Clerk's Stamp:

COURT FILE NUMBER	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ALBERTA HEALTH SERVICES
RESPONDENTS	TY NORTHCOTT, GAIL NORTHCOTT and NORTHCOTT RODEO INC.
DOCUMENT	**BRIEF OF THE RESPONDENTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Justice Centre for Constitutional Freedoms #253, 7620 Elbow Drive SW Calgary, AB T2V 1K2 Attention: Jay Cameron James S. M. Kitchen Phone: 403-475-3622 Email: jcameron@jccf.ca jkitchen@jccf.ca

PART I - OVERVIEW

1. Alberta Health Services ("AHS") has applied to this Court for a declaration that the Respondents, Ty Northcott, his wife Gail Northcott, and Northcott Rodeo Inc. have acted in contempt of an *ex parte* Order pronounced on May 6, 2021 by Associate Chief Justice Rooke (the "May 6 Order").

2. Due to amendments made to the May 6 Order on May 13, 2021, the May 6 Order as amended on May 13 does not apply to the Northcotts. Further, the Northcotts have not been given Notice of the May 13 Amended Order, as required by the Order. Any application by AHS to declare the Northcotts in contempt of this Order is hopeless, frivolous, and vexatious, and therefore an abuse of process. AHS' June 2, 2021 application against the Northcotts is tainted by this abuse of process and therefore must be struck in its entirety.

PART II - FACTS AND BACKGROUND

3. On May 6, 2021, AHS submitted to the Court an Originating Application (the "Action"), the Affidavit of Mr. Brown, the Affidavit of Dr. Hinshaw, and a Brief in support of its *ex parte* application to seek this Honourable Court's assistance to enforce various Orders issued by Alberta's Chief Medical Officer (the "CMOH Orders") against the named respondents, Whistle Stop (2012) Ltd. and its claimed proprietor, Christopher Scott (collectively, the "Whistle Stop Respondents"), the claimed organizer of the event to take place in Innisfail on May 15, 2021 of the "Welcome to the Fun Zone! Family Jamboree" (the "Innisfail Jamboree"), Glen Carritt (the "Innisfail Jamboree Respondent"), together with any other person acting under their instructions or in concert with them (the "Jane Doe(s) or John Doe(s)") (collectively, the "May 6 Respondents").

4. The outcome of that application was the May 6 Order. On a plain English reading of the May 6 Order, and as a matter of logic and grammar, the May 6 Order enjoined the entire population of Alberta from organizing, promoting, or attending an "Illegal Public Gathering" as defined in the May 6 Order. An "Illegal Public Gathering" is defined as one that does not comply with CMOH Orders, which purports to limit the gatherings of persons

to very small numbers (10 or 20 people, as the case may be) and places restrictions on such small gatherings.

5. On May 13, the May 6 Order was amended by the removal of the words “independently to like effect” (the May 13 Amended Order). These words were the operable words in the May 6 Order that rendered the May 6 Order applicable to all Albertans. The removal of these words from the May 13 Amended Order, on a plain English reading of the Order and as a matter of logic and grammar, renders the May 13 Amended Order inapplicable as against the entire population of Alberta. Rather, the May 13 Amended Order only applies to the named Respondents in the order and those persons working in concert with or under the directions of the named Respondents.

6. The Northcotts have not been provided with Notice of the May 13 Amended Order as required by the Order.

7. The Northcotts are not in concert with or working under the direction of the Chris Scott, the Whistle Stop Café, or Glen Carritt.

PART IV - ARGUMENT

The May 13 Amended Order Does Not Bind the Northcotts

8. It is trite law that an injunction, like any other order of the court, only binds the actual parties to the suit. This principle has been recognized in the common law for over **220 years**. In *Iveson v Harris* (1802), Lord Chief Justice Eldon held that "you cannot have an injunction except against a party to the suit." This principle has been consistently repeated by Canadian courts.

9. As a result, it is well recognized that Courts do not have the jurisdiction to grant an injunction as against non-parties. This principle was summarized by the Manitoba Court of Appeal in *Royal Bank v Merchants Consolidated Ltd*, 1988 CarswellMan 33 at para 14

where the Court held that an injunction can only be granted against a party to the action:

> In *Brydges v Brydges*, [1909] P. 187 (C.A.), Farwell L.J. considered the jurisdiction of the court in enforcing its own orders, and referred with approval to *Iveson*. He said (p. 191):
>
> > But the Court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction (e.g., persons served with notice of an administration decree or in the same interest with a defendant appointed to represent them), or persons coming in and submitting to the jurisdiction of their own free will, to the extent to which they so submit (e.g., creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity). **But the Courts have no jurisdiction to make orders against persons not so before them merely because an order made, or to be made, may or will be ineffectual without it**. Even in the case of an injunction Lord Eldon says in *Iveson v. Harris*: "**I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into Court, so as according to the ancient laws and usages of the country to be made a subject of the writ**." [emphasis added]

10. Other Canadian courts have similarly found that the Court lacks jurisdiction to bind non-parities. For example, in *CPR Co v Brady et al* (1960), Collins J. held at para 34 that:

> ...**it appears that the court is without jurisdiction to make an order restraining a person who is neither a party nor the servant**… [emphasis added]

11. Related to the above principles, the use of injunctions against persons unknown (through the use of John Doe and Jane Doe) is fraught with risks,[1] which are identified and explained in the following quote from Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada Ltd., 2017; Looseleaf ed. updated to November 2018, Rel. No. 27) at p. 270:

> **"It has been forcefully argued that the willingness to enforce injunctions against non-parties has been taken too far** [Berryman, "Injunctions — The

[1] See also *Re Brake; Andersom v Nalcor Energy*, 2019 NLCA 17, at paras. 32-33.

Ability to Bind Non- Parties" (2002), 81 Can. Bar Rev. 207]. The net of liability is not cast too wide where the plaintiff is able to show that the non-party has deliberately agreed to flout the order at the instigation of the defendant. However, **the court must be cautious not to hold in contempt a party who acts independently of the defendant and who may exercise a right distinct from that of the defendant.** Such a person has not yet had his or her day in court and should not be bound by an order made in an action to which he or she was not a party and as the English Court of Appeal stated, the court must take into account "the potential injustice to unidentified [parties] of giving permission to enforce the orders against them, possibly by criminal process, without considering their individual circumstances" [*Astellas Pharma Ltd. v. Stop Huntingdon Animal Cruelty (SHAC)*, [2011] EWCA Civ. 752, at para 20]. **The court should not simply delegate to the police the power to determine who is covered by the injunction: the alleged contemnors are entitled to their day in court**. [emphasis added]

12. Academic writers have also commented on the problem of overbreadth with respect to John Doe injunctions. For example, Julia E. Lawn in "The John Doe Injunction in Mass Protest Cases" (1998), 56 U.T.Fac.L.Rev 101, observes that:

> "**A potentially overbroad order can result either from allowing a non-party to be bound by the order via John Doe or from the practice of permitting contempt prosecutions to go forward against non-parties**" (at 123).
>
> …[N]owhere in the jurisprudence is specific reference made to the obligation of plaintiffs to advance facts and issues pertaining to John Doe's case or to the care the judiciary must exercise in evaluating his interests. When 'John Doe' is used in place of the name of a known but unidentified person, John Doe's case and interests could be evaluated and discussed in the same way as in an ex parte application. **In mass protest cases, a group affiliation may or may not exist** with which to infuse the John Doe shell with some humanity. In the Clayoquot Sound and *Everywomen's* cases, some defendants caught by the John Doe orders were interest-group members. Others were not. For the purpose of the litigation, John Doe may not be part of a trade union with identifiable obstructionist goals. He may not be a member of an Indian band or other collectivity. The Court implicitly acknowledged that group identity would allow defendants to be more satisfactorily named in a protest injunction application in *Repap Manitoba Inc. v. Mathias Colomb Indian Band* [(1996), 47 C.P.C. (3d) 118 (Man. C.A.)]. **The Court removed the provisions referring to persons unknown and substituted the name of the Indian Band whose members were objecting to logging in their traditional territory. Where possible, then, courts should**

turn their minds to the position of a potential John Doe" (at 125). [emphasis added]

13. Canadian Courts have been extremely reluctant to grant John Doe injunctions and have routinely overturned and set aside such injunctions. For example, in *Saskatchewan Power Corp. John Doe*, 1988 CarswellSask 305, at para. 10, the Court refused to grant a John Doe injunction, noting that:

> **It is paramount that only a *party* to an action in which a perpetual injunction is sought can be bound by an order restraining his or her actions**. The defendants in the present case are "John Doe and all persons ... who are congregating on or about a roadway located ..." The injunction order sought is directed not only to those persons, but as well to:
>
> > ... any person acting on or under their or under any of his or their instructions, or anyone having knowledge or notice of the order herein requested, who, upon any view of the matter, are not parties to the action. **An order enjoining the behaviour of all persons who become apprised of the order is to cast much too wide a net**. **Persons against whom no suggestion is made of having previously participated in activity of the kind sought to be put at an end would be restrained. Such an order would be "convenient" from the standpoint of Saskatchewan Power, but not a "just" order, I suggest, as regards the greatest number of persons who would be bound by its terms**. [emphasis added]

14. Based on the foregoing, injunctions are not to be directed to the "world at large". That is distinguishable from a "worldwide injunction" of the type that was upheld by the Supreme Court of Canada in *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34. In that case, the Supreme Court confirmed a worldwide injunction against a single identifiable entity – Google. The basis for doing so in that case was clear since the internet has no borders. The only way to ensure the injunction attained its objective was to have it apply where Google operated: globally. The nature of the Internet being accessible globally was clearly a significant consideration in the Supreme Court's analysis in that case. The *Google* decision is completely distinguishable from the facts in this case.

15. AHS is seeking to bind the May 13 Amended Order on individuals clearly beyond the jurisdiction of the Court. The May 13 Amended Order only applies to the specific parties named in the Order and cannot extend to complete strangers to that proceeding such as the

Northcotts. Simply put, the application of the May 13 Amended Order to persons and events that are completely unconnected to Chris Scott, Whistle Stop Café and Glen Carritt is a dramatic overreach that is completely inconsistent with well-settled legal principles.

The Northcotts Have Not Been Given Notice of the May 13 Amended Order

16. The Northcotts say that this Court has no procedural jurisdiction to hear the merits of the within contempt application because Notice has not been given to the Northcotts of the May 13 Amended Order. On that basis alone, AHS' application for a declaration of contempt is hopeless.

17. Pursuant to Rule 3.68, this Court has the discretion to strike applications that are hopeless and have no reasonable prospect of success.[2] Striking applications with no reasonable chance of success promotes litigation efficiency and allows all parties to focus their time and energy on serious claims.[3] The Northcotts submit that "it is plain and obvious" that AHS' contempt application "cannot succeed" because they were not made aware of the content of the May 13 Amended Order, which is a clear procedural pre-requisite to being found in contempt.[4]

18. The test is "fairly settled" in Alberta.[5] Courts should interpret claims generously,[6] but allegations must be supported by material facts that are not absurd on their face if they are to survive a striking application.[7] A failure to provide material facts sufficient to demonstrate the core elements of the relief sought are ripe for being struck.[8]

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[2] ***HOOPP Realty Inc v The Guarantee Company of North America***, 2015 ABCA 336 at para 13 [***HOOPP Realty***], citing ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140 at para 14 [***O'Connor***]; *Ernst v EnCana Corp*, 2014 ABCA 285 at para 14, affirmed 2017 SCC 1, summarizing from *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 19-21.

[3] ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at paras 19-20 [***Imperial Tobacco***].

[4] ***HOOPP Realty***, *supra* note 9 at para 13, citing ***Tottrup v Lund***, 2000 ABCA 121 at para 7.

[5] ***Fort McKay Métis Community Association v Métis Nation of Alberta Association***, 2019 ABQB 892 at para 26.

[6] ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 [***Perpetual Energy***] at para 70 citing, ***Imperial Tobacco*** at para 21; ***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19 at para 19.

[7] Arabi v. Alberta, 2014 ABQB 29 at para 74.

[8] ***GH v Alcock***, 2013 ABCA 24 at para 58.

19. The ABCA recently summarized the test for striking for no reasonable cause:

> When applying the test under r 3.68(2)(b), the Court must accept the allegations of fact as true **except to the extent the allegations are based on assumptions or speculations or where they are patently ridiculous or incapable of proof**. [emphasis added].[9]

20. Paragraph 1 of the May 13 Amended Order states:

> The named individual Respondents and any other person acting under their instructions or in concert with them **and with Notice of this Order**, shall be restrained anywhere in Alberta 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 in a "public place" or a "private place", which each have the same meaning as given to them in the Public Health Act.

21. Paragraph 3 of the May 13 Amended Order states:

> Any member of any Police Service, as defined in the Police Act, RSA 2000, c P-17, or any peace officer as defined in the Criminal Code, RSC 1985, c C-46 (collectively, "Law Enforcement"), is authorized to use reasonable force in arresting and removing any person **who has notice of this Order** and whom Law Enforcement has reasonable and probable grounds to believe is contravening this Order.

22. The May 13 Amended Order clearly stipulates that only those who "have notice" of the Order can be found to be in contempt of it. This reflects the established doctrine that no steps to enforce a civil court order can be taken unless and until the applicant seeking to enforce has served or otherwise provided notice of the court order upon the respondent.[10]

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[9] *Grenon v Canada Revenue Agency*, 2017 ABCA 96 at para 6.

[10] See *Morguard Trust Company v. Doonanco*, 1980 CarswellAlta 448.

23. The May 13 Amended Order defines "notice" at paragraph 5:

> A person shall be deemed to have Notice of this Order **if that person is shown a copy of the Order, or it is posted in in plain sight where it can be easily read by them, or if it is read to them**.

24. The Northcotts have not had Notice of the May 13 Amended Order. They were not shown a copy of the Order, it was not posted in plain sight where they could have easily read it, and it has not been read to them. The Respondent has not filed with this Honourable Court an Affidavit evidencing that the Northcotts were personally served with a copy of the May 13 Amended Order prior to this Application. Meanwhile, the Northcotts have provide sworn testimony that they have not been notified of the content of the May 13 Amended Order.

25. The contempt application is thus procedurally flawed in a manner which cannot be judicially remedied. It is impossible for AHS to establish the necessary procedural basis to succeed in a contempt application against the Northcotts. The application is hopeless.

Abuse of Process

26. The Application by AHS to declare the Northcotts in contempt of the May 13 Amended Order should never have been brought. In addition to the fact the Northcotts have not been given Notice of the Order, the Order cannot possibly be interpreted to apply to the Northcotts. The contempt application is therefore not merely hopeless, but vexatious and frivolous. It amounts to an abuse of process.

27. The alternative relief sought by AHS should not be granted, even in the event there is any merit supporting this relief, because the entire proceeding is tainted with the abuse of process identified above. The appropriate response of this Court is to deny all relief sought by AHS in the within application and to direct that AHS must file a new application that does not include hopeless, vexatious, and frivolous aspects.

REMEDY SOUGHT

28. A Declaration that the within Application by AHS to declare the Northcotts in contempt of the May 13 Amended Order is denied.

29. A Declaration that the Application for an injunction against the Northcotts sought in the alternative by AHS is denied on the basis of an abuse of process.

30. Costs; and

31. Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of June 2021.

James S. M. Kitchen
Counsel for the Respondents

LIST OF AUTHORITIES

1. *Suncor Energy Inc v Unifor*, Local 707 A, 2014 ABQB 555
2. *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2005 ABCA 320
3. *Royal Bank v Merchants Consolidated Ltd*, 1988 CarswellMan 33
4. *CPR Co v Brady et al* (1960)
5. *Re Brake; Andersom v Nalcor Energy*, 2019 NLCA 17
6. *Saskatchewan Power Corp v John Doe*, 1988 CarswellSask 305
7. *Creditel of Canada Ltd v Terrace Corp (Construction) Ltd (1983)*, 50 A.R. 311 (Alta. C.A.)
8. *Motkoski Holdings Ltd v Yellowhead (County)*, 2010 ABCA 72
9. *Fraynn (Next Friend of) v Co-operative General Insurance Co*, 1997 CarswellAlta 1067 (Alta. Q.B.)