

Supreme Court of Nova Scotia

Between:

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

Applicant
Responding party on motion

and

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

Respondent
Responding party on motion

and

The Canadian Civil Liberties Association

Non-Party
Moving party on motion

Brief of the Canadian Civil Liberties Association
(Motion for public interest standing)

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OVERVIEW

1. The Injunction Order obtained by the Province of Nova Scotia on an expedited basis raises serious concerns about the exercise of government authority, and its impact on the *Charter*-protected rights of Nova Scotians.
2. The Injunction Order was obtained on an *ex parte* basis with no one appearing to defend the rights of Nova Scotians, to test the government's evidence or to question whether the Order was justified. The Canadian Civil Liberties Association ("CCLA") seeks to be added as a party with public interest standing to pursue a rehearing of the Injunction Order on behalf of all persons in Nova Scotia who are affected by its broad scope.
3. The Injunction Order is substantially broader than the context in which it was sought, and extends beyond the circumstances contemplated by the evidentiary record before the Court. It applies to all Nova Scotians for an indefinite period of time, until varied or set aside by the Court. It increases police enforcement powers for prohibited activities that carry no or low risk of COVID-19 transmission, including online expression. It relies on definitions of prohibited activities that are poorly defined, internally inconsistent, and constantly changing.
4. Instead of targeting a group of individuals alleged to be at risk of causing public harm, the Injunction Order interferes with the *Charter*-protected rights of all Nova Scotians, including the rights to freedom of expression, freedom of assembly, and liberty. This interference cannot be justified even in the context of the exigent circumstances created by an outbreak during the COVID-19 pandemic. The Injunction Order is also inconsistent with principles of fundamental justice prohibiting arbitrariness, overbreadth, and gross disproportionality.
5. The CCLA meets the test for public interest standing. The scope of the Injunction Order and its interference with *Charter*-protected rights are serious justiciable issues. CCLA has a genuine interest in these issues and has been closely engaged with the balance between COVID-19 public health restrictions and constitutional rights. In all of the circumstances, CCLA's proposed rehearing is a reasonable and effective way to bring these issues before the Court.

PART I–STATEMENT OF FACTS

The Province of Nova Scotia’s Application for Ex Parte Injunctive Relief

6. On May 14, 2021, the Province of Nova Scotia obtained a *quia timet* injunction on an expedited basis, in anticipation of an imminent protest against COVID-19 public health restrictions where it was anticipated that participants would not respect social distancing or masking requirements.
7. The Application was heard in Chambers *ex parte*, with none of the Respondents appearing and no cross-examination on the Province’s evidence.
8. In *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, this Court granted the Application and issued a permanent *quia timet* injunction (the “**Injunction Order**”).¹
9. The Injunction Order includes “Janes Doe(s)” and “John Doe(s)” as respondents. The injunctive relief obtained is not limited to members of Freedom Nova Scotia or those acting in concert with them and also applies to those acting “independently to like effect.”²
10. The Injunction Order prohibits any person with notice of the Injunction Order from organizing or attending outdoor gatherings that contravene public health restrictions, including political protests that respect social distancing and masking.³
11. The Injunction Order also prohibits “promoting” such protests, including through online expression, though no definition of “promoting” is included in the Injunction Order.⁴
12. People who violate the Injunction Order, deliberately or accidentally, face a risk of arrest and detention until such time as they can be brought before a Justice of this Court.⁵

¹ *Nova Scotia (Attorney General) v Freedom Nova Scotia*, [2021 NSSC 170 \[TAB 5\]](#)

² Injunction Order, Supreme Court of Nova Scotia, Hfx. No. 506040 (14-May-2021), para 3

³ Injunction Order, para 3

⁴ Injunction Order, para 3

⁵ Injunction Order, paras 4-5

13. The Injunction Order continues in effect indefinitely until varied or discharged by a further Order of the Court.⁶
14. The Injunction Order invites “anyone with notice of this Order [to] apply to the Court at any time to vary or discharge this Order or so much of it as affects such person.”⁷

The Canadian Civil Liberties Association

15. Founded in 1964, the CCLA is a national, non-profit, independent, non-governmental organization dedicated to promoting respect for and observance of fundamental human rights and civil liberties in Canada. The CCLA works to defend and ensure the protection and full exercise of those rights and liberties through research, public advocacy, and litigation.⁸
16. The CCLA has appeared in more than 200 civil rights and *Charter* cases. It has been granted public interest standing in three recent cases concerning the constitutionality of public health restrictions related to the COVID-19 pandemic. The CCLA has specific expertise in addressing legal issues relating to the rights of freedom of expression, freedom of assembly, and liberty, and the principles of fundamental justice.⁹
17. The CCLA has five main concerns with the Injunction Order:
 - a. Whether a permanent *quia timet* injunction can be obtained against all Nova Scotians, on evidence of the actions of very few Nova Scotians;
 - b. Whether the apparent harm(s) related to protests against public health guidelines and restrictions create a strong probability of harm in other contexts;
 - c. Whether injunctive relief is appropriately granted where the scope of the enjoined activity (“Illegal Public Gatherings”) is subject to change, and the Order continues indefinitely;

⁶ Injunction Order, para 8

⁷ Injunction Order, para 9

⁸ Zwibel Affidavit, paras 5-6

⁹ Zwibel Affidavit, paras 7-9, 18-26

- d. Whether the *Charter*-protected rights to freedom of expression, freedom of assembly, and liberty are engaged and unjustifiably infringed; and
 - e. Whether principles of fundamental justice are violated, including principles against arbitrariness, overbreadth and gross disproportionality.
18. On the basis of these concerns, the CCLA wishes to pursue a rehearing of the Province's Application pursuant to *Civil Procedure Rule 22.06*.
19. On May 26, 2021, the Chambers Judge directed that the CCLA must first request public interest standing in *Nova Scotia (Attorney General) v Freedom Nova Scotia* (Hfx. No. 506040). This motion follows the Court's direction.

PART II—ISSUE

20. This motion raises a single issue: Whether the CCLA should be granted public interest standing for the purpose of requesting a rehearing of the *ex parte* Application?

PART III—LAW & ARGUMENT

21. Civil Procedure Rule 35.01(e) allows a person to make a motion to be added as a party, and Rule 35.08(2) creates a rebuttable presumption that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing. In the instant case, the addition of the CCLA as a party would not cause any other party serious prejudice such that this presumption would be rebutted.
22. The CCLA's interest in the issues before the Court in this proceeding is as a public interest litigant. Public interest standing exists to protect the rule of law and to ensure that the misuse of authority that affects the public generally can be brought before the courts.¹⁰ In the circumstances of this case, where the Injunction Order was issued *ex parte* and interferes with the *Charter*-protected rights of all Nova Scotians, it is in the interests of justice to grant the CCLA public interest standing to request a rehearing of the Province's Application for injunctive relief.

¹⁰ *Canadian Elevator Industry Education Program v Nova Scotia (Elevators and Lifts)*, [2016 NSCA 80 at paras 13-14](#) [TAB 3]

23. Public interest standing is discretionary. In exercising this discretion, the court must flexibly and purposively consider three interrelated factors, which are to be “weighed cumulatively, not individually, and in light of their purposes”:
- a. whether there is a serious justiciable issue raised;
 - b. whether the plaintiff has a real stake or a genuine interest in it; and
 - c. whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.¹¹

Each of these factors supports granting public interest standing to the CCLA on this motion.

There is a Serious Justiciable Issue

24. The threshold for a “serious justiciable issue” is low and can be met by either an important issue or a substantial constitutional issue. Courts should not conduct a detailed merits examination of the issues at this stage beyond ensuring they are “far from frivolous.”¹²
25. The CCLA raises two sets of issues that meet this standard:
- a. Concerns about the scope of the Injunction Order, its evidentiary foundation, indeterminacy, and intelligibility; and
 - b. Concerns about the constitutionality of the Injunction Order.
26. In terms of scope, the Injunction Order does not match the narrower context in which it was sought. It applies to Nova Scotians who have no demonstrated history of violating public health restrictions and who may in fact be making best-efforts to comply. It applies to all types of activities which may technically qualify as an “Illegal Public Gathering” under the Public Health Order, and does not apply to only those activities about which evidence of imminent harm was presented to the Court. The evidence presented was

¹¹ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37 [*Downtown Eastside*] [TAB 1]

¹² *Downtown Eastside* at paras 42, 46, 56 [TAB 1]

untested and limited to particular types of activities; it may not meet the probable harm standard needed to obtain a *quia timet* injunction in other contexts that are captured by the Injunction Order. The Injunction Order also has no end date and relies on an external definition contained in a Public Health Order subject to amendment at any time by the Chief Medical Officer of Health, and that is regularly changing.

27. In terms of constitutionality, the Injunction Order engages the *Charter*-protected rights to freedom of expression, freedom of assembly, and liberty. The restrictions on expression capture online speech where there can be no possible risk of transmission of the COVID-19 virus. The restrictions on gathering effectively limit political protest and assembly in Nova Scotia, even if protestors are physically distanced and masked.
28. The restrictions also come with a risk of arrest and detention, which engages the right not to be deprived of liberty. Such restrictions are inconsistent with principles of fundamental justice, including principles against arbitrariness, overbreadth and gross disproportionality. The Injunction Order is arbitrary because it permits some outdoor activities (exercise in groups of five) while prohibiting other outdoor activities (protest in groups of five). It is overbroad because it captures people with no history of non-compliance with public health restrictions, who may in fact be trying to comply. It is grossly disproportionate given the low transmission risk of COVID-19 in outdoor activities that are physically distanced and masked.
29. These concerns meet the serious justiciable issue standard.

The CCLA's Genuine Interest in the Issue

30. A requirement of “genuine interest” ensures that scarce judicial resources are not spent on proceedings brought by busybodies. Accordingly, courts are asked to assess a prospective party’s reputation, continuing interest, and link with the claim.¹³
31. The CCLA has a strong reputation as an organization that brings meritorious and well-argued claims as a public interest litigant. The CCLA has been referred to by courts as an

¹³ *Downtown Eastside* at [para 43](#) [TAB 1]

“experienced and qualified public interest litigant,”¹⁴ an organization with “substantial experience in promoting and defending the civil liberties of Canadians,”¹⁵ and as “a prominent civil liberties organization” with a history of “developing the law of civil liberties and human rights.”¹⁶

32. The CCLA has continuously engaged with government action in the context of the COVID-19 pandemic. The CCLA has brought three *Charter* challenges as a public interest litigant in the context of COVID-19 on issues such as conditions in homeless shelters, protections for inmates in jails, and provincial travel restrictions. The CCLA has also engaged in broader letter writing and advocacy on these issues.¹⁷ This demonstrates a continuing interest and link with the claim.

Rehearing is a Reasonable and Effective Way to Bring the Issues Before the Court

33. Finally, a public interest litigant must be seeking participation rights which represent a reasonable and effective way to bring the issues before the Court.
34. In *Downtown Eastside*, Justice Cromwell, writing for a unanimous Supreme Court of Canada, emphasized that this third factor is to be approached flexibly and purposively.¹⁸
35. The Court identified four non-exhaustive factors to assist with determining the third branch of the test for public interest standing:
- a. The capacity of the litigant;
 - b. The nature of the public interest;
 - c. Alternative means to bring the case forward; and
 - d. The impact of the proceedings on the rights of others.¹⁹

¹⁴ *Landau v Ontario (Attorney General)*, [2013 ONSC 6152 at para 22](#) [TAB 4]

¹⁵ *Tadros v Peel Regional Police Service*, [2008 ONCA 775 at para 3](#) [TAB 7]

¹⁶ *CCLA v Attorney General of Ontario*, [2020 ONSC 4838 at para 26](#) [TAB 2]

¹⁷ Zwibel Affidavit, paras 17-21

¹⁸ *Downtown Eastside* at [paras 47-50](#) [TAB 1]

¹⁹ *Downtown Eastside* at [para 51](#) [TAB 1]

36. *Capacity*—The CCLA has the capacity and experience to bring rehearing forward, including experienced counsel and a sophisticated instructing client.²⁰ The CCLA also has a proven track record of meaningful contributions to public interest litigation, and “has contributed through its interventions to the development of Canadian law on civil liberties generally and on freedom of expression and association in particular.”²¹
37. *Nature of the interest*—The nature of the interests at stake are truly ones of public interest, balancing public health restrictions against the *Charter*-protected rights of all Nova Scotians in the context of a pandemic. While the Injunction Order was sought in a narrow context, its scope and application are broad. It applies to all John and Jane Does in Nova Scotia, and continues until varied or set aside by the Court. It prohibits all political protest and some online speech.
38. *Alternative means*—The Injunction Order continues until varied or set aside by the Court. Freedom Nova Scotia, one of the named Respondents, does not appear to be a legal entity and therefore cannot have standing (public or private) to engage in any legal proceeding. Given barriers to obtaining legal representation in Canada, it is unrealistic to assume that the named individuals, or any Jane Doe or John Doe resident in Nova Scotia, will seek to set aside or vary the Injunction Order. Accordingly, there is likely no alternative means to bring the issues raised by the CCLA before the Court.
39. The Injunction Order also invites anyone with notice of the Order to apply to the Court at any time to vary or discharge the Order or so much of it as affects such person.²² This signals the Court’s intention to welcome a broad range of means for revisiting the Order. The Court of Appeal has instructed that there is also inherent jurisdiction to review any order that was obtained on an *ex parte* basis.²³
40. *Impact on rights of others*—The Injunction Order impacts the *Charter* rights of all Nova Scotians. However, the vast majority of Nova Scotians impacted by the Injunction Order do not share the circumstances of the three named individual Respondents. Accordingly,

²⁰ Zwibel Affidavit, para 27

²¹ *Working Families Ontario v. Ontario*, [2021 ONSC 3652 at paras 4-6 \[TAB 8\]](#)

²² Injunction Order, para 9

²³ *Smith v Lord*, [2013 NSCA 34 at para 34 \[TAB 6\]](#)

even if the individual named Respondents were to come before the Court to seek to set aside or vary the Injunction Order, their position is unlikely to represent the public interest. Given the scope of the Injunction Order and its pervasive impact on public rights far beyond the named Respondents, the silence of these individuals on matters of public importance should not prevent a public interest litigant from raising the serious issues identified by the CCLA.

41. Public interest standing for the CCLA to seek rehearing of the Province’s Application in Chambers would be a reasonable and effective way to bring the important issues outlined above back to the Court. Permitting the CCLA to take this step would also protect the legality principle, which seeks to uphold the “important role of the courts in assessing the legality of government action”, and to ensure that public exercises of authority are *Charter*-compliant and supported by evidence.²⁴

PART IV–ORDER SOUGHT

42. CCLA seeks an Order adding it as a party with public interest standing in *Attorney General (Nova Scotia) et. al. v. Freedom Nova Scotia et. al.* (Hfx. No.506040), for the purpose of requesting a rehearing of the Province’s *ex parte* Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated May 27, 2021, in Halifax, Nova Scotia.

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Counsel for the CCLA

²⁴ *Downtown Eastside* [at para 23](#) [TAB 1]