

SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Attorney General) v. Freedom Nova Scotia*,
2021 NSSC 170

Date: 20210514

Docket: Hfx. No. 506040

Registry: Halifax

Between:

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

Applicant

v.

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

Respondents

DECISION ON <i>EX PARTE</i> INJUNCTION

Judge: The Honourable Justice Scott C. Norton

Heard: May 14, 2021, in Halifax, Nova Scotia

Written Decision: May 14, 2021

Counsel: Duane Eddy, for the Applicant

By the Court:

Introduction

[1] An anti-mask rally organized by the Respondents, “Freedom Nova Scotia”, is scheduled to occur at Citadel Hill, in Halifax, on Saturday May 15, 2021 at 1:00 p.m. A Worldwide Freedom Rally is also being scheduled for Barrington, Nova Scotia, on May 15, 2021 at 6:00 p.m. at the Barrington baseball field.

[2] Historical gatherings organized by Freedom Nova Scotia and others have failed to comply with COVID-19 Emergency Health Orders made under section 32 of the Nova Scotia *Health Protection Act*, SNS, 2004, c. 4, s. 1. Consequently, the Attorney General of Nova Scotia (hereinafter, “Province”) is seeking a *quia timet* injunction on evidence to prohibit the rally from taking place, among other relief. The injunction is said to be required to prevent or reduce the community spread of COVID-19 within the Province of Nova Scotia and to ensure compliance with current Health Orders made under the *Health Protection Act*.

[3] The *quia timet* or pre-emptive injunction sought would: (1) order compliance with the provisions of the *Health Protection Act*; (2) enjoin the Respondents and any other person acting under their instructions or in concert with them, from organizing in-person public gatherings; and (3) authorize law enforcement to engage in enforcement measures to ensure compliance with the *Health Protection Act* and any order issued to date under that Act.

Procedure

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

[5] On May 13, 2021 the Applicants filed the Notice of *Ex Parte* Application pursuant to *Civil Procedure Rule* 5.02. Accompanying the Notice, and forming the evidentiary basis for the Application, were Affidavits of Dr. Robert Strang, Nova Scotia’s Chief Medical Officer of Health, sworn May 12, 2021; and, Hayley Crichton, Director of Public Safety and Investigations, Department of Justice for the Province of Nova Scotia, sworn May 12, 2021. On May 14, 2021 the

Applicants filed “Restated Order #2 of the Chief Medical Officer of Health Under Section 32 of the *Health Protection Act* 2004, c.4, s.1”, dated May 13, 2021. The Applicants also filed a Pre- Hearing Memorandum. I reviewed all of these materials in advance of the hearing.

[6] Today, May 14, 2021 I heard oral submissions from the Applicants virtually.

Facts

[7] Based on the qualifications cited in his affidavit, I qualify Dr. Robert Strang as an expert witness capable of giving expert opinion evidence in the field of Public Health and Preventative Medicine, the assessment and interpretation of evidence in public health matters and in particular those related to SARS-CoV-2 and COVID-19. His affidavit will be accepted as his written report.

[8] Based on the affidavit evidence of Hayley Crichton, I make the following findings of fact:

1. Worldwide Rally for Freedom and Democracy is a global movement and organizer that has been developed with the explicit objective of spreading anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.
2. In the Nova Scotia context, mask requirements and adherence to restrictions are set out in the Public Health Orders.
3. The Restated Public Health Order issued under section 32 of the *Health Protection Act*, SNS, 2004, c. 4, s. 1, by Dr. Robert Strang, was last updated on May 8, 2021 (“Public Health Order”). A true copy of the Public Health Order is marked Exhibit “A” of Hayley Crichton’s affidavit.
4. On April 23, 2021, Halifax Regional Police attended a large gathering at a private residence. 22 fines were issued as a result of this gathering as it was in contravention of the Public Health Order.
5. On April 25, 2021, RCMP attended a residence in Wolfville, Nova Scotia, at which 30 people were gathered in contravention of the Public Health Order for a party. 4 fines were issued as a result of this gathering.

6. On May 3, 2021, New Glasgow Police attended a private residence in Trenton, Nova Scotia. Eight people were gathered in contravention of the Public Health Order and were subsequently ticketed.
7. Worldwide Rally for Freedom and Democracy has planned a global event entitled, “The Worldwide Demonstration May 15, 2021”. The associated open Facebook event page has a total of 31,000 followers.
8. In Nova Scotia, participation in the Worldwide Rally for Freedom and Democracy global events are organized by the local Facebook group “Freedom Nova Scotia”. The Freedom Nova Scotia Facebook open group has a total of 896 followers and the related Instagram account has 100 followers.
9. On March 20, 2021, Freedom Nova Scotia organized an open event on Facebook to rally against mask wearing and restrictions. Attendees gathered in a large group of approximately 100 people, the attendees were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order. The event drew media attention.
10. A picture of the event derived from CTV News is marked Exhibit “B” of Hayley Crichton’s affidavit. The picture shows a large gathering of people who can be observed to not be wearing masks, nor maintaining a distance of six feet from one another.
11. Freedom Nova Scotia has also organized rallies in the greater Halifax area on March 28, 2021 (Spring Garden Road), April 1, 2021 (Alderney Landing) and May 1, 2021 (Halifax). The rallies were in contravention of the Public Health Order.

Anti-Mask Rally

12. Freedom Nova Scotia has scheduled an event for Saturday May 15, 2021, at 1:00pm entitled, “Worldwide Rally for Freedom – Halifax” in support of anti-mask rhetoric. The event is open and there are 261 comments on the event page, with 88 people listed as “interested” and 66 people listed as “going” as of May 12, 2021.
13. Historical public gatherings organized by Freedom Nova Scotia have not complied with the requirements of COVID-19 Emergency Health

Orders issued under section 32 of the *Health Protection Act*, including but not limited to:

- a. masking requirements;
 - b. attendance limits applicable to indoor or outdoor gatherings; and
 - c. minimum physical distancing requirements.
14. During the week of May 3rd, 2021, Halifax Regional Police Inspector David Boon was contacted by Freedom Nova Scotia event participant Amy Brown via telephone. Ms. Brown requested protection for the rally participants who will attend Citadel Hill to protest the COVID-19 lockdown and restrictions.
 15. Halifax Regional Police advised Ms. Brown that any such gathering would contravene the Public Health Order, and potentially the Travel Directive issued under the *Emergency Management Act*, SNS, 1990, c. 8, s. 1; 2005, c. 48, s. 1. (should people travel in from outside HRM).
 16. The Halifax Regional Police provided the Province with information pertaining to Freedom Nova Scotia, Worldwide Rally for Freedom and Democracy, inclusive of the related social media posts advertising the event scheduled for Saturday May 15, 2021, at 1:00 pm entitled, “Worldwide Rally for Freedom – Halifax”.
 17. The information provided by the Halifax Regional Police to the Province references multiple rallies hosted by Freedom Nova Scotia. The information provided by the Halifax Regional Police contains photographs depicting attendees gathering without masks and in large groups in direct contravention of the Public Health Order. This is supplemented by screenshots of the open group in which commenters have requested Halifax Regional Police and Government intervention.
 18. A Worldwide Freedom Rally is also being scheduled for Barrington, Nova Scotia, on May 15, 2021 at 6:00 pm at the Barrington baseball field. A Worldwide Freedom Rally is also scheduled for Dartmouth, Nova Scotia (Alderney Landing) on May 15, 2021 at 1:00 pm.
 19. Similar anti-mask, anti-vaccine, anti-restriction protests have taken place across Nova Scotia that have included gatherings of people who

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

20. On April 24, 2021, an event was planned at the New Brunswick and Nova Scotia border to protest COVID-19 restrictions, including border closures and mask requirements, by disrupting traffic on Hwy 104. The event organizer Tasha Everett posted the following to her open Facebook page, “12PM tomorrow! Be there! Its time to make more noise than ever before! Truckers have our backs and are planning to block the highways with us. United we stand, Divided we fall. A screenshot of this post is marked Exhibit “G” of Hayley Crichton’s affidavit.
21. On May 9, 2021, Kings District RCMP were called to Weston Christian Fellowship Church in Weston, Nova Scotia. 26 people were gathered at the church in contravention of the Public Health Order. 26 fines were laid against individuals and a larger fine was laid against the organizer.
22. On May 12, 2021, the Province received the following information from the Royal Canadian Mounted Police (RCMP) regarding a rally held on May 9, 2021:

PURPOSE:

To update the Attorney General of a protest, in relation to the continued border restrictions between Nova Scotia and New Brunswick that occurred on May 9, 2021.

BACKGROUND:

A group on Facebook, identified as “Support to OPEN The NS/NB Border”, organized a protest for May 9, 2021 at 12:00 pm, at the NS Tourism Centre along Hwy 104, immediately as you enter Nova Scotia.

Organizers indicated that this was strictly about the border closure and the impact it is having on everyday lives.

CURRENT STATUS:

An assembly took place as scheduled on May 9, at 12:00 pm.

Approximately 20 protesters assembled along the Nova Scotia side of the Provincial border, Highway 104 Eastbound lane.

At approximately 12:30 pm, a passenger from a vehicle involved in the protest was seen throwing traffic cones into the ditch which had been positioned to block off exit 1.

The interaction between the RCMP and the vehicle passenger was met with hostility from the occupants of the vehicle.

Shortly after, a hostile crowd of 15-20 people formed around the police officer.

Protesters were recording police and expressed negative comments.

Protesters were not wearing masks or social distancing.

All attendees left by 2:30 pm.

Commentary from attendees suggests protests will be a weekly occurrence.

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

[9] Based on the evidence of Dr. Strang, I make the following findings of fact:

COVID-19

1. COVID-19 is a new disease which can cause adverse health outcomes, including death in individuals with pre-existing medical conditions and in individuals over 65 years of age. People not in a high-risk group can also experience adverse health outcomes after contacting the SARS-CoV-2 virus which causes COVID-19.
2. In addition, SARS-CoV-2 is a new strain of coronavirus for which there is no underlying immunity and therefore wide spread of the virus can create a significant burden of disease and negative impacts on health systems, communities and economies.
3. There are at present no drug therapies to cure COVID-19 nor its various strains. Accordingly, the only available resources to prevent or reduce the spread of the virus, aside from vaccination, involve the use of public health requirements, including physical distancing measures, limiting the size of gatherings and mandatory mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.

4. Nova Scotia public health requires that people maintain a distance of two meters from one another. This physical distance requirement is based on current knowledge regarding the virus' spreading mechanisms.
5. If left unchecked, SARS-Cov-2 can spread exponentially, for this reason, it is critical that public health requirements are followed in order to minimize the spread of the virus, reduce long-term consequences, and reduce the number of hospitalizations and deaths. It is therefore imperative to reduce the number of contacts an individual has with others to reduce the risk of spread of the virus.
6. Due to the virus' transmissibility patterns, restrictions on how people interact with others outside of their households are necessary to prevent the transmission of SARS-CoV-2 and its variants, which in turn can effectively reduce cases of COVID-19. This includes mandating the use of mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.
7. The current Public Health Order outlines measures directed toward preventing or reducing the transmission of COVID-19 among the population of Nova Scotia.
8. Transmission of SARS-Co V-2 can occur even when infected people are asymptomatic. SARS-CoV-2 is spread primarily from close person to person contact. The virus may be transmitted by respiratory droplets or droplet nuclei (aerosols) produced when an infected person breathes, coughs, sneezes, talks, or sings. The virus may also be transmitted by touching a surface or object contaminated with the virus and then touching the eyes, nose, or mouth.
9. Risk of SARS-Co V-2 transmission depends on many variables, such as location (indoors versus outdoors), quality of ventilation, and activity. The Public Health Order requires that people maintain a distance of two meters (six feet) from one another. This physical distance requirement is based on current knowledge of droplet spread which is the main way the virus spreads between people.
10. These requirements are designed to be implemented together as no one measure alone will prevent all SARS-CoV-2 person-to-person transmission.

11. The time from infection with SARS-CoV-2 until the development of observable symptoms is called the incubation period. The incubation period can last 14 days or very rarely longer. Unfortunately, infected people can transmit SARS-CoV-2 to others beginning about 48 hours before symptoms are present (pre-symptomatic transmission) until at least 10 days after, longer if symptoms continue past 10 days.
12. Not all people infected with SARS-CoV-2 develop symptoms but, even without symptoms, an infected person can transmit the virus to others. This is called asymptomatic transmission.
13. SARS-CoV-2 can be spread through direct or indirect (surfaces) contact with an infected person. Community spread refers to the spreading of a disease from person to person in the community. Community spread can occur when the source is known or unknown. The latter form of spread poses a serious threat to the community. The effectiveness of contact tracing is greatly reduced in cases of unknown community spread.
14. COVID-19 testing is available in Nova Scotia for both asymptomatic and symptomatic people, people in outbreak settings, and people identified as a close contact of a case. A COVID-19 test result only reflects a snapshot of a moment in time. A negative result does not necessarily mean that the person is not infected. A person infected with SARS- CoV-2 could have 13 days of negative results and a positive test on day 14.

Nova Scotia's Current COVID-19 Situation

The Spread of COVID-19

15. Since March 1, 2020, there have been a total of 4152 confirmed cases of COVID-19 and 71 deaths reported.
16. During Wave 3 (April 1, 2021 – present), there have been 2410 confirmed cases and 5 deaths have been reported. The cases reported in Wave 3 constitute 58% of the total cases reported in Nova Scotia since March 1, 2020. In addition, there have been 103 hospitalizations (non-ICU and ICU) compared to 12 during Wave 2, 54% of hospitalizations occurred in individuals <60 years of age and 13.7% of contacts became cases, compared to 7.6% in Wave 2 suggesting that the virus is more transmissible.

17. SARS-CoV-2 can spread exponentially if left unchecked. It is critical that Nova Scotians follow public health requirements and protocols to minimize the spread of the virus and its variants, reduce the long-term consequences, and reduce the number of hospitalizations and deaths.
18. Left unchecked SARS-CoV-2 virus will spread within a population resulting in an exponential growth in the number of people infected. Public health measures put in place in December 2020 brought cases down. When public health measures were eased in March 2021, cases plateaued but began to rise again in late April. Even with increased public health requirements in place, the number of recognized SARS-CoV-2 infections (COVID-19 cases) has continued to grow dramatically in the past 3 weeks.

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

19. When this capacity is exceeded, non-COVID-19 patients will experience cancelled treatments for non-urgent conditions. The cancellation of these non-urgent, but necessary, surgeries can have health impacts, such as ongoing pain and mobility issues.
20. If Nova Scotia's COVID-19 hospitalization capacity is significantly exceeded, it could result in the need to ration acute care resources. This may mean that some patients, who are in need of critical care supports, may be unable to receive those supports.
21. In Nova Scotia, as of May 11, 2021, there were 1591 active cases of people with COVID-19, 64 people in the hospital due to COVID-19. There were 10 patients in the ICU, 54 patients in non-ICU beds due to COVID-19 and 71 people have died from COVID-19 or associated complications since the first Public Health Order was issued on March 23, 2020. This high level of hospitalization will result in continued cancellation of non-urgent surgical treatments. If the requirements for in hospital care continue to escalate, a need to triage access to care supports, especially supports in intensive care, may be required. This could require doctors and nurses to make decisions between which patients live and which die.

Nova Scotia's COVID-19 Public Health Measures

22. Nova Scotia has attempted to control the spread of the SARS-CoV-2 virus by implementing a number of public health requirements under the Public Health Order. Restrictions on how people interact with

others outside of their households in public places, whether indoors or outdoors, are necessary to prevent the transmission of SARS-CoV-2 and are effective in reducing cases of COVID-19.

23. Nova Scotia's approach has been to attempt to protect Nova Scotians and control the spread of the virus through the enactment of Public Health restrictions on gathering limits, physical distancing and mandatory masking, no greater than reasonably required, considering the circumstances of the global pandemic and risk mitigation strategies required to respond to this communicable disease and its negative impact on Nova Scotians' lives. As the number of COVID-19 cases and related hospitalizations, ICU stays, and deaths have increased, public health measures have also evolved.
24. One of the health measures that Nova Scotia has employed to control the spread is to implement mandatory masking. Masks, when worn properly, are a valuable tool in reducing the transmission of SARS-CoV-2. The use of masking can prevent an infected person from transmitting the virus to others and use of masks, especially medical masks, can help protect a healthy individual from infection in public places, whether indoor or outdoor settings. Masking, on its own, is not sufficient to control the spread of COVID-19.
25. In response to the number of COVID-19 cases with no identifiable source, Nova Scotia implemented additional public health measures, aimed at limiting the spread in high-risk settings or in settings with high-risk activities. High risk activities are activities that have more expulsions of air than ordinary activities. With increased expulsions of air, there is an increased risk of respiratory droplets or aerosols. For example, singing, shouting, and activities that result in heavy breathing are higher risk activities. These activities also may occur in higher risk settings, such as in indoor settings or settings where individuals will remain for prolonged periods of time. Reducing time spent indoors with large groups of people and reducing the time spent indoors engaging in high-risk activities can reduce the risk of the spread of COVID-19. Recent evidence also shows that even outdoors, if people are not distanced from each other or masked, transmission can happen from an infectious person to someone else.
26. The available evidence shows that widespread public masking, in addition to other public health measures, such as reducing time spent

indoors with large groups of people (relative to the size of the room and the spacing of people within the room) while engaging in high-risk activities, can contribute to controlling the overall transmission of SARS-CoV-2. In addition, outdoor gatherings must also include measures such as restricted gatherings, and physical distancing and masking in order to prevent COVID-19 transmission.

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

[10] By “RESTATED ORDER #2 OF THE CHIEF MEDICAL OFFICER OF HEALTH UNDER SECTION 32 of the HEALTH PROTECTION ACT 2004, c. 4, s. 1.” dated May 13 2021, an “illegal public gathering” was defined and prohibited as follows:

13.5 For the purpose of section 13.6, an “illegal public gathering” is defined as a gathering that does not comply with the requirements of this Order, including:

- (a) the attendance limits applicable to gatherings, whether indoors or outdoors;
- (b) physical distancing requirements; and
- (c) masking requirements.

13.6 For greater certainty, persons are prohibited from:

- (a) organizing an in-person gathering, including requesting, inciting, or inviting others to attend an illegal public gathering;¹⁰
- (b) promoting an illegal public gathering via social media or otherwise; or
- (c) attending an illegal public gathering of any nature, whether indoors or outdoors.

Law

[11] Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240 provides this Court with the authority to order an interlocutory injunction “in all cases in which

it appears to the Supreme Court to be just or convenient that such order should be made”.

[12] The three-part test for an interlocutory injunction is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) is for the applicant to show:

1. a serious question to be tried between the parties;
2. the applicant will suffer irreparable harm if the injunction is not granted; and
3. that the balance of inconvenience lies in favour of the applicant.

[13] The test for an interlocutory injunction has been applied many times by the Supreme Court of Nova Scotia.

[14] However, the injunction being sought in the present case is a *quia timet* injunction. *Quia timet* means, "because he fears or apprehends". While injunctions are generally aimed at preventing harm into the future based on the recent conduct of a defendant, in a *quia timet* injunction the injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at a point in time in the future.

[15] In *526901 BC Ltd. V. Dairy Queen Canada*, 2018 BCSC 1092, Justice Kent summarized the law pertaining to *quia timet* injunctions as follows:

71 For sure, the law permits a *quia timet* injunction to be granted when wrongful acts have not yet occurred but are imminent or have been threatened. To obtain such an injunction, an applicant must establish not only the three elements of the *RJR McDonald* test but also that there is a high degree of probability the alleged harm will in fact occur: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at para. 35; and *XY Inc. v. IND Lifetech Inc.*, 2008 BCSC 1215 (B.C. S.C. [In Chambers]) at para. 70.

[16] In *Robinson v. Canada (Attorney General)*, 2019 FC 876, Justice Gascon expanded on the analysis of the law pertaining to *quia timet* injunctions at paras. 87 to 91:

87 All injunctions are future-looking in the sense that they all intend to prevent or avoid harm rather than compensate for injury already suffered (Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2018, release 23) [Sharpe] at para 1.660). One type of injunction that is frequently considered and issued by the courts is the *quia timet*

("because he or she fears") injunction, where injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at some future point. To a certain extent, and given its timing, the mandatory interlocutory injunction sought by Mr. Robinson is akin to such a *quia timet* injunction.

88 Applications for this type of injunction are not necessarily dismissed by the courts even though they often require the motion judge to assess the propriety of injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. To assess prospective harm for *quia timet* injunctions, the courts have adopted a cautious approach generally requiring two elements: a high probability that the alleged harm will occur; and the presence of harm that is about to occur imminently or in the near future, thus adding a temporal dimension to the feared harm (*Merck & Co. v. Apotex Inc.*, [2000] F.C.J. No. 1033, 2000 CarswellNat 1291 (Fed. C.A.) at para 8; *Doucette v. Canada (Attorney General)*, 2018 FC 697 (F.C.) at para 23; *Gilead Sciences, Inc. v. Teva Canada Ltd.*, 2016 FC 336 (F.C.) [*Gilead*] at paras 5, 10; *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 162 (F.C.) [*Amnesty*] at para 70; see also Sharpe at para 1.690).

89 In the context of interlocutory injunctions, the first element (i.e., the high probability that the harm will occur) has often been expressed by the Court in terms of clear and non-speculative evidence that irreparable harm will ensue if the interlocutory relief is not granted (*Amnesty* at paras 69, 123), thus mirroring the general test for irreparable harm. On the imminence of harm, the case law developed by this Court offers no clear definition or timeline of what is "imminent", but rather suggests that it will depend on the facts of each case. For example, harm distant from as much as 18 months has been found to be imminent (*Gilead* at paras 5-6). In fact, in *Gilead*, the Court reframed the imminence criterion as a factor to be considered in determining the likelihood of future harm (*Gilead* at para 11):

[11] At the same time the requirement of imminence in the temporal sense may be relevant in the determination of the likelihood of a future event. A potential event that is more distant in time may be an event that is less likely to occur.

Furthermore, temporal imminence appears to be a subordinate consideration in a case where the likelihood of future harm appears high: see *Canadian Civil Liberties Assn v Toronto Police Service*, above, at para 88.

90 In other words, the determinative element is the likelihood of harm, not its futurity (*Horii v. R.*, [1992] 1 F.C. 142 (Fed.C.A.) at para 13). The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. On this requirement to prove the imminence of harm, Justice Sharpe (writing extrajudicially) suggests that the temporal imminence of harm may not be the best way to analyze the issue, and that the courts should rather look at

whether the factors relevant in the granting of injunctive reliefs have "crystallized" (Sharpe at para 1.750). According to this approach to the imminence criterion, prematurity only arises in situations where, for example, the nature or the extent of the harm may change between the time of the decision and the moment where the harm would occur. In other words, a *quia timet* injunction should not be granted by the courts unless the situation that will exist when the alleged harm eventually occurs is already crystallized.

91 In light of the foregoing, I am of the view that the test applicable for apprehended harm is whether there is clear, convincing and non-speculative evidence allowing the Court to find or infer that irreparable harm will result if the relief is not granted, using the cautious approach prescribed for *quia timet* injunctions. Stated differently, to meet its burden in an application where the harm is apprehended and more distant, the moving party must establish, on a balance of probabilities, that there is clear, convincing and non-speculative evidence demonstrating that such harm has crystallized, so that any findings or inferences made about the harm can be found to reasonably and logically flow from the evidence.

[Emphasis added]

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

a. the presence of harm that is about to occur imminently

[18] In Nova Scotia, the presence and spread of COVID-19 and its' variants among the public is irrefutable.

[19] The harm is the continued spread of COVID-19 within the Province if the anti-mask rally or other rallies and public gatherings in violation of the Health Orders are permitted to proceed as scheduled on May 15, 2021, or otherwise.

b. high probability that the alleged harm will occur

[20] The Court finds that there is a high probability that the harm will occur because the correlation between social gatherings and the spread of COVID-19 can reasonably be inferred from the evidence of Dr. Robert Strang.

[21] Based on the foregoing, the Court finds that there is clear, convincing and non-speculative evidence allowing the Court to infer that irreparable harm will result if the injunction is not granted. The Province has met the test for a *quia timet* injunction on the evidence.

***Quia Timet* Injunctions and Charter Considerations**

[22] In *Ingram v. Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806, the applicants challenged the validity of public health orders aimed at managing the spread of COVID-19, made by Alberta's Chief Medical Officer of Health (CMOH), on grounds that they offended the *Alberta Bill of Rights (ABR)* and unjustifiably infringed rights protected by the *Canadian Charter of Rights and Freedoms*. The applicants also challenged the validity of certain sections of Alberta's *Public Health Act* on grounds they violated the *ABR*, *Constitution Act, 1867*, and the *Charter*.

[23] In *Ingram*, the applicants argued that restrictions and mandatory mask requirements unjustifiably infringed rights protected by ss. 2 and 7 of the *Charter*.

[24] On the application Ms. Ingram asserted that without the injunction staying the Business Closure Requirement, there would be no possibility for her to recover losses of revenue from the closure of her gym and in turn, the value of her shares in that business.

[25] In *Ingram*, the court found that her evidence fell short of the clear evidence required to establish irreparable harm of that nature. The court went on to find that it was speculation that an interlocutory injunction will necessarily ameliorate business losses, unemployment, or financial stress (para 57). It was not enough at irreparable harm stage for the applicants to simply say that *Charter* rights were being infringed; and to ask the court to presume that if the injunction was not granted, they would suffer harm for which there was no just and reasonable remedy.

Balance of Convenience and Public Authorities

[26] With respect to balance of convenience and public interest considerations I adopt the following analysis from the court in *Ingram*:

64 While it is "... open to all parties in an interlocutory *Charter* proceeding to rely upon considerations of public interest" and to "... tip the scales of convenience in

[their] favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought", the Supreme Court of Canada in *RJR* also observed at paragraph 73 that:

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

65 And at paragraphs 76-78 of *RJR* the Court stated that:

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

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

.....

81 I am bound by Supreme Court of Canada authority to assume that the Restrictions serve the public good; here, that they protect public health. I also have evidence from Dr. Hinshaw explaining how, left unchecked, the virus is anticipated to spread, threatening people's lives and the capacity of the health care system to provide patient care for Albertans who need it, whether as a result of COVID-19 or otherwise.

82 The Applicants ask me to find that there will be no harm because the Respondents have not provided an adequate scientific basis to establish that the Restrictions work.

83 Not only is this inconsistent with their acknowledgment that it is in the public interest to address the transmission of COVID-19, it is not the law that guides the Court on an interlocutory application for injunctive relief.

84 Again, and precisely because these applications are brought on short notice and before the Court has a complete evidentiary record and can undertake the complex *Charter* analysis required, I must assume the Restrictions protect public health. Moreover, Dr. Hinshaw's affidavit sets out the data that leads to her concern for the health and safety of all Albertans if the Restrictions are stayed.

85 Given the risks associated with the spread of the virus that the Respondents are seeking to manage, I am of the view that there is a greater public interest in maintaining the integrity of Order 42 than there is in staying the parts of it that the Applicants ask me to suspend so that they, and other citizens of this Province, are able to gather and celebrate the holidays and to otherwise exercise their religious freedoms.

[Emphasis added]

[27] In order to grant a *quia timet* injunction, the Court must find the following:

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

[28] Having regard to the affidavit of Dr. Robert Strang, the Court finds that the harm that is anticipated if the anti-mask rally is permitted, i.e. the continued spread of COVID-19, is imminent.

[29] In the present case, damages are not an adequate remedy because the harm associated with contracting COVID-19 is death. There are also serious medical and health complications that occur in individuals who contract the virus. The associated impact on the public health care system, communities, and economies is immeasurable.

[30] In the context of interlocutory injunctions, the balance of convenience analysis requires the court to consider which of the parties would suffer greater harm if the injunction was not granted: *Laurent v. Fort McKay First Nation*, 2008 ABQB 84 (Alta. Q.B.), at para 10.

[31] The Court finds that the balance of convenience does not favour permitting the anti-mask rally to proceed on May 15, 2021. The balance of convenience also does not favour permitting similar events to be held within the Province at any

point in the future while the Public Health Order preventing such activity is in place.

[32] There is a greater public interest in maintaining integrity of the current Public Health Order and the restrictions set out within that Order than permitting the rally to be carried out as planned.

Conclusion

[33] The intensive care units at our hospitals are filling with COVID patients. The health care workers in this Province have been working tirelessly for more than 14 months to manage this crisis. Schools have had to close. Businesses have had to close. Many Nova Scotians are unemployed as a result. Yet, Nova Scotia has done better than many other provinces because its public health officials have taken an aggressive approach based on science, medicine and common sense. The vast majority of Nova Scotians have and continue to support and follow the public health recommendations with a view to returning to pre-COVID activity and enjoyment of life as quickly and as safely as possible.

[34] The Respondents and those who would support them by attending the planned or other in-person public gatherings, without following the public health recommendations and orders, are uninformed or willfully blind to the scientific and medical evidence that support those measures. Their plan to gather in-person in large numbers, without social distancing and without masks, in contravention of the public health recommendations and orders shows a callous and shameful disregard for the health and safety of their fellow citizens.

[35] The Applicants are entitled to the injunction sought to:

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

[36] It is appropriate that the order includes clear language that law enforcement officers and other law enforcement agencies will enforce the prohibitions. It is appropriate to include notice that law enforcement officers will arrest and charge anyone in breach of the prohibitions. The leading authority on injunctions against unknown persons is *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048. At paras 41-42, Justice McLachlin (as she then was) stated:

41 ... I observe only that the inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.

42 I conclude that the British Columbia Supreme Court has jurisdiction to make orders enjoining unknown persons from violating court orders. Such orders are enforceable on the long-standing principle that persons who are not parties to the action, but who violate an order of the court, may be found guilty of contempt for interfering with justice. Provided that contempt is the only remedy sought, it is not necessary to join all unknown persons in the action under the designation, "John Doe, Jane Doe or Persons Unknown". Nor, strictly speaking, is it essential that the order refer to unknown persons at all. However, the long-standing Canadian practice of doing so is commendable because it brings to the attention of such persons the fact that the order may constrain their conduct. Similarly to be commended is the practice followed by the courts in this case of ensuring that the wording of the orders is clear and that their effect is properly circumscribed.

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

[38] The Order herein was granted on an *ex parte* basis. It is important that the Respondents, or anyone else effected by this Order, have an opportunity to apply to the Court to vary or challenge the Order or so much of it as effects that person. Accordingly the Order will contain a provision giving notice that any such person may apply to the Court, in accordance with the procedures set out in the *Civil Procedure Rules*, to challenge or vary the Court's Order.

[39] The Applicants did not seek costs and none are ordered.

Norton, J.