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 His Majesty the King in Right of the Province of Nova Scotia

Respondents

BRIEF OF THE RESPONDING PARTIES
CANS' MOTION FOR PUBLIC INTEREST STANDING

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

Background

1. The Province of Nova Scotia was under a provincial State of Emergency, pursuant to the *Emergency Management Act*, SNS 1990, c 8, from March 22, 2020, until March 21, 2022, in response to the global COVID-19 pandemic.

2. In March 2020, the Chief Medical Officer of Health of Nova Scotia, Dr. Robert Strang ("Dr. Strang" or "CMOH"), determined on reasonable and probable grounds that COVID-19 posed an immediate risk of outbreak presenting a risk to public health.

3. To decrease the risk to public health posed by the COVID-19 pandemic, Dr. Strang, in his capacity as CMOH, issued a Public Health Order (the "PHO" or the "Order") pursuant to authority set out at s 32 of the *Health Protection Act*, SNS 2004, c 4 (the "*HPA*").

4. The first iteration of the Order was issued verbally by Dr. Strang on March 22, 2022, followed by issuance of the first written Order on March 23, 2020.

5. The Order was updated throughout the pandemic in response to prevailing epidemiology.

6. The most recent Amended Notice of Judicial Review filed on August 11, 2023, by Citizen's Alliance of Nova Scotia, a body corporate, (the "Corporate Applicant" or "CANS") refers to iterations of the Order in force between October 1, 2021, and July 6, 2022 (collectively, for purposes of this Brief, all iterations will be referred to as the "PHO" or "the Order"). The Respondents understand that the Applicants seek judicial review not for a single iteration of the PHO, but for each and every iteration of the Order in effect throughout this timeframe.

7. On October 27, 2021, the Corporate Applicant filed the first version of its Notice for Judicial Review of the PHO. A Motion for Directions was scheduled for December 16, 2021.

8. On November 12, 2021, Respondents' counsel filed a Notice of Participation.

9. Following the filing of the first version of the Notice of Judicial Review and before the Motion for Directions, the Corporate Applicant retained counsel. A Notice of New Counsel was signed by Christina Lazier on December 6, 2021, and was filed with the Court on December 9, 2021.

10. On December 16, 2021, the Motion for Directions proceeded by teleconference before the Honourable Justice Peter Rosinski. At the Corporate Applicant's request, the Motion for Directions was adjourned without day to permit the Corporate Applicant an opportunity to make a motion to amend the Notice of Judicial Review, and to make such

further and other motions as they deemed necessary to advance their Judicial Review. The Respondents agreed to the adjournment, hoping that the benefit of counsel would assist the Corporate Applicant to better define its issues and result in a more efficient process.

11. Effective Monday, February 28, 2022, the Order's requirements regarding proof-of-vaccination ("POV") were lifted, except for limited high-risk settings such as hospitals and long-term care homes.

12. On March 10, 2022, the Respondents sent a Demand for Particulars to the Corporate Applicant's Counsel, seeking clarification on numerous aspects of the draft amendments to the Notice of Judicial Review which Applicants' Counsel intended to confirm through motion to the Court.

13. On March 21, 2022, in addition to the end of the provincial state of emergency, the provincial mask mandate was lifted, except for certain high-risk locations.

14. The Corporate Applicant brought motions to amend the Notice of Judicial Review, to add a minor party, and to anonymize a minor party, which motions were heard by the Honourable Justice Pierre L. Muise on March 24, 2022. Justice Muise granted the requested orders, adding J.M. (the "Minor Applicant") as a co-Applicant in this proceeding. Justice Muise also scheduled a Motion for Directions for ½ day on May 20, 2022.

15. The Respondents took no position on the Applicants' three motions heard on March 24, 2022. The Respondents did, however, express concerns that the amended Notice did not set out the Minor Applicant's interests or requested relief in the judicial review. The Respondents took the position that the Notice would require further amendment to clarify these issues and perfect the pleadings so that the Respondents could understand the case to be met.

16. On April 13, 2022, where the Applicants had not addressed the Respondents' concerns about the minor Applicant's grounds and requested order in his own right by way of intended amendments to the Notice of Judicial Review, the Respondents sent a second Demand for Particulars to Applicants' Counsel to clarify these issues.

17. On April 22, 2022, Respondents' Counsel wrote the Court seeking an adjournment of the May 20, 2022, Motion for Directions to June 10, 2022, to provide Applicants' Counsel with further time to respond to the Demands for Particulars. This request was made with the consent of the parties and was granted.

18. On May 13, 2022, Respondents' Counsel emailed the Court seeking information about available dates if the June 10, 2022, Motion for Directions were adjourned to provide further time for the Applicants to respond to the Demands for Particulars and to better clarify the scope of the judicial review. This request was forwarded to the Honourable Justice John A. Keith, and on May 26, 2022, the Motion for Directions was rescheduled for August 31, 2022.

19. On July 6, 2022, all remaining restrictions in the Order which affected the Applicants were lifted.

20. On July 28, 2022, the Applicants delivered responses to the Respondents' Demands for Particulars delivered to them on March 10, 2022, and on April 13, 2022.

21. On August 17, 2022, the Respondents filed a Motion seeking to have the Applicants' judicial review dismissed for mootness (the "Mootness Motion").

22. On August 31, 2022, the parties appeared before Justice Keith for a Motion for Directions. Justice Keith directed that before the Mootness Motion be set down, the Respondents should provide the Record to the Applicants and the Applicants should file their intended motion about the contents of the Record.

23. The Record was filed with the Court and delivered to the Applicants on November 1, 2022.

24. On December 2, 2022, the Applicants filed a second motion to amend the Notice for Judicial Review, and a motion to add another party.

25. The Applicants' two motions filed December 2, 2022, were heard in a half-day hearing in Halifax on February 7, 2023. No decision was ever rendered – the Applicants withdrew the motion to add another party while the decision remained reserved. The parties provided submissions on costs of the withdrawn motion, for which a decision is pending.

26. On May 2, 2023, Christina Lazier filed a Motion to Withdraw as counsel of Record for the Corporate Applicant. This Motion was granted by order of Justice Muise on May 5, 2023. The Minor Applicant continued to be represented by Christina Lazier for a period of time, but is now represented by new counsel, Hugh Robichaud.

27. From May 2, 2023, the Corporate Applicant became represented by its agent Sameen Toms, the Secretary for CANS. On August 10, 2023, the Applicant again changed its agent to William Ray, a member of the Corporate Applicant's Board. On September 6, 2023, via

email, the Corporate Applicant requested and was given permission for Mr. Ray to be assisted by a "MacKenzie friend", Tara Ibrahim.

28. Since May 2, 2023, the Corporate Applicant has not had the benefit of legal counsel. The Corporate Applicant apparently intends to conduct this judicial review without the benefit of legal counsel.

29. On May 23, 2023, the PHO was lifted in its entirety. The Order subject to this judicial review is no longer in effect.

30. A second amendment to the Notice of Judicial Review was made, dated August 11, 2023. The Respondents maintained concerns with the form, including various technical deficiencies for non-compliance with the Civil Procedure Rules. These were to be corrected by September 14, 2023, and Justice Keith reserved the right to review amendments before approving them.

31. For purposes of these submissions, the Respondents assume that the Corporate Applicant's proposed amendments will be approved, and references to the Notice for Judicial Review should be taken to mean the version first provided by the Corporate Applicant on August 11, 2023, with the essential technical corrections.

32. This Motion of the Corporate Applicant seeking public interest standing to speak for "all Nova Scotians" is scheduled for hearing on January 24, 2024, in Yarmouth. Following disposition of this Motion, filing deadlines will be established for the Mootness Motion filed in August 2022, and depending upon the disposition of that Motion, further dates will be set to consider any further preliminary issues, including the pending Record Motion.

Issues

33. The only issue in this Motion is whether it is appropriate to grant public interest standing to the Corporate Applicant. The outcome of this motion is relevant to the scope of review the Applicants seek and will therefore have bearing upon the Mootness Motion which has been outstanding since August 2022, and which will require updates due to certain developments canvassed above which have occurred in the fourteen months since the Mootness Motion was initially filed.

34. In addition, the Court asked during the September 8, 2023, teleconference that these submissions confirm whether the Respondents objected to any contents of Affidavits

filed by the Applicants in support of the Motion for Public Interest Standing, and whether the Respondents require any affiants for cross examination. The Respondents also have concerns with certain of the Corporate Applicant's submissions, which purport to offer statements of fact unsupported by evidence.

35. The Respondents will address these issues in the Analysis section below under the following subheadings:

    a. Affidavits and Cross-Examination
    b. Private interest standing is accepted
    c. Defining nature of public interest standing will impact the scope of the proceeding
    d. Certain of CANS' submissions must be disregarded
    e. The Law on Public Interest Standing
        i. The ***Downtown Eastside*** Principles
    f. Application of principles to the present motion for public interest standing
        i. Some relief possible with private interest standing
        ii. The Application does not raise a Serious Justiciable Issue
        iii. The Corporate Applicant has no real stake or genuine interest in the matter for public interest standing
        iv. Judicial Review with public interest standing is not a reasonable and effective means to bring the Corporate Applicant's issues to Court
        v. Weighing the ***Downtown Eastside*** factors

Analysis

Affidavits and Cross-Examination

36. The only Affidavit filed in support of the Corporate Applicant's motion is the Affidavit of Tara Ibrahim sworn August 25, 2023. This Affidavit consists of ten numbered paragraphs.

37. The Respondents do not contest the admissibility of the contents of this Affidavit. The Respondents do require Ms. Ibrahim for cross-examination.

38. The Minor Applicant has not filed any materials with respect to the Corporate Applicant's Motion for public interest standing.

39. The Respondents are not filing any Affidavit evidence with respect to this motion. The Corporate Applicant bears the burden of demonstrating that a grant of public interest

standing is appropriate. The Respondents say they have failed to meet their burden based upon their evidence and submissions.

Private interest standing is accepted

40. CANS was a directly impacted litigant in this matter insofar as certain iterations of the PHO required that they verify the vaccination status of individuals attending events. This limited scope of standing was conceded in the Respondents' Mootness Motion filings in August 2022.

41. Additionally, CANS sponsored the addition of the Minor Applicant to this proceeding in March 2022. The Minor Applicant was impacted by certain iterations of the PHO insofar as he was unable to participate in recreational activities or to visit long term care facilities due to his vaccination status.

42. The impact of the PHO on both CANS and the Minor Applicant varied over time in different iterations of the PHO. However, all restrictions affecting each Applicant in their personal capacities were lifted on July 6, 2022. This is the subject of the pending Mootness Motion filed by the Respondents in August 2022.

43. For present purposes, the Respondents accept that the Corporate Applicant possesses private interest standing to seek review of the *vires* of the PHO, and to seek review of the allegations of bad faith in the PHO as it specifically impacted the Corporate Applicant.

44. Certain allegations in the current Notice for Judicial Review are not suitable to be determined based upon the Respondents' position on standing. These issues can be resolved later in this proceeding, where the scope of the review is dependent upon the Corporate Applicant's standing.

Defining nature of public interest standing will impact the scope of the proceeding

45. The Applicants' respective private interest standing permits them to seek judicial review of how the PHO affected them.

46. The Corporate Applicant has consistently sought to review the PHO on much broader grounds. For instance, in the most recent iteration of the Notice for Judicial Review, the Corporate Applicant appears to be most concerned with "*The health and integrity of the Family unit…*" (Corporate Applicant's Brief, at para 24).

47. To advance their position, the Corporate Applicant implies, without evidence, that the PHO confers legal rights without legal redress (Corporate Applicant's Brief, at para 28). This hypothetical begs a factual framework to be considered, but the Corporate Applicant seeks to pursue it absent evidence and absent any clear connection to the hypothetical issue they identify.

48. The present Motion is important to defining the scope of the review the Court is being asked to undertake. The Corporate Applicant seeks to pursue a hypothetical issue lacking factual context, and to have the Court consider multiple iterations of an Order that has not been in effect in any way since May 2023.

49. As set out below, the Corporate Applicant should be restricted to its private interest capacity in this proceeding. The scope of review should be confined to the impact the PHO had on the Corporate Applicant in its own right.

Certain of CANS' submissions must be disregarded

50. The Corporate Applicant is a self-represented party. However, this does not exempt them from the rules of evidence.

51. Certain of the Corporate Applicant's written submissions in support of the present motion make statements which are offered as fact, but which cannot be accepted absent evidence. These include:

    a. At paragraph 1, citing previous pandemics and purported fatalities. The impact of such pandemics in Nova Scotia is not in evidence. The purported casualty figures lack context, including but not limited to the geographic areas to which they pertain, timeframe of pandemics, and epidemiological information.
    b. At paragraph 3, citing purported responses to previous pandemics.
    c. At paragraphs 9 and 10, citing reports not properly in evidence to inform conclusions upon which CANS asserts positions.
    d. At paragraph 14, the Corporate Applicant refers to matters outlined in its corporate governing documents. These documents are not in evidence, and references to their contents must be disregarded. Similarly, references to issues identified by the collective membership of CANS as fundamental to its formation are not in evidence and should be disregarded.
    e. At paragraph 16, the Corporate Applicant speaks to reasons for the formation of CANS, which are not supported by evidence.
    f. At paragraphs 21 and 22, the Corporate Applicant set out its Mission Statement and Vision Statement, which were not included in the supporting Affidavit.

52. The Corporate Applicant also refers to the law of *habeas corpus*, which is not applicable to this motion or this proceeding.

53. Similarly, the Corporate Applicant suggests at paragraphs 8 and 23 that Section 7 *Charter* rights are engaged in this proceeding. That is not pleaded in the current version of the Notice for Judicial Review. No *Charter* challenge is engaged. The references to the *Bill of Rights* are, as the Respondents have repeatedly identified throughout this proceeding, not relevant, as the *Bill of Rights* is a federal statute inapplicable to provincial legislation.

54. Paragraph 24 alleges a tort of misfeasance "*toward KM litigation guardian of JM and every parent in Nova Scotia*", although KM is not independently a party to this proceeding, no tort is alleged in the Notice for Judicial Review, and litigation involving allegations of tort should be pursued by processes other than judicial review. Far from supporting the Corporate Applicant's request for judicial review, this demonstrates that hypothetical claims may be open to those who were directly affected by the PHO. Such claims should not be considered in a factual vacuum.

55. Similarly, the statements at paragraphs 27 and 28 respecting the capacity of minors to make "life altering decisions" does not at all engage the PHO's effects on the Corporate Applicant and is submitted in a factual vacuum. No evidence exists that the alleged issue arose because of the PHO or resulted in any form of actionable harm. This issue cannot be considered as a hypothetical, and in any event the Corporate Applicant is not suitable to bring such arguments.

56. These and other problems with how the Corporate Applicant has approached this proceeding to date will be discussed below in the context of the test for granting public interest standing.

The Law on Public Interest Standing

57. In its recent decision in ***British Columbia (Attorney General) v Council of Canadians with Disabilities***, 2022 SCC 27 ("***Council of Canadians***"), the Supreme Court of Canada affirmed its decision in ***Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 ("***Downtown Eastside***") as the governing authority on public interest standing. In doing so, the Supreme Court comprehensively reviewed the relevant legal principles and criteria relating to public interest standing as set out in ***Downtown Eastside***.

The *Downtown Eastside* Principles

58. A grant of public interest standing is discretionary (***Downtown Eastside***, at para 20; ***Council of Canadians***, at para 28). The party seeking public interest standing has the burden of establishing that they should be granted such standing.

59. As cited in ***Council of Canadians***, the legal principles relevant to public interest standing as set out in ***Downtown Eastside*** are as follows:

    a. The decision to grant or deny public interest standing is discretionary *(**Downtown Eastside***, at para 20). In exercising its discretion, a court must cumulatively assess and weigh three factors purposively and about the circumstances. <u>These factors are: (i) whether the case raises a serious justiciable issue, (ii) whether the party bringing the action has a genuine interest in the matter, and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court (para 2)</u>

    b. In ***Downtown Eastside***, the Supreme Court explained that each factor is to be "*weighed … in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes*" (para 20). These purposes are threefold: (i) efficiently allocating scarce judicial resources and screening out "busybody" litigants; (ii) ensuring that courts have the benefit of the contending points of view of those most directly affected by the issues; and (iii) ensuring that courts play their proper role within our democratic system of government (para 1).

    c. Courts must also consider the purposes that justify *granting* standing in their analyses. These purposes are twofold: (i) giving effect to the principle of legality and (ii) ensuring access to the courts, or more broadly, access to justice.

    d. The goal, in every case, is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it.

    e. The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (***Downtown Eastside***, at para 31). Access to justice has several meanings, which includes being able to secure legal remedies through access to courts (***Council of Canadians***, at para 35). In ***Downtown Eastside***, the Court recognized that access to justice is symbiotically linked to public interest standing: the judicial discretion to grant or deny standing plays a gatekeeping role that has a direct impact on access (at para 51).

f. Courts should strive to balance *all* the purposes in light of the circumstances and in the "*wise application of judicial discretion*" (***Downtown Eastside***, at para 21). It follows that they should not, as a rule, attach "*particular weight*" to any one purpose, including legality and access to justice. Legality and access to justice are important — indeed, they played a pivotal role in the development of public interest standing — but they are two of multiple concerns that inform the ***Downtown Eastside*** analysis.

g. As the Court explained in ***Downtown Eastside***, none of the factors it identified are "*hard and fast requirements*" or "*free-standing, independently operating tests*" (***Downtown Eastside***, at para 20). Rather, they are to be assessed and weighed cumulatively, considering all the circumstances. Under this framework, courts flexibly and purposively weigh the three ***Downtown Eastside*** factors considering the "particular circumstances" and in a "liberal and generous manner" (para 2, citing ***Canadian Council of Churches v R***, [1992] 1 SCR 236 ("***Canadian Council of Churches***")).

60. As noted, the ***Downtown Eastside*** framework addresses several concerns that underlie standing law, legality, and access to justice. But the framework also accommodates traditional concerns related to the expansion of public interest standing, including allocating scarce judicial resources and screening out "*busybodies*", ensuring that courts have the benefit of contending points of view of those most directly affected by the issues, and ensuring that courts play their proper role in our constitutional democracy (***Council of Canadians***, para 42). Limitations on standing are necessary to ensure that courts do not become hopelessly overburdened with marginal or redundant cases.

61. At the root of the law on standing is a need to strike a balance "*between ensuring access to the courts and preserving judicial resources*" (***Downtown Eastside***, at para 23, quoting with approval from ***Canadian Council of Churches***, at p 252).

62. These principles have repeatedly been accepted and applied in Nova Scotia courts.

63. In ***Ecology Action Centre v Nova Scotia (Environment)***, 2023 NSCA 12 ("***Ecology Action Centre***"), the Court of Appeal granted Ecology Action Centre public interest standing to pursue judicial review of a Ministerial Decision approving a Highway Realignment Project required to further the Goldboro LNG Project, overturning the decision not to grant such standing below. As discussed below, the appellants were granted public interest standing in circumstances distinguishable from the present case, including that Ecology Action Centre and its co-applicant did not possess private interest standing.

64. The most recent decision in Nova Scotia considering public interest standing is ***Nova Scotia Civil Liberties Association v Nova Scotia (Minister of Municipal Affairs and Housing)***, 2023 NSSC 207 ("***NSCLA***"). The case is similar to the present in that it also involved an organization founded in 2021 in the midst of the pandemic, and in its challenge to a decision related to the pandemic – in that case, a prohibition against highway blockades. However, ***NSCLA*** involved an application and would have included evidence, distinguishing it from the judicial review process in the matter now before the Court.

65. The Court in ***NSCLA*** dismissed an application by the Nova Scotia Civil Liberties Association ("NSCLA") for public interest standing to pursue a *Charter* challenge to the Province's Ministerial Directive prohibiting planned highway blockades in early 2022.

66. NSCLA had to seek public interest standing because, unlike in the present case, the organization was not directly affected by the Ministerial Directive and there was no other directly affected party to the proceeding. The Court also considered the Province's mootness argument, and determined that NSCLA should not be granted public interest standing and the matter did not disclose the exceptional circumstances necessary to proceed despite being moot (***NSCLA***, at paras 89 and 90).

67. In ***NSCLA*** at para 21, the Court quoted an excerpt from the applicant's affidavit in support of public interest standing confirming that the applicant sought public interest standing *"…on behalf of Nova Scotians*", submitting that it was a suitable public interest litigant "*[a]s a result of its mission, its expertise, its special knowledge and its perspective regarding constitutional rights and government accountability, including in the context of the Covid 19 pandemic…*"

68. The Court defined "standing" in the following terms at para 11 of ***NSCLA***:

> *[11] "Standing", for present purposes, has been defined as:*
>
> > *"a concept in civil, criminal, constitutional and administrative litigation. 1. The legal right to initiate a legal proceeding with respect to a specified cause of action. It involves the threshold issue in a legal proceeding of whether the complainant is entitled to have the court decide the merits of the dispute or of particular issues."*
>
> (Underlining in original)

Application of principles to the present motion for public interest standing

Some relief possible with private interest standing

69. For the Corporate Applicant, there are two identified issues. The first issue is the question of whether the PHO was *ultra vires* the CMOH's statutory authority to issue. This does not require public interest standing to pursue. Both CANS and J.M. were directly affected by certain iterations of the PHO. If the PHO was *ultra vires* as they allege, it is open to them to make this argument in their own rights for the PHO, so long as it affected them.

70. However, the Respondents have consistently been concerned about the scope of the review the Applicants are seeking. The Applicants are looking to review not just the *vires* of specific portions of specific iterations of the PHO which affected them – they are seeking to review every iteration of the PHO issued since October 2021.

71. Because the Applicants each possess private interest standing to seek review of the *vires* of iterations of the PHO which directly affected them, the attempt to obtain public interest standing is an effort to seek review of a broader range of iterations of the PHO than the Applicants can pursue in their own rights.

72. It is unclear from the Applicants' Notice for Judicial Review and their submissions throughout this proceeding to date why they perceive a need to review each iteration of the PHO. Presumably, if any iteration of the PHO was *ultra vires*, as the Applicants contend, all iterations would similarly be *ultra vires*. The Applicants' assertion does not challenge individual components of the PHO, but the PHO as a whole. The analysis as framed by the Applicants will not be on the reasonableness of restrictions at periods in time, but on whether the CMOH was authorized to issue the PHO *ab initio*.

73. Accordingly, there is no need for the Corporate Applicant to obtain public interest standing to review the *vires* of iterations of the PHO which affected them.

74. For bad faith, the Applicants bear a heavy burden of demonstrating, on the basis of the Record, not only that iterations of the PHO being reviewed were unreasonable, but also that it was issued in bad faith. This allegation is spurious, and clearly cannot be made out on the Record. If the Applicants had evidence of bad faith, it was open to them to file an action and test such evidence. This possibility was identified for them by the Respondents in 2021. The Applicants decided to proceed with the judicial review.

75. For the Corporate Applicant, the allegation of bad faith must proceed, if at all, with public interest standing. There is no allegation of bad faith as against the Corporate Applicant – the allegations as pled are much more general. It is also unclear from the Corporate Applicant's brief whether allegations of bad faith would be against "*every Nova Scotian*", or to a narrower band of persons, such as parents whose rights the Corporate Applicant alleges were infringed or minor children directly (based upon the Corporate Applicant's brief, at para 24). However, the allegations of bad faith, should they proceed, must be considered on the Record alone, absent any evidence of bad faith and absent any factual framework to contextualize the alleged bad faith.

76. The ***NSCLA*** case involved an Application in Court and considered extensively the factual context provided by evidence. Justice Rosinski held that the evidence did not provide a serious justiciable issue.

77. Judicial review proceedings do not include evidence. These proceedings involve review of a Record. There is even less factual context in this judicial review proceeding than would be the case in a proceeding with evidence such as ***NSCLA***. Here, it is clear from the Record that no determination of bad faith can be made.

78. The Applicants may argue that bad faith could be established on a more complete record. However, the Applicants have possessed the Record for almost a year, and a Record Motion has been anticipated since August 2022. Nothing is filed to date. The Applicants have failed, despite repeated requests by Respondent's counsel throughout 2022, to offer concrete materials they believe ought to be included in the Record. There is no *prima facie* indication of bad faith in the Record filed by the Respondents, and the Applicants have provided no sustainable argument that any decision was taken in bad faith.

79. This proceeding cannot be permitted to devolve into a 'fishing expedition'. If the Applicants possessed evidence of bad faith, they could have filed an action or application is which such materials could be tested. Or, they could have identified specific material they alleged were improperly excluded from the Record, and the Respondents could have reviewed and answered. Here, there is no *prima facie* evidence of bad faith.

80. Without demonstrating direct impact of the PHOs upon the Corporate Applicant, the scope of the proceeding as presented in the most recent Notice for Judicial Review remains much broader than is reasonable for CANS to pursue with public interest standing.

81. The Corporate Applicant must meet the three criteria in the ***Downtown Eastside*** framework for public interest standing: (i) serious justiciable issue; (ii) genuine interest; and (iii) reasonable and effective means of bringing the issues to court. The onus is on the Corporate Applicant, as the party seeking standing, to establish that the three factors favour the granting of standing.

82. As ***Downtown Eastside*** affirms, the three factors are not intended to be a checklist but should be treated as interrelated considerations to be weighed cumulatively, not individually, in a purposive, flexible, and generous manner (para 53).

83. Weighing the ***Downtown Eastside*** factors, in light of the underlying purposes for limiting and granting standing, the Respondents submit that CANS should be denied public interest standing to challenge the PHO on the grounds that the judicial review as framed in the most recent iteration of the Notice for Judicial Review does not raise a *serious* justiciable issue, the Corporate Applicant has no real stake or genuine interest beyond its own private interest standing, and judicial review is not a reasonable and effective means to bring the issues the Corporate Applicant has identified to court.

The Application does not raise a Serious Justiciable Issue

84. The requirement of justiciability was discussed by the Court in ***Council of Canadians***, at para 50:

> *50 To be justiciable, an issue must be one that is appropriate for a court to decide, that is, the court must have the institutional capacity and legitimacy to adjudicate the matter (Highwood Congregation, at paras. 32-34). Public interest standing hinges on the existence of a justiciable question (Downtown Eastside, at para. 30). Unless an issue is justiciable in the sense that it is suitable for judicial determination, it should not be heard and decided no matter who the parties are (Highwood Congregation, at para. 33, citing L. M. Sossin, Boundaries of Judicial Review: The Law of Justiciability in Canada (2nd ed. 2012), at p. 7).*
>
> (Emphasis added)

85. The requirement of a justiciable issue in relation to public interest standing ensures that the exercise by the courts of their discretion with respect to standing is consistent with their proper constitutional role. By contrast, *seriousness* addresses the concern about the allocation of scarce judicial resources and the need to screen out the "*mere busybody*" and ensure that "*judicial resources remain available to those who need them most*". (***Council of Canadians***, at para 48). The "*serious issue*" requirement arises when the question is found to be "*far from frivolous*" (***Council of Canadians***, at para 49).

Analysis of the "*seriousness*" issue requires a practical assessment of the contentions - a peremptory disposition does not suffice. (***Ecology Action Centre***, at para 94).

86. The Respondents acknowledge that the issues as most recently framed by the Applicants – namely, whether the PHO was *vires* and whether the PHO was issued in bad faith, are justiciable. However, the Respondents submit that neither issue rises to the level of *serious* justiciable issue in the present context. While these matters may have been *serious* when the PHO was in force and affected the Applicants, it is no longer serious where the PHO has not affected the Applicants in their personal capacities since July, 2022, has not been in effect at all since May 23, 2023, and where the only relief available is declaratory. Judicial resources would be better applied to cases that will offer meaningful results to those who seek redress from the Court.

87. As was the case in ***NSCLA*** as set out at para 40, the issues CANS seeks for judicial review may have been "*far from frivolous*" at a certain point in time when it impacted them directly but cannot be considered "*far from frivolous*" where the PHO is no longer in effect.

88. With respect to the *vires* of the PHO, a review of reasonableness at certain points in time is specific to the context of that point in time. The question is now academic. Assuming the Applicants were successful in obtaining a declaration that a certain requirement set out in a certain iteration of the PHO, a declaratory remedy could follow, but such declaration would serve no practical purpose for the Applicants and would not serve as a useful precedent for any future application of public health orders pursuant to section 32 of the *HPA*. Being responsive to unique public health considerations, each public health order, if challenged, must be considered in its own factual context.

89. The first issue raised in the Application is a question of law which is justiciable. The second, however, cannot be determined on the Record in this judicial review proceeding. The Respondents have raised this point consistently since their very first filings in this proceeding on December 8, 2021. A decision subject to judicial review can be determined to be reasonable or unreasonable based upon the record, but whether a decision was or was not taken in bad faith begs evidence which is not available in the judicial review process. Bad faith is difficult if not impossible to establish purely on the factual record.

90. This point was highlighted by the Supreme Court in ***Canadian Council of Churches***. In that case, the Council challenged the validity of the amended *Immigration Act* 1976, SC 1976-77, c 52, as amended by SC 1988, c 35 and 36 as contrary to the *Charter*. Justice Cory observed that the "*issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge*" (at para 38).

91. While the *vires* aspect of the Notice raises an issue as to the validity of the legislation, the bald allegation of bad faith is so hypothetical in nature based upon the Record "*that it would be impossible for any court to make a determination with regard to them*" (at para 38). In contrast, in ***Canadian Council of Churches***, refugee claimants were bringing forward claims akin to those bought by the Council daily, where "*each case presented a clear concrete factual background upon which the decision of the court could be based*" (at para 40).

92. The comments of Justice Charron in the ***Canadian Civil Liberties Assn v Canada (Attorney General)***, 1998 CanLII 6272 (ONCA) ("***Canadian Civil Liberties***"), are also instructive. In that case, the applicant sought a declaration that certain provisions of the *Canadian Security Intelligence Services Act*, RSC 1985, c C-23 (CSIS) were contrary to ss 2(b) to 2(d), 7 and 8 of the *Charter*. The motions judge granted public interest standing on the basis that the challenge was a serious issue to advocacy groups and citizens at large and there was no better way for the issues to be litigated. The trial judge then proceeded to dismiss the challenge on its merits. The applicant appealed and the Attorney General cross-appealed on the issue of the applicant's standing. At issue was the adequacy of the factual record (the adjudicative facts) grounding the applicant's challenge and whether this was relevant to a consideration of standing, or was a matter left to be decided after standing had been adjudicated.

93. Justice Charron concluded that the adequacy of the factual record was relevant to the consideration of standing. In relation to public interest litigants Justice Charron concluded (at paras 28-29):

> *28 I would agree with L'Heureux-Dubé J. that the issue of sufficiency of the evidence is entirely separate from the question of standing for those litigants who have a cause of action under the traditional rules, a situation which she was of the view existed in Hy & Zel's. These litigants have standing as of right. They do not depend on a discretionary grant of standing to pursue their claim. Any screening of unmeritorious claims which may be made under the rules of procedure on the ground of a lack of a proper evidentiary basis will not likely be related to any issue of standing.*
>
> *29 <u>However, where a litigant does not have a cause of action under the traditional rules and requires a discretionary grant of public interest standing to pursue its claim, the concerns identified above have to be addressed and these concerns, as held by the majority in Hy & Zel's, include a consideration of</u>*

the sufficiency of the evidence. More will be said later on what constitutes a sufficient evidentiary basis for this purpose.

(Emphasis added)

94. Although there was an evidentiary record in ***Canadian Civil Liberties***, Justice Charron concluded that it was not such as to raise a justiciable issue, and that the standing of the applicant ought to have been denied.

95. Similarly, the Record in this judicial review proceeding does not offer the Court sufficient means to assess whether the decision to implement the PHO was taken in bad faith. The Corporate Applicant cannot simply assert that bad faith exists and hope to find a 'smoking gun' as the matter proceeds. Having chosen judicial review as opposed to an action, the Corporate Applicant waived its right to discovery as would have existed in an action, and must rely solely on the Record, from which the Applicants cannot establish bad faith decision making against them or Nova Scotians generally.

96. The Applicants may say that the Record is not complete and there are materials which may come out following the Record Motion to substantiate their claims. However, the Applicants have failed to identify specific deficiencies in the Record despite repeated requests from the Respondents. The Applicants failed to efficiently file and pursue the Record Motion anticipated since August 2022. Based upon the Record as filed, there is insufficient evidence to raise a justiciable issue with respect to bad faith.

The Corporate Applicant has no real stake or genuine interest in the matter for public interest standing

97. As noted above, the Respondents agree that the Corporate Applicant has a stake in the *vires* of the Order. This can be pursued in their private interest capacity, subject to the comments above about scope of the review. The Respondents say that the question of whether the PHO was *ultra vires* can reasonably be considered within the bounds of private interest standing and public interest standing need not be considered.

98. With respect to the bad faith issue, the Corporate Applicant has not demonstrated that they have any real stake or genuine interest in the matter. As noted above, allegations of bad faith appear, from the Corporate Applicant's submissions, to be directed at all Nova Scotians, or possibly parents, or possibly minor children, instead of at the Corporate Applicant. The Corporate Applicant has not demonstrated any basis upon which it should be granted public interest standing to pursue allegations of bad faith against any of these classes.

99. In ***Ecology Action Centre*** at para 111, the Court of Appeal agreed with the motions judge's assessment that the applicants for public interest standing met the second and third ***Downtown Eastside*** factors in the following terms:

> *[111] The motions judge held Downtown Eastside's second and third factors favoured standing. I adopt her views:*
>
> - *The Ecology Action Centre and NB Alliance are not "busybodies". Their affidavits show a significant track record and a genuine interest, on behalf of their thousands of members, in the environmental issues at play.*
> - *This judicial review is a reasonable and effective way to litigate the matter. The Ecology Action Centre and NB Alliance have the resources and capacity, with experienced counsel, to assist the court. The court will hear an opposing view. As Justice Jamieson said (para. 76), "there are no realistic alternatives to the Applicants bringing the case via judicial review, as was acknowledged by the Department".*

100. Specifically, the motions judge noted at first instance in ***Ecology Action Centre v Nova Scotia (Environment)***, 2022 NSSC 104 as follows:

a. That Ecology Action Centre was one of the oldest environmental associations in Canada, established in 1971 (at para 2).
b. That Ecology Action Centre had actively participated in both the 2014 environmental assessment of the Goldboro LNG project, and the 2021 review of the Highway Realignment Project proposed for Goldboro (at para 3).
c. That a supporting affidavit confirmed Ecology Action Centre's involvement in oil and gas issues for over twenty years, including environmental assessment processes for multiple projects or issues in Nova Scotia (at para 71).
d. That the second applicant seeking public interest standing, New Brunswick Anti-Shale Gas Alliance, had a track record of over ten years involved in unconventional oil and gas issues including through public advocacy and litigation respecting environmental issues and climate change (at para 72).
e. That the two applicants said they had sufficient resources and capacity to undertake judicial review, as demonstrated through their involvement in other litigation, they were represented by counsel with experience in environmental law, and they brought a useful perspective to the resolution of the issues which was distinct from those more directly affected (at para 37).

101. By contrast, the Corporate Applicant in the present case:

a. Is not an established organization, having only been founded in 2021;
b. Has offered no evidence of any track record of public advocacy or education about matters related to this proceeding;
c. Has not participated in any litigation other than the present proceeding;
d. Is not represented by counsel with experience in the subject matter of this review or judicial review processes generally. In fact, the Corporate Applicant does not have any legal representative;
e. The Corporate Applicant brings no unique perspective to resolution of the issues distinct from those directly affected. Indeed, the Corporate Applicant's brief suggests that one of their principal concerns is what they frame as rights of parents. The Corporate Applicant has not identified any connection to this interest in their evidence, and have not identified how views about purported rights of parents cannot be better considered with factual context by affected parents.

102. The Corporate Applicant asserts at paragraph 20 of its submissions appears to imply that simply being a group formed to address certain issues qualifies it for public interest standing. Respectfully, this is far from adequate to justify public interest standing. As the comparison above between the Corporate Applicant in the present case and Ecology Action Centre in its case demonstrates, the two are clearly distinguishable on the merits of granting public interest standing in their cases.

103. In ***NSCLA***, the applicant was, like the Corporate Applicant, formed in the midst of the pandemic and their origins appear to have been prompted by the pandemic (at para 46). As was the case in ***NSCLA***, there are no corporate bylaws before the Court explaining the nature and function of the organization (at para 47). Although the Court noted that the affidavit evidence was "very limited" (***NSCLA***, at para 47), it is clear from the excerpt of the affidavit at para 48 of that decision that NSCLA offered the Court significantly more context justifying their claim of genuine interest than what the Corporate Applicant has provided in the present case.

104. The Respondents have experienced frustration throughout this proceeding in their attempts to narrow the scope to discrete and manageable issues. It is clear that the Corporate Applicant disagrees with the justification of the PHO, and in its private interest capacity it is in a position to challenge the Order's *vires*. There is no reason to permit the Corporate Applicant to pursue this issue with public interest standing.

105. The Court accepted that the applicants had a genuine interest in both ***Ecology Action Centre*** (at para 111) and ***NSCLA*** (at para 50). However, based upon the distinguishing features summarized above, the Corporate Applicant has failed to

demonstrate any real stake or genuine interest in the bad faith arguments issue it seeks to address.

Judicial Review with public interest standing is not a reasonable and effective means to bring the Corporate Applicant's issues to Court

106. As stated in ***Council of Canadians***, at para 60:

> *60 The third Downtown Eastside factor requires courts to consider whether, in all the circumstances, a proposed suit is a reasonable and effective means of bringing an issue before the courts. One of the many matters a court is to consider when assessing this factor is "the plaintiff's capacity to bring forward [the] claim" (para. 51). To evaluate the plaintiff's capacity to do so, the court "should examine, amongst other things, the plaintiff's resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting" (para. 51).*

107. In assessing whether a particular means of bringing a matter to court is "*reasonable and effective*" the Court is to take a purposive and flexible approach in determining whether the proposed action is an economical use of judicial resources, whether permitting the action to proceed will uphold the principle of legality and "*whether the issues are presented in a context suitable for judicial determination in an adversarial setting*" (***Downtown Eastside***, at para 50).

108. At para 55 of ***Council for Canadians***, the Supreme Court of Canada set out a non-exhaustive list of factors to consider with respect to the reasonable and effective means consideration. In ***NSCLA***, at para 51, Justice Rosinski listed and considered each of the ***Council for Canadians*** factors and their application to the circumstances of NSCLA. The following assessment adopts Justice Rosinski's approach in the Corporate Applicant's context:

a. *The plaintiff's capacity to bring the claim forward*: What resources and expertise can the plaintiff provide? Will the issue be presented in a sufficiently concrete and well-developed factual setting?

    i. The Corporate Applicant has offered no evidence of its financial resources, other than the reference to "*funds generously donated by our members*" at para 9 of the Affidavit of Tara Ibrahim. The Corporate Applicant was founded in 2021, as compared to the Ecology Action Centre

which was founded in 1971. Given its relative infancy, it is unlikely that the Corporate Applicant has established consistent and reliable funding sources, or consistent and reliable professional resources to support its work, comparable to those of the Ecology Action Centre. In any event, it has not provided evidence of the extent of its resources. Regarding resources in expertise, the Corporate Applicant's deficiencies are crystalized in one illustrative example which is on the record. Unlike the Applicants in ***Ecology Action Centre*** and ***NSCLA***, the Corporate Applicant is not represented by counsel. Further, the Corporate Applicant has offered no evidence of any expertise with respect to the experience of all Nova Scotians, of minors, or of parents. With respect to the issue of bad faith, as discussed above, there is no well-developed factual context for the allegations, which would have been better taken up through another form of proceeding.

b. *Whether the case is of public interest:* Does the case transcend the interests of those most directly affected by the challenged law or action? Courts should take into account that one of the ideas animating public interest litigation is that it may provide access to justice for disadvantaged persons whose legal rights are affected.

    i. When in effect, the PHO applied to all Nova Scotians and other persons present in the province. The impact of the Order would have been felt differently by different individuals. However, the Order was fully lifted in May 2023, and is now moot. There is no indication that granting public interest standing would provide access to justice for disadvantaged groups, or that any meaningful remedy would flow from determination of either issue identified by the Applicants, for them personally or for any persons whose interests they seek to represent with public interest standing.

c. *Whether there are alternative means*: Are there realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination? If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues?

    i. As discussed above, the Corporate Applicant could have commenced an action defining material facts and harm resulting, which would have

provided a discovery process and exchange of evidence permitting the parties and Court to consider – they chose to continue with judicial review, which limits the useful factual context for determination of issues.

ii. The remaining questions above are not applicable.

d. *The potential impact of the proceedings on others*: What impact, if any, will the proceedings have on the rights of others who are equally or more directly affected? Could "the failure of a diffuse challenge" prejudice subsequent challenges by parties with specific and factually established complaints? (para 51, citing *Danson v Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 SCR 1086, at p 1093).

i. When active, the PHO affected all Nova Scotians and persons in the Province. A determination that it was made *ultra vires* will have no practical effect where the Order is no longer in effect. There would be no difference on the impact of the decision on others whether it proceeds with public interest standing, or on a more limited scope as discussed above under the Applicants' respective private interest standing.

ii. The allegation of bad faith will similarly have no direct impact on others. If others intend to claim damages on the basis of bad faith, then the question of bad faith is better left for determination on a clear factual context with evidence, rather than considered generally on the basis of the Record alone.

109. In addition to the non-exhaustive list discussed above, the Respondents submit that the manner in which this proceeding has been handled by the Corporate Applicant to date demonstrate that this judicial review is not a "*reasonable and effective means*" to resolve the issues to court, in practice.

110. The Corporate Applicant has twice amended its initial pleading, and twice attempted to add further parties as co-applicants. It has failed to define what it perceives to be missing from the Record but relies upon serious allegations of bad faith against the CMOH in his issuance of the PHO to protect the public from a novel communicable illness which had not just local, but global impact.

111. As discussed above, even the Corporate Applicant's submissions in support of this Motion fail to adhere to the rules of evidence. Although this has been a persistent issue throughout this proceeding, the Corporate Applicant's current lack of legal

representation raises concerns about its ability to capably or adequately proceed with public interest standing.

Weighing the *Downtown Eastside* factors

112. The judicial review process has languished for two years, and there are still several preliminary motions to be heard before the matter can be heard on its merits. The lack of a concrete factual framework within which to explore the serious allegations the Applicants make against the CMOH has complicated the problem.

113. The absence of clear direction in the Corporate Applicant's approach is evident in the multiple rounds of amendments to the Notice for Judicial Review, attempts to add new co-applicants, and failure to clearly define what they perceive to be deficiencies in the Record. The manner in which the Corporate Applicants have conducted this proceeding to date, and the burden it has placed on scarce judicial resources, makes this a case study in defining the "*busybody*" litigants the Supreme Court of Canada has warned against.

114. The Corporate Applicant's issues cannot reasonably be defined as *seriously* justiciable. The Corporate Applicant has no real stake or genuine interest in the issues beyond what it already has private interest standing to pursue. This judicial review process is neither a reasonable nor effective means of resolving the issues.

115. The Corporate Applicant now does not have legal counsel but seeks to speak for all Nova Scotians, or potentially minors or their parents. Respectfully, any of these are unreasonable propositions. The Corporate Applicant can speak for itself but should not be permitted to expand its representation through public interest standing unrepresented. The Corporate Applicant has not offered any case law supporting a grant of public interest standing absent representation by competent counsel.

116. The issue of representation is of particular concern to the Respondents where the Corporate Applicant has repeatedly failed to adhere to the *Civil Procedure Rules*. Public interest standing should not be granted where the party seeking such standing has not demonstrated its ability to consistently comply with court procedure.

117. Overshadowing all of these considerations is the fact that despite the original Notice for Judicial Review having been filed in October 2021, the Corporate Applicant failed to move the matter forward in a timely and efficient manner to such an extent that the PHO for which they sought review was lifted in May 2023. Even a grant of public interest standing was given, the issues the Corporate Applicant raises are moot.

118. Weighing all the ***Downtown Eastside*** factors, together with these additional considerations, flexibly and purposively, the Corporate Applicant should not be permitted to proceed with public interest standing.

Conclusion

119. For the foregoing reasons, the Respondents say that the Corporate Applicant should be permitted to proceed with this judicial review in its own right, but not with public interest standing.

120. The Respondents respectfully request that the Applicants' Motion for public interest standing be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2023

Daniel Boyle
Counsel to the Respondents