SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Attorney General) v. Freedom Nova Scotia,* 2021 NSSC 217

Date: 20210630
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

Applicants

and

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

Respondents

and

The Canadian Civil Liberties Association

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	June 30, 2021 in Halifax, Nova Scotia
Oral Decision:	June 30, 2021
Written Decision:	June 30, 2021
Counsel:	Duane A. Eddy, for the Attorney General of Nova Scotia Nasha Nijhawan, Benjamin Perryman and Jaime Burnet, for the Canadian Civil Liberties Association

By the Court [orally]:

INTRODUCTION:

[1] On May 13, 2021, the Attorney General of Nova Scotia (the "Province") sought a *quia timet* injunction on an expedited basis. The Province applied for this pre-emptive injunction in anticipation of an imminent protest against COVID-19 public health restrictions as it was anticipated that participants would not respect social distancing or masking requirements.

[2] The Respondents to the Application included 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 the province.

[3] The Application was heard in Chambers on May 14th *ex parte*, with none of the Respondents appearing and no cross-examination on the Province's affiants.

[4] In *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, 2021 NSSC 170, this Court granted the requested order and issued the *quia timet* injunction (the "Injunction Order").

[5] In *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, Norton, J. described the injunction as follows:

> [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.

[6] The Court had before it the materials described at para. 5 of the decision:

> [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. …

[7] Relying on the affidavit evidence of Ms. Crichton, Justice Norton made 23 findings of fact (para. 8) and on the affidavit of Dr. Strang, 28 findings of fact (para. 9).

[8] Following a review of the law, Norton, J. noted as follows at paras. 27 – 31:

> [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.
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> [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.
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> [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.
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> [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.
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> [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.

[9] In concluding his decision, Justice Norton stated:

> [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.

[10] No such person or public interest group applied to the Court to challenge or vary the Injunction Order until almost two weeks later when on May 27, 2021 The Canadian Civil Liberties Association ("CCLA") filed a Notice of Motion seeking among other things an Order:

> … Granting the CCLA public interest standing in this proceeding as a party for the purpose of requesting a rehearing of the Application in Chambers, seeking to set aside or vary the Injunction Order obtained *ex parte* by the Applicant.

[11] The CCLA's motion was set down for June 4, 2021. On June 1st the Province wrote to advise the Court that it consented to an Order granting the CCLA standing. On June 3rd Cara Zwibel, the CCLA's Director of the Fundamental Freedoms Program filed an affidavit (sworn May 27, 2021) in support of the motion, concluding with these paras.:

> 27. In addition to its expertise, the CCLA has the resources to pursue a rehearing of the Province's Application. CCLA is being represented by able and experienced counsel with the capacity to manage litigation of this nature, and will effectively present the issues to this Court.
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> 28. I believe the CCLA's submissions will assist this Honourable Court in reviewing the Injunction Order's interference with the *Charter* rights of all Nova Scotians in the context of COVID-19 public health restrictions. The CCLA's submissions will be grounded in its mandate to promote and protect fundamental rights and liberties and its extensive experience in addressing the difficult questions that arise when those fundamental rights and liberties have to be balanced with other important governmental objective.

[12] Justice Gabriel heard the motion on June 4th. The Order granted public interest standing to the CCLA in this proceeding as a party for the purpose of a rehearing of the *ex parte* Application in Chambers and the rehearing was set for a full day on today's date.

[13] On June 14th the Province filed a Notice of Motion for an Order discharging the Injunction Order. The motion was scheduled for June 22nd. Having reviewed the filed material and hearing the parties on June 22nd, Justice Gatchalian issued an Order which discharged the Injunction Order. Her Ladyship then declined the Province's request to cancel today's hearing.

[14] Later on June 22nd as the Judge assigned for today's hearing, I received a letter from the Province. In his opening paragraph Mr. Eddy stated:

I am writing to advise that Justice Gail Gatchalian granted the Attorney General's motion for an Order discharging the injunction in this proceeding. Given that the injunction has been discharged, pursuant to paragraph nine (9) of the Injunction Order, the Attorney General submits that there is no longer a live controversy. The Attorney General submits that the matter is moot and relies on the enclosed case of *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291, wherein Justice Rosinski reviewed the law of mootness beginning at paragraph 14.

[15] He concluded his correspondence as follows:

- *"**adjudicating may be viewed as intruding into the role of the legislative branch"***

The Attorney General applied for the Injunction Order granted on May 14, 2021, to ensure compliance with the Public Health Order issued under s. 32 of the *Health Protection Act.*

Moreover, the Public Health Order remains in effect and sets out restrictions on illegal gatherings and the activities that cause illegal gatherings to occur. The CCLA is not challenging the Public Health Order. Adjudication of the impugned provisions of the Injunction Order which mirror the conditions prohibiting illegal gatherings in the Public Health Order and the activities set out in the Public Health Order that cause illegal gatherings to occur may be viewed as intruding into the role of the legislative branch.

Furthermore, when Justice Gabriel set filing deadlines on June 4, 2021 with respect to the rehearing of the injunction application, his Lordship encouraged the parties to communicate to possible resolve some or all of the issues in this proceeding. The Order discharging the Injunction Order has effectively resolved the matter.

Conclusion

Based on the foregoing, the Attorney General requests that the June 30th hearing be removed from the docket and the filing deadlines pertaining to that hearing be set aside.

[16] On June 23rd Ms. Nijhawan wrote the Court, advising:

The CCLA disagrees that the issues raised on rehearing are moot, given that the issues raised by the CCLA include a challenge to the legal authority for the injunction, the state of emergency arising from the public health crisis remains in place, and the relief sought on the rehearing includes setting aside the decision of Justice Norton, dated May 14, 2021.

In our respectful submissions, the application of the doctrine of mootness to an *ex parte* injunction application is not adequately canvassed in the submissions of the Province, contained in Mr. Eddy's letter. The CCLA would like the opportunity to make full responding submissions to the request of the Province, prior to the

> determination of mootness by Your Lordship. In our view, this is best done in oral argument at the commencement of the hearing already scheduled on June 30, 2021. We would be pleased to make written submissions on this issue in advance of the hearing, at the Court's direction.

[17] In advance of today's hearing I reviewed the correspondence and determined that it would be appropriate to hear the parties on the issue of mootness. I also asked for any written submissions to be received from CCLA by June 25th and from the Province by June 28th.

[18] On June 25th CCLA provided their brief and affidavit of their counsel's paralegal, Jody Lussier sworn on that date. The Court also has Ms. Lussier's previously filed sworn affidavits. On June 28th the Province provided their mootness brief.

[19] In advance of today's decision I have reviewed the entirety of the file, inclusive of the Injunction Order and all of the subsequent filings. Although styled as a "rehearing", it is important to understand that the initial remedies sought by CCLA are as stated in their brief filed June 21, 2021:

> a. an Order setting aside the decision of the Honourable Justice Scott Norton, dated May 14, 2021; and
>
> b. an Order discharging the Injunction Order in its entirety without prejudice to the Attorney General of Nova Scotia filing a new application, if necessary.

[20] There is no debate that the June 22nd Order discharges the Injunction Order.

[21] The Province's claim of mootness raises two issues:

1. Whether there is a live controversy that affects or may affect the rights of the parties?
2. If not, whether the Court should nevertheless exercise its discretion to hear the case?

[22] The doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties", *Barowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at para. 15.

[23] In *Borowski* the Supreme Court of Canada canvassed the types of circumstances that render a dispute moot. These included the repeal of a bylaw being

challenged, an undertaking to pay damages regardless of the outcome of an appeal, the non-applicability of statute to the party challenging the legislation, the death of a party appealing a criminal matter, or the end of the strike for which a prohibitory injunction was obtained. In *Borowski* the matter was found moot because the sections of the challenged legislation had been repealed.

[24] In *Nova Scotia (Community Services) v. Nova Scotia (Attorney General)*, 2017 NSCA 73, our Court of Appeal reviewed the doctrine of mootness at paras. 56 – 63. Justices Beveridge, Farrar and Bourgeois then applied the rationale articulated in *Barowski* in fashioning these comments at paras. 67 and 68:

> [67] The lack of an adversarial context informs the second rationale. The courts are full of live controversies, with real issues impacting upon the lives of real litigants. It is hardly a secret that the administration of justice is often criticized for backlogs and delay. Before adding a time consuming constitutional reference to the docket, it is "preferable to wait and determine the point in a genuine adversarial context".
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> [68] Finally, there is nothing on the present record which would, in our view, justify a judge-initiated intrusion into the proper role of the Legislature. The issues raised by the hearing judge were moot. They were not triggered by a litigant with a real, or even potential, argument that the legislation constituted an infringement on their rights. The concerns raised were those solely of the hearing judge. They were entirely hypothetical. With respect, it was not his function to question the constitutionality of the statutory product of legislative decision-making.

[25] More recently, Chief Justice Wood referred to the above case in *C.S.J.L.M. v. Nova Scotia (Community Services)*, 2019 NSCA 59 at para. 11. Wood, CJNS succinctly set forth the rationale behind the mootness doctrine at para. 10.

> [10] Even if a matter is moot, the court retains discretion to consider the issue in appropriate circumstances. The seminal decision from the Supreme Court of Canada on the issue is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. There the Court said that, when considering its discretion to decide a matter which is moot, a court should consider the rationales behind the doctrine of mootness which are:
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> 1. Necessity for an adversarial context which is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.
> 2. The importance of conserving scarce judicial resources and considering whether the circumstances of the dispute justify applying those resources to its resolution.

> 3. Sensitivity to the courts' adjudicative role and ensuring that it will not intrude into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of litigants.

[26] CCLA submits that the case is not moot. They submit that there is live controversy between the parties concerning the legality and constitutionality of this Court's *ex parte* decision. In CCLA's brief it is stated that "the COVID-19 pandemic is ongoing and at any time the Attorney General could return to this Court on an *ex parte* basis to again seek an order that would infringe upon the constitutionality protected rights of Nova Scotians". CCLA continues, stating "even if the case is moot, the interests of justice require that a re-hearing in open court proceeds. There is an adversarial context that has produced a more exhaustive record and complete legal submissions. The ongoing public health emergency and the far-reaching nature of this Court's *ex parte* decision warrant the use of judicial resources, particularly given the evidence and case law that was not presented to the application judge, the illegality of the injunctive relief granted, and the inadequate review that was given to the *Charter* issues. Re-hearing an *ex parte* application is squarely within the proper role of the Court and would not interfere in any way with policy making".

[27] The CCLA alleges that this Honourable Court issued an illegal injunction in this proceeding and argues that the injunction order violates *Charter* rights and is overly broad. The Province disagrees.

[28] The Province points out that the Injunction Order has been lifted and that there no longer remains a controversy affecting the parties. Accordingly, they submit that the matter is moot and it is not in the interests of justice to have the matter heard.

[29] In my view, there is no longer a live controversy or adversarial context. No party is advocating in favour of the injunction continuing given the Order discharging the Injunction Order granted by Justice Gatchalian. Furthermore, no contempt proceedings have been brought against any person under the Injunction Order. Consequently, no person's rights or liberties are in jeopardy under the Injunction Order. Given that there are no outstanding contempt proceedings requiring adjudication, this further supports the Province's submission that an adversarial context no longer exists in this case.

[30] Given my finding of no "live controversy" between the parties, the Court has discretion to hear an otherwise moot case where it is in the "interests of justice" to do so, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 17.

[31] The rule pertaining to *ex parte* applications or *quia timet* injunctions and when they may be granted does not need clarification.

[32] Whether an injunction is granted is determined on a case-by-case basis. The Court applies the settled law to the evidence before it. The Injunction Order incorporated verbatim certain restrictions contained in the Public Health Order. The Public Health Order remains effective and has gone unchallenged by the CCLA. In my view, there is no practical consequence on the rights of the parties when the impugned provisions of the Injunction Order remain incorporated into the Public Health Order, which all Nova Scotians are legally required to comply with.

[33] The Injunction Order was granted under the exceptional circumstance of the worst outbreak of COVID-19 in Nova Scotia – the "third wave". In the third wave daily case infections of COVID-19 ballooned into the triple digits. The Injunction Order was an extraordinary remedy granted in extraordinary circumstances. No injunctive relief was sought during the first or second wave. No injunctive relief is now being sought. If and when it is, the Court must then consider the evidence brought before it at that time. This contemporaneous, timely evidence will guide whether or not an injunction will then be granted. If an injunction is to be granted, it may be quite distinct from the one granted by Justice Norton six weeks ago. Rather than proceeding *ex parte,* the Province has gone on record stating that it will provide CCLA with notice.

[34] The record reflects that the Court upon hearing evidence inclusive of the expert evidence of Dr. Robert Strang, Chief Medical Officer of Health, issued a *quia timet* injunction. The burden of proof on a *quia timet* injunction is much higher than a regular injunction. The Province met the burden required to obtain a pre-emptive injunction in this matter. The Province set out the law pertaining to *quia timet* injunctions in its written submission to the Court, which the Court then referenced in its written decision. The Province also provided the evidentiary foundation supporting the *quia timet* injunction. The evidentiary foundation for the *quia timet* injunction was accepted as set out in the Court's written decision. I am mindful of CCLA's arguments that the decision is lacking in these areas. While the decision may not be perfect, to my mind it represents timely, thorough written reasons in the context of an urgent situation. The reader is given a clear understanding as to why the Judge felt the Injunction Order was required as referenced herein at para. 8 and continuing at paras. 33 – 37 of the decision.

[35] The Public Health Order remains in effect and sets out restrictions on illegal gatherings and the activities that cause illegal gatherings to occur. The CCLA is not challenging the Public Health Order. In my view, the adjudication at this time of the impugned provisions of the Injunction Order which mirror the conditions prohibiting illegal gatherings in the Public Health Order would intrude into the role of the legislative branch.

[36] In *C.S.J.L.M.* Chief Justice Wood concluded at para. 16:

> [16] I am satisfied that, in the circumstances of this case, the Court should not exercise its discretion and decide what would otherwise be a moot issue. Should future proceedings arise involving C.M., where the Minister believes it would be appropriate to seek appointment of a litigation guardian, that application should be supported by appropriate evidence and submissions. The hearing judge will make their decision based on the circumstances which exist at that time.

[37] Similar reasoning applies to this case. I am not prepared to exercise my discretion to allow the CCLA's requested rehearing to occur. The Injunction Order was granted in markedly different circumstances which existed six weeks ago. Who knows what another six weeks will bring. The mind contemplates anything from an extinguished pandemic to a raging variant fueled fourth wave.

[38] The Injunction Order was lifted just over a week ago. I am not persuaded that a lengthy hearing is now necessary. There will be no Order setting aside the May 14, 2021 decision of this Court. The CCLA's issues, while interesting and thought-provoking, do not necessitate a lengthy hearing (or rehearing) at this time. This is a courtroom not a classroom. Should it become necessary, the Court will be well-placed to make a decision based on the circumstances which exist at that time.

[39] Costs were not sought on this aspect of the hearing; consequently, they are not awarded.

Chipman, J.