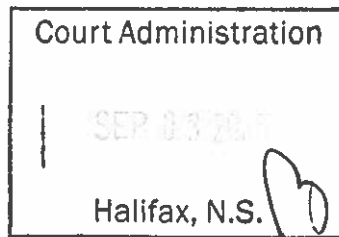


Form 5907

2020



Hfx. No. 500272

Supreme Court of Nova Scotia

Between:

THE CLOUD FACTORY VAPE SHOP INC. AND EDWARD GEORGE  
WILLIAM MACEACHERN

Applicants

and

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty  
the Queen in right of the Province of Nova Scotia

Respondent



### Notice of Application in Court

To: The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia ("the Province")

#### The Applicants request an order against you

The Applicants are applying to the court for the following declarations, determinations and orders:

1. A declaration that section 3(e) in the *Tobacco Access Act*, 1993, c 14 – insofar as it bans the sale of flavoured vaping liquid, when read in concert with s. 3(ba) and s. 7 of that same act – violates section 7 of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1;
2. A determination and order that section 3(e) of the *Tobacco Access Act* is of no force and effect, insofar as it prohibits the sale of flavoured vaping liquid; in the alternative the Applicants seek a determination and order that s. 7 of the *Tobacco Access Act* shall specifically exclude flavoured vaping liquid from that list of prohibited products; in the further alternative, the Applicants seek a determination and order that s. 7 of the *Tobacco Access Act* shall exclude same when sold by a specialty, adult-only retailer.
3. A declaration that a lack of specific exclusion for specialty stores selling vaping liquid and vaping liquid accessories from section 5(1)(j) of the *Smoke-Free Places Act*, 2002 c. 12 violates section 7 of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1;

4. A determination and order that section 5(1)(j) of the *Smoke-Free Places Act* shall specifically exclude specialty stores selling vaping liquid and vaping liquid accessories;
5. A declaration that the *Revenue Act*, SNS 1995-96, c 17, s 46C, as amended by SNS 2020 c 2, s 10 violates section 7 of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1.
6. A determination and order that the *Revenue Act*, SNS 1995-96, c 17, s 46C, as amended by SNS 2020 c 2, s 10 is of no force and effect.
7. An order that the Province pay to the Applicants damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*;
8. Pre-judgment and post-judgment interest;
9. Costs, including special costs or increased costs; and
10. Such other relief under Section 52 of the *Constitution Act, 1982*, or otherwise as counsel requests or this Honourable Court declares just.

The Applicants started this application by filing this notice on the date certified by the Prothonotary.

### **Grounds for the order**

The Applicants are applying for the above determinations, declarations, and orders on the following grounds:

#### *i) The Parties*

1. The Applicant, The Cloud Factory Vape Shop Inc., is an Extra-Provincial Corporation bearing Nova Scotia Registry of Joint Stock identification number 3329461 and is in the business of specialty vape retail in Nova Scotia.
2. The Applicant, Edward George William MacEachern, is an individual resident in Nova Scotia and co-owner of The Cloud Factory Vape Shop Inc. Mr. MacEachern was a long-time tobacco smoker who successfully used vaping as a smoking cessation tool. Mr. MacEachern's life, liberty, and security of the person is therefore impacted by the subject legislation.
3. Both Applicants have a real and continuing interest in the issues raised by this Application.
4. The Respondent, the Province, are obliged to not create laws that interfere with the life, liberty, and security of Nova Scotians, pursuant to section 7 of the *Charter of*

*Rights and Freedoms*, in a manner that is not justified in accordance with the principles of fundamental justice.

ii) *The Acts of the Province*

**Tobacco Access Act**

5. *An Act to Amend Chapter 12 of the Acts of 2002, the Smoke-free Places Act and Chapter 14 of the Acts of 1993, the Tobacco Access Act, SNS 2020, c 18, s 4* amended the existing *Tobacco Access Act*, prohibiting the sale of vaping liquid by adding “electronic cigarettes” to the definition of “tobacco” in that act. This change, in concert with s. 3(ab) and s. 7 of the *Tobacco Access Act*, effects the ban on flavoured vaping liquid.
6. Banning flavoured vaping liquid does not prevent “e-cigarette or vaping associated lung injury” (EVALI). Further, the availability of flavoured vaping liquid is not responsible for higher rates of youth vaping than is present in other provinces in which flavoured vaping liquid is also available.
7. This legislation unreasonably deprives adults of an important part of their smoking cessation method (flavoured vaping liquid). Many adult-only specialty vape shops will be forced to close as a direct result of this legislation, while convenience stores and gas stations will become larger purveyors of vaping products, which will increase youth access.
8. This legislation therefore infringes on the s. 7 *Charter* rights of smokers and ex-smokers, including Mr. MacEachern, who do or would rely on vaping as a smoking-cessation method, in a manner that is arbitrary and overbroad.

**Smoke-Free Places Act**

9. The *Smoke-Free Places Act*, 2002, c 12, s 5(1)(j) prevents customers from testing products in specialty vape stores. Specifically, Bill 60, *An Act to Amend Chapter 12 of the Acts of 2002, the Smoke-free Places Act, and Chapter 14 of the Acts of 1993, the Tobacco Access Act*, 2<sup>nd</sup> Sess, 62<sup>nd</sup> General Assembly, Nova Scotia, 2014, changed the definition of “smoke” in section 2(h) of the *Smoke-Free Places Act* to indirectly include vapor. The effect of this was that vaping was banned in all retail shops, boutiques, and stores (including specialty vape shops) pursuant to section 5(1)(j), as of May 2015.
10. Specialty vape shops are already restricted to minors. Further, being able to sample vaping liquid, and to learn how to use the device and determine the appropriate nicotine concentration for the individual user, is critical to the success of vaping as a smoking-cessation method. In effect, smokers are denied reasonable access to harm reduction strategies that allow them to better preserve their health and integrity.

11. The same infringes on the s. 7 *Charter* rights of those smokers, including Mr. MacEachern, in a way that is arbitrary, as it is not rationally-connected to reducing youth smoking. Further, any positive impacts this law could have on the youth smoking or vaping rates is grossly disproportionate to the resulting harm on those who reasonably seek to use vaping to quit smoking tobacco.

### Revenue Act

12. As of September 15, 2020, vaping liquid and vaping products will be taxed as per *Act Respecting Certain Financial Measures*, SNS 2020, c 2, s 10, adding s. 46C to the *Revenue Act*, SNS 1995-96, c 17, s 46C. These taxes would require vaping liquid to be taxed at rate of \$0.50 per millilitre (regardless of the concentration of nicotine in the subject liquid) and vaping devices and components to be taxed at a rate of 20% of their suggested retail price.
13. Under this taxing regime, one millilitre of vaping liquid that contains the minimal concentration of nicotine will be taxed the same amount as a millilitre that contains the maximum concentration.
14. This tax, as with the aforementioned legislative changes, infringes on the s. 7 *Charter* rights held by those who legitimately rely on vaping as part of their smoking cessation strategy, including Mr. MacEachern.
15. If the intended purpose of the tax is to curb smoking (youth or otherwise), then it is arbitrary to tax the thing that is used to quit smoking. Further, this creates a competitive advantage for non-specialty shops (e.g., convenience stores and gas stations) selling high-concentration pod systems, which cannot be said to be rationally connected to the goal of reducing rates of youth vaping.
16. The subject taxes are also overbroad with regards to their ostensible purpose – a reduction in the use of tobacco products. The primary function of vaping products is smoking cessation. Notwithstanding the intended impact these taxes might have on youth smoking rates—and despite the causal disconnect between that intention and reality— these taxes would price-out adult smokers who use vaping products for their intended purpose. It would cede the market advantage back to the tobacco companies and incentivise smokers to continue or return to smoking tobacco.
17. Any positive impact this taxation could have on youth smoking and/or nicotine-addiction rates would be grossly disproportionate to the negative impact on the majority of users—people who use vaping products as a smoking-cessation tool.

### Witnesses for Applicant

The Applicants expect to file affidavits from the following witnesses, dealing with the following subjects:

Name of witness	Subject
Edward George William MacEachern	Personal history using vaping for smoking cessation as well as the impact of the subject legislation on the Cloud Factory Vape Shop Inc. and the practical impact on the vape industry
Lay Witness	Personal history using vaping for smoking cessation
Lay Witness	Personal history using vaping for smoking cessation
Expert Witness	Public health and harm reduction— Smoking cessation and lung health
Expert Witness	Public Health and harm reduction – Vaping as a smoking cessation tool and approaches in other countries
Expert Witness	Public health and harm reduction – Epidemiology and smoking cessation
Expert Witness	Public health and smoking research

### Motion for date and directions

At 11:00 a.m. on November 18, 2020, the Applicants will appear before a judge at the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia to make a motion for an order giving directions and appointing a time, date and place for the hearing. The judge may provide directions in your absence if you or your counsel fail to attend.

### Affidavit on motion for directions

The Applicants file the affidavit of Sarah J. S. Emery, sworn on September 8, 2020, as evidence on the motion for directions. A copy of the affidavit is delivered to you with this notice.

### You may participate

You may file with the court a notice of contest and any affidavit for the motion for directions no less than fifteen days after this notice is delivered to you or you are otherwise notified of the application. Filing the notice of contest entitles you to notice of further steps in the application.

### Possible final order against you

The court may grant a final order on the application without further notice to you if you fail to file a notice of contest or if you or your counsel fail to appear at the time, date and place for the motion for directions.

**Filing and delivering documents**

Any documents you file with the court must be filed at the office of the Prothonotary at The Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia (telephone #902 424-6900).

When you file a document you must immediately deliver a copy of it to the Applicants and each other party entitled to notice unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

**Contact information**

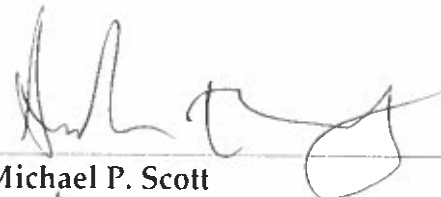
The Applicants designate the following address:

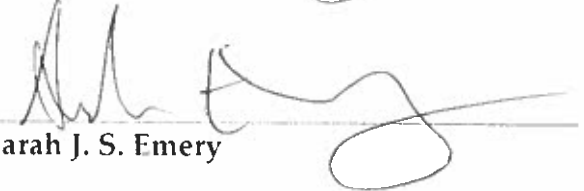
Patterson Law, 1801 Hollis Street, Suite 2100, Halifax, NS B3J 3N4

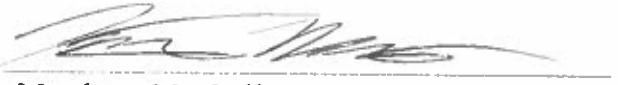
Documents delivered to this address are considered received by the Applicants on delivery. Further contact information is available from the Prothonotary.

**Signature**

Signed September 8, 2020

  
FOR Michael P. Scott

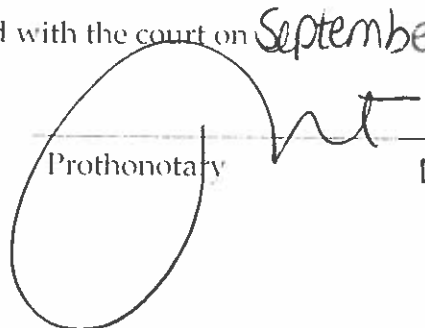
  
Sarah J. S. Emery



**Matthew MacLellan**  
Patterson Law  
1801 Hollis Street, Suite 2100  
Halifax, Nova Scotia B3J 3N4  
Telephone: 902.405.8000  
Facsimile: 902.405.8001  
Counsel for the Applicants

**Prothonotary's certificate**

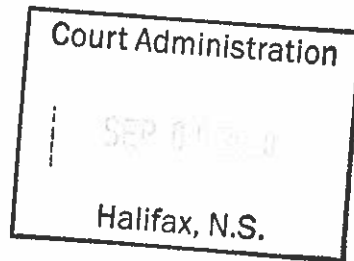
I certify that this notice of application was filed with the court on September, 2020.

  
Prothonotary **JENNA BENT**  
Deputy Prothonotary

September 8, 2020

**By Hand**

Mr. Timothy Morse, Prothonotary  
Supreme Court of Nova Scotia  
The Law Courts  
1815 Upper Water Street  
Halifax NS B3J 1S7



Hfx 500272  
~~717005~~

Dear Mr. Morse:

**The Cloud Factory Vape Shop Inc. and Edward George William MacEachern v.  
The Attorney General of Nova Scotia  
Motion for Directions: November 18, 2020 at 11:00 a.m.  
Our File Number: 4200671**

Further to the above-noted matter, please find enclosed for filing the following documents with respect to a Notice of Application in Court:

1. One original and five copies of the Notice of Application in Court;
2. One original and five copies of the Affidavit on Motion for Directions, sworn on September 8, 2020; and
3. Our firm cheque in the amount of \$218.05.

I ask that you kindly file the documents, certify the copies, and place them in our box for pick-up. I understand that November 18, 2020 is the next available date for a Motion for Directions and that it is currently being held in my name. I ask that you place this matter on the docket for November 18, 2020 at 11:00 a.m.

Please also find enclosed for filing the following documents related to a Notice of Motion in the same proceedings:

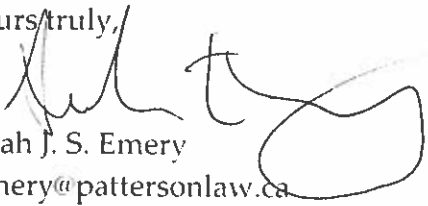
1. One original and five copies of the Notice of Motion;
2. An original and five copies of the Undertaking pursuant to Rule 41.06;

3. Five draft orders; and
4. Our firm cheque in the amount of \$66.00.

I ask that you kindly file the documents, certify the copies, and place them in our box for pick-up.

Thank you for your assistance.

Yours truly,



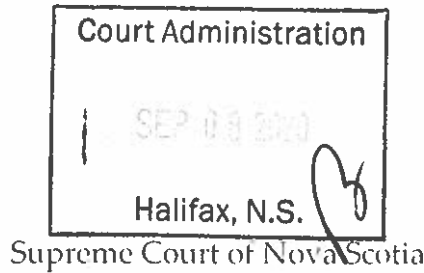
Sarah J. S. Emery  
semery@pattersonlaw.ca  
Tel: 902.405.8195

SJE

Enclosures



2020



Hfx No. 500272

Between:

THE CLOUD FACTORY VAPE SHOP INC. AND EDWARD GEORGE  
WILLIAM MCEACHERN

Applicants

and

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty  
the Queen in right of the Province of Nova Scotia

Respondent

**Undertaking Pursuant to Rule 41.06**

This undertaking is made with respect to the Motion for Interlocutory Injunction or Interlocutory Stay scheduled to be heard in the above noted Application. We, the undersigned, undertake to do the following:

- Indemnify the Respondent for losses caused by the interlocutory injunction if a judge who finally determines the claim is satisfied that the injunction is not justified in light of the findings on final determination; and
- Bring this Application to a final determination without delay.

**Signature**

Signed September 4th, 2020

SWORN before me at Halifax  
in Halifax Regional Municipality,  
Province of Nova Scotia,  
this 4th day of September, 2020.

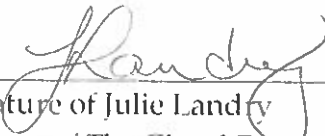
Matthew G. MacLellan  
A Barrister of the Supreme Court of  
Nova Scotia

Edward George William McEachern

SWORN before me at Halifax  
in Halifax Regional Municipality,  
Province of Nova Scotia,  
this 4th day of September, 2020.

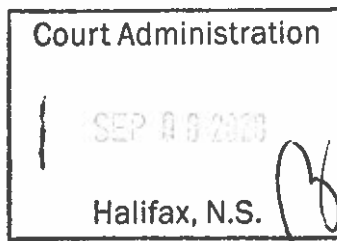


Matthew MacLellan  
A Barrister of the Supreme Court of  
Nova Scotia



Signature of Julie Landry  
Director of The Cloud Factory Vape Shop Inc.,  
on behalf of The Cloud Factory Vape Shop  
Inc.

2020



Hfx No.5 0 0 2 7 2

Supreme Court of Nova Scotia

Between:

THE CLOUD FACTORY VAPE SHOP INC. AND EDWARD GEORGE  
WILLIAM MACEACHERN

Applicants

and

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty  
the Queen in right of the Province of Nova Scotia

Respondent

*Notice of Motion*

**Motion**

The Applicants in this proceeding move for:

- An Order granting an interlocutory injunction or interlocutory stay of section 3(e), section 3(ba) and section 7 in the *Tobacco Access Act*, 1993, c 14 – insofar as those sections ban the sale of flavoured vaping liquid – until the issue is finally determined;
- An Order granting an interlocutory injunction or interlocutory stay of section 5(1)(j) of the *Smoke-Free Places Act*, 2002, c 12 – insofar as it includes specialty stores selling vaping liquid and vaping liquid accessories – until the issue is finally determined; and
- An Order granting an interlocutory injunction or interlocutory stay of section 46C of the *Revenue Act*, SNS 1995-96, c 17, s 46C, as amended by SNS 2020 c 2, s 10 until the issue is finally determined.

**Time and place**

The motion is to be heard by a judge in Special Chambers on November 30, 2020 at 2:00 pm in the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia. The moving party has arranged for one half day or less. The moving party says that the Motion will not require more time.

**References**

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

1. *Canadian Charter of Rights and Freedoms*, RSC (1985), app. II, no 44
2. *Judicature Act*, RSNS 1989, c 240, s 43(9)
3. *Nova Scotia Civil Procedure Rules*: Rule 41 – Interlocutory Injunction and Receivership

### Evidence

The evidence in support of the motion is as follows:

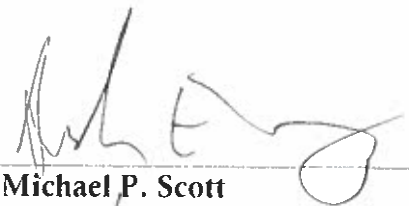
- Affidavit of Edward George William MacEachern to be sworn and filed before the deadline in Rule 23.11; and
- Further Affidavit evidence to be filed before the deadline in Rule 23.11.

### Possible order against you


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 grant an order without further notice to you.

### Signature

Signed September 8, 2020

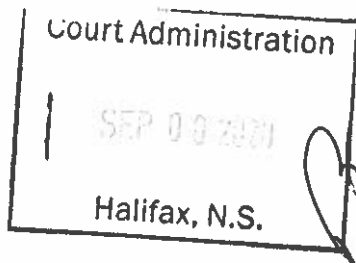
  
FUR **Michael P. Scott**

  
**Sarah J. S. Emery**

  
**Matthew MacLellan**  
Patterson Law  
1801 Hollis Street, Suite 2100  
Halifax, Nova Scotia B3J 3N4  
Telephone: 902.405.8000  
Facsimile: 902.405.8001  
Counsel for the Applicants

Form 39.08

2020



Hfx. No 5 0 0 2 7 2

Supreme Court of Nova Scotia

Between:

CLOUD FACTORY VAPE SHOP INC. AND EDWARD GEORGE WILLIAM  
MACEACHERN

Applicants

and

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty  
the Queen in right of the Province of Nova Scotia

Respondent

### Affidavit on Motion for Directions

I, Sarah J. S. Emery, of Truro, Nova Scotia, make oath and give evidence as follows:

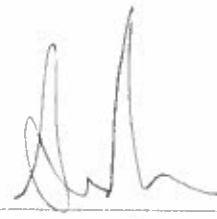
1. I am a lawyer at Patterson Law in Halifax, Nova Scotia and I am Co-Counsel for the Applicants in this proceeding.
2. I have personal knowledge of the evidence sworn to in this Affidavit except where otherwise stated to be based on information and belief.
3. I state, in this Affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
4. The only person of which I am aware who is not a party to this Application, but who may have an interest in these proceedings, is the Attorney General of Canada. A Notice of Constitutional Issue will be provided to the Attorney General of Canada, along with a copy of the Notice of Application and this Affidavit.
5. To the best of my knowledge, the list of witnesses provided in the Notice of Application in Court is complete, regarding the number of witnesses and type of evidence provided respectively by said witnesses. The witnesses themselves are yet to be determined.

6. The Applicants will disclose their documents as required by the *Nova Scotia Civil Procedure Rules* within the timeframe ordered by this Honourable Court.
7. The Applicants anticipate filing four expert reports, in the areas of:
  - (a) Public health, harm reduction, and smoking cessation and lung health;
  - (b) Public health, harm reduction, and vaping as a smoking cessation tool;
  - (c) Public health, harm reduction and epidemiology and smoking cessation; and
  - (d) Public health and smoking research.
8. The Applicant does not anticipate taking discovery of the Respondent.
9. This Application concerns events that are unfolding, namely that the Respondents have passed, and have and will be enforcing, legislation impacting the Constitutionally-protected rights of the Applicants.
10. I estimate that the hearing will take no more than five days.
11. I am not aware of any other information that would significantly affect the estimate of time needed to prepare for the Hearing or the length of time to conduct the Hearing.
12. The Applicants anticipate that the parties will be ready for a hearing within 12 months from this date.

SWORN before me at Halifax,  
in the Province of Nova Scotia,  
this 8<sup>th</sup> day of September, 2020



HEATHER M. WYSE  
Barrister of the Supreme  
Court of Nova Scotia

  
Sarah J. S. Emery