NOVA SCOTIA COURT OF APPEAL

Citation: *Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2021 NSCA 65

Date: 20210831
Docket: CA 507668
Registry: Halifax

Between:

The Canadian Civil Liberties Association

Applicant

v.

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

Respondents

Judge:	Bourgeois J.A.
Motion Heard:	July 22, 2021, in Halifax, Nova Scotia in Chambers
Held:	Motion for extension of time granted
Counsel:	Nasha Nijhawan and Jaime Burnet, for the applicant Duane A. Eddy, for the respondents Attorney General of Nova Scotia and Chief Medical Officer of Health

Decision:

[1] On July 22, 2021, I heard a motion brought by the Canadian Civil Liberties Association (the "CCLA") seeking an extension of time to file a Notice of Appeal in relation to an order and decision of Justice Scott Norton of the Supreme Court of Nova Scotia (*Nova Scotia (Attorney General) v. Freedom Nova Scotia*, 2021 NSSC 170). The motion was strenuously opposed by the Province.

[2] For reasons that will become apparent, this motion is far from the typical request to extend the time to file a late Notice of Appeal. This is an unusual matter, triggering strong opposing views, not unlike the unusual times we are experiencing due to the COVID-19 pandemic.

Background

[3] Some factual and procedural background is helpful to put the arguments advanced on the motion in context.

[4] On May 12, 2021, the Province filed a Notice of *Ex Parte* Application seeking a *quia timet* injunction in anticipation of an imminent protest against COVID-19 public health restrictions. The protest was anticipated to be staged on Citadel Hill in Halifax and scheduled for May 15, 2021.

[5] The Application included as respondents three named individuals who were allegedly members of a collective known as "Freedom Nova Scotia", as well as unnamed Jane Doe(s) and John Doe(s). The Province sought to prohibit the respondents, effectively all persons in Nova Scotia, from organizing, promoting, or attending "Illegal Public Gatherings", as defined in the Public Health Order under the *Health Protection Act*, S.N.S. 2004, c. 4 ("*HPA*").

[6] Because the Application was brought on an *ex parte* basis, the only party to appear in court and provide evidence and submissions in support of an injunction was the Province.

[7] On May 14, 2021, Justice Norton issued the *quia timet* injunction sought by the Province (the "Injunction Order"). The Injunction Order did not include a set date for the matter to return to court to hear from the named respondents or others impacted by it. The Injunction Order did provide, however, that the respondents

and anyone with notice of the Order could apply to the court to vary or discharge it. The relevant provisions state:

> 8. This Order shall remain in force until varied or discharged by a further Order of the Court.
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> 9. The Respondents and anyone with notice of this Order may apply to the Court at any time to vary or discharge this Order or so much of it as affects such person, in accordance with the process provided in the *Civil Procedure Rules* but no such motion shall in any way excuse that person from compliance with the terms of this Order.

[8] On May 27, 2021, almost two weeks after the decision of Justice Norton was released, the CCLA filed a Notice of Motion seeking public interest standing in the proceeding for the purpose of requesting a hearing as contemplated in provision 9 set out above. Specifically, the CCLA sought an order setting aside the decision of Justice Norton and a discharge of the Injunction Order.

[9] The Province consented to an order granting the CCLA standing. The CCLA was granted public interest standing by order of Justice Timothy Gabriel in chambers on June 4, 2021. The rehearing was scheduled for June 30, 2021.

[10] 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 on procedural grounds but did not disagree a discharge of the Injunction Order was appropriate. Justice Gail Gatchalian granted a discharge on June 22, 2021, but declined to cancel the rehearing.

[11] Counsel for the Province wrote to Justice James Chipman (the judge scheduled to preside over the rehearing) on June 22, 2021, submitting the matter was moot and requested the rehearing date and filing deadlines be vacated. The CCLA wrote to the court on June 23, 2021. It disagreed with the Province that the issues to be raised at the rehearing were moot.

[12] The issue of mootness was heard before Justice Chipman on June 30, 2021. He determined the requested *de novo* hearing of the application was moot and declined to exercise his discretion to allow it to proceed.

[13] The CCLA now seeks to appeal the Injunction Order and decision of Justice Norton. Its proposed Notice of Appeal sets out the following grounds:

1. The judge below erred in granting an injunction order without the Applicants having advanced any common law cause of action, statutory authority, or having asserted any other right to a remedy;
2. The judge below erred in applying the test for an interlocutory injunction to the Applicants' request for a permanent injunction;
3. The judge below erred in stating and applying the wrong test for a *quia timet* injunction;
4. The judge below erred in granting an injunction order against all Nova Scotians without requiring any evidence in relation to all Nova Scotians;
5. The judge below erred in granting an injunction order, without any consideration that the order infringed the *Charter* rights of all Nova Scotians; and
6. 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.

[14] As the deadline for filing an appeal of the Injunction Order expired on June 22, 2021, the CCLA needs the permission of a judge of this Court to do so. On July 15, 2021, the CCLA filed a Notice of Motion seeking an extension of time to file its proposed Notice of Appeal. Before considering the issues raised on the motion, it is helpful to outline the general legal principles governing the matter before me.

Legal Principles

[15] The motion for extension to file the Notice of Appeal is brought pursuant to *Civil Procedure Rule* 90.37(12)(h). It provides:

> **90.37 (12)** A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
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> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[16] The *Rules* do not set out a test to be applied in such motions. However, a multi-factorial approach has developed in the case authorities, with the ultimate consideration being as to whether or not justice requires the motion be granted.

See, for example, *Farrell v. Casavant*, 2010 NSCA 71 and *Shupe v. Beaver Enviro Depot*, 2021 NSCA 46.

[17] The factors to be considered on a motion for extension of time are:

- the length of the delay;
- the reason for the delay;
- the presence or absence of prejudice;
- the apparent strength or merit of the proposed appeal; and
- the good faith intention of the applicant to exercise its right of appeal within the prescribed time period.

[18] The test is a flexible one, with the relative weight afforded to each of the above factors varying given the particular circumstances.

[19] Because of the nature of the arguments raised on the motion, it is also helpful to call to mind my limited authority as a single judge sitting in chambers. The final determination of legal issues in dispute is not, unless specifically authorized, within my role. This was explained by Justice Bryson in *Abridean International Inc. v. Nova Scotia (Labour Standards)*, 2017 NSCA 25 as follows:

> [5] Generally speaking, the powers of the Court of Appeal are exercised by a full panel of the Court. The authority of judges sitting in chambers is confined to what the *Rules* or statute explicitly permits them to do: *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)*, 154 N.S.R. (2d) 358 per Hallett J.A. in chambers; *R.B. v. Children's Aid Society of Nova Scotia*, 2002 NSCA 108 per Cromwell J.A. in chambers.
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> [6] The powers of a single judge in chambers are largely procedural and interlocutory, (90.37; 90.40). They may tangentially touch the merits where other matters are raised, i.e. on a motion to dismiss for noncompliance with the *Rules* or the granting of a stay.

Analysis

[20] I will now turn to consider the factors outlined above.

Length of the delay

[21] The deadline for appealing the Injunction Order expired 17 days prior to the CCLA filing its motion seeking an extension of time. Recently in *Shupe*, Justice Farrar characterized the 13-day delay as being "relatively short". The delay here is not much longer and, in my view, is not inordinate.

Reason for the delay

[22] The CCLA explains it delayed in seeking to appeal the Injunction Order because it had focused instead on following the provision that permitted it to be discharged or varied. The CCLA suggests if it had immediately attempted to appeal the Injunction Order, the Province would have surely argued an appeal was premature, and the proper route was to seek a variation or discharge.

[23] Clearly this is not a situation where the CCLA sat on its hands and let the appeal period tick by. It chose to follow the route set out in the Injunction Order and sought to have it set aside. Had a rehearing not been contemplated in the Injunction Order, I am satisfied the CCLA would have launched a timely appeal. In my view, the CCLA has provided a reasonable explanation for its delay.

The presence or absence of prejudice

[24] If the extension is not granted, the CCLA's attempt to have this Court consider its concerns surrounding the issuance of the Injunction Order will be barred. With respect to the Province, it will suffer inconvenience and expense responding to an appeal if the motion is granted. However, in determining the existence of prejudice, it is prejudice arising from the delay itself that is the crucial consideration. I am not satisfied the passage of 17 days has caused prejudice to the Province. In terms of responding to the appeal, it is in the same position it would have been in had the CCLA filed its Notice of Appeal within the proper time frame.

The apparent strength or merit of the proposed appeal

[25] It is the merit of the proposed appeal that was the focus of the arguments advanced on the motion. Given their nature, I will start with the Province's view.

[26] The Province says there is no merit to the appeal, citing three primary rationales. Firstly, there can be no merit or arguable issue because the appeal is moot. The Province, quite correctly, points to the fact that the Injunction Order is no longer in effect and, as such, there is no live controversy between the parties.

[27] Secondly, the Province argues the CCLA lacks standing to bring an appeal in this Court. Although the CCLA was granted standing in the court below, the Province says it was confined to seeking a review of the Injunction Order. It was not a party to Justice Norton's original Order, and therefore, it has no standing to appeal it. Without standing, the Province says the appeal lacks merit.

[28] Finally, the Province argues the CCLA's proposed appeal is an improper collateral attack on Justice Chipman's determination that the matter is now moot. It asserts the CCLA is attempting to side-step Justice Chipman's finding by launching an appeal of the original Injunction Order and that such conduct should not be permitted.

[29] The CCLA says there is merit to the appeal and its proposed grounds of appeal raise arguable issues that have never been addressed by any court. It asserts that none of the concerns raised by the Province should preclude me from exercising my discretion to permit the late filing of the Notice of Appeal.

[30] With respect to the allegation of mootness, the CCLA acknowledges the Order it is seeking to challenge is no longer operative. That, however, is not the end of the inquiry. The CCLA submits a determination of mootness is a two-step process. It is a panel of this Court, considering the guidance set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, which should determine if the issues being raised justify appellate review in these circumstances. The CCLA says a single judge in chambers should not make such a determination.

[31] The CCLA makes a similar argument with respect to the issue of standing. Although it provided comprehensive substantive arguments as to why it does enjoy standing to bring an appeal, again, the CCLA says determining that question is for a panel. It relies on the decision of Justice Freeman in *ABN Amro Bank Canada v. NsC Corp.*, [1992] N.S.J. No. 520 (N.S.S.C. (A.D.)). There, a respondent argued against an appeal being set down because the appellant lacked "status" to bring an appeal. However, Justice Freeman, sitting in chambers, scheduled the matter for a hearing, noting:

> If that status is to be attacked, it should be attacked at the appeal itself before a full panel of the Appeal Court.

[32] With respect to the Province's assertion that the proposed appeal is an improper collateral attack on the decision of Justice Chipman, the CCLA disagrees. It submits the appeal it is seeking to advance is intended to address alleged legal

errors committed by Justice Norton. It points out that the review it sought before Justice Chipman would have been a hearing *de novo* with evidence. The outcome of that hearing would not have included an identification of errors of law, as that function rests solely with the Court of Appeal.

[33] Further, although the CCLA acknowledges the existence of overlap in the issues it sought to argue on the review before Justice Chipman and the grounds of appeal, there are clear distinctions, including issues that have not been addressed by any court given the *ex parte* nature of the Province's application and resulting Injunction Order.

[34] I agree with the CCLA that the issues being raised by the Province are ones that should be properly addressed by a full panel of this Court. With respect to the issue of mootness in particular, I take note of what Justice Cromwell said in *LeBrun v. Woodward*, 2001 NSCA 9:

> [7] Mr. Zatzman's argument amounts to saying that the appeal is moot because even if successful, it will have no practical effect on the rights of the parties. On the face of it, his argument appears to have some merit, although it might be argued that where a claim for lien has been vacated but restored on appeal some adjustment to the time limits under the **Mechanics' Lien Act** may be necessary. I express no opinion on that point. I do not think, however, that I should give effect to this argument on an application by the Registrar to dismiss this appeal for two reasons.
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> [8] First, the question of whether or not an appeal is moot is a question of law going to the merits of an appeal which would normally be decided by a panel of three judges of this Court. A judge in chambers in the Court of Appeal does not have the authority to dismiss an appeal because it apparently lacks merit. If I were to give effect to Mr. Zatzman's argument, I would, in effect, be doing indirectly what I am not empowered by the Rules of the Court to do directly. **I think there is at least an arguable issue as to whether or not the appeal is moot. Once that threshold is reached, it would not be proper for a chambers judge to dismiss it on a Registrar's motion on the basis of mootness**. Second, Ms. LeBrun is not represented by counsel and no briefs on this point of law were filed. I do not think it would be fair to rule on the mootness question when it has not been fully argued.
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> (Emphasis added)

[35] I am satisfied there is an arguable issue here as to whether the appeal should fail on the basis of mootness. The Supreme Court of Canada in *Borowski*, *supra*, set out the considerations for a court's exercise of discretion to resolve legal issues

notwithstanding the absence of a live controversy between the parties. This Court in *Pratt v. Nova Scotia (Attorney General)*, 2020 NSCA 39 recently exercised that discretion to give guidance in relation to *habeas corpus* applications and related procedural fairness concerns.

[36] I am satisfied the proposed grounds of appeal give rise to issues that a panel of this Court may view as being important to resolve notwithstanding the absence of a live controversy. In its written submissions, the CCLA explains:

> 6. It is strongly in the interests of justice that the CCLA's proposed appeal of the Decision be heard on its merits. The Decision confers on the Province a new power to supplement the enforcement of provincial offences through arrest and detention for contempt proceedings that is without precedent in Canada. This new power was granted to the Province without hearing from any opposing party. The CCLA submits that the Province's argument in support of the Injunction, which was adopted in the Decision, disregarding binding Supreme Court of Canada jurisprudence, misapplied basic principles of injunctions, and ignored the *Charter*. Without consideration or correction by the Court of Appeal, the Decision will remain available as a precedent for future *ex parte* government action.

[37] I note in particular that on its face, the Injunction Order bound every citizen of Nova Scotia, precluding them from organizing, promoting, including via social media, and attending an "Illegal Public Gathering" anywhere in the Province. The CCLA says this directive was an infringement of the right to freedom of assembly and liberty, as well as the right to freedom of expression, yet the hearing judge gave no consideration of the *Charter* implications of his Order in his written reasons. The CCLA says this is particularly concerning in the context of an *ex parte* determination and is an issue on which this Court may wish to provide guidance.

[38] The CCLA also raises a concern regarding the hearing judge's acceptance of expert evidence offered by one of the named parties, again in the context of an *ex parte* matter. It submits the independence of experts is foundational to the integrity of the adjudicative process, and this is well reflected in *Civil Procedure Rule* 55, as well as a multitude of case authorities. Yet the hearing judge issued an injunction against every citizen of the Province on the basis of the "expert opinion" of one of the named parties before it. The CCLA says this Court may be inclined to comment on the appropriateness of such a conclusion.

[39] As in *Pratt*, *supra*, a panel of this Court, in its discretion, may view some or all of the issues being raised by the CCLA as being important to address. That is not my decision to make. For the purposes of what I do need to decide, I am satisfied the CCLA has shown there are arguable issues.

Good faith intention to appeal

[40] While the CCLA did not have a good faith intention to **appeal** the Injunction Order within the prescribed period, it did formulate an intention to challenge its continuation. This is not a situation where a party was content with the decision, only to seek to change the outcome after the passage of time. The CCLA has always been opposed to the Injunction Order; however, it chose to implement its challenge by way of requesting a review as opposed to an appeal.

Conclusion

[41] Although the Province has raised several issues that may go to the ultimate merits of the proposed appeal, those should be addressed by a panel of this Court and not by a single judge in chambers. Considering the factors as outlined above, I am satisfied it is in the interest of justice that the motion be granted.

[42] The CCLA shall be entitled to file a Notice of Appeal, in the same form as argued in the motion before me and as attached as Exhibit Q to the Affidavit of Drew Hampden, no later than September 3, 2021.

[43] As an incidental matter, the CCLA raised the issue of service of the Notice of Appeal on the other named respondents. From the materials before me on the motion, it does not appear as if "Freedom Nova Scotia", Amy Brown, Tasha Everett, Dena Churchill, or anyone else appeared in the Supreme Court of Nova Scotia for any of the matters following the issuance of the Injunction Order. The CCLA submits personal service will be impractical as "Freedom Nova Scotia" does not appear to be a legal entity, and the addresses and whereabouts of the other named personal respondents are uncertain.

[44] I am satisfied that upon filing of the Notice of Appeal, service thereof can be effected upon the other named respondents by posting a copy on the CCLA website (www.ccla.org). The Province should be provided with a filed copy of the Notice of Appeal in the usual manner.

[45] As a public-interest litigant, the CCLA did not seek costs of this motion. None are ordered.

Bourgeois J.A.