2021 **Yar No. 510031**

SUPREME COURT OF NOVA SCOTIA

Between:

Citizens Alliance of Nova Scotia and J.M. by his litigation guardian K.M.

Applicants

and

Robert Strang acting as Chief Medical Officer of Health of Nova Scotia and Michelle Thompson acting as Minister of Health and Wellness of Nova Scotia and the Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

REPLY BRIEF OF THE RESPONDING PARTIES
MOTION REGARDING MOOTNESS
TO BE HEARD DECEMBER 6, 2024

Hugh E. Robichaud
8314 Highway 1
PO Box 40
Meteghan, NS B0W 2J0

Solicitor for the Applicant J.M. by his litigation guardian K.M.

Daniel Boyle
Nova Scotia Department of Justice
1690 Hollis Street – 8th Floor
Halifax, NS B3J 2L6

Solicitor for the Respondents

William Ray
CANS Board
91-3045 Robie Street, Unit 5
Halifax, NS B3K 4P5

Agent for the Applicant CANS

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1. This Reply Brief of the Respondents to the main proceeding is in response to the Brief of the Applicant CANS ("CANS" or the "Corporate Applicant") filed November 22, 2024, and the Brief of the Applicant JM, by his litigation guardian KM (the "Minor Applicant") filed November 22, 2024, as well as to the Affidavits of Chris Milburn and Shelly Hipson which I understand were also filed on November 22, 2024. These reply submissions are supplemental to the Respondents' Motion Brief filed October 11, 2024.

Comments upon Evidence filed in this Motion

2. The Respondents have offered the evidence of Tara Walsh to the effect that the public health order was lifted insofar as it affected the Applicants by July, 2022, and that it was lifted in its entirety in May, 2023.

3. The Minor Applicant chose not to file any evidence in response to this Mootness Motion. Accordingly, no evidence of any live controversy as between the Minor Applicant and the Respondents has been tendered.

4. CANS filed two Affidavits – one from Chris Milburn and another from Shelly Hipson. Neither of these Affidavits contradict the Respondents' position and evidence that no public health order remains in effect, and consequently that no live controversy exists between the parties.

5. On the evidence, therefore, this matter is factually moot and should accordingly be dismissed.

6. The Corporate Applicant suggests at para 61 of its Brief that Chris Milburn "*will testify*" to certain facts. The assertions contained in the Brief are not included in the Affidavit of Chris Milburn. Moreover, it is not clear when or how such testimony would be obtained, where it has not been offered in the context of this motion.

7. In addition to the Corporate Applicant's evidence failing to disclose any ongoing live controversy, the Respondents note several technical deficiencies in the two Affidavits tendered by Corporate Applicant. The Respondents seek to strike all of the exhibits attached to both Affidavits, and to strike para 8 of the Affidavit of Shelly Hipson, for the following reasons:

    a. At para 8 of the Affidavit of Chris Milburn, the affiant mentions three exhibits attached to the document without identifying the exhibits, explaining the relevance of the exhibits, explaining the source of the exhibits, or affirming the

affiant's belief in the source of the information, contrary to Civil Procedure Rule 39.02(2).

b. At para 8 of the Affidavit of Shelly Hipson, Ms. Hipson improperly offers opinion and argument about the documents she attaches as exhibits. Moreover, the opinion and argument are not relevant to the sole issue of mootness to be considered in the motion presently before the Court, contrary to Civil Procedure Rule 39.04(2)(a).

c. At para 8 of the Affidavit of Shelly Hipson, the affiant mentions seventeen exhibits attached to the document without identifying the exhibits, explaining the relevance of the exhibits, explaining the source of the exhibits, or affirming the affiant's belief in the source of the information, contrary to Civil Procedure Rule 39.02(2).

8. In the alternative to striking the noted portions of the Affidavit of Chris Milburn and the Affidavit of Shelly Hipson, the Respondents say that this Honourable Court should assign no weight to the offending portions of these Affidavits, including Exhibits.

Response to Corporate Applicant's Brief

9. The Respondents say that the present motion should be granted because neither Applicant has tendered evidence of any ongoing live controversy. In the alternative, the Respondents offer the following replies to the submissions of the Corporate Applicant. The Respondents note that much of the Corporate Applicant's Brief covers issues which would be the subject of a merits hearing should this Mootness Motion be dismissed. The Respondents do not concede these arguments but will not address them here because they are not relevant to the test for mootness.

The Corporate Applicant does not possess public interest standing and can only proceed in the context of its own private interest

10. The Corporate Applicant's private interest in this proceeding is limited to the public health order requiring them to confirm proof of vaccination for individuals attending public gatherings in certain iterations of the order. However, its Brief and various exhibits attached to its Affidavits focus on vaccine safety or efficacy and continue to

argue unique and special protections for children. These are not issues which implicate the Corporate Applicant's private interests.

11. While the Respondents acknowledge with respect to the grounds of the judicial review that the Corporate Applicant may challenge the *vires* of the public health order, its private interest standing limits such considerations to whether the issuance of the public health order generally was permitted by law, or whether requiring an organization to verify proof of vaccination for natural persons attending public gatherings was permitted by law.

12. The Corporate Applicant has no standing to challenge vaccine safety or efficacy, or medical treatment generally, nor do they have standing to speak to the public interest generally or non-party individuals specifically.

The Corporate Applicant is incorrect to suggest the public health order was evasive of review or likely to recur

13. Respectfully, the public health order was not evasive of review as suggested by the Corporate Applicant. The Respondents reply to the Applicants' position by reference to the submissions in the Respondents' Motion Brief beginning at para 63.

14. However, the Corporate Applicant also argues throughout its submissions that public health orders are likely to recur. They have offered no evidence on this point, and have further offered no evidence that any future public health order will be similar to the one subject to this proceeding.

There is no practical utility to this matter proceeding

15. The Corporate Applicant suggests throughout its Brief that the relief they seek would have practical utility by restricting the Chief Medical Officer of Health ("CMOH") from certain future actions, which actions are undefined, purely speculative and not supported by evidence.

16. The Respondents say that any future public health orders issued pursuant to s 32 of the *Public Health Act* must be assessed on their own merits considering prevailing information and circumstances. Your Lordship acknowledged this in ***Citizens Alliance of***

Nova Scotia v Nova Scotia (Health and Wellness), 2024 NSSC 253,[1] as follows at para 36:

> *[36] I do not find that this aspect of the claim raises a serious justiciable issue. The Court does not address challenges based on hypotheticals or conjectural scenarios that may or may not come to pass. The Courts determine disputes involving real people and real facts as demonstrated through existing evidence. They do not stray into decisions based on what might happen in the future but has not yet occurred. The claims and complaints of a litigant must almost always be anchored in existing facts to help ensure that "... the issue will be presented in a sufficiently concrete and well-developed factual setting" (Downtown Eastside Sex Workers at para. 51. See also Alberta Union of Public Employees v. Her Majesty the Queen (Alberta), 2021 ABCA 416 at paras. 27 – 30).*

17. Should a public health order affecting the Corporate Applicant exist in future, its merits must be assessed at that time. There is no benefit to be gained by opining on a circumstance which was unique, and which has become factually moot. If a particular restriction is found to be inappropriate in one situation, it may be entirely appropriate in another. Absent a factual framework, this Honourable Court cannot make such assessment.

No live controversy exists

18. At para 42 of the Corporate Applicant's Brief, the Corporate Applicant suggests that whether something was done illegally in the past represents an ongoing live controversy. Respectfully, if an active public health order was determined to be illegal, the remedy would be to declare the offending order of no force or effect. This remedy is not available where the public health order is no longer in effect.

19. The Corporate Applicant suggests in its Brief for the first time that this judicial review would form the basis of a 'tort of unlawful means' claim, which presumably would be brought by further legal proceeding. There are several issues with this premise, which include but are not limited to:

    a. No evidence of any intention to file further proceedings has been offered.
    b. No evidence that any active legal proceedings have been filed which is awaiting determination of issues which are the subject of this judicial review.

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[1] **Tab 1**, Respondents' Book of Authorities.

c. No evidence of any intention by the CMOH to harm economic interests has been offered.
d. No evidence of actual economic harm sustained by the Corporate Applicant has been offered.

20. The Corporate Applicant also suggests at paras 67 and 68 of its Brief that its *Charter* rights under s 15, 2, and 2(c) are infringed. The Respondents say these concerns do not create a live controversy for several reasons:

    a. The Applicants amended the Notice for Judicial Review several times. The current version does not plead infringement of *Charter* rights, so this is not a matter properly before the Court.
    b. Regardless, a corporation like the Corporate Applicant could not advance certain of such claims had they been properly pled because corporations cannot avail themselves of all Charter rights available to a natural person.

21. Similarly, the Corporate Applicant's reference to "*Charter* values" in its pleading does not result in a live controversy because Charter values have no independent function in the administrative law context.[2]

22. With respect to the Corporate Applicant's argument that the fact that financial penalties *could* have been issued for non-compliance with the public health order, such arguments are irrelevant because no such penalty was ever issued to the Corporate Applicant, and in any event no such penalty forms the subject matter of this proceeding.

Case law cited by the Corporate Applicant is distinguishable

23. The Corporate Applicant cites and relies upon numerous decisions which are distinguishable from the matter presently before the Court. Generally, the Corporate Applicant appears to cite these cases to establish principles set out in ***Borowski***,[3] or to set out principles of statutory interpretation which are not relevant to this Mootness Motion, or to set out elements of torts which are not applicable to the judicial review process. However, there are certain cases the Corporate Applicant cites as examples of matters proceeding despite mootness. These cases are distinguishable from the present matter on their facts.

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[2] ***Law Society of British Columbia v Trinity Western University***, 2018 SCC 32 (**TAB 2 Respondents' Reply Book of Authorities**), at paras 57 (per majority), 115 (per McLachlin, CJ, concurring), and 166 through 173 (per Rowe J, concurring).

[3] **Tab 2**, Respondents Book of Authorities.

24. ***Nassichuk-Dean v University of Lethbridge***, 2022 ABKB 629 (***"Nassichuk-Dean"***)[4] involved a student who sought declaratory relief for alleged infringement of her s 7 *Charter* rights due to a university's vaccination policy. The Court found that the matter was not moot because a live controversy remained as to whether the applicant's *Charter* rights were infringed. The present matter is distinguishable in that no infringement of *Charter* rights have been pleaded in this proceeding. Notably, while the Court in ***Nassichuk-Dean*** found the matter was not moot, it went on at para 38 to reject similar arguments to what the Corporate Applicant is advancing in this proceeding about the "public interest" of non-parties in obtaining the requested declarative relief, before dismissing the application at para 41.

25. ***Trang v Alberta (Edmonton Remand Centre)***, 2005 ABCA 66[5] involved consideration of individual *Charter* rights of an incarcerated person. The facts are distinguishable from those in the present case, and as noted above, no *Charter* rights are involved in the present case. Notably, however, the Alberta Court of Appeal closed its decision at para 6 by cautioning about the scope of the proceedings, warning against giving them the complexion of a public inquiry. The Respondents have maintained similar concerns throughout this proceeding, and these concerns remain based upon the content of the Corporate Respondent's Brief.

26. ***Pridgen v University of Calgary***, 2010 ABQB 644,[6] and ***J. Cote & Son Excavating Ltd. V City of Burnaby***, 2017 BCSC 2323[7] are both distinguishable from the present case in that they involved *Charter* rights, which are not at play in this proceeding. The latter case is further distinguishable in that it involved an action, not judicial review, did not involve any formal application for determination of mootness, and had a developed adversarial context in the main proceeding (as compared to interlocutory processes as is the case in the present matter) due to the nature of the proceeding.

27. ***Kassam v Canada (Minister of Citizenship and Immigration)***, 138 FTR 60 (FC),[8] ***Grapendaal v Canada (Minister of Citizenship and Immigration)***, 2010 FC 1221,[9] ***Skobrev v Canada (Minister of Citizenship and Immigration)***, 2004 FC 485,[10] and ***Shakeri v Canada (Citizenship and Immigration)***, 2016 FC 1327[11] are all immigration cases distinguishable in that the outcome would directly impact the applicants' ability to

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[4] **Tab 28**, Corporate Applicant's Book of Authorities.
[5] **Tab 48**, Corporate Applicant's Book of Authorities.
[6] **Tab 33**, Corporate Applicant's Book of Authorities.
[7] **Tab 18**, Corporate Applicant's Book of Authorities.
[8] **Tab 20**, Corporate Applicant's Book of Authorities.
[9] **Tab 16**, Corporate Applicant's Book of Authorities.
[10] **Tab 40**, Corporate Applicant's Book of Authorities.
[11] **Tab 39**, Corporate Applicant's Book of Authorities.

visit Canada because the decision would impact further visa applications by the applicants. Past and future public health orders are not so connected. Further, the adversarial context in these cases was established in part by the need for the applicants to obtain leave for judicial review, a factor which is absent in this proceeding.

28. ***Canadian Frontline Nurses v Canada (Attorney General)***, 2024 FC 42[12] involved a judicial review of the Public Order Emergency to end disruptive protests in Ottawa and other areas. The case considered standing for various parties and mootness, but the Corporate Applicant cites it as an example of "importance to the public" as a reason for the Court to exercise discretion to hear a moot matter. However, the case is distinguishable for several reasons, including that the statute in the case required that a public order emergency be temporary. This by definition would make it evasive of review, whereas the public health order subject to this proceeding was in place for an extended period of time.

29. ***The Alberta Teachers' Association v Buffalo Trail Public Schools Regional Division No 28***, 2022 ABCA 13[13] involved a teacher's workload policy grievance. Notably, at para 3, the teachers acknowledged that declarative relief remedies were moot. The appeal, and conclusion of the Court, were based on an unresolved claim for damages. The facts are clearly distinct from this proceeding.

30. ***Health Freedom Def. Fund, Inc. v Carvalho***[14] is irrelevant to this proceeding. It is an American case involving a statutory exception to mootness with no parallel in Nova Scotia law. Moreover, the presumption of 'voluntary cessation' issue is accounted for in discretion of Nova Scotia courts to hear otherwise moot matters. Where the public health order was not evasive of review, as discussed elsewhere in the Respondents' submissions, this issue has been accounted for.

Response to Minor Applicant's Brief

31. The Minor Applicant filed no evidence. Their submission that pandemics are "fast becoming a leading public health issue" or are "entirely predictable" for the "near future", are not demonstrated by evidence, and the relevance of these statement to the unique circumstances surrounding COVID-19 is not clear.

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[12] **Tab 1**, Respondents' Reply Book of Authorities. Cited at para 31 of the Corporate Applicant's Brief.
[13] **Tab 44**, Corporate Applicant's Book of Authorities.
[14] **Tab 53**, Corporate Applicant's Book of Authorities.

32. The minor Applicant suggests that the fact that the CMOH continues to have a role in monitoring and responding to pandemics constitutes a live controversy. The Respondents say this is a statutory function of the CMOH and has no relevance to a live controversy in the context of this proceeding.

33. Like the Corporate Applicant, the Minor Applicant refers to constitutional or *Charter* considerations in this proceeding. No constitutional issues or *Charter* rights are pleaded in the Notice for Judicial Review.

RELIEF SOUGHT

34. For all of the foregoing reasons, the Respondents restate that the issues raised by the Applicants in the Amended Notice are moot, and the Court should not exercise its discretion to proceed despite mootness.

35. The Respondents respectfully repeat their request that this judicial review be dismissed, and to be heard on costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2024

Daniel Boyle
Counsel to the Respondents

LIST OF AUTHORITIES FIRST REFERENCED IN THIS REPLY BRIEF

1. ***Canadian Frontline Nurses v Canada (Attorney General)***, 2024 FC 42
2. ***Law Society of British Columbia v Trinity Western University***, 2018 SCC 32