

2021



C.A. No.

507668

Nova Scotia Court of Appeal

Between:

The Canadian Civil Liberties Association

Appellant

and

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

Respondent

and

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

Respondents

Notice of Motion

To: **The Attorney General of Nova Scotia**
Per: Duane A. Eddy
Nova Scotia Department of Justice
1690 Hollis St, 8th Floor
Halifax, NS B3J 2L6
T: 902-209-5986
F: 902-424-1730
E: duane.eddy@novascotia.ca

And to: **Amy Brown**
Tasha Everett
Dena Churchill
Jane Doe(s) and John Doe(s)

Motion

Take notice that the Appellant will make a motion to extend the time to file a Notice of Appeal before this court, in Court of Appeal Chambers on Thursday, the 22nd day of July, 2021, at the hour of 10:00 AM at The Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia.

The CCLA also moves for an order:

1. Dispensing with the requirement of notice of this motion and of the proposed appeal to the Respondent, “Freedom Nova Scotia”; and
2. Permitting service of this Notice of Motion and of the proposed Notice of Appeal on the Respondents Jane Doe(s) and John Doe(s), Amy Brown, Tasha Everett, and Dena Churchill by posting the Notice of Motion and motion materials, and the Notice of Appeal if permitted to be filed, on the website www.ccla.org.

References

The moving party relies on the following legislation, Rules, or points of law:

1. On May 12, 2021, the Attorney General of Nova Scotia, the Department of Health and Wellness, and the Chief Medical Officer of Health (hereafter the “Province”) filed a Notice of Application in Chambers (*ex parte*) seeking a *quia timet* injunction, in anticipation of an imminent protest against COVID-19 public health restrictions.
2. The Respondents to the Province’s application include three named individuals who were alleged to associate with a collective known as “Freedom Nova Scotia”, as well as every Jane Doe and John Doe in Nova Scotia.
3. On May 14, 2021, the application was heard *ex parte* by Norton J. (the “Application Judge”). Later that day, the Court granted an order (“**Injunction Order**”) enjoining the Respondents, including all Jane Does and John Does everywhere in Nova Scotia, from various activities prohibited by the Order of the Chief Medical Officer of Health, pursuant to s. 32 of the *Health Protection Act*, SNS 2004, c 4 (“Public Health Order”), for an indefinite period of time. The decision of the Application Judge granting the Injunction Order is set out in *Nova Scotia v. Freedom Nova Scotia*, 2021 NSSC 170.
4. On May 17, 2021, the CCLA informed the Attorney General that the Injunction Order violated the *Charter*-protected rights of Nova Scotians, and requested that the Province consent to variation or rescission of the Injunction Order. The Attorney General did not respond substantively to the CCLA’s request.
5. On May 27, 2021, the CCLA sent a letter to the Court, attaching documents to file for a rehearing of the application for an Injunction Order. The Court directed the CCLA to obtain public interest standing before requesting a rehearing.

6. On June 4, 2021, the CCLA was granted public interest standing, by order of Gabriel J. The Province opposed the CCLA's request for an expedited rehearing date of June 14, 2021, and Gabriel J. set the rehearing down for the Province's preferred date of June 30, 2021. A timetable for the exchange of rehearing materials was also ordered.
7. On June 14, 2021, the Province filed a motion to have the Injunction Order discharged on the basis that it was "no longer necessary". The CCLA opposed the Province's discharge motion given the lack of notice to other Respondents, solicitor's affidavit containing hearsay statements, and failure to file a brief, but did not contest that discharge of the order was appropriate. Gatchalian J. granted a discharge of the Injunction Order in Chambers on June 22, 2021.
8. Later that day, the Province wrote to Chipman J. by letter, submitting that the matter was moot and requesting that the rehearing date and filing deadlines be vacated.
9. On June 25, 2021, the Province filed its brief for rehearing, conceding that the Injunction Order engaged the *Charter*.
10. Chipman J. heard oral argument on the issue of mootness on June 30, 2021, after receiving written submissions from both parties. At the appearance before Chipman J., the parties were prepared to conduct cross-examinations and argue the merits of the Injunction Order in a hearing *de novo*.
11. Chipman J. decided that the matter was moot and that he was not prepared to exercise his discretion to allow the rehearing to occur. He issued his written decision shortly after the conclusion of the oral hearing, in *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, 2021 NSSC 217.
12. The CCLA now seeks to appeal the decision of Norton J. granting the Injunction Order, on the basis that it contains several reviewable errors. In particular, the CCLA intends to advance the following grounds of appeal if an extension of time is granted:
 - a) The judge below erred in granting an injunction order without the Applicants having advanced any common law cause of action, statutory authority, or other right to a remedy;
 - b) The judge below erred in applying the test for an interlocutory injunction to the Applicants' request for a permanent injunction;
 - c) The judge below erred in stating and applying the wrong test for a quia timet injunction;
 - d) The judge below erred in granting an injunction order against all Nova Scotians without requiring evidence that such a remedy was needed against all Nova Scotians;

- e) The judge below erred in granting an injunction order, without considering that the order infringed the Charter rights of all Nova Scotians and that this infringement may not be justified in the circumstances; and
 - f) The judge below erred in accepting the evidence of a named Applicant as independent expert evidence, and without compliance with Rule 55 or the common law requirements for independent expert evidence.
13. Civil Procedure Rule 90.37(12)(h) provides that a judge of the Court of Appeal hearing a motion may order that any time prescribed by Rule 90 (which includes the time within which to start an appeal under Rule 90.13) be extended or abridged before or after the expiration thereof.
 14. The appeal deadline in respect of the Application Judge's decision dated May 14, 2021 was on June 22, 2021. On this date, the Province's *ex parte* Application in Chambers remained scheduled for a rehearing on June 30, 2021, in accordance with the June 4, 2021, order of Gabriel J.
 15. The CCLA's delay in filing is short. It was caused primarily by the CCLA's reliance on the availability of the right to a hearing *de novo*, the Court ordered timeline for rehearing, and the fact that the scheduled rehearing was not vacated until June 30, 2021. At all times, the CCLA has maintained a good faith intention to seek review of the decision of the Application Judge.
 16. Notice to the Province of the CCLA's intention to appeal was provided on July 8, 2021. There is no prejudice to the Respondents by the delay in filing the notice of appeal.
 17. The proposed appeal has merit. The decision under review relies on incorrect legal principles and applies the wrong legal test to create a new state power to enforce provincial offences through contempt proceedings against all Nova Scotians. The Province did not advance any common law cause of action, or any statutory or other right to an injunction, or any evidence supporting its position against all unnamed individuals in the province. The analysis employed by the judge below also entirely disregards the *Charter* rights infringed by the Injunction Order. Without correction, this decision will be available as a precedent for future public injunctions by the government against Nova Scotians, on an *ex parte* basis.
 18. An extension of time to permit the CCLA to appeal is particularly appropriate where the decision of the Application Judge was made without hearing any opposing party, and the Province failed to provide full and fair disclosure of the facts and law on the *ex parte* application.
 19. Civil Procedure Rule 31.10 permits a judge to order a substituted method of notification if required. The Injunction Order permits service of the Injunction Order via email and social media posting, and by posting on the website <https://novascotia.ca/coronavirus/>.

20. It is not possible for the CCLA to serve the named respondent “Freedom Nova Scotia” because it is not a legal person.
21. The Province has not personally served or identified a physical or electronic address for named Respondents to the application and Injunction Order, Tasha Everett and Dena Churchill. There is no evidence in the record capable of identifying Amy Brown. The Jane Doe and John Doe respondents include every person in Nova Scotia.

Evidence

In support of the application, attached is the Affidavit of Cara Zwibel, affirmed on July 12, 2021.

Possible order against you

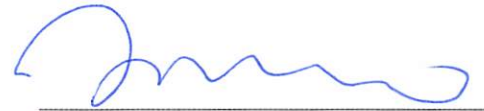
You have the right to be present or represented by counsel. You may file an affidavit and a brief, attend the hearing of the motion, and state your position on whether the proposed order should be made. If you do not attend, the judge may proceed without you and grant an order without further notice to you.

Signature

Signed July 15, 2021



Nasha Nijhawan



Benjamin Perryman

Counsel for the CCLA