2021 Hfx. No. 506040

Supreme Court of Nova Scotia

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

Applicant

and

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

Respondent

and

The Canadian Civil Liberties Association

Respondent

Brief of the Canadian Civil Liberties Association

(Responding to the Attorney General of Nova Scotia's informal motion to dismiss on account of mootness)

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OVERVIEW

1. The Supreme Court of Nova Scotia rendered a decision and Order that affects the constitutionally-protected rights of all Nova Scotians. It did so at an *ex parte* hearing that lasted 13 minutes. The parties and the public were not present. They had no opportunity to test the evidence that purportedly justified such a far-reaching Order, or to challenge the legal basis of the Province's request.

2. Given the secret nature of the hearing, the Attorney General of Nova Scotia had an obligation to present all relevant evidence and jurisprudence to the Chambers judge, including contrary views. He failed to fulfill this obligation. Accordingly, the Chambers judge was deprived of relevant evidence showing that injunctive relief was not needed for enforcement of the existing Public Health Order, and that some of the activities being enjoined carried no or minimal risk of COVID-19 transmission. The application judge was also deprived of case law establishing that the injunctive relief requested was neither legally available nor substantively justified.

3. When the Injunction Order resulting from this secret hearing became public, the Canadian Civil Liberties Association ("CCLA") took immediate steps to pursue an urgent re-hearing to protect the constitutional rights and civil liberties of Nova Scotians. The Attorney General opposed an urgent re-hearing. Then, one week before this matter was to be heard in open court, the Attorney General moved to discharge the Injunction Order, on the bare assertion that it was "no longer necessary". The Court granted the discharge of the Order on June 22, 2021. The Attorney General now says that the re-hearing should not occur because the case is moot.

4. The case is not moot. There is live controversy between the parties about the legality and constitutionality of this Court's *ex parte* decision. 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 constitutionally protected rights of Nova Scotians.

5. 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.

PART I–STATEMENT OF FACTS

The Province's *ex parte* application for injunctive relief

6. On May 11, 2021, the Attorney General of Nova Scotia was granted permission to file an *ex parte* application, on an expedited basis, seeking *quia timet* injunctive relief in anticipation of a planned rally against COVID-19 public health restrictions.[1]

7. The only justification pleaded for the *ex parte* nature of the hearing was the assertion that "injunctive relief is necessary to prevent or reduce the spread of SARS-CoV-2 which causes Covid-19 within the Province of Nova Scotia".[2]

8. The Attorney General filed his materials on May 13, 2021, which included a brief and affidavits affirmed by Dr. Robert Strang, Chief Medical Officer of Health, and Hayley Crichton, Director of Public Safety and Investigations for the Department of Justice.[3]

9. Missing from the Attorney General's materials was evidence addressing the following relevant questions:

    1) Whether any available enforcement activities had already been attempted against the named respondents for known past breaches of the Public Health Order, and if not, why not;

    2) Whether all activities that the Attorney General sought to enjoin carried the same public health risk;

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[1] *Nova Scotia (Attorney General) v Freedom Nova Scotia*, 2021 NSSC 170, at para 1 ("*Freedom Nova Scotia*"); **BOA, Tab 13.**

[2] Notice of *Ex Parte* Application, May 12, 2021, page 1, see for contrast, the available justifications for an *ex parte* motion under Rule 22.03(2).

[3] *Freedom Nova Scotia,* at para 5; **BOA, Tab 13.**

3) Whether the Injunction Order was necessary to issue against all Jane Doe and John Doe respondents in the province; and

4) The Chief Medical Officer of Health's intention to use his powers to restrict "activities that incite illegal gatherings" including through the regulation of online speech.[4]

Also missing from the Attorney General's materials was any reference to authoritative jurisprudence which indicated that the relief sought may not be legally authorized, including recent Covid-19 injunction case law such as *Beaudoin v. British Columbia*, 2021 BCSC 248, or the leading case on *quia timet* injunctions, *R. v Canadian Broadcasting Corp.*, 2018 SCC 5, or other contra cases as set out in the CCLA's brief on the merits.

The 13-minute *ex parte* hearing, resulting Injunction Order, and decision

10. The application was heard the day after the Attorney General filed his materials, at a closed hearing that lasted 13 minutes. The affiants did not appear. The Court did not ask any questions about the Attorney General's evidence, including questions about whether past enforcement activities had failed, or whether the injunctive relief was warranted to enjoin online speech or political protest and peaceful assembly that was physically-distanced and masked.

11. The application judge did ask if this *ex parte* process had ever been used to obtain the type of injunctive relief requested in Nova Scotia. Counsel for the Attorney General advised that it had not, to his knowledge. He offered no authority for his novel procedural approach.

12. There was an approximately two-minute discussion between the application judge and counsel for the Attorney General about the impact of the injunctive relief on the rights of Nova Scotians. No specific *Charter* rights were identified or discussed. The Attorney General was not asked to justify the apparent rights intrusions contained in the Injunction Order.

[4] Supplemental Affidavit of Dr. Strang, sworn June 15, 2021, para 45

13. After a brief recess, court resumed, and the application judge advised the Attorney General that he would sign the draft Order (the "Injunction Order") provided by counsel. The Injunction Order applied not just to persons associated with the planned rally, but also against John Does and Jane Does, that is to say, all Nova Scotians. There was no discussion about apparent differences between the scope of the Injunction Order and the evidence presented at the hearing, or the remarkable inclusion of everyone in the province as respondents.

14. Later that day, the application judge issued reasons for his decision. Those reasons contain four paragraphs on "*Quia Timet* Injunctions and Charter Considerations." These paragraphs were copied verbatim from the Attorney General's brief. The reasons also contain seven paragraphs on "Balance of Convenience and Public Authorities" which are almost identical to the Attorney General's brief.[5]

15. The Injunction Order and the application judge's decision were then made publicly available and posted online.

CCLA's steps to obtain public interest standing and an urgent re-hearing

16. The CCLA acted immediately to attempt to address its concerns about the illegality of the Injunction Order, both by direct request to the Attorney General and by seeking redress in the Court as contemplated by the order itself.

17. On May 17, 2021, the CCLA wrote to the Attorney General and identified its concerns with the constitutionality of the Injunction Order, requesting that the Attorney General narrow its scope. The CCLA also indicated its intention to seek a rehearing of the *ex parte* Application, if no timely steps were taken.[6]

18. The CCLA had received no response from the Attorney General as of May 26, 2021, when it initiated a request for rehearing to the Court. With the assistance of the Prothonotary, the CCLA received direction from the Chambers judge that it must first bring a motion for standing in the Attorney General's Application, prior to requesting a rehearing.[7]

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[5] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, at para 50; **BOA, Tab 4.**
[6] Affidavit of Jody Lussier, sworn June 25, 2021, para 6 and Exhibit D.
[7] Affidavit of Jody Lussier, sworn June 25, 2021, para 5 and Exhibit C.

19. The CCLA filed its motion materials for public interest standing promptly, on May 27, 2021, and set down a Chambers motion at the earliest possible date on June 4, 2021. Counsel for the Attorney General, prior to obtaining instructions on the motion, immediately sought to have it delayed until after June 14, 2021.[8] Ultimately, the Attorney General consented to the CCLA's motion for standing on June 1, 2021.[9]

20. On May 27, 2021, the Attorney General responded to the CCLA's letter of May 17, 2021, and indicated that the matter would be dealt with through counsel.[10] The Attorney General did not subsequently agree to amend the terms of the Order in any fashion or to address the CCLA's concerns about its scope, and the litigation has proceeded.

21. The CCLA sought an expedited date for the rehearing, on June 14, 2021. The Attorney General opposed the request for an expedited date, on the basis that the matter was complex and that there was no urgency in the rehearing.[11] In Chambers on June 4, 2021, Justice Gabriel ordered that the rehearing would proceed on the date requested by the Attorney General, on June 30, 2021. A schedule for the exchange of materials on the rehearing was also established.[12]

The Attorney General's informal motion for mootness and threat to pursue costs

22. On June 14, 2021, the Attorney General filed a motion to have the Injunction Order set aside, scheduled for Chambers on June 22, 2021. The only evidence on the motion was a Solicitor's Affidavit which indicated on hearsay evidence that the injunction was "no longer necessary". No brief was filed by the Attorney General, and notice of the motion was not made public until June 18, 2021, after an objection about lack of notice was raised by the CCLA to the Court.[13]

23. The CCLA took the position that the Attorney General's motion should have been heard on June 30, 2021, at the time of the rehearing, and that in the alternative the motion should be

[8] Affidavit of Jody Lussier, sworn June 25, 2021, para 6 and Exhibit D.
[9] Affidavit of Jody Lussier, sworn June 25, 2021, para 7 and Exhibit E.
[10] Affidavit of Jody Lussier, sworn June 25, 2021, para 3 and Exhibit A.
[11] Affidavit of Jody Lussier, sworn May 27, 2021, para 6 and Exhibit D.
[12] Order of Justice Gabriel, June 4, 2021.
[13] Affidavit of Jody Lussier, sworn May 27, 2021, para 5-7 and Exhibit A.

granted only on a without prejudice basis to the CCLA's right to a rehearing on June 30, 2021, as ordered by Justice Gabriel.

24. The motion to set aside the Injunction Order was granted by Justice Gatchalian in Chambers on June 22, 2021. At the hearing of the motion, without notice, counsel for the Attorney General sought an order from Justice Gatchalian vacating the June 30, 2021, rehearing date. This relief was denied by Justice Gatchalian, on the basis that another judge of the Court was already seized of the rehearing.

25. The Attorney General wrote to the Court on the same day, requesting that the June 30, 2021, date be vacated due to mootness, without filing a motion. The CCLA opposed this request, and submitted that the question of mootness should be resolved at the rehearing as scheduled.

26. The Attorney General subsequently notified the CCLA that it would be seeking an adverse costs award against the CCLA (a public interest litigant), in the event that the CCLA's arguments on the rehearing were not successful.[14]

27. At the direction of the Court, the CCLA is responding to the Attorney General's argument that the matter is moot and the rehearing date should be vacated. The CCLA maintains that it is appropriate for the Court to rehear the Attorney General's *ex parte* application.

PART II–ISSUES

28. The Attorney General'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?

[14] Affidavit of Jody Lussier, sworn June 25, 2021, para 8 and Exhibit F.

PART III–LAW & ARGUMENT

ISSUE I – There is a live controversy that affects or may affect the rights of the parties

29. 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."[15] In this case, there is a "live controversy" between the parties, and the Court's decision on re-hearing will or may affect their rights. The case is therefore not moot.

30. In *Borowski v Canada (Attorney General)*, 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* itself, the matter was found moot because the sections of the challenged legislation had been repealed.[16]

31. The common thread linking all of these examples is that a change of circumstances has made the concrete dispute disappear, rendering the issues academic.

32. While the Injunction Order has been discharged, the application judge's *ex parte* decision remains. The Province takes the position that the decision should remain the law in Nova Scotia. CCLA takes the position that the Court must rehear the issues raised, so that a new decision can be rendered on full evidence and argument, replacing the original decision. This is a live controversy.

33. The *ex parte* decision confers new powers on the Attorney General that have not previously been recognized by any provincial superior court in Canada, specifically the power to obtain injunctive relief against all citizens in a province in the absence of any statutory authority or common law cause of action, even where this relief interferes with *Charter* rights. This new

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[15] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, at para 15 ("*Borowski*"); **BOA, Tab 2.**
[16] *Borowski*, at paras 17-23; **BOA, Tab 2.**

power was both requested and conferred without any apparent acknowledgment that it was new.

34. In the context of an ongoing public health emergency—one that has seen multiple waves of outbreaks and related public health restrictions—there is a real possibility that the Attorney General will use this new power to again obtain *ex parte* injunctive relief that infringes the *Charter* rights of Nova Scotians.

35. Accordingly, what this Court decides on re-hearing will affect or may affect the rights of the parties. If the Court refuses re-hearing or affirms the application judge, the Attorney General will have a new power not previously established at law that can be used to the detriment of the fundamental and legal rights of Nova Scotians. On this basis, the case is not moot.

ISSUE 2 – It is in the interests of justice to hear this case

36. Even if the Court finds no "live controversy" between the parties, it can still permit re-hearing of the *ex parte* application. The Court has discretion to hear an otherwise moot case where it is in the "interests of justice" to do so.[17] This is a flexible test that is met in the unique circumstances of this case.

37. Three considerations guide this discretion:

    1) the absence or presence of an adversarial context;

    2) whether the circumstances of the dispute warrant the use of scarce judicial resources; and

    3) whether the court would be exceeding its proper role by making law in the abstract.[18]

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[17] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 17; **BOA, Tab 6.**
[18] *CSJLM v Nova Scotia (Community Services)*, 2019 NSCA 59, at para 10; **BOA, Tab 5**; *Nova Scotia (Community Services) v Nova Scotia (Attorney General)*, 2017 NSCA 73, at paras 61-63; **BOA, Tab 14.**

Presence of an adversarial context

38. The requirement of an adversarial context "may be largely or wholly satisfied if the matter has been fully and zealously argued".[19] In the present case, both the Attorney General and the CCLA are represented by legal counsel. Both have submitted legal briefs, case law, and affidavit evidence to the Court. There is ongoing disagreement between the parties regarding the legality of the decision granting the *ex parte* Injunction Order, which, regardless of the discharging of the injunction, remains good law with the ability to impact Nova Scotians.

Appropriate use of judicial resources

Common law and statutory right to re-hearing

39. A re-hearing of the *ex parte* application for an injunction, in which the Court will receive evidence and hear argument from both parties, is an appropriate use of judicial resources. Civil Procedure Rule 22.06(2) provides for the ability of a party "who is affected by an *ex parte* order" to "require the motion to be heard again". In *Smith v Lord*, the Court of Appeal held that the Supreme Court has inherent jurisdiction to re-hear an *ex parte* proceeding to prevent abuse, but should exercise this jurisdiction within a framework of principles relevant to the matters in issue.[20] Part of that framework is the *audi alteram partem* principle—a fundamental tenet of our legal system—which "requires that courts provide an opportunity to be heard to those who will be affected by the decisions."[21]

40. In *Kapoor v Makkar*, the British Columbia Court of Appeal relied on the *audi alteram partem* principle and the inherent dangers of *ex parte* proceedings to justify rehearing:

> In *Gulf Islands Navigation Limited v. Seafarers' International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 625 at 631, 28 W.W.R. 517 at 522-523 (B.C.C.A.), Mr. Justice S. Smith explored the nature of a hearing to set aside an *ex parte* injunction and explained that the parameters of the hearing subsequent to the *ex parte* order are influenced by the general rule of adjudication, *audi alteram partem*:

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[19] *Mercredi v. Saskatoon Provincial Correctional Centre*, 2019 SKCA 86, at para 20; **BOA, Tab 11**. See also *Borowski*, at para 43; **BOA, Tab 2.**

[20] *Smith v Lord*, 2013 NSCA 34 at paras 22-38; **BOA, Tab 18.**

[21] *L.L.A. v. A.B.*, [1995] 4 S.C.R. 536, at para 27, as cited in *Waterman v. Waterman*, 2014 NSCA 110, at para 72; **BOA, Tab 10.**

> *Ex parte* orders are *sui generis*; the general rule of adjudication is *audi alteram partem*, and that rule is only relaxed in *ex parte* proceedings because of their inconclusiveness. In such proceedings a Judge usually relies on counsel to a large extent, both as to the facts and the law; and to hold that when the inconclusive order is looked at again more carefully, the party at first absent is restricted so that he cannot raise all the points that he could have raised if heard in the first instance, is clearly an injustice. It would mean that if the original Judge is not available for a rehearing, the party not at first heard is seriously prejudiced. In the absence of intractable authority the other way, we should hold that he is entitled to be heard, not to be half heard, which is all that he would be if any part of the subject of the *ex parte* order were closed to him when he at last got before a Judge.

> A "without notice" order is an extraordinary, powerful, interlocutory remedy which is recognized as having the potential to inflame a dispute between parties in fraught situations or to produce potential injustice when made on incomplete submissions that generate a wrong understanding of the circumstances. To protect against avoidable damage to the litigants or the litigation process, while retaining this valuable judicial response for emergency situations, procedural safeguards (which I do not see in this case) are usually employed. These may include a true interim term establishing the duration of the order, or a term providing a return date by which an opportunity is given to the other party to be heard without their filing a fresh application, and a term requiring service, by a time certain, of all materials that were before the judge on the application, along with a copy of the entered order. On occasion even short notice, or even informal notice, will serve to alleviate some of the offence that may be taken from the presentation to a party of an order obtained against them without notice. There is, of course, a time and place for without notice orders, but I respectfully suggest that to the extent possible when a without notice order must be made, these time honoured safeguards should be employed vigorously.[22]

Special considerations where constitutionality challenged

41. Re-hearing the Attorney General's application is a particularly apt use of judicial resources where CCLA has challenged the legality and constitutional validity of the Order.

42. Even where no adversarial issue remains between parties, courts have nevertheless determined it an appropriate use of judicial resources to hear a factually moot constitutional challenge. This is especially so where the challenge is to a newly conferred power by which "affected persons can be temporarily denied their fundamental rights".[23]

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[22] *Kapoor v Makkar*, 2020 BCCA 223 at paras 10-11; **BOA, Tab 9.**
[23] *A.L.G.C. v. Prince Edward Island*, [1998] P.E.I.J. No. 15, at paras 8-11 ("*A.L.G.C.*"); **BOA, Tab 1.**

43. In the present case, the Court's decision has conferred new, unprecedented powers on the Attorney General – to obtain *ex parte* injunctive relief against all Nova Scotians in the absence of any statutory authority or common law cause of action, even where this relief interferes with Nova Scotians' *Charter* rights. In the context of an ongoing and evolving public health emergency, it is not speculative to anticipate that the Attorney General will use this new power again.

44. In *A.L.G.C. v. Prince Edward Island*, a constitutional challenge was filed regarding "new and novel legislation" that conferred power on a justice of the peace to issue *ex parte* emergency protection orders that would temporarily deny respondents their fundamental rights.[24]

45. Jenkins J. found that no adversarial issue remained between the parties, as the order concerning the applicant was revoked the day after the application was commenced. He nevertheless exercised his discretion to hear the application:[25]

> Special considerations apply to the exercise of this discretion where the case is a constitutional challenge. In constitutional cases, the general rule against deciding moot cases usually, but not always, gives way to the exercise of discretion in favour of deciding the case.

46. Jenkins J. wrote that, with regard to constitutional cases, the Supreme Court of Canada's decision not to decide the moot appeal in *Borowski* "appears as the exception", and the Court's decision in *Tremblay v. Daigle*,[26] "represents the prevalent practice."[27]

47. *Tremblay v. Daigle* was an appeal of an interlocutory injunction that prevented the appellant from obtaining an abortion. Among the appellant's grounds of appeal was that the substantive rights the lower courts had held supported the injunction did not exist. During the hearing before the Supreme Court of Canada, the Court learned that the appellant had already obtained an abortion. Though the appeal was factually moot, the Court exercised its discretion to continue the hearing, "in order to resolve the important legal issue raised".[28]

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[24] *A.L.G.C.* at para 10; **BOA, Tab 1**; See also *Head v. Leader*, 2001 MBQB 228; **BOA, Tab 8.**
[25] *A.L.G.C.*, at para 8; **BOA, Tab 1.**
[26] *Tremblay v. Daigle*, [1989] S.C.J. No. 79 ("*Tremblay*"); **BOA, Tab 19.**
[27] *A.L.G.C.*, at para 8; **BOA, Tab 1.**
[28] *Tremblay*, at para 77; **BOA, Tab 19.**

Quickly changing circumstances

48. It is also an appropriate use of judicial resources for Courts to hear factually moot matters where, as here, quickly changing circumstances can render the matter moot so that it may never be able to be heard as a live controversy. It is not speculative to anticipate that the Attorney General could again apply for an *ex parte* injunction, and move to discharge it once an affected party seeks a rehearing.

49. In *Mission Institution v. Khela*, an appeal regarding a *habeas corpus* application, the matter was rendered factually moot after the appellant was transferred to another facility. The Supreme Court of Canada held that, despite being moot, the appeal merited a decision as the nature of *habeas corpus* applications are such that "the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision."[29] The Court wrote, "such cases will often be moot before making it to the appellate level, and are therefore 'capable of repetition, yet evasive of review'."[30]

50. In this case, it took a public interest litigant nearly seven weeks to obtain a date for rehearing, after the Attorney General obtained its relief *ex parte*. The Attorney General's successful motion to discharge the *ex parte* Injunction Order in the present case, one week before the matter was scheduled for a contested hearing, should not prevent this Court from proceeding.

Issues of procedural fairness

51. Finally, it is an appropriate use of judicial resources for Courts to hear factually moot matters where a party raises issues of procedural fairness. In the present case, the Attorney General failed to fulfill its obligation to present all relevant evidence and case law at the *ex parte* hearing. The hearing resulting in the Injunction Order was therefore procedurally unfair.

52. The Attorney General is not an ordinary party. Crown attorneys, as agents of the Attorney General, have broader responsibilities to the court.[31]

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[29] *Mission Institution v. Khela*, 2014 SCC 24, at para 14 ("*Khela*"); BOA, Tab 12.
[30] *Ibid.* See also *Wilcox v. Alberta*, 2020 ABCA 104, at para 27; **BOA, Tab 22**, and *Pratt v Nova Scotia (Attorney General)*, 2020 NSCA 39 ("*Pratt*"), at para 8; **BOA, Tab 16.**
[31] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 37; **BOA, Tab 15.**

53. On an *ex parte* proceeding, the Crown is required to provide full, fair, and frank disclosure to preserve the integrity of the court's process:

> ... the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.[32]

54. *Pratt v Nova Scotia (Attorney General)*, 2020 NSCA 39, was an appeal of a decision of the Nova Scotia Supreme Court. Rosinski J. at the NSSC determined that the appellant's *habeas corpus* application was factually moot, and summarily dismissed it. The Court of Appeal exercised its discretion to hear the matter, despite that fact that it was factually moot, as the appellant had by that time been released from solitary confinement. The appeal raised issues of procedural fairness, including that Rosinski J. relied on information not disclosed to the appellant by the Attorney General, and did not provide him with the opportunity to make submissions.[33] Further, as in the instant case, Rosinski J's decision established new legal principles without providing any legal authority.[34] The Court of Appeal held that the issues raised were important, and "subject to repetition yet evasive of review".[35] It held that Rosinski J.'s summary dismissal of Mr. Pratt's application was not procedurally fair, and that a live controversy remained at the time warranting a hearing.[36]

55. In this case, the Attorney General failed to provide full, fair, and frank disclosure of all relevant facts and contrary case law. This strongly favours rehearing.

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[32] *United States of America v Friedland*, [1996] O.J. No. 4399, at para 27; **BOA, Tab 20**. See also *PricewaterhouseCoopers LLP v. Phelps*, 2010 ONSC 1061, at para 44; **BOA, Tab 17**.
[33] *Pratt*, at paras 4-5; **BOA, Tab 16.**
[34] *Ibid*, at para 6; **BOA, Tab 16.**
[35] *Ibid*, at para 8; **BOA, Tab 16.**
[36] *Ibid*, at para 9 and 69; **BOA, Tab 16.**

Re-hearing is squarely within the proper role of the Court

56. This matter was initiated by the Attorney General commencing a legal proceeding and asking this Court to exercise its judicial authority. The Court obliged. If hearing the *ex parte* application was within the proper role of the Court, then a re-hearing of the application is also within the proper role of the Court.

57. As stated above, Civil Procedure Rule 22.06(2) provides for the ability of a party "who is affected by an *ex parte* order" to "require the motion to be heard again". A rehearing of the Attorney General's application for an injunction is clearly within the proper role of this Court.

58. Contrary to the assertion of the Attorney General in its written submissions, CCLA has not argued that the prohibitions as set out in the Public Health Order are unconstitutional. Rather, the CCLA submits that the Court itself must not restrict *Charter*-protected activities with an Injunction Order that is enforceable by arrest and detention. There can be no intrusion into the role of the Legislature on a re-hearing of the Attorney General's application.

59. The Attorney General cites only *Coaker v. Nova Scotia (Attorney General)* in support of its position that the present matter is moot and should not be heard. In that case, the applicants had filed applications for *habeas corpus* in relation to a "lockdown" of general inmate population cells that began on or about September 2, 2018 and ended on September 24, 2018, before the date of the hearing. In his reasons for decision, Rosinski J. noted that Chipman J. had already adjudicated the lawfulness of the lockdown between September 1, 2018 and September 19, 2018 in *Pratt v. AGNS*, 2018 NSSC 243, and had determined that it was lawful and procedurally fair.[37]

60. Rosinski J. wrote that he understood that the applicants were asking the Court to conclude their constitutional rights had been breached, and to "pass judgment on section 79 of the Correctional Services Regulations by providing 'helpful guidance' to correctional facility staff which would ensure that such lockdown decisions in future are made in a more

[37] *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291 ("*Coaker*"), at paras 23-24; **BOA, Tab 3.**

procedurally and substantively fair manner".[38] He opined that, "in the circumstances of this case, these requests are not properly 'the business of the court'."[39]

61. *Coaker* is distinguishable. This is the first time that the Court will receive contested submissions on the legality of the Injunction Order, and the Court is not being asked to pass judgment on or determine the constitutionality of the Public Health Order or the *Health Protection Act*. Rather, the CCLA has filed a notice to require the Court to rehear the Attorney General's application for an injunction and to consider the constitutional issues raised by the injunction applied for, as it is entitled to do in the public interest.

PART IV–ORDER SOUGHT

62. CCLA requests that the Court deny the Attorney General's motion on the basis that the rehearing is not moot, or alternatively, that it is in the interests of justice to rehear this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated June 25, 2021, in Halifax, Nova Scotia.

Nasha Nijhawan

for

Benjamin Perryman

Counsel for the CCLA

[38] *Coaker*, at para 35; **BOA, Tab 3.**
[39] *Coaker*, at para 39; **BOA, Tab 3.**