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File No.: 21-1681

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June 22, 2021

The Honourable Justice James L. Chipman
Supreme Court of Nova Scotia (HRM)
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord:

Re: Attorney General of Nova Scotia v. Freedom Nova Scotia et al - Hfx No. 506040
Hearing – June 30, 2021 – 9:30 a.m.

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.

At paragraph 16, Justice Rosinski in *Coaker* (supra) set out the following *(inter alia)*:

> 15 The factors to be considered in deciding whether a moot legal dispute should nevertheless be heard by a court have been articulated in: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; and *Springhill Institution v. Richards*, 2015 NSCA 40, per Beveridge JA.
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> 16 In *Richards*, Justice Beveridge stated:
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> 52 Nonetheless, the Attorney General asks this Court to exercise its discretion to hear and decide these appeals. He relies on the principles set out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and recently applied by that Court in *Mission Institution v. Khela*, 2014 SCC 24.
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> 53 Justice Sopinka, writing for the Court in *Borowski*, stressed that certain established principles guide how a court should exercise its discretion. *These include whether:* ***there is still an adversarial context; resolution will have some practical consequences on the rights of the parties; the cases that spark the controversy are of a recurring, but brief duration; it is in the public interest to expend judicial resources to mitigate the social cost of***

<u>continued uncertainty in the law; adjudicating may be viewed as intruding into the role of the legislative branch</u> (pp. 358-362).

The Attorney General submits that the principles set out in *Borowski* (supra) when applied in the context of an injunction order that has been discharged militate against proceeding with the re-hearing on June 30th for reasons that include the following:

- ***"there is still an adversarial context"***

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 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 - see also the affidavit of Hayley Critchton, at paragraph 18, filed with the court on June 16, 2021. The fact that there are no outstanding contempt proceedings requiring adjudication further supports the Attorney General's submission that an adversarial context no longer exists in this case.

- ***"resolution will have some practical consequences on the rights of the parties"***

An injunction is granted on a case-by-case basis on evidence. The Injunction Order granted on May 14, 2021 incorporated verbatim certain restrictions contained in the Public Health Order. The Public Health Order remains effective and has gone unchallenged by the Canadian Civil Liberties Association (hereinafter, the "CCLA"). The Attorney General submits that this Honourable Court's jurisdiction regarding public peace, order, and safety does not conflict with the provisions of the *Health Protection Act* or the Public Health Order issued under section 32 of that *Act*. 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.

- ***"the cases that spark the controversy are of a recurring, but brief duration"***

The Injunction Order was granted under the exceptional circumstance of the worst wave of COVID-19 – the "Third Wave". In the third wave daily case infections of COVID-19 ballooned into the triple digits. This matter has no precedential value given that injunctive relief is an equitable remedy and is granted on a case-by-case basis based on evidence. The injunction was an extraordinary remedy granted in extraordinary circumstances. No injunctive relief was sought during the first or second wave and any possible future injunctions must be considered on its own facts and evidence.

- ***"it is in the public interest to expend judicial resources to mitigate the social cost of continued uncertainty in the law"***

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

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 Attorney General disagrees. This Honourable 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 *quia timet* injunction in this matter. The Province accurately 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 by this Honourable Court. The evidentiary foundation was set out in the court's written decision. The Province wishes to clarify the CCLA's assertion that the injunction is the Province's injunction. The impugned Injunction Order is not the Province's Order it is an Order of the Supreme Court of Nova Scotia granted on evidence provided by the Province.

- ***"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 re-hearing 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.

All of which is respectfully submitted.

Yours very truly,

Duane A. Eddy

DAE/jdm
Enclosure
cc: Benjamin Perryman and Nasha Nijhawan