than not there is a fee for service, and not everyone can access the internet (i.e. low income individuals are less likely to have access to the internet).

187. The internet may be public in the sense that it may be used by the public for a variety of purposes. However, access is more often than not restricted to those who can afford to pay a fee for service. In that sense the internet is analogous to a subway station as in *Breeden* (above). Just because an individual posts on Facebook access may be limited and available to only those paying a fee for internet access or by some other means. Access to the internet may be restricted and not accessible to everyone. An individual cannot go into an internet website created by another person and change the internet website, in that sense an internet domain or website of an individual is private and they may exclude others from interacting with them through the internet.

188. The Attorney General submits that the internet is not an inherently public space. The exclusivity and how you can access the internet does not make it a historical public forum in furtherance of *Charter* values. If the Attorney General is incorrect in that regard then in the present case the actual use of the forum being organizing, requesting, inciting, promoting, inviting, or attending illegal public gatherings in contravention of the Injunction Order and Public Health Order, is contrary to the values that s. 2(b) is meant to protect, because such expression causes actual or threatened harm (spread of a deadly disease) to vulnerable groups and Nova Scotians.[17] The available science outlined in Dr Strang's evidence unequivocally draws a causal connection between exceeding gathering limits established under the Public Health Order and COVID-19 transmission.

189. Restrictions on internet use is not unprecedent. The Attorney General notes that the *Criminal Code* provides for various offences associated with use of the internet (i.e. child pornography, terrorist activities, voyeurism to name a few).

Other Aspects of the Place

190. Inherently, some places are not meant to be public and should remain outside the protected sphere of s. 2(b). Simply because the Respondent, Freedom Nova Scotia has allowed very limited expressive activity on its Facebook public forum domain, does not mean open access and protection under s. 2(b). Justice Deschamps, writing for the majority, said in *Montreal City*, that s. 2(b) is not without its limits, and governments will not be required to justify every restriction on expression under s. 1. She said that the method or location of the expressive activity may exclude it from protection.

191. The majority in *Montreal City*, while noting that the "method or location" test reflects the fact that our jurisprudence requires broad protection at the s. 2(b) stage, said it also reflects the fact that

[17] Dr. Strang affidavit and supplemental affidavit.

some places must remain outside of the protection of s. 2(b). The court noted that restricted access to many government-owned venues is part of our history and our constitutional tradition and that the *Charter* was not intended to turn this state of affairs on its head:

> 79 ... it also reflects the reality that some places must remain outside the protected sphere of s. 2(*b*). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under s. 1. As six of seven judges of this Court agreed in *Committee for the Commonwealth of Canada*, **the test must provide a preliminary screening process. Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate**. Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.

[Emphasis added]

192. The location in the present case, is not static and may be the internet, social media, verbal or non-verbal communication, or other mediums. However, the harm inflicted by the content of the expression is the same. Promoting, organizing, inciting, requesting inviting, or attending, illegal social gatherings in the context of the Injunction Order is activity that causes illegal gatherings. The acts set out in the Injunction Order if permitted create harm, these acts create an apprehension of harm and actual harm to Nova Scotians, the harm being the transmission and spread of COVID among the population and another wave of high COVID-19 cases and anther lockdown for all Nova Scotians. In the context of a pandemic affecting public health the restrictions are reasonable and appropriate. The nature of the content of the expression is not consistent with s. 2 (b) values and is not protected under s.2(b).

IF THE INJUNCTION ORDER INFRINGES SECTION 2 (b), IS THE INFRINGEMENT JUSTIFIED UNDER SECTION 1 OF THE *CHARTER* IN RESPONSE TO THE COVID-19 PANDEMIC?

193. The Attorney General reiterates that the Respondents and the public's right to freedom of expression is not absolute. However, the Attorney General would agree that if government is to infringe a *Charter* right, if it is going to tell a citizen such as the Respondents and all Nova Scotians that they cannot organize an in person gathering, including requesting, inciting, or inviting others to attend an "Illegal Public Gathering"; promote an illegal public gathering via social media or otherwise; or attend an illegal public gathering of any nature whether indoors or

outdoors as set out in the Injunction Order and Public Health Order, it had better have a very good reason. In legal terms that "very good reason" finds its expression in s. 1 of the *Charter*. [18]

194. The yardstick by which the restrictions set out in the Injunction Order is to be measured are the values and principles essential to a free and democratic society. As the Supreme Court of Canada observed in *R. v. Oakes* [1986] 1 S.C.R. 103, the rights and freedoms guaranteed by the *Charter* are not absolute and there may be "circumstances where their exercise would be inimical the realization of collective goals of fundamental importance" (at para. 68).

195. The Attorney General argues that in the case at bar there are "**collective goals of fundamental importance**" which must prevail over the right to illegally gather in contravention of the Injunction Order and Public Health Order, namely the protection of others from the spread of COVID-19.

196. On the other hand, the CCLA argues that the restrictions are overbroad, that they subject all Nova Scotians to an arbitrary standard, that they put people's liberty at risk of being imprisoned for contempt, and make people liable under the Injunction Order even if they use their best efforts to comply with the Public Health Order, and cannot be justified under s. 1 of the *Charter*. In response, the Attorney General reiterates that imprisonment and fines are also possibilities for individuals who contravene the Public Health Order, and that Order has gone unchallenged by the CCLA in this proceeding. As set out above, the fact that enforcement measures may be instituted under the Public Health Order does not prevent this Honourable Court from issuing an injunction that further protects public safety, where measures under the Public Health Order may prove inadequate. This Honourable Court did not err in law in issuing the Injunction Order, as alleged by the CCLA.

197. As stated above the Injunction Order is a valid court order in furtherance of a valid statutory scheme intended to protect public health. How the Injunction Order is enforced and its validity will withstand *Charter* scrutiny until the statutory scheme is set aside or challenged as was the case in *Beaudoin*.

198. My Lord, the Injunction Order was a necessary measure to control COVID-19. The Injunction Order can be justified under s. 1 of the *Charter* based on the evidentiary record in this case.

Context

[18] Section 1 of the *Charter* stipulates: 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

199. The Attorney General will begin the s. 1 analysis with considering the context of the Injunction Order, and the nature of the problem it was intended to address. Context has been described as the "indispensable handmaiden" to the section 1 analysis. As Justice Gonthier stated for the majority in *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877 (S.C.C.) (at para. 87):

> 87. The analysis under s.1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes,* [1986 1 S.C.R. 103 (S.C.C.), requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

200. Contextual factors are directed towards determining whether or not, given the nature of the case, evidence will consist of "approximations and extrapolations" and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the s. 1 case (*R v. Bryan*, 2007 SCC 12, at para. 29).

201. In *Harper v. Canada (Attorney General),* 2004 SCC 33 (S.C.C.), Justice Bastarache observed that the "**legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case**" (*Harper*, at para. 77). In the absence of determinative scientific evidence, the court is entitled to rely "**on logic, reason and the application of common sense to what is known"** (*Harpe*r, at para. 78).

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

> 76 This is not the first time the Court has addressed the standard of proof the Crown must satisfy in demonstrating possible harm. Nor is it the first time that the Court has been faced with conflicting social science evidence regarding the problem that Parliament seeks to address. Indeed, in *Thomson Newspapers*, supra, this Court addressed the nature and sufficiency of evidence required when Parliament adopts a regulatory regime to govern the electoral process. The context of the impugned provision determines the type of proof that a court will require of the legislature to justify its measures under s. 1; see *Thomson Newspapers*,

> at para. 88. As this pivotal issue affects the entire s. 1 analysis, it is helpful to consider the contextual factors at the outset.
>
> [emphasis added]

203. Justice Bastarache, in *Harper* (supra), then proceeded to consider the applicable contextual factors under four categories:

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

    (ii) vulnerability of the group;

    (iii) subjective fears and apprehension of harm; and

    (iv) nature of the infringed activity.

204. With respect to the above noted contextual considerations outlined in *Harper*, the Attorney General seeks to add deference to Dr. Strang, Chief Medical Officer of Health ("CMOH"), the Province of Nova Scotia, and the institutional capacity of the courts.

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

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

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

(ii) Vulnerability of the Group

207. Nova Scotia has an aging population. Those in the age group of being 65 years and older are more likely to be hospitalized and admitted to ICU even without other co-morbidities. However,

[19] Dr. Strang affidavit.

COVID-19 can have serious health consequences no matter your age.[20] Effectively, every Nova Scotian is part of the vulnerable group. Every individual's response to the COVID-19 infection is different and potentially deadly.

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

(iii) Subjective Fears and Apprehension of Harm

209. It is stating the obvious but given the potential for serious illness or death from COVID-19, there is a heightened fear of contracting this illness within the population. The CCLA may submit that there is no evidence of this in the record but that would be an absurd and academic position to put before this court. Judicial notice may be taken that in a global pandemic that is killing people such fear and apprehension exists within the population.

(iv) Nature of the Infringed Activity

210. In this case the activity infringed is set out in paragraph three (3) of the Injunction Order is follows:

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

211. The infringement of a right to attend illegal public gatherings, inclusive of engaging in activities that cause illegal public gatherings to occur, in contravention of the Public Health Order is fleeting. Nova Scotia will likely move into Phase 3 of the Province's reopening on June 30th and restrictions on gathering are continuing to ease. If the phased plan is successful Nova Scotia could return to fully opened before 2022. Moreover, it was always the Province's intention to continually reassess the need for the Injunction Order based on the COVID-19 data existing at

[20] Dr. Strang affidavit and supplemental affidavit.

the time. This is evidenced by the Province's motion to lift the injunction that was granted by the court on June 22, 2021. [21]

(v) Role of the Chief Medical Officer of Health (CMOH) and the Institutional Capacity of the Court

212. An examination of context is essential in deciding whether or not deference is appropriate. However, deference itself is not to be determined at the outset of the s. 1 inquiry but rather, where appropriate, under the various steps in the s. 1 analysis (*M. v. H*, [1999] 2 S.C.R. 3 at paras.80-81).

The Section 1 Test for Infringement

213. The Attorney General will now address the specific requirements which must be met in order to justify the infringement of a *Charter* right.

214. The onus of proving that a limit or freedom guaranteed by the *Charter* meets the criteria of s. 1 rests upon the party seeking to uphold the limitation, the Province in this case. The standard of proof is the civil standard, namely proof on balance of probabilities. A tipping of the scales.

215. Two central requirements must be met in order to establish that a limit is reasonable and demonstrably justified in a free and democratic society.

216. First, the objective which the measures responsible for a limit on a *Charter* right or freedom are designed to serve must be of sufficient importance to warrant overriding the right or freedom.

217. Second, if a sufficiently important objective is identified, the party invoking s. 1 must establish that the means chosen are reasonable and demonstrably justified (see *Oakes*, paras. 73 - 74).

218. This second requirement involves a form of proportionality test, where in each case the court is required to "balance the interests of society with those of individuals and groups" (*Oakes*, at para. 74). There are three components to this inquiry. First, the measures adopted must be rationally connected to the objective.

219. Second, the means chosen must impair as little as possible the right or freedom in question. Sometimes referred to as the least drastic means, or minimum impairment, the law should impair the right no more than is necessary to accomplish the desired objective.

[21] Dr. Strang supplemental affidavit. See also, Motion and Order discharging the injunction granted on June 22, 2021 on file herein.

220. Third, there must be proportionality between the effects of the measures and the objective. With regard to this third criteria, in order to be reasonable and demonstrably justified, the more severe the deleterious effects of a measure the more important must be the objective (*Oakes*, at para. 74, 75). As such, even if the objective is of sufficient importance, the measures rationally connected and the impairment a minimum, it remains possible that the severity of the deleterious effects will not be justified by the purposes it is intended to serve (*Oakes*, at para. 75).

221. Turning now to an application of these criteria to the case at hand.

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

222. The first step in the s. 1 analysis is to determine whether the objectives of the law are of sufficient importance to warrant the limitation of the constitutional right, the right to freedom of expression. Is the objective of the law, the stopping the spread of COVID-19 in this context, pressing and substantial?

223. The express purpose of prohibiting illegal gatherings and the activity that cause illegal gatherings to occur contained in the Injunction Order and the Public Health Order is "to prevent the spread of COVID-19 in Nova Scotia".

224. The gathering restrictions are to protect the health of Nova Scotia residents by limiting the spread of COVID-19, ensuring the continued functioning of the health-care system; limiting the amount of future deaths due to the virus.

225. The gathering restrictions have been proven to control the spread of COVID-19, by "flattening the curve", such that COVID-19 infections can be controlled to a level that aims to ensure the proper functioning of the health care systems and where Nova Scotians are not subject to an unreasonable level of risk of contracting this deadly disease.

226. During the third COVID-19 wave gathering restrictions contributed to reducing COVID-19 case numbers and hospitalizations in the Province and assisted in containing further community spread of the virus.[22]

227. With the greatest respect to the CCLA, its position misapprehends the objective of the Injunction Order. Having the Public Health Order in effect does not make the Injunction Order unnecessary.

228. If a person breaches the Injunction Order the Injunction Order provides for the same penalties in a proceeding for contempt of court that could have been imposed for a breach of the Public

[22] Dr. Strang supplemental affidavit.

Health Order. This is true. However, the powers of the court in contempt proceedings permit a tailored approach for deterrence that may be directed to the specific offender. The court may impose imprisonment but may impose conditions against the offender to ensure that breaches of the Public Health Order that endangers public health are prevented.

229. It is entirely logical to put measures in place such as the Injunction Order in addition to the Public Health Order to control the types of activity that can occur in the Province to stop the spread of COVID-19.

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

231. There can be no doubt that the goal of the restrictions set out in section 13 of the Public Health Order and paragraph 3 (a) (b) and (c) of the Injunction Order is reducing COVID-19 spread in Nova Scotia. This is a pressing and substantial objective.

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

232. A rational connection prevents limits from being imposed on rights arbitrarily. The requirement to abide by gathering restrictions and the public health measures incorporated into the Injunction Order, is tailored to suit its purpose.

233. In the present case the Attorney General submits that it is reasonable to find based on the evidence of the CMOH, Dr. Strang, that the restrictions contained in the Injunction Order would further the goal of reducing cases of COVID-19 infection, not that it is guaranteed to do so (*Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 (S.C.C.), at para. 48).

234. The CCLA argues that the Attorney General has failed to show why the Public Health Order is insufficient to stop the spread of COVID-19 or why the Injunction Order should apply to everyone in the Province; and submits that the Public Health Order has successfully worked at reducing COVID-19 case numbers.

235. Even though the Attorney General accepts that there are other measures which have proven successful in the fight against COVID-19, he does not agree that these measures render the Injunction Order unnecessary, such that it is not rationally connected to combating the spread of the disease.

236. The Attorney General submits that while empirical evidence is not necessary to establish a rational connection, the Attorney General has provided convincing evidence of the effectiveness of the restrictions and prohibited activities that cause illegal public gatherings to occur as set out in paragraph 3 (a) (b) and (c) of the Injunction Order. After the Injunction Order was issued on May 14, 2021 certain anti mask rallies scheduled for May 15, 2021 were cancelled whereas previously rallies were carried out in willful violation of the Public Health Order.[23]

237. After the issuance of the Injunction Order case numbers fell and the Province is moving into phase 3 of its reopening plan, hospitalizations have decreased and gathering restrictions have relaxed.

238. Based on the evidentiary record, and the evidence of Dr. Strang particularly, it is beyond argument that the Injunction Order and the restrictions and prohibitions contained therein were an effective means for reducing the spread of COVID-19 in Nova Scotia in addition to the Public Health Order. The Injunction Order was rationally connected to its objective.

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

239. This component of the *Oakes* test requires that the law not impair the right any more than is necessary to achieve its desired objective.

240. The fact that prohibiting illegal public gatherings and the activities that cause those gatherings to occur is rationally connected to reducing the spread of COVID-19 in Nova Scotia does not necessarily mean that it is the least drastic means for doing so. Here, as throughout the s. 1 analysis, the onus is on the Attorney General to establish that the other measures taken are not an effective substitute for the Injunction Order, or that the Injunction Order itself cannot be tweaked to accommodate a less intrusive infringement on freedom of expression.

241. The court is required to inquire into whether there are reasonably feasible and less impairing alternatives to achieve the same objective. At the same time, the Attorney General argues that the Province must be afforded a degree of flexibility in crafting a solution to the spread of COVID-19. As Justice LaForest explained in *R v. Videoflicks Ltd*. [1986] 2 S.C.R. 713 (para. 214):

> Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in *McGowan*, *supra*, at p. 524 calls "the practical living

[23] Hayley Crichton affidavit and supplemental affidavit.

> facts" to which a legislature must respond. That is especially so in a field of so many competing pressures as the one here in question.[115]

[emphasis added]

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

243. The court must consider the role of deference to the CMOH, the Province, and the institutional capacity of the court.

244. While the Injunction Order has legal force, it is in essence an Order based on medical and public health evidence directed towards protecting the health of Nova Scotia residents. The qualifications of the CMOH to make public health decisions are not challenged. In the exercise of his authority Dr. Strang draws upon specialized resources at his disposal. This team approach is conducive to informed decision making based on the best medical evidence available. Dr. Strang and his public health team guide the Province's path forward to re-opening the Province while still combating COVID-19 spread.

245. To this the Attorney General would add that the courts do not have the specialized expertise to second guess the decisions of public health officials or the Province.

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

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

247. While the CCLA may argue that while some measure of deference to the decisions of Dr. Strang or the Province is appropriate, the court must not abdicate its responsibility as guardian of the Constitution and rule of law. The Attorney General would agree.

248. The CCLA may also argue that while the case law supports deference to the provincial legislature, in this case the Public Health Order implemented by a single, unelected individual, and that because special measures (restrictions contained in the Public Health Order in this context) are neither debated nor approved by the legislative assembly, somehow detracts from the validity of the Injunction Order is untenable.

249. With respect, this argument ignores two key considerations; first, it was the legislature that saw fit to bestow the special measures powers on the CMOH in the first place; second, these powers are only activated in times of a declared public health emergency. On such occasions there may be little time for legislative debate, assuming of course that the emergency was such that the legislature could convene to do so in the first place.

250. The Attorney General would accept any argument made by the CCLA that the pandemic is not a magic wand which can be waved to make constitutional rights disappear and that the decision of the CMOH is not immunized from review.

251. However, it is not an abdication of the court's responsibility to afford the CMOH and the Provicne an appropriate measure of deference in recognition of (1) the expertise of the CMOH Office and (2) the sudden emergence of COVID-19 as a novel and deadly disease and global pandemic. It is also not an abdication of responsibility to give due recognition to the fact that the CMOH, and those in support of that office, face a formidable challenge under difficult circumstances.

252. In considering whether or not the Injunction Order could have been less intrusive, the court should exercise caution in recognition of the fact that the public health response to COVID-19 is ever evolving. The implementation of restrictions in paragraphs 3 (a) (b) and (c) of the Injunction Order must be gauged from the circumstances as they existed on May 14, 2021 and what was known about COVID-19 at the time.

253. The evidence of Dr. Strang amplifies the “precautionary principle” in public health decision making. In the context of the COVID-19 pandemic, with the prospect of serious illness or death, the margin for error is small. In such a circumstance, the public health response is to err on the side of caution until further confirmatory evidence becomes available; the “precautionary principle”. Applying public health measures across the population is often a more effective means than trying to target smaller at risk sub groups. Public health goals are rarely achieved through

single actions or simple tools. A range of mechanisms may be employed, depending on the health problem and context.

254. Relying on the evidence of Dr. Strang, the Attorney General submits that there is no simple one size fits all solution to the effective management of a pandemic such as COVID-19. A variety of public health measures are required in combination.

255. A multi-pronged provincial approach that will address control of importation of COVID-19, enhanced testing, rapid case identification and contact tracing along with strategies to maintain physical distancing will undoubtedly lead to the best health outcomes. However, the relative prioritization of each of these measures will differ, due to regional differences in infection levels and disease spread, vulnerability of the provincial populations, and regional characteristics that influence the effectiveness of public health measures.

[Dr. Strang, Affidavit]

256. In May 2021 prohibiting illegal public gatherings was one of a number of special measures implemented by the CMOH in an effort to stop the spread of COVID-19. The Province was, at that time, in a state of lockdown with the closure of institutions, and non-essential business. With few exceptions individuals were required to self-isolate for 14 days. Enhanced testing for COVID-19 was available to those with symptoms of the disease. Social distancing of six feet was, and remains the rule. Public health officials employed contact tracing as a means of tracking the infection in the population and social gathering restrictions limited to households among other restrictions were enforced. Notwithstanding these efforts there were numerous unknown people within the population that wanted to hold illegal public gatherings while in the worst wave of COVID-19. An additional measure had to be taken to protect the public and that additional measure was the *quia timet* injunction granted by this Honourable Court on May 14, 2021.

257. The COVID-19 pandemic presents as a moving target and as a consequence the necessity of the Injunction Order and Public Health Order was regularly reassessed.

258. Based on the foregoing evidence pertaining to an enemy as resilient as COVID-19 will not be kept in check through the approach advocated by the CCLA. The task of wrestling this disease into submission is no easy feat and is one that requires a dynamic and multipronged approach. The Injunction Order is integral to that approach since it provides for elevated penalties, pursuant to Civil Procedure Rule 89, for those who may choose to willfully breach the Public Health Order.

259. The Attorney General submits that the least drastic means component of the *Oakes* test has been satisfied.

260. There has been no violation of s. 2 (b) of the *Charter*.

Do the Statutory Effects of the Measure outweigh its Deleterious Effects?

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

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

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

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

265. While restrictions on being able to express violating Public Health Orders and participating in illegal public gatherings may cause mental anguish, anger, and frustration, to some, the collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease. In the circumstances of this case the right to engage in expression that causes illegal public gatherings to occur and the right to attend illegal public gatherings must give way to the common good. The CCLA takes issue with the fact that the Injunction Order applies to all Nova Scotians, in response the Attorney General submits that the evidence of COVID-19 transmissibility necessitates that it applies to all Nova Scotians. Moreover, it is impossible for the Province to know which one of its residents will decide to attend illegal public gatherings or engage in activities that include inciting, promoting, and requesting illegal public gatherings, or acting in concert with other proponents of illegal public gatherings.

266. Again, it is important to note that the CCLA has not challenged the constitutional validity of the underlying Public Health Order which contains the same prohibitions that are set out in paragraph 3 (a) (b) and (c) of the impugned Injunction Order issued by the Supreme Court. The fact that the CCLA has not challenged the underlying Public Health Order is fatal to the CCLA's motion given that this Honourable Court's inherent jurisdiction runs concurrent to the provisions of the *Health Protection Act*. The Injunction Order is a valid court order that furthers a valid statutory scheme pertaining to public health.

Conclusion with Respect to Section 1 of the Charter

267. Based on the evidence presented the Injunction Order represents a reasonable limit on the right of freedom of expression, as demonstrably justified in a free and democratic society.

Section 2 (c)

268. Section 2 (c) sets out the following:

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

269. The Attorney General concedes there is an infringement of the right to assemble contrary to the gathering limits set out in the Public Health Order but the infringement is saved by section 1.

Pressing and Substantial Objective

270. The objective of the social gatherings restrictions is to stop the spread of COVID-19. That objective is pressing and substantial.

Proportional

271. There is a rational connection evidenced by Dr. Strang's affidavit evidence relative to the characteristics of COVID-19, how it spreads, the public health measures implemented to curb the spread of the virus, and the impact on Nova Scotia's health care systems, economies, and people.

272. The restriction is minimally impairing in that the means chosen do not impair the right as is reasonably necessary to meet the objective. Not all gatherings are prohibited, just those that present an increased risk of COVID spread, namely close contact with groups of people exceeding the gathering limits and each individual's households.

273. The benefits of the restrictions outweigh the harm of the infringement. The Province has begun to reopen in a measured way. Activity that hampers the reopening by exceeding gathering limits risks another wave of COVID-19 and a reversion back to the restrictions implemented at the beginning of May 2021. The impugned objective (stopping COVID-19 spread) is sufficiently pressing to warrant overriding the *Charter* right under s. 2 (c).

274. The Attorney General submits that Dr. Strang reasonably balanced the restriction on assembly with protection of public health at the time he first imposed the social gathering restrictions and on an ongoing basis thereafter when extending them.

275. Any infringement on the right to assembly is saved by s. 1 of the *Charter*.

Section 7 of the *Charter*

276. The CCLA sets out the following additional issues:

> **ISSUE 5. The Injunction Order is arbitrary because the definition of "Illegal Public Gathering" permits some outdoor activities and prohibits other outdoor activities without consideration of the risk of each activity.**
>
> **ISSUE 6. The Injunction Order is overbroad in its scope because it applies regardless of whether persons are making best-efforts to comply with public health orders.**
>
> **ISSUE 7. The Injunction Order is also grossly disproportionate insofar as it applies to online activities that have no public health risk and outdoor activities where the public health risk is low.**

277. With respect to issues 5, 6, and 7 the Attorney General submits that these grounds engage section 7 *Charter* rights, namely liberty.

Section 7

(v) Section 7 of the Charter

278. There are two stages to an analysis under s. 7. First, the applicant must establish that the impugned governmental act imposes limits on a "life", "liberty" or "security of the person" interest, such that s. 7 is "engaged". If the first step is met, the applicant must then establish that this

"deprivation" is contrary to the "principles of fundamental justice": Canada (Attorney General) v. Bedford, 2013 SCC 72 at para. 57.

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

280. The Attorney general concedes that an individual's liberty interest is affected by the Injunction Order but that it is saved by s. 1. The limitations contained in the Injunction Order meet the objective of stopping COVID-19 spread, it is proportional in that the least intrusive measures have been employed to meet the objective – some social gatherings are permitted but others that pose great risk of COVID-19 transmission are not (i.e. interacting with people outside of your household or individuals of consistent contact), the gathering limits are rationally connected to the purpose of stopping COVID-19 spread, and the benefits of prohibiting illegal public gatherings and the activities that cause illegal gatherings to occur, curbing the spread of COVID-19, outweigh the right to gather in large numbers in close contact, or engage in activities that cause people to gather in large numbers to occur – large numbers being those numbers that exceed the gathering limits set out in the Public Health Order.

ISSUE 5: The Injunction Order is arbitrary because the definition of "Illegal Public Gathering" permits some outdoor activities and prohibits other outdoor activities without consideration of the risk of each activity.

281. With respect to issue number five (5), the Attorney General submits that the Injunction Order is not arbitrary.

282. The revised Public Health Order, dated May 13, 2021, includes restrictions on gatherings, Persons living in the same household could gather together outdoors or indoors but social gathering exceeding the following limits were not permitted.

> 13.2 Notwithstanding sections 13 and section 13.1:
>
> (a) persons living in the same household may gather together, whether indoors or outdoors, up to the maximum of the number of immediate family members residing in the same the household, and are not required to practice physical distancing and masking;

> (b) where the number of persons living in the same household is 2 persons or less, they may gather together indoors with up to a maximum of 2 additional persons, who shall be 2 consistent persons, and they are not required to practice physical distancing and masking; and

283. The CCLA has not presented any evidence to contradict, or that refutes, the public health decision made by Dr. Strang to implement the above noted restrictions into the Public Health Order (as of May 13, 2021) and in the Injunction Order by reference. Dr. Strang determined that the above noted restrictions curb the spread of COVID-19. The court is not in the position to second guess or to question Dr. Strang's decision or the Public Health Order. COVID-19 is a virus that must be responded to based on the medical evidence. Close contact increases the risk of COVID-19 spread. It is logical and a matter of common sense that if you maintain only contact with a small group of people and if those close contacts remain covid free the risk of transmission or spread of the virus is reduced. Common sense applied in this case renders the gathering restrictions not arbitrary but clearly rationale and reasonable.

284. The Attorney General reiterates that the Injunction Order cannot be challenged as arbitrary when it is a valid court order that furthers a valid statutory scheme pertaining to public health and the Public Health Order has not be found to be unconstitutional. This ground is unsustainable on that basis along.

ISSUE 6: The Injunction Order is overbroad because it applies regardless of whether persons are making best-efforts to comply with public health orders.

ISSUE 7: The Injunction Order is also grossly disproportionate insofar as it applies to online activities that have no public health risk and outdoor activities where the public health risk is low;

285. With respect to issue number six (6), again the Attorney General reiterates that paragraph 3 (a) (b) and (c) of the Injunction Order incorporates the Public Health Order's provisions in s. 13.5 and 13.6 (effective May 13, 2021). The Injunction is a valid court order in furtherance of a valid statutory scheme. The Public Health Order is not challenged in this proceeding.

286. Moreover, there is a public health risk in engaging in activities that cause illegal public gatherings to occur. The evidence of Hayley Crichton evidenced the fact that social media and online resources were used to promote illegal public gatherings and in fact caused illegal public gatherings to occur. Anyone in the Province who engages in such activity puts all Nova Scotians at risk of contracting COVID-19.

287. The organizing of in person illegal public gatherings, requesting, inciting or inviting others to attend illegal public gatherings; promoting an illegal public gathering via social media or by other means is inextricably linked to illegal public gatherings. An analogy may be drawn to our neighbours south of the border. Former U.S. President Donald Trump did not attend the Capital insurrection on January 6, 2021 in Washington D.C. but may very well have been the catalyst for its occurrence.

288. Finally, the Attorney General submits that there is no evidence from the CCLA to refute Dr. Strang's Public Health Order and the restrictions regarding risk to public health. Deference should be afforded to Dr. Strang as the CMOH for the province in charge of the protection of public health in this Province. We are in a global pandemic and the majority of Nova Scotians are doing their part. Only a small few want to put others at risk by engaging in reckless activity of socially gathering in large numbers endangering the public health. Now is not the time to seek to overthrow measures and methods that are proven to stop the spread of COVID-19 under the guise of "rights advocacy". Public health is paramount in the context of fighting COVID-19.

Overbroad and Vagueness

289. With respect to issue number seven (7), the Supreme Court of Canada in *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123 wrote the following with respect to vagueness and overbreadth at para. 37 to 42

> 37 Before embarking on a review of the Canadian experience with the "void for vagueness" doctrine, I pause to note that the American jurisprudence distinguishes between vagueness and overbreadth. As Professor Tribe explains at p. 1033, although there is a parallel between the two concepts, "Vagueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision ..." A law that is overly broad sweeps within its ambit activities that are beyond the allowable area of state control, and in fact burdens conduct that is constitutionally protected. The proper approach to adopt in understanding the relationship between vagueness and overbreadth has been stated by Marshall J., speaking for the United States Supreme Court in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 at 494-95, 71 L. Ed. 2d 362, 87 S. Ct. 408 (1982):
>
> > In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.
> >
> > The relationship between vagueness and overbreadth in Canadian law has been expressly addressed in *R. v. Zundel* (1987), 58 O.R. (2d) 129, 56 C.R. (3d) 1, 31 C.C.C. (3d) 97, 35 D.L.R. (4th) 338, 29 C.R.R. 349, 18 O.A.C. 161 (C.A.), in a decision rendered "By the Court", at pp. 125-26:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad. Vagueness or overbreadth, for the purpose of determining the permissibly regulated area of conduct, and whether freedom of expression under s. 2(*b*) of the Charter has been breached, may be different from vagueness or overbreadth for the purpose of applying the criteria in *Oakes* as to the application of s. 1 of the Charter.
>
> Further, the position in *Hoffman Estates* was adopted and followed by the Ontario Court of Appeal in *R. v. Morgentaler* (1985), 52 O.R. (2d) 353 at 387-88, 48 C.R. (3d) 1, 22 C.C.C. (3d) 353, 22 D.L.R. (4th) 641, 17 C.R.R. 223, 11 O.A.C. 81, reversed [1988] 1 S.C.R. 30, 63 O.R. (2d) 281, 62 C.R. (3d) 1, 37 C.C.C. (3d) 449, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 26 O.A.C. 1, 82 N.R. 1.

38 It would seem to me that since the advent of the *Charter* the doctrine of vagueness or overbreadth has been the source of attack on laws on two grounds. First, a law that does not give fair notice to a person of the conduct that is contemplated as criminal is subject to a s. 7 challenge to the extent that such a law may deprive a person of liberty and security of the person in a manner that does not accord with the principles of fundamental justice. **Clearly, it seems to me that, if a person is placed at risk of being deprived of his liberty when he has not been given fair notice that his conduct falls within the scope of the offence as defined by Parliament, then surely this would offend the principles of fundamental justice.** Second, where a separate *Charter* right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the Charter. In this regard I quote from the decision of Huges sen J. of the Federal Court of Appeal in *Luscher v. Can. (Dep. Min., Revenue Can., Customs & Excise)*, [1985] 1 F.C. 85 at 89-90, 45 C.R. (3d) 81, [1985] 1 C.T.C. 246, 9 C.E.R. 229, 17 D.L.R. (4th) 503, 15 C.R.R. 167, 57 N.R. 386:

> **In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is.** A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. **If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited.** Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability to the legal consequences.
>
> See also *Re Information Retailers Assn. of Metro. Toronto Inc. and Metro. Toronto (Mun.)* (1985), 52 O.R. (2d) 449, 32 M.P.L.R. 49, 22 D.L.R. (4th) 161, 10 O.A.C. 140 (C.A.), and *R. v. Robson*, 45 C.R. (3d) 68, [1988] 6 W.W.R. 519, 28 B.C.L.R. (2d) 8, 31 M.V.R. 220, 19 C.C.C. (3d) 137, 19 D.L.R. (4th) 112, 15 C.R.R. 236 (C.A.).

39 As I understand it, this appeal was argued on the basis that the impugned sections of the *Criminal Code* violate s. 7 of the Charter because they subject an individual to a deprivation of liberty and security of the person in the form of potential imprisonment

> and are allegedly impermissibly vague. Therefore I will proceed with my analysis on that basis. As I have stated above, in my view a law that is impermissibly vague and that has as a potential sanction the deprivation of liberty or security of the person offends s. 7 of the *Charter*. There is no dispute that the impugned sections have the potential to deprive one of liberty and security of the person upon conviction. What remains to be determined is whether the sections are impermissibly vague and thereby offend the principles of fundamental justice.
>
> 40 I begin by noting that the vagueness doctrine does not require that a law be absolutely certain; no law can meet that standard. I point to the introductory comments of the Law Reform Commission of Canada in respect of its draft Code (report 31, Recodifying Criminal Law (1987), at p. 2):
>
> > It [the draft Code] is drafted in a straightforward manner, minimizing the use of technical terms and avoiding complex sentence structure and excessive detail. It speaks, as much as possible, in terms of general principles instead of needless specifics and *ad hoc* enumerations.
> >
> > In addition, the role of the courts in giving meaning to legislative terms should not be overlooked when discussing the issue of vagueness. The Ontario Court of Appeal in *R. v. Morgentaler*, supra, said the following at p. 388 [O.R.]:
> >
> > In this case, however, from a reading of s. 251 with its exception, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear.
> >
> > Also, as the Ontario Court of Appeal has held in *R. v. LeBeau* (1988), 62 C.R. (3d) 157, 41 C.C.C. (3d) 163 at 173, *(*sub nom. *R. v. LeBeau; R. v. Lofthouse)* 25 O.A.C. 1, "the void for vagueness doctrine is not to be applied to the bare words of the statutory provision but, rather, to the provision as interpreted and applied in judicial decisions".
>
> 41 The fact that a particular legislative term is open to varying interpretations by the courts is not fatal. As Beetz J. observed in *R. v. Morgentaler* at p. 107 [S.C.R.]: "Flexibility and vagueness are not synonymous." Therefore the question at hand is whether the impugned sections of the Criminal Code can be or have been given sensible meanings by the courts. In other words, is the statute so pervasively vague that it permits a "standardless sweep", allowing law enforcement officials to pursue their personal predilections?: see *Smith v. Goguen*, 415 U.S. 566 at 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974), and *Kolender v. Lawson*, 461 U.S. 352 at 357-58, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)

290. The Attorney General submits that the Injunction Order is not overbroad or vague. The Public Health Order incorporated into the Injunction Order by reference clearly delineates what is an Illegal Public Gathering and what is not. It is not ambiguous, or indescribable that a person cannot hold a party with 30 people or carry out a protest in the streets of Halifax with 200 people at this moment in time while COVID-19 is still present in our communities without social distance or masking. Nor is the Injunction Order vague or overbroad such that if you are not someone who attends an illegal public gathering or in activity who's purpose is to cause an illegal public

gathering to occur you will not be subject to the Injunction Order or Public Health Order. If you are not in breach of the Public Health Order you will not be in breach of the Injunction Order. It is not vague or overbroad that gathering in numbers that exceed the gathering limits is not permitted under the Injunction Order and Public Health Order and meets the objective of protecting public health, which was proven in evidence by Dr. Strang.

291. Conversely, the Injunction Order is not vague or overbroad if the words in their everyday usage in paragraph 3 (a) (b) and (c), are read together with the definition of illegal public gatherings. The Injunction Order sets out that if you attend an illegal public gathering or if you organize an in person illegal public gathering, including requesting, inciting or inviting others to attend an illegal public gathering and that activity causes an illegal public gathering to occur you will be subject to the Injunction Order. Willful blindness is not a permissible defence regarding one's actions that objectively can be inferred to materially contribute to illegal public gatherings occurring within the Province in contravention of the Injunction Order.

292. The activity online or through other methods of inciting, organizing, requesting, and attending illegal public gatherings are causally linked to illegal public gatherings. The activity noted in paragraphs 3 (a) (b) and (c) of the Injunction Order was proven to cause people to attend illegal public gatherings evidenced by Hayley Crichton. It was the online presence of Freedom Nova Scotia that was used to tell people where and when to attend illegal public gatherings that breached the Public Health Order. There is a close nexus between the activity and the harm meant to be addressed by the Injunction Order (spread of Covid-19).

293. The evidence pertaining to the social media group Freedom Nova Scotia evidenced the following activities:

> Historical public gatherings organized by Freedom Nova Scotia and others within the Province have not complied with the requirements of COVID-19 Emergency Health Orders issued under section 32 of the *Health Protection Act*, including but not limited to:
>
> a. masking requirements;
>
> b. attendance limits applicable to indoor or outdoor gatherings; and
>
> c. minimum physical distancing requirements.

294. The above noted activities, which was evidenced through Dr. Strang's affidavit, increases the risk of COVID-19 transmission and spread within the Province.

295. If it is found that the Injunction Order, in purpose or effect, infringes s. 7 of the *Charter* the Attorney General submits that the infringement can be justified under s. 1. Promoting “breaking the law” and threatening further COVID-19 spread, creating an apprehension of harm and actual harm to Nova Scotians, is not a constitutionally protected right.

296. As stated above the stop of covid spread is a pressing and substantial objective. The Injunction Order considers all rights and the rights of all Nova Scotians not to be exposed to an increased risk of COVID-19 transmission or another lockdown which is what illegal public gatherings cause.

Proportional

297. Setting gathering limits and a prohibition on illegal public gatherings and the activities that cause illegal public gatherings to occur is minimally impairing. Not all gatherings are prohibited just those that it has been deemed based on epidemiology evidence to increase the spread of COVID-19.

298. The objective of the Injunction Order is rationally connected to the public health measures.

299. The restrictions and prohibitions in the Injunction Order are minimally impairing in that the means chosen do not impair the right more than what is reasonably necessary to meet the objective. Not all gatherings or activities, online or otherwise, are prohibited just those that present an increased risk of COVID-19 spread.

300. Again, the benefits of the Injunction Order outweigh the harm of the alleged infringement.

301. Although. not on the same level of hate speech having regard to the harm principle, prohibiting individuals from engaging in activities that materially contribute to the occurrence of illegal public gatherings and prohibiting individuals from attending illegal gatherings is demonstrably justified and saved under s. 1 of the *Charter*.

Law Enforcement Powers under the Injunction

302. The Injunction Order permits law enforcement to enforce the Injunction Order in the same manner or in like effect as the Public Health Order. The only difference is the powers given to law enforcement to enforce contempt proceedings if an individual is found in breach of the Injunction Order. The rationale submitted by the Province for the Injunction Order and the potential for initiating contempt proceedings has already been set out above.

303. To date, based on the evidence of Hayley Crichton, law enforcement have engaged enforcement measures pertaining to illegal public gatherings by citing violators for breaching the Public Health Order and issuing Summary Offence Ticket.

304. The purpose and intent of the injunction was aimed at prohibiting any person from increasing the risk of COVID-19 transmission by attending an illegal public gathering or causing illegal public gatherings to occur within the Province. It was the intent of the Province to subject anyone who contravenes the Public Health Order to also be liable under the Injunction Order given that anti mask rally's persisted with increasing frequency despite enforcement activities being carried out under the Public Health Order.[24]

If the Injunction Order CANNOT BE JUSTIFIED BY SECTION 1, SHOULD the Injunction Order be varied so that it is *Charter* compliant?

305. The Attorney General submits that any infringements are justified under section 1. However, in the alternative, the Attorney General requests that any declaration of invalidity be suspended to permit the Attorney General to submit variations to the Injunction Order in a manner that does not infringe *Charter* rights or if there is any infringement the variation is saved by s. 1. Given the importance and effectiveness of the Injunction Order at curtailing mass illegal public gatherings it is in the public interest to permit the Attorney General's request to submit a varied Injunction Order – if necessary.

Duration of the Injunction

306. Due to the unpredictable nature of COVID-19 spread it was not possible to provide an end date so long as the third wave and high daily case counts of COVID-19 persisted. As the Province moved out of the third wave and considered the most recent epidemiology data and risk mitigation strategies the necessity of the injunction was re-evaluated by Dr. Strang, the Premier and provincial health officials. On June 22, 2021, the Province moved for an Order discharging the injunction because the Premier in consultation with Dr. Strang determined that the injunction was no longer necessary.

307. All Nova Scotians are doing their part to protect their neighbour and family. The Injunction ensured compliance with the public health measures which are not indefinite. With increased vaccination rates and transmissibility declining public health measures will continue to evolve. However, the harm sought by the Injunction to prevent and reduce is still present and government

[24] Affidavit of Hayley Crtichton, sworn May 12, 2021.

has utilized its exceptional powers to protect the public out of necessity not out of an intent to suppress *Charter* rights. Again, the Attorney General reiterates a person's right to protest or any other right is not infringed beyond what is reasonably necessary which can be justified under s. 1 given the state of emergency and the COVID-19 pandemic. Two neighbours can talk by standing six feet apart and wearing masks. The only right that may be infringed and saved by section 1 is the right to protest in unlimited numbers, unmasked, or to voice opposition to government action in a manner that increases the risk of COVID-19 transmission and spread. The CCLA argues no evidence exists to delineate activities that pose more risk than others but the CCLA has not provided any evidence to support its speculative opinions and conjecture.

308. In the context of global pandemic a reasonable limit on public gatherings, protest, or assembly has been implemented under the Public Health Order reinforced by the Injunction Order. The CCLA has not established on evidence that the Province's mitigation strategy of COVID-19 spread is overbroad, vague, or not in accordance with the principles of fundamental justice.

Application in Chambers vs. Application in Court

309. Rules 5.01, 75.02 , and 2.02 (1) set out the following:

> **Scope of Rule 5**
>
> **5.01** **(1)** As provided in these Rules, an application is an original proceeding and a motion is an interlocutory step in a proceeding.
>
> **(2)** This Rule provides for an *ex parte* application, an application in chambers, and an application in court.
>
> **(3)** The application in chambers is heard in a short time, and it is scheduled at a time when chambers is regularly held or at an appointed time.
>
> **(4)** The application in court is for longer hearings, and it is available, in appropriate circumstances, as a flexible and speedy alternative to an action.
>
> **(5)** A person may make an application or respond to an application, in accordance with this Rule, except an application in a family proceeding is made and responded to as provided in Part 13 - Family Proceedings.

> **Motion for injunction**

75.02	**(1)**	A party who claims an injunction as a final remedy may make a motion for the injunction in either of the following circumstances:
		(a) the party is entitled to judgment under Rule 8 - Default Judgment, or Rule 13 - Summary Judgment;
		(b) a judge determines, after the trial of the action or hearing of the application in which the claim is made, that an injunction should be issued.
	(2)	A party who obtains a judgment and finds that an injunction is required to give effect to the judgment may make a motion for the injunction.

Irregularity or mistake

2.02	**(1)**	A failure to comply with these Rules is an irregularity and does not invalidate a proceeding or a step, document, or order in a proceeding.

310. As counsel for the Attorney General, I decided to bring the application for the injunction in chambers, pursuant to Rule 5.01. The Province's *ex parte* application was heard in less than one-hour and was an original proceeding wherein the Province requested a permanent *quia timet* injunction. The CCLA raises procedural issues that are immaterial. The Supreme Court found that the Province established the evidentiary foundation for the injunction and granted the injunction in accordance with the law.

Conclusion

311. The task of wrestling this disease into submission is no easy feat and is one that requires a dynamic and multipronged approach. The Injunction Order was part of that approach and the Injunction Order played a pivotal role to curb the spread of COVID-19.

312. If the court finds that there is an infringement of s. 2 (b) the Injunction Order it is saved by s. 1, considering the pressing and substantial objective of stopping the spread of COVID-19, the "harm principles" similar to "hate speech" incorporated into the *Charter,* and how being able to express anti-lockdown rhetoric, organize, request, incite, promote, invite, or attend illegal public gatherings, causing actual and threatened harm (spread of a deadly disease) to vulnerable

groups and Nova Scotians, is contrary to the values s. 2(b) is meant to be protect. Moreover, any infringement on liberty or right to assemble is also saved under s. 1. The COVID-19 restrictions that may affect liberty under s. 7 and s. 2 (c) “right to assembly” is evidenced by Dr. Strang to save lives by reducing COVID-19 transmission and spread, which is a pressing and substantial objective and proportional. The Province used the least intrusive measures (i.e. some limited gathering permitted) and all Nova Scotians were, at the time the injunction was in effect, subject to the same Public Health Order and Injunction Order *mutatis mutandis*. The gathering restrictions do not discriminate on the basis of any enumerated ground or analogous ground under the *Charter*.

313. In summary, the Supreme Court had jurisdiction to grant the *quia timet* injunction on evidence. The Supreme Court did not issue an illegal injunction.

PART IV. RELIEF SOUGHT

314. The Attorney General requests that the motion be dismissed with costs.

315. All of which is respectfully submitted.

Duane Eddy, counsel for the Attorney General of Nova Scotia.

Halifax, Nova Scotia
June 25, 2021