SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Civil Liberties Association v. Nova Scotia (Minister of Municipal Affairs and Housing)*, 2023 NSSC 207

Date: 20230628
Docket: Hfx No. 513479
Registry: Halifax

Between:

Nova Scotia Civil Liberties Association

Applicant

v.

His Majesty the King in right of the Province of Nova Scotia as represented by the Minister of Municipal Affairs and Housing

Respondent

Decision

Judge: The Honourable Justice Peter Rosinski

Heard: April 27, 2023, in Halifax, Nova Scotia

Counsel: Daniel Wilband, for the Applicant
Mark Rieksts, for the Respondent

By the Court:

Introduction

[1] Most Canadians will be familiar with the phenomenon that came to be known as the "Freedom Convoy", during the months of **January and February 2022**.[1]

[2] The members of that vehicular trek from manifold parts of Canada ended in Ottawa near the Parliament Buildings. The consequent blockade of traffic remained for 3 weeks. Those in the motor vehicles undoubtedly would claim that they were protesting pursuant to their freedoms of "expression" and "peaceful assembly".[2] Many of those whose lives were adversely affected by that blockade were likely confounded by why that disruption was permitted, and permitted to persist for so long. They likely wondered why their rights to freely traverse public property and live in peace without the excessive noise, were not recognized and protected.

[3] That phenomenon is the backdrop to the present Application by the Nova Scotia Civil Liberties Association ["NSCLA"], filed **March 17, 2022**, which requests from this court:

> An order that the Direction of the Minister under a Declared State of Emergency 22 – 002 issued January 28, 2022, and the Direction of the Minister under a Declared State of Emergency 22 – 003 issued February 4, 2022 (the "Directives") are inconsistent with subsections 2(b) and 2(c) of the *Canadian Charter of Rights and Freedoms*, and that such inconsistency cannot be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*, as well as, if applicable, an immediately effective declaration that the Directives are of no force and effect pursuant to subsection 52 (1) of the *Constitution Act*, 1982.

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[1] See paras. 11-14 of Hayley Crichton's affidavit, sworn in her capacity as the Executive Director of Public Safety and Security Division - Nova Scotia Department of Justice.

[2] These freedoms of "expression" and "peaceful assembly" are not without limits. Notably, the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, contains many provisions that themselves prohibit individual instances of blockading public roads – e.g., see ss. 2(am), 100, 138, 143, 151, 156, and 158. S. 261 permits the arrest of persons in such circumstances.

1 - The two Directions issued by the Province[3]

A - Direction 22 – 002 was titled "**Highway Blockade Ban**", and read as follows:

During the Provincial State of Emergency declared Province-wide on March 22, 2020 by the Minister of Municipal Affairs and Housing, having satisfied myself that it is necessary for the protection of property and the health or safety of persons and the Province, and under the authority provided to me in section 14 of the *Emergency Management Act*, including specifically under clause(d) to control or prohibit travel to or from an area or on a road, street or highway, I direct as follows:

Highway Blockade Ban

1. **Effective on and after January 28, 2022**, all persons are **prohibited from**

(a) **stopping, parking, or operating a vehicle** or putting any item in such a manner as **to create or contribute to a partial or complete blockade of the normal flow of vehicle traffic** on a road, street or highway in the Province;

(b) **participating in, financing, organizing, aiding, encouraging, or supporting an interruption of the normal flow of vehicle traffic** at a location on or near Highway 104 in Cumberland County Nova Scotia, or the Nova Scotia – New Brunswick border, or

(c) participating in the stopping or gathering of people along the side of, or in an area on or near the

(i) **Cobequid Pass** portion of Highway 104 and the associated access roads and toll plaza,

(ii) **Highway 104** in Cumberland County, Nova Scotia, or

(iii) **Nova Scotia – New Brunswick border crossing in support of a 2022 Freedom Convoy, and Atlantic Canada Holds The Line event, or an organized protest intended to interfere with the normal flow of vehicle traffic** on a road, street, or highway.

2. The prohibitions in Section 1 do not apply to:

[3] Although in evidence before me, the NSCLA has not challenged the constitutionality or validity otherwise of either: a Direction pursuant to s. 14 of the *Emergency Management Act* dated March 22, 2020; or a Declaration of Provincial State of Emergency by Minister pursuant to subsection 12(1) of the *Emergency Management Act* dated March 22, 2020, which were both signed by the Honourable Chuck Porter as Minister of Municipal Affairs and Housing.

(i) Provincial or municipal workers, or the vehicles used while engaged in sanctioned highway maintenance and repairs, or

(ii) law enforcement officers while on duty.

The Direction is in addition to any requirements established in a Medical Officer's order under the *Health Protection Act*, and any other directions issued under the *Emergency Management Act*.

A failure to comply with this Direction could result in a summary conviction with fines between $3000-$10,000 for individuals and between $20,000-$100,000 for a corporation per incident.

This Direction will remain in place for the duration of the Provincial State of Emergency, including any renewal periods made by the Minister and approved by Governor General in Council under section 19 of the *Emergency Management Act*, **unless it is terminated earlier in writing**.

B - Direction 22 – 003 was titled "**Road Blockade Ban**", and read as follows:

During the Provincial State of Emergency declared Province-wide on March 22, 2020 by the Minister of Municipal Affairs and Housing, having satisfied myself that it is necessary for the protection of property and the health or safety of persons and the Province, and under the authority provided to me in section 14 of the *Emergency Management Act*, including specifically under clause(d) to control or prohibit travel to or from an area or on a road, street or highway, I direct as follows:

Road Blockade Ban

1. **Effective on and after February 4, 2022**, all persons are **prohibited from stopping, parking, or operating a vehicle** or putting any item in such a manner as **to create or contribute to a partial or complete blockade of the normal flow of vehicle traffic** on a road, street or highway in the Province, including municipal roads, streets and highways.

2. The prohibitions in Section 1 do not apply to:

(i) Provincial or municipal workers, or the vehicles used while engaged in sanctioned highway maintenance and repairs, or

(ii) law enforcement officers while on duty.

> The Direction is in addition to any requirements established in a Medical Officer's order under the *Health Protection Act*, and any other directions issued under the *Emergency Management Act*.
>
> A failure to comply with this Direction could result in a summary conviction with fines between $3000-$10,000 for individuals and between $20,000-$100,000 for a corporation per incident.
>
> **This Direction will remain in place for the duration of the Provincial State of Emergency, including any renewal periods** made by the Minister and approved by Governor General in Council under section 19 of the *Emergency Management Act*, **unless it is terminated earlier in writing**.

2 - A summary of the issues to be decided by the court

[4] On or about March 4, 2022, the Province announced that the Provincial State of Emergency would not be renewed after its expiration on March 20, 2022.

[5] The Provincial State of Emergency expired on March 20, 2022 - 7 weeks after the first Direction was effective, and 3 days after this Application was filed by the NSCLA.

[6] The NSCLA Application requests this Court to decide after a full hearing whether these one or both of these two Directions infringed or denied Nova Scotians' freedoms under section 2(b) or (c) of the *Canadian Charter of Rights and Freedoms* ["the *Charter*"].[4]

[7] The *Charter* reads in part:[5]

> **Guarantee of Rights and Freedoms**
>
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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[4] In Mr. Wilband's March 16, 2022 sworn affidavit in support of the motion for directions, he characterized the effect of the impending expiration of the Provincial State of Emergency as follows: "The events underlying the Application are unfolding in light of the ongoing, unpredictable and volatile nature of the Covid 19 pandemic and related emergency measures and other restrictions including those at issue in this Application. While the impugned Directives are now scheduled to expire on March 21, 2022, the rights of Nova Scotians' to freedom of expression and freedom of assembly may continue to be eroded over time if the same or similar directives are issued in response to pandemic-related issues in the future and without prior judicial consideration of the legitimate scope of such pandemic-related emergency measures."

[5] Being Part I of the *Constitution Act, 1982*, proclaimed in force April 17, 1982.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) **freedom of** thought, belief, opinion and **expression,** including freedom of the press and other media of communication**;**

(c) **freedom of peaceful assembly**;

(d) freedom of association.

[8] This decision deals with two preliminary issues.

[9] The questions before me are, whether:

> I should grant the NSCLA "**public interest standing**" to present its arguments on the merits of the grounds in the Application in Court; and if I do so, are these circumstances of a sufficiently exceptional nature that I should hear the case on its merits, in spite of it being "**moot**".[6]

[10] The Province argues that this Court, should exercise its discretion to not grant the NSCLA "public interest standing" to permit it to argue these issues notionally on behalf of Nova Scotians;[7] and should not hear the merits of the moot Application, as it is not in the interests of justice to do so.

[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

[6] Counsel agreed that, for me to understand the legal positions of each party on this preliminary motion, I could contextually consider the Notice of Application, the Notice of Contest and all the affidavits filed on the Application for the purposes of the merits hearing, should the matter proceed. No affiants were cross-examined.

[7] The NSCLA makes reference in support of its arguments generally, to the reasons in *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General),* 2022 NSCA 64. Notably, in that case the Province consented to the CCLA having "public interest standing", and the injunction in question had been issued on an *ex parte* basis – para. 31.

> 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."[8]
>
> [My underlining added]

[12] The Province says:

1. the NSCLA should not be granted "standing" because, although it may have a genuine interest in the matter, there is no serious justiciable issue to be decided here, and that proceeding by way of an Application in Court is not a reasonable and effective means of bringing the case to court; and
2. the legal questions the NSCLA has presented are "moot", and there are no exceptional circumstances which would justify the court hearing this moot Application.

[13] I conclude the NSCLA should not be granted "public interest standing".

[14] Nevertheless, I will go on to also consider the other preliminary issue of mootness.

[15] "Moot" for present purposes, has been defined as:

> A legal proceeding involving an abstract or theoretical question of law… A case which originally involved an actual dispute, but which no longer involves an actual controversy between the parties at the time when it comes before court. Where subsequent to the initiation of… [a] proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be or to have become moot. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law.[9]
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> [My underlining added]

[16] The NSCLA and the Province agree that the matter is "moot"; however, they differ on whether it is nevertheless "in the interests of justice" that the court should of hear the merits of the Application.

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[8] See the definition of "standing" in volume 3 of *The Encyclopedic Dictionary of Canadian Law*, Kevin P McGuinness, Lexis-Nexis Canada, Toronto Ontario, (November 2021).

[9] See the definition of "moot" in volume 2 of *The Encyclopedic Dictionary of Canadian Law*, Kevin P McGuinness, Lexis-Nexis Canada, Toronto Ontario, (November 2021).

[17] The NSCLA rightly points out that, in spite of a matter being moot, in exceptional circumstances courts may hear the merits of a matter that is moot.

[18] I conclude that these are not such exceptional circumstances, and therefore I decline to hear the Application on the merits.

[19] I dismiss the Application at this preliminary stage. Let me next explain my conclusions in greater detail.

Should there be an Order for Public Interest Standing?

[20] The NSCLA has the burden to persuade the court of its position on this issue.

[21] It relies particularly on the affidavit of William McMullin, in which he stated, *inter alia*:

> I am the President of the Nova Scotia Civil Liberties Association ("NSCLA")…
>
> The NSCLA seeks standing, as a public interest litigant, to bring this Application on behalf of Nova Scotians. As 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, I believe that the NSCLA is a suitable public interest litigant.
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> …
>
> Over the course of 2021, I met with various Nova Scotia community members who shared a conviction that a dedicated local civil society rights association in the tradition of the then defunct [since 1976] NSCLA would be beneficial for Nova Scotians. Such an organization would endeavour to supplement and advance the promotion and defence of civil liberties in Nova Scotia that is currently often conducted only in a patchwork fashion by out-of-province civil liberties organizations.[10]

[10] See for example, in relation to an injunction granted by the Supreme Court of Nova Scotia in response to the Province's *ex parte* request regarding Covid 19 issues: *Canadian Civil Liberties Association v. Nova Scotia (Attorney General), supra*. As Justice Fichaud noted at para. 275 and Justice Bryson stated therein at para. 11: "On May 14, 2021, the Attorney General of Nova Scotia and the Province's Chief Medical Officer of Health obtained a sweeping *ex parte* Injunction Order binding all Nova Scotians, preventing them from organizing, promoting or attending public gatherings that would be contrary to public health orders issued by the Chief Medical Officer…" The named respondents in the injunction request were identified as "Freedom Nova Scotia" and other named and unknown parties. Our Court of Appeal firstly had to consider whether to hear the otherwise moot appeal from the Injunction Order since there had been no *inter partes* hearing, and there was no longer "a live issue between the parties, in part because the [Injunction] Order has been discharged" [by a Justice of the Nova Scotia Supreme Court

…

In late 2021, I and a small group of representatives from different backgrounds, professions and industries decided to establish a formal organization that would engage in advocacy, public communications and, where appropriate, litigation on civil liberties issues in Nova Scotia.

On November 5, 2021, after considering several other name options, the organization was incorporated under Nova Scotia law as the Nova Scotia Civil Liberties Association …

The NSCLA is a provincial, non-profit, independent, non-governmental organization dedicated to promoting respect for and observance of fundamental human rights and civil liberties in Nova Scotia. Pursuant to its bylaws, the NSCLA works to defend and ensure the protection and full exercise of those rights and liberties through research, public advocacy and engagement, and litigation.

…

Having been constituted in its present form in 2021, this Application is the first litigation in which the current iteration of the NSCLA has appeared as a party in Nova Scotia courts.

…

The NSCLA has a genuine and specific interest in, and has endeavoured to obtain expertise in, addressing legal issues relating to freedom of expression and freedom of assembly. The NSCLA's members and directors have a keen interest in litigation before the courts throughout Canada on all matters involving the *Charter of Rights and Freedoms* and civil liberties.

…

A dominant and recurring theme in the NSCLA's current communications with its membership is critique and analysis of the broad executive powers that have been exercised in the context of the Covid 19 pandemic and the related states of emergency declared in this province and elsewhere since early 2020. The NSCLA has been engaged in review and discussion of the impact of pandemic related measures on the civil liberties of different communities in Nova Scotia and on the overall health and well-being of Nova Scotians. The organization has and intends to continue to discuss issues beyond Covid 19 related policies as well.

…

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in June 2021 – see Justice Chipman's decision in *Nova Scotia (Attorney General)* v. *Freedom Nova Scotia*, 2021 NSSC 217].

> In the NSCLA's view, irrespective of whether the same or similar directives are in fact issued in response to pandemic related issues in the future, or for any other reason, Nova Scotians deserve to have their courts analyse and comment upon the unprecedented use of executive authority in the Directives to limit their freedom of assembly and freedom of expression.
>
> The NSCLA has a genuine interest in the issues raised in the Application as they are directly connected to the organization's mandate. The NSCLA is engaged closely with these issues through its advocacy, public education and research.
>
> …
>
> Being in its current form a relatively new organization, the NSCLA as presently constituted has not yet been a party to litigation before the courts.
>
> The members of the NSCLA's Board of Directors and its advising members are competent and experienced individuals with a genuine interest in the legal, political and scientific aspects of the Application, and who possess experience in the conduct of civil litigation.
>
> The NSCLA has the resources to pursue the application. The NSCLA has access to funds well within the litigation budget provided by able and experienced counsel by which it is represented, and which include former Senior Counsel to the Nova Scotia Human Rights Commission. Its counsel has the capacity to manage litigation of this nature and will effectively present the issues at stake to this Court.
>
> …
>
> I believe the NSCLA's submissions will assist this Honourable Court in reviewing the constitutionality of the Directives, their inconsistency with the rights protected in past Canadian jurisprudence, and their interference with the Charter rights of all Nova Scotians in the context of Covid 19 public health restrictions.

[22] What then does the jurisprudence say about whether the NSCLA should receive "public interest standing"?

[23] Both the Province (para. 85 brief) and the NSCLA (para. 88 brief) agree that the Supreme Court of Canada's decision in *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, is the "leading case" on this issue.

[24] That unanimous decision of the Court confirms that there is a three-part test for "public interest standing", and it is a discretionary decision for the court of first instance.

[25] The Court stated:

> 28 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 with regard to the circumstances. **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).
>
> 29 In *Downtown Eastside*, this 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).
>
> 30 **Courts must also consider the purposes that justify *granting* standing in their analyses** (*Downtown Eastside*, at paras. 20, 23, 36, 39-43, 49-50 and 76). **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** (paras. 20, 39-43 and 49). **The goal, in every case, is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it** (para. 23).
>
> 31 *Downtown Eastside* remains the governing authority. **Courts should strive to balance *all* of the purposes in light of the circumstances and in the "wise application of judicial discretion**" (para. 21). It follows that they should not, as a general 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 many concerns that inform the *Downtown Eastside* analysis."
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> [My emphases added]

[26] The Province argues that the NSCLA has *not* met its burden to establish it is entitled to public interest standing, *inter alia*, in the following respects.[11]

1 - There is no serious justiciable issue

[11] I will not detail the Applicant's arguments here because I answer them largely through an examination of the Province's positions, although I have kept them in mind throughout. I note that the Applicant's positions were very well put forward by Mr. Wilband in his extensive and responsive brief and oral argument.

[27] The Province argues that as the evidentiary record available to the court becomes less and less fulsome in any particular case, so too is the likelihood lessened that there is a serious justiciable issue. Moreover, it notes that no one was charged with an offence under the Directions, and there is no evidence that anyone specifically was materially affected by the Directions, yet the Directions are being challenged as contrary to s. 2 of the *Charter* which protects "everyone".

[28] Without a concrete robust factual record of the effect of the Directions,[12] the court will be essentially conducting a "private reference" case - i.e. the court would be giving a legal pronouncement on the constitutionality of government action in the abstract.

[29] The Province relies on Justice Chipman's words in *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, *supra*, [which was being argued before him, based on the consented-to standing for the Canadian Civil Liberties Association to do so during its motion for a rehearing].

[30] He was asked to re-consider the merits of the *quia timet*, or pre-emptive injunction issued May 14, 2021, by Justice Norton [2021 NSSC 170], which had been discharged by Justice Gatchalian on June 22, 2021.

[31] Justice Chipman put it as follows (albeit on the basis of mootness):

> [26] CCLA submits that the case is not moot. …
>
> …
>
> [38] … There will be no Order setting aside the May 14, 2021, decision of this Court. The CCLA's issues, while interesting and thought-provoking, do not necessitate a lengthy hearing (or rehearing) at this time. This is a courtroom not a classroom. …

[12] I noted that the evidence in the affidavit of Mr. Everett only chronicles events leading up to January 28, 2022, which is the same day that the first Direction was made effective. The affidavit of Mr. Mirshahi references a protest scheduled to take place on March 24, 2022, which was 4 days after the expiry of the Declared State of Emergency. Moreover, his statements such as: "As a result of the chilling effect created by the Directives, participants [who protested on March 24, 2022] remained crowded onto the narrow sidewalk near Province House during the entire demonstration and many were unable to hear the speeches that were given. The apparent breadth of the Directives' scope, and the severity of the associated penalties,… and confusion arising therefrom, caused these organizations to avoid exercising their legitimate right to associate and express their views to the full extent to which these rights had been exercised in the past, out of fear of suffering repercussions from the emergency measures set out in the Directives."; are inadmissible in an Application in Court proceeding (Civil Procedure Rule 5.20) – and in any event, the Court would only have given very little weight to such assertions of fact.

[32] The Province also relies on the reasoning of Charron JA (as she then was) in *Canadian Civil Liberties Association (Corporation of the) v. Canada (Attorney General of)*, (1998) 48 OR (3d) 489 (Ont CA) at paras. 28-9, where she stated that it is appropriate to "includ[e] consideration of the sufficiency of the evidence" in cases where public interest standing is in issue; see also Justice Cory's observation in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, at para. 38 that: "… issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge."; and Justice Sopinka's reasons at para. 26 in *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086: "[that the Court] has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of the impugned legislation are the subject of the attack".

[33] However, as noted by the Supreme Court in the *Council for Canadians* [2022 SCC 27] case, even without a directly affected person(s) challenging the legislation, sometimes such cases may proceed:[13]

> 63 **At the outset, both parties rightly acknowledge that public interest litigation may proceed in some cases without a directly affected plaintiff (see, e.g., A.F., at para. 59). A statute's very existence, for example, or the manner in which it was enacted can be challenged on the basis of legislative facts alone** (see, e.g., *Danson*, at pp. 1100-1101).
>
> 64 **The AGBC, however, submits that where the impacts of legislation are at issue, evidence from a directly affected plaintiff is *vital* to "ensuring that a factual context suitable for judicial determination is present" before standing is granted** (A.F., at para. 60). In such cases, the AGBC maintains, an applicant for public interest standing should be required to (i) explain the absence of an individual plaintiff, (ii) show how it is a suitable proxy for the rights and interests of directly affected plaintiffs, and (iii) demonstrate, "with some specificity", how it will provide a well-developed factual context that compensates for the absence of a directly affected plaintiff (paras. 40 and 66).
>
> 65 **I would not impose such rigid requirements, for two reasons**.
>
> 66 **First, a directly affected *plaintiff* is not vital to establish a "concrete and well-developed factual setting". Public interest litigants can establish such a setting by calling affected (or otherwise knowledgeable) non-plaintiff *witnesses*** (see, e.g., Carterv. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) , at paras. 14-16, 22 and 110; Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101, at

[13] I cite liberally herein the court's comments on each of the three factors, which are interrelated.

paras. 15 and 54; *Downtown Eastside*, at para. 74). As long as such a setting exists, a directly affected co-plaintiff or a suitable proxy is not required for a public interest litigant to be granted standing. If a directly affected co-plaintiff is not required, then would-be public interest litigants should not have to justify — or compensate for — the absence of one.

67 **Second**, the AGBC's proposed requirements would thwart many of the traditional purposes underlying standing law. A strict requirement for a directly affected co-plaintiff would pose obstacles to access to justice and would undermine the principle of legality. Constitutional litigation is already fraught with formidable obstacles for litigants. These proposed requirements would also raise unnecessary procedural hurdles that would needlessly deplete judicial resources. Given these concerns, **the Court was correct in *Downtown Eastside* to retain the presence of directly affected litigants as a *factor* — rather than a separate legal and evidentiary hurdle — in the discretionary balancing, to be weighed on a case-by-case basis**. I would not disturb that conclusion here.

(2) Satisfying a Court on this Factor Will Be Context-Specific

68 The question remains: **In the absence of a directly affected co-plaintiff, how might a would-be public interest litigant demonstrate that the issues "*will* be presented in a sufficiently concrete and well-developed factual setting**" (*Downtown Eastside*, at para. 51 (emphasis added))? And, **in particular, how might such a litigant do so where (as here) standing is challenged at a *preliminary* stage of the litigation?**

69 **To begin, a few clarifications are in order**. 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, in light of all the circumstances. It follows that, where standing is challenged *at a preliminary stage*, whether a "sufficiently concrete and well-developed factual setting" *will* exist at trial may not be dispositive. The trial judge retains the discretion to determine the significance of this consideration at a preliminary stage by taking the particular circumstances into account**.

70 **That said, *the absence of such a setting will in principle be dispositive at trial*. A court cannot decide constitutional issues in a factual vacuum** (*Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). **Evidence is key in constitutional litigation unless, in exceptional circumstances, a claim may be proven on the face of the legislation at issue as a question of law alone** (see, e.g., *Danson*, at pp. 1100-1101, citing *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 133). Standing may therefore be revisited where it becomes apparent, after discoveries, that the plaintiff has not adduced sufficient facts to resolve the claim. As I will explain below, however, parties should consider other litigation management strategies before revisiting the issue of standing, given that such strategies may provide a more appropriate route to address the traditional concerns that underlie standing law (*Downtown Eastside*, at para. 64). For

> example, summary dismissal may be open to a defendant where there is no evidence to support an element of the claim (as in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 93).
>
> [My bolding added]

[34] I have available to me what will be the evidence should this matter proceed to be argued on the merits. In the case at Bar, there is not evidence from a "directly affected plaintiff", or reliably so from materially "affected non-plaintiff witnesses".[14]

[35] However, there is evidence that the Freedom Convoy was underway at the relevant times, and there were unknown numbers of unknown supporters, as well as the Freedom Convoy participants *per se*, some of whom could have been more directly affected by the Directions.[15]

[36] On the other hand, the paucity of evidence available, measured against the evidence that would be required to assist the court meaningfully with its examination of the constitutionality of the Directions in this particular case, amounts to no more than a veneer of a "factual context suitable for judicial determination".[16]

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[14] The evidence of Messrs Everett and Mirshahi is presumably the most cogent that the NSCLA could provide to the Court.

[15] I appreciate that the Applicant argues that: "they went so far as to prohibit all Nova Scotians from participating in, or expressing support for, any gathering that would partially or completely impair traffic on any municipal street, road or highway in the Province for an indefinite period" (para. 92 brief). Firstly, only the January 28-February 4, 2022 Direction addressed public support indirectly causing partial/complete road blockades (clauses 1(b) and 1(c). Generally speaking, while the Directions restricted all Nova Scotians choice of manner of expressing themselves, there is no reliable evidence regarding how many, if any, made changes to their intended protest actions in response to the Directions. Moreover, there is also a significant difference between the outright banning of people using their vehicles from public roads, and banning only those who intend to purposefully disrupt/blockade traffic on those roads. The Directions are targeted against only those persons who effectively "create or contribute to a partial or complete blockade of the normal flow of vehicle traffic on a road, street or highway in the Province" and do so for specific purposes: "in support of a 2022 Freedom Convoy, and Atlantic Canada Holds The Line event or an organized protest intended to interfere with the normal flow of vehicle traffic on a road street or highway." Moreover, the Directions were only in place for 7 weeks; and no others have been issued since March 2022, so the number of persons potentially directly affected is thereby constrained.

[16] Having said this, I do consider the Applicant's position that: "the pleadings reveal that the case can be largely argued on the face of the impugned Emergency Directives themselves. Further individual facts beyond the comprehensive contextual facts provided by the affiants are not pivotal. The above is true because, critically, in its pleadings, the Applicant alleges that the purpose as well as the effect of the Emergency Directives infringed the *Charter*. Although the Emergency Directives were not "legislation" *per se*, the equivalent of "legislative facts" are provided in the affidavit evidence filed by both parties to sufficiently establish the purpose and background of the

[37] I keep in mind as well what the Court in *Council of Canadians* stated:

> (b) Serious Justiciable Issue
>
> 48 The first of the *Downtown Eastside* factors, **whether there is a serious justiciable issue, relates to two of the traditional concerns. Justiciability is linked to the concern about the proper role of the courts and their constitutional relationship to the other branches of state**. By insisting on the existence of a justiciable issue, the courts ensure that the exercise of their discretion with respect to standing is consistent with their proper constitutional role. **Seriousness, by contrast, addresses the concern about the allocation of scarce judicial resources** and the need to screen out the "mere busybody". This factor also broadly promotes access to justice by ensuring that judicial resources remain available to those who need them most (see, e.g., Trial Lawyers, at para. 47).
>
> 49 **A serious issue will arise when the question raised is "far from frivolous"** (*Downtown Eastside*, at para. 42, citing *Finlay*, at p. 633). **Courts should assess a claim in a "preliminary manner" to determine whether "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation**" (*Downtown Eastside*, at para. 42, citing *Canadian Council of Churches*, at p. 254). **Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually be unnecessary to minutely examine every pleaded claim to assess standing** (*Downtown Eastside*, at para. 42).
>
> 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).
>
> [My bolding added]

[38] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, the court stated:

> 32 … Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?

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impugned measures, including their social, political and purported emergency-driven context. Here, that is to say, the concrete purpose and intended scope of the Directives are clearly available to the court for analysis, both on the face of the Directives themselves and as supplemented by the background affidavit evidence provided by the Province along with that of the Applicant." (paras. 107-108 Brief.)

33 Lorne M. Sossin defines justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.

(*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)

Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.

34 **There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context,** and the proper approach to determining justiciability must be flexible. **The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter:** see Sossin, at p. 294. **In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute"** (*ibid.*).

[My bolding added]

[39] I conclude that there are "some aspects of the [grounds set out in the Application in Court which]… reveal[s] at least one [potential] serious issue" (para. 49 - *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27): whether the Directions' purpose and/or effect violated ss. 2(b) or (c) of the *Charter* (which has been accepted by both parties to be a provisionally moot question).

[40] However, although that issue is "far from frivolous, in present circumstances, it is not that "far from frivolous".

[41] The Court stated in *Council of Canadians*:[17]

[17] It is important to appreciate the factual context in that case: a not-for-profit organization working for the rights of people living with disabilities in Canada, together with two individual plaintiffs (who withdrew from the action early on) filed a claim challenging the constitutionality of certain provisions of British Columbia's mental health legislation. The claim asserted that the impugned provisions violate ss. 7 and 15(1) of the *Charter* by permitting

64 **The AGBC, however, submits that where the impacts of legislation are at issue, evidence from a directly affected plaintiff is *vital* to "ensuring that a factual context suitable for judicial determination is present" before standing is granted** (A.F., at para. 60). In such cases, the AGBC maintains, an applicant for public interest standing should be required to (i) explain the absence of an individual plaintiff, (ii) show how it is a suitable proxy for the rights and interests of directly affected plaintiffs, and (iii) demonstrate, "with some specificity", how it will provide a well-developed factual context that compensates for the absence of a directly affected plaintiff (paras. 40 and 66).

65 **I would not impose such rigid requirements, for two reasons.**

66 **First, a directly affected *plaintiff* is not vital to establish a "concrete and well-developed factual setting". Public interest litigants can establish such a setting by calling affected (or otherwise knowledgeable) non-plaintiff *witnesses*** (see, e.g., Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) , at paras. 14-16, 22 and 110; Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 15 and 54; *Downtown Eastside*, at para. 74). **As long as such a setting exists, a directly affected co-plaintiff or a suitable proxy is not required for a public interest litigant to be granted standing. If a directly affected co-plaintiff is not required, then would-be public interest litigants should not have to justify — or compensate for — the absence of one.**

67 **Second, the AGBC's proposed requirements would thwart many of the traditional purposes underlying standing law. A strict requirement for a directly affected co-plaintiff would pose obstacles to access to justice and would undermine the principle of legality**. Constitutional litigation is already fraught with formidable obstacles for litigants. These proposed requirements would also raise unnecessary procedural hurdles that would needlessly deplete judicial resources. Given these concerns, the Court was correct in *Downtown Eastside* to retain the presence of directly affected litigants as a *factor* — rather than a separate legal and evidentiary hurdle — in the discretionary balancing, to be weighed on a case-by-case basis. I would not disturb that conclusion here.

…

70 **That said**, *the absence of such a setting will in principle be dispositive at trial*. A court cannot decide constitutional issues in a factual vacuum (*Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). **Evidence is key in constitutional litigation unless, in exceptional circumstances, a claim may be proven on the face of the legislation at issue as a question of law alone** (see, e.g., *Danson*, at pp. 1100-1101, citing *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 133). …

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physicians to administer psychiatric treatment to involuntary patients with mental disabilities without their consent and without the consent of a substitute decision-makers. The Attorney General of British Columbia applied to have the action dismissed on the basis that the organization lacked standing.

…

71 With these clarifications in mind, I will now return to the question at hand: **What suffices to show that a sufficiently concrete and well-developed factual setting will be forthcoming at trial?** The answer to this question necessarily depends on the circumstances, including (i) the stage of litigation at which standing is challenged, and (ii) the nature of the case and the issues before the court. On the first point, what may, for example, satisfy the court at an early stage may not suffice at a later stage. Likewise, the significance of a lack of evidence will vary with the nature of the claim and the pleadings. Some cases may not be heavily dependent on individual facts — where, for example, the claim can be argued largely on the face of the legislation. In such cases, an absence of concrete evidence at the pleadings stage may not be fatal to a claim for standing. Where a case turns to a greater extent on individual facts, however, an evidentiary basis will weigh more heavily in the balance, even at a preliminary stage of the proceedings.

72 **When standing is challenged at a preliminary stage, the plaintiff should not be required to provide trial evidence**. That would be procedurally unfair, as it would permit the defendant to obtain evidence before discovery. **Generally, however, a mere undertaking or intention to adduce evidence will *not* be enough to persuade a court that an evidentiary basis will be forthcoming**. **It may be helpful to give some examples of the considerations a court may find relevant when assessing whether a sufficiently concrete and well-developed factual setting will be produced at trial.** As was the case in *Downtown Eastside*, **for the purposes of its assessment of the "reasonable and effective means" factor, this list is not exhaustive, but illustrative**.

1. ***Stage of the proceedings***: The court should take account of the stage of the proceedings at which standing is challenged. At a preliminary stage, a concrete factual basis may not be pivotal in the *Downtown Eastside* framework — the specific weight to be attached to this consideration will depend on the circumstances, and ultimately lies within the trial judge's discretion. **At trial, however, the absence of a factual basis should generally preclude a grant of public interest standing**.

2. ***Pleadings*:** The court should consider the nature of the pleadings and what material facts are pled. **Are there concrete facts with respect to how legislation has been applied that can be proven at trial?** Or are there merely hypothetical facts with respect to how legislation might be interpreted or applied? **Do the pleadings reveal that the case can be argued largely on the face of the legislation, such that individual facts may not be pivotal?** Or does the case turn more heavily on individualized facts?

3. ***The nature of the public interest litigant***: The court may also consider whether the litigant — if it is an organization — is composed of or works directly with individuals who are affected by the impugned legislation. If that is the case, it would

be reasonable to infer that the litigant has the capacity to produce evidence from directly affected individuals.

4. ***Undertakings*:** Courts rigorously enforce undertakings, which must be "strictly and scrupulously carried out" (see, e.g., Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-6). An undertaking by a lawyer to provide evidence might help to persuade a court that a sufficient factual setting will exist at trial, but an undertaking alone will seldom suffice.

5. ***Actual evidence***: Though a party is not required to do so, **providing actual evidence** — or a list of potential witnesses and the evidence they will provide — **is a clear and compelling way to respond to a challenge to standing at a preliminary stage.** As I explained above, the significance of a lack of evidence will depend on the stage of the litigation, the nature and context of the case, and the pleadings.

…

83 This approach misses the point of **the "justiciability" inquiry, which is directed at maintaining an appropriate boundary between an impermissible "private reference" and a proper grant of public interest standing** (see, e.g., *Borowski* (1989), at p. 367). Whether facts relative to specific individuals are or are not pleaded *may* be a relevant factor, but it is not, in itself, the point to be decided, nor is it determinative.

84 As I will explain below, while **it is true that purely hypothetical claims are not justiciable**, there is an undisputed cause of action here. CCD has alleged facts which, if proven, could support a constitutional claim.

[My bolding added][18]

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[18] As I observed earlier, this case (note that the individual plaintiffs discontinued their claims early on leaving only the CCD not-for-profit organization as a plaintiff) involved a request for a summary dismissal of the action, consequently para. 84 must be read in that light. Nevertheless, even the pleadings in the present case, which give a context for the material facts that the NSCLA says it has provided in its evidentiary base herein, contain only a semblance of generalized factual statements for the period between January 28, 2022 and March 20, 2022 which is when the Directions were extant. While I recognize that the Applicant challenges both the purpose *and* effect of the Directions, insofar as the effect is concerned, the pleadings are largely limited to the following: "19 After the issuance of the Directives, forms of participation in protest, demonstration, legal fundraising, and other activity related to criticism of provincial or federal government policies in Nova Scotia, in particular in relation to Covid 19, became significantly less active and in some cases became completely inactive. The Applicant says the Directives can reasonably be thought to have had a chilling effect on other political expression and assembly activity in the Province. On or about March 4, 2022, the Province announced that the Provincial State of Emergency would not be renewed after its expiration on March 20, 2022." The challenge against the "purpose" of the Directions, rests on an examination of what effect the Executive was seeking to achieve by issuing the Directions. The record suggests that the core purpose was to forestall the intentional and purposeful interference with traffic on public roadways, rising to the level of partial or total blockade. [My underling added]

[42] I bear in mind that what is being considered is whether there is a "serious [and] justiciable issue", however on review of the evidence, seen in the context of the pleadings, I am very concerned that there is not a sufficiently concrete and well-developed factual basis present here.[19]

[43] I recognize that this factor is not dispositive, and will be weighed by the Court, with the others.

[44] In conclusion, I find myself on a knife's edge about whether there is a "serious" and "justiciable" issue present here.

2 - Does the NSCLA have a "genuine interest in the matter"?

[45] At para. 51 the Court in *Council of Canadians* stated:

> … This factor asks "whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise" (*Downtown Eastside*, at para. 43). To determine whether a genuine interest exists, a court may refer, among other things, to the plaintiff's reputation and to whether the plaintiff has a continuing interest in and link to the claim (see, e.g., *Canadian Council of Churches*, at p. 254).

[46] The NSCLA was formed in the midst of the Covid 19 pandemic. While its origins may have been prompted thereby, that does not by itself suggest that it cannot have a genuine interest in other related and unrelated civil liberties issues.

[47] I have no specific information about its bylaws, and the numbers of its members. Only very limited information has been provided to me in the affidavit of Mr. McMullin.

[48] In his affidavit he confirms that:

> The NSCLA was incorporated on November 5, 2021, and is dedicated to promoting respect for and observance of fundamental human rights and civil liberties Nova Scotia. Pursuant to its bylaws the NSCLA works to defend and ensure the protection of full exercise of those rights and liberties through research, public advocacy and an engagement and litigation. The NSCLA has a consistently growing base of supporters drawn from all

[19] In such circumstances, Courts should be reluctant to wade into the waters of the Executive's jurisdiction where its general authority to act (e.g. to have issued the Directions) is not disputed (in contrast to the specific content of the means chosen), and its exercise does not *prima facie* reveal indicia of bad faith.

> walks of life in communities across Nova Scotia. A wide variety of persons, occupations and interests are represented amongst the organization's supporters. The NSCLA has built relationships, actively coordinates, and communicates regularly with representatives of other national and provincial civil liberties organizations throughout Canada including among others the Canadian Civil Liberties Association. The Board of Directors and the Advising Members of the NSCLA include representatives from the medical, legal, healthcare and educational professions as well as other occupations, members of the business community and other representatives of civil society in Nova Scotia. This application is the first litigation in which the current iteration of the NSCLA has appeared as a party in Nova Scotia courts. The NSCLA has a genuine and specific interest in, and has endeavoured to obtain expertise in, and addressing legal issues relating to freedom of expression and freedom of assembly.

[49] The Province did not argue that the NSCLA could not have a genuine interest in the case at Bar.

[50] For present purposes, I am satisfied that the NSCLA has the required "genuine interest".

3 - Is the Application in Court a reasonable and effective means of bringing the case to court?

[51] In *Council of Canadians* the court stated:

> 52 **The third factor, reasonable and effective means, implicates both legality and access to justice.** It is "closely linked" to legality, since it involves asking whether granting standing is desirable to ensure lawful action by government actors (*Downtown Eastside*, at para. 49). It also requires courts to consider whether granting standing will promote access to justice "for disadvantaged persons in society whose legal rights are affected" by the challenged law or action (para. 51).
>
> 53 **This factor also relates to the concern about needlessly overburdening the justice system**, **because "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use"** (*Hy and Zel's* , at p. 692). And it addresses the concern that courts should have the benefit of contending views of the persons most directly affected by the issues (*Finlay*, at p. 633).
>
> 54 To determine whether, in light of all the circumstances, a proposed suit is a reasonable and effective means of bringing an issue before the court, **courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting, and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality (*Downtown Eastside*, at para.**

> **50). Like the other factors, this one should be applied purposively, and from a "practical and pragmatic point of view"** (para. 47).
>
> 55 **The following non-exhaustive list outlines certain "interrelated matters" a court may find useful when assessing the third factor** (*Downtown Eastside*, at para. 51):
>
> > 1. *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?

[Answer: the Applicant NSCLA seems prepared to bring the claim forward, and will argue the case as stated in their brief: "Here, that is to say, the concrete purpose and intended scope of the directives are clearly available to the court for analysis, both on the face of the Directives themselves and as supplemented by the background affidavit evidence provided by the Province along with that of the Applicant."]

> > 2. *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.

[Answer: from the evidence available: it is unclear how many people were in fact materially directly affected, but it is likely to be a very small group and it does not meaningfully transcend the interests of these persons, and it is moot; the Directions only having been in place for 7 weeks and the state of emergency having ended in March 2022 - the case is of limited public interest. There has been no suggestion that this litigation "may provide access to justice for disadvantaged persons whose legal rights are affected".][20]

> > 3. *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?

[Answer: Arguably, one could imagine an alternative that would see the creator of the Directions, the Provincial Government of the day, to be confronted politically in relation to these Directions. However, that process would involve engaging partisan parties, whose interests diverge, and their attention would likely be hard to

[20] In addition, I am inclined to think that if in fact there were numerous individuals who were directly affected and feeling aggrieved, would not some number of them be agreeable and well positioned to make individual claims that their *Charter* rights were directly affected, and would they not have contacted the NSCLA, and would it not have accepted them as either individual co- plaintiffs or witnesses, if they had cogent evidence to give?

sustain in relation to an issue that is moot, regarding the period before and during the 7 weeks in early 2022 (and may divert them from their own present important work); and there would be no concrete outcome, as compared with a hearing by a court.]

If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? [Not applicable]

Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? [Not applicable]

Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues? [Answer: No]

> 4. *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?

[Answer: this is not expected to be a concern]

> 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] 2 S.C.R. 1086, at p. 1093).

[Answer: this is not expected to be a concern]

[52] I appreciate that there is no other administrative or quasi-judicial body to address the Applicant's arguments in a manner that could permit a meaningful investigation of the issues and a concrete outcome.

[53] Courts are commonly called upon to determine issues of constitutionality of legislation and actions by government.

[54] If the other conditions were sufficiently satisfied for a court to become involved with the merits of this matter, a court would be the most, and perhaps only, effective venue to address the Applicant's concerns.

[55] However, I have not been persuaded by the NSCLA that I should grant it public interest standing.

[56] Nevertheless, I will go on to examine the mootness issue.

Why I conclude that this "moot" matter should not be heard on its merits

[57] Although the Directions issued on January 28 and February 4, 2022, expired March 20, 2022, rendering the matter "moot", nevertheless is it in the interests of justice for the court to hear the Application on its merits?

[58] Since the NSCLA was aware on or about March 4, 2022, that the Provincial State of Emergency was set to expire on March 20, 2022, it pleaded in its March 17, 2022, Application the following grounds why the court should still hear the matter.

1 - The position of the NSCLA

> The Applicant says that, in the event that the Directives cease to be in force and effect prior to the hearing of this Application, serious grounds for the Application nonetheless exist. Given the unpredictable nature of the Covid 19 pandemic and associated government measures and restrictions, *inter alia*, in the circumstances it is in the interests of justice to subject to judicial scrutiny the Province's extraordinary use of its emergency powers under the *Emergency Management Act* to limit protected freedom of expression and freedom of assembly throughout the Province by way of the Directives, irrespective of their date of revocation. (para. 27 Brief)

[59] The NSCLA supplements this with its evidence (drawing as well on the Province's evidence), legal brief and oral argument. In summary, it argues:

> 1. In light of its admission that there is no longer a "live controversy" which affects or may affect the rights of the parties, it is still in the interests of justice that the court hear the application and that its position in relation to the three factors that have been articulated in the jurisprudence (*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342; as more recently summarized in *CSJLM v. Nova Scotia (Community Services)*, 2019 NSCA 59, per Wood CJNS at para. 10):
>
> > a. Necessity for an adversarial context which is a fundamental tenet of our legal system and helps guarantees that issues are well and fully argued by parties who have a stake in the outcome.
> >
> > b. The importance of conserving scarce judicial resources and considering whether the circumstances of the dispute justify applying those resources to its resolution.
> >
> > c. Sensitivity to the courts' adjudicative role and ensuring that it will not intrude into the role of the legislative branch by pronouncing judgements in the absence of a dispute affecting the rights of litigants.
>
> 2. "A sufficiently adversarial context exists… In the recent case of *Canadian Civil Liberties Association*… "*CCLA*" [2022 NSCA 64] the Court of Appeal overturned an

Injunction Order that was issued by the Nova Scotia Supreme Court in May 2021 against certain individuals, as well as against all Nova Scotians, in anticipation of pending protests against Covid 19 public health restrictions. As a public interest litigant, the Canadian Civil Liberties Association sought to appeal the Injunction Order which was discharged before the challenge to it was heard. The Court of Appeal considered the three factors outlined above… and decided that it should exercise its discretion to hear the challenge presented by the public interest litigant despite the fact that the Injunction Order was discharged. The appeal was then successful on the merits. [paras. 40-1 Brief] … if an adversarial context existed in *CCLA* such that the Court of Appeal could exercise its discretion to hear a public interest litigant's arguments… then an adversarial context also exists in the present Application". [para. 43]

3. "The issues raised… involve important legal questions concerning the process underlying, and justification for the Province's taking of emergency measures under the emergency management legislation by Ministerial decree that affected all Nova Scotians' freedom of expression and assembly under the *Charter of Rights and Freedoms*. The consideration of whether the issuance of the directives was compliant with the *Charter* warrants the use of judicial resources… [in *CCLA* the Court of Appeal noted the issues there "involve important legal issues concerning the process to avoid imminent harm while respecting freedoms of expression and assembly under the *Charter of Rights and Freedoms*"]. The Applicant submits that for similar reasons, this Honourable Court should exercise its discretion to hear the present Application. *The present case challenges the constitutionality not of any public health measure per se. Rather it challenges the process by which unique and novel measures were undertaken by the Minister under the purported authority of emergency legislation too broadly and expressly 'banned' certain forms of assembly and expressive activity…* [These] were in effect across Nova Scotia for a period of nearly 2 months… expressly intended to, and in fact did, limit the freedom of all Nova Scotians to assemble and to express their views on matters of public interest on all roads, municipal streets and highways throughout the Province… **The right to demonstrate and express political views, individually and collectively, including the right to do so on a public road, is unambiguously protected by the *Charter*… Canadian courts have definitively held that the right to demonstrate on public streets is protected under section 2(b) of the *Charter***,… *Where the purpose of government action is to restrict the content of expression, to control access to a certain message, or to limit the ability of a person who attempts to convey a message to express themselves, that purpose will infringe section 2(b)… With respect to section 2(c) of the Charter, our courts have likewise held that [that] section of the Charter protects the right to participate in peaceful demonstrations, protests, parades, meetings, picketing and other assemblies***. Canadian courts have expressly recognized that 'temporary access to a public highway for the exercise of freedom of peaceful assembly is enshrined in international law'**…). *Whether or not the Provincial State of Emergency remains in effect today, the context of an ongoing public health emergency [still] justifies the use of judicial resources to assess the Minister's actions and whether such actions properly balanced Nova Scotia's freedom of*

expression and assembly against the scope of measures taken under the emergency management legislation." [paras. 45-55 Brief][21]

[My bolding and italicization added]

[60] The NSCLA stresses that it is challenging both the purpose *and* the effect of the impugned Directions.[22]

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[21] Firstly, all lands in Canada are vested in the Crown, unless proven otherwise – *Tsilhquot'in Nation v. British Columbia*, 2014 SCC 44, at paras. 106-116. I am not convinced the law is as straightforward and settled as referenced in the bolded portions above. As Justice Fichaud's reasons in *CCLA* demonstrate (paras. 252-254; 280; 304-317; and paras. 142-148 per Bryson JA), an injunction against protests can be granted to the Province in proper cases of "public nuisance" and that claimed *Charter of Rights and Freedoms* protections are not determinative, but rather a factor in the analysis of whether an injunction should issue. The NSCLA cites the *Garbeau* decision, 2015 QCCS 5246, at paras. 120-128, for the proposition that "Canadian courts have definitively held that the right to demonstrate on public streets is protected under section 2(b) of the *Charter*, and our courts have consistently rejected arguments to the contrary when presented by governments". (para. 51 Brief). The decision is impressive in its breadth and depth. It was not appealed. However, the *Perron* decision, 2015 QCCS 456, bears some similarity, albeit s. 2 of the *Charter of Rights and Freedoms* was not argued. Each of the individual parties claimed to be entitled to the use of a "camp" on public lands based on their purported exercise of their subsection 35(1) of the *Constitution Act* Aboriginal rights, and were refusing to leave the site they occupied on public land. A Québec statute regarding "Lands in the domain of the State" was the basis for the Provincial government's request that the court grant an Order removing those defendants if they did not leave the site. After concluding that none of the defendants met the definition of a Métis person consequent to the *Powley* test [2003 SCC 43], the court upheld their dispossession/removal from the lands in question. That decision was upheld: 2018 QCCA 1172; leave to appeal denied by the Supreme Court of Canada May 2, 2019. I located a case which would generally support the Applicant's statement of the law, at least insofar as the Province of Québec is concerned, since the case has not been cited outside that Province: *Bérubé v. Ville de Québec*, 2019 QCCA 1764. Notably in that case: Québec conceded a violation of s. 2 of the *Charter*, and the case was argued in relation to whether the violation could be justified under s. 1 of the *Charter*. The Québec City Regulation in issue there did not ban demonstrations/protests on public property- but rather required that in advance thereof, the demonstration be brought to the attention of the police [time and place or route] and if those parameters were respected and no acts of violence or vandalism are committed, the demonstration/protest remains legal. *Bérubé* is distinguishable because it did not involve a public health emergency context nor similar facts to the case at Bar. The NSCLA also makes the statements (para. 51 Brief): "public streets are 'clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted'". [2005 SCC 62] which involved an exotic dancers club blasting music into public spaces and on its facts favours the Province's position, cited in *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208, at para. 71 [but see paras 1-5, which make it distinguishable]; **and** "with respect to section 2(c) of the *Charter*, our courts have likewise held that [that] section protects the right to participate in peaceful demonstrations, protests, parades, meetings, picketing and other assemblies" (para. 53 Brief) citing *Fraser v. Nova Scotia (Attorney General)*, [1986] 30 DLR (4th) 340 (NSSC), which is a decision by Justice Grant of this Court. That decision is inapplicable here. No other Nova Scotia cases on point were cited by the NSCLA.

[22] While I am not presently focused on the merits, I do have available to me the "trial evidence"/affidavits which the parties have given me. The herein claims to freedom of expression and peaceful assembly inherently clash with the rights of other persons to use (highly regulated) public roadways, in contrast to other public spaces. As I am permitted to consider the sufficiency of the evidence available should the case proceed to a full hearing on the merits, I bear in mind that the stated purpose of the Directives was to ban or prohibit "blockades" and purposeful intentional interferences with roadways in Nova Scotia.

[61] More specifically, the NSCLA disagrees with the Province when it argues that:

> Not hearing the case would give rise to no social cost; if a decision was rendered by the court on the merits it would have "no precedential weight"; and that there "is no reason why a future challenge based on the factual and legal context that arises then cannot be brought and dealt with by the court at that time".
>
> [My underlining added]

[62] The NSCLA argues that the issues raised by its Application are "by nature, evasive of review" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 20), and this factor adds weight to its position that this Court should hear its Application (citing for example, the unanimous court's reasons at para. 15 in *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7.[23] In summary, its submission is (paras. 86-87):

> The Applicant submits that the determination of whether, in their purpose and effect, the impugned Directives infringe the *Charter* rights of all Nova Scotians, and of whether such infringement was justified in the circumstances in which they were issued, would in no way require the Court to adopt an executive or legislative function… the court has the final and most important say on whether laws and government measures comply with the *Charter*…. the Court will provide principled legal guidance in possible future scenarios that are, in any event, certain to involve their own distinct facts.

2 - The position of the Province

[63] Summarily stated, the Province says that:

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[23] At para. 76 of the NSCLA brief it relies upon a verbatim quote from Justice Bastarache in *Mazzei*: "15 The issue here (the Board's powers) [including whether the Criminal Code Review Board can impose binding conditions regarding or supervising, including prescribing or imposing medical treatment for an NCR accused] remains unresolved and is likely to come before the courts again. Yet it is 'evasive of review' in terms of requiring a 'live' dispute between parties in an adversarial context; this is because new orders are continuously crafted, and as is the case here, a controversial order may be quickly overtaken by subsequent orders. This court should therefore exercise its discretion (as per *Borowski*) to hear this appeal.". While the Court did exercise its discretion to hear the appeal, it should be noted that immediately preceding that sentence in the paragraph, the Court stated: "However, all parties agree (as they did before the BCCA , and as did the BCCA itself) that because the impugned order is 'capable of repetition, yet evasive of review'… the appeal should still be heard.". I will say more below, however, I conclude that the present circumstances are likely not expected to be "capable of repetition yet evasive of review" in the future. [My underlining added]

> "[This] Application lacks the indicia of an adversarial context, which would justify the exercise of the Court's discretion in the circumstances" (para. 36 brief); "the instant case does not involve any special circumstances which justify applying scarce judicial resources to resolve it" (para. 46); and "the Court would be stepping into the Executive sphere of activity in relation to the issuance of Ministerial directions in response to emergencies under the *Emergency Management Act*, should it decide to hear the moot *Charter* claims in this Application (para. 80)… A decision by this Court in the absence of a live factual dispute, without a sufficient evidentiary record, could act as a prior restraint for any future directions which a Minister may someday have to make if another state of emergency should be declared in another context (para. 81)… the Court would be departing from its adjudicative role, by prematurely stepping into the Executive sphere of action in relation to the nature and scope of future Executive emergency measures, in the absence of a sufficient factual record as part of a live dispute (para. 82)… The Legislature intended that the Executive branch should be allowed a wide discretion and broad scope of action to respond to whatever emergencies may arise, for the protection of property and health and safety of citizens." (para. 83).

3 - My conclusions regarding the "mootness" issue

[64] The NSCLA has the persuasive burden to establish that, in spite of the mootness of a previously extant "live issue", there are exceptional circumstances in this case.

[65] The NSCLA relies on our Court of Appeal's decision in *CCLA* (2022 NSCA 64, released October 26, 2022) as a similar case, in which the Court concluded that, although moot, the appeal should be heard.

[66] Although the Court did hear the appeal on its merits, its having done so is of little consequence here, because the circumstances are distinguishable. The Court's reasons were focussed on distinct, and procedural, issues.

[67] For one, that case involved the granting of a *quia timet* injunction, thus rather than the Executive power of the government, the court process was used in the first instance with the Province as a "mere litigant".

[68] After that *ex parte* court process, the Supreme Court granted "a sweeping *ex parte* Injunction Order binding all Nova Scotians, preventing them from organizing, promoting or attending public gatherings [anywhere in Nova Scotia] that would be contrary to public health orders issued by the Chief Medical Officer. … The Order was granted indefinitely in time and extent [on May 14, 2021, while the Covid 19 pandemic emergency was still ongoing and was extant until discharged on June 22, 2021 (by Justice Gail Gatchalian)]. There was no return

date for an *inter partes* hearing for the Respondents to be heard."[24] (per Bryson, JA at paras. 11-13)

[69] The purpose and effect of the Injunction Order, were much broader than the Directives herein, and described as:

> 28 The Province sought to enjoin all persons in Nova Scotia from organizing promoting or attending 'illegal public gatherings'. Subject to exceptions not relevant in this case, [regardless of location] any public gathering was illegal. (per Bryson JA)
>
> [My underlining added]

[70] Moreover, although the Justices agreed that "the motion judge erred by issuing injunctive relief that was far too broad", per Beveridge, JA, at para. 2, substantive issues (including the *Charter* - albeit see paras. 20(g) and 142 per Bryson, JA) were not the focus in *CCLA*.

[71] As Justice Fichaud observed in *CCLA*:

> [207] This Court cannot overturn a discharged Order. That request does not speak to a live controversy and is moot. *However, as to the three criteria for the exercise of this Court's residual discretion:*
>
> - an adversarial context exists;
> - the issues raised by the CCLA involve important legal issues concerning the process to avoid imminent harm while respecting freedoms of expression and assembly under *Charter of Rights and Freedoms*;
> - the Court is not asked to either depart from its role as an adjudicator or enter the legislative or executive sphere.
>
> …
>
> [209] Subject to the matter of issue estoppel I will discuss next, I agree that, in the interests of justice as prescribed by *Borowski* and *Doucet-Boudreau*, this Court should address the legal issues arising from the CCLA's grounds.

[24] Although the hearing was held *ex parte,* at the time of its filing, the Notice of Application (pursuant to Civil Procedure Rule 5.02), did name as Respondents: "Freedom Nova Scotia, Amy Brown, Tasha Everett, Dena Churchill, John Doe(s) and Jane Doe(s)".

[210] On June 30, 2021, the CCLA submitted to Justice Chipman that, in the interests of justice as prescribed by *Borowski* and *Doucet-Boudreau*, the Supreme Court should re-hear the injunction motion. The CCLA's proposed issues to be considered on the rehearing largely replicated the CCLA's contentions now advanced in the Court of Appeal.

[211] Justice Chipman rejected the CCLA's submission and declined to hold a re-hearing (2021 NSSC 217).

…

[212] In the Court of Appeal, the question arises whether Justice Chipman's refusal to exercise his discretion in the interests of justice, under the second test from *Borowski* and *Doucet-Boudreau*, raises issue estoppel. May this Court exercise that discretion without an appeal from Justice Chipman's decision?

[213] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460, Justice Binnie for the Court stated a two-fold test for issue estoppel:

- Has a question of fact, law or mixed fact and law been determined by a final judicial decision in a proceeding between the same parties or their privies? (*Danyluk*, paras. 24-25, 54-60).

- If so, should the court exercise its discretion to decline the application of issue estoppel? As issue estoppel is an "implement of justice", the discretion should be exercised to promote justice in the circumstances of each case. (*Danyluk*, paras. 33, 62-67).

[214] Justice Chipman's un-appealed ruling answers *Danyluk*'s first question – Yes.

[215] To *Danyluk*'s second question, the CCLA replies that Justice Chipman's decision focused on whether there should be a re-hearing of the evidence from May 2021. *The CCLA distinguishes Justice Chipman's ruling by noting the CCLA's appeal has a different perspective – i.e. the establishment of legal precedent to govern a future controversy with its own facts. The CCLA says that such an appellate ruling would be in the interests of justice* under *Borowski*, *Doucet-Boudreau* and *Danyluk*'s residual test.

[216] The Attorney General takes no position on the issues of mootness and issue estoppel.

[217] I accept the CCLA's submission. As I will discuss, the process here involved errors that need not recur. It is in the interests of justice that the Court addresses the CCLA's four legal issues.

[218] The response to the mootness issue frames this Court's function. This appeal is limited to precedential guidance under the "interests of justice" exception from Borowski and Doucet-Boudreau and Danyluk's second test. …"

…

[250] The Attorney General says the legal basis was that the imminent gatherings would offend the Public Health Order and thereby infringe the *Health Protection Act*, an infringement that the superior court has inherent power to enjoin.

[251] The CCLA replies by citing s. 71(1) of the *Health Protection Act*: "[e]very person who fails to comply with this Part or the regulations is guilty of an offence and is liable on summary conviction" to (for an individual) a fine of $2,000 or six months imprisonment. The CCLA says s. 71(1) is an adequate statutory remedy that excludes the superior court's inherent power to enjoin an infringement of the statute.

[252] What are the principles? Generally, unless the statute expresses a contrary intent, the Attorney General can apply to enjoin an infringement of a public statute. The power traces its provenance to the sovereign's parens patriae jurisdiction to participate in legal proceedings for the protection of the public: The Right Hon. Lord Woolf, et. al., DeSmith's Judicial Review (London: Sweet & Maxwell, 2018), 8th ed., pp. 897-99.

[253] The Honourable Robert J., Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, looseleaf ed.), summarizes the authorities:

> CHAPTER 3 – INJUNCTIONS TO ENFORCE PUBLIC RIGHTS
>
> …
>
> II Injunctions at the Suit of the Attorney General
>
> …
>
> 3:2 Introduction
>
> There is a well-established jurisdiction to award injunctions at the suit of the Attorney General to enjoin public wrongs. The Attorney General is said to invoke the *parens patriae* jurisdiction when suing in the public interest.
>
> …
>
> 3:3 Public nuisance
>
> The role of the Attorney General in suing in the public interest to enjoin public nuisance is of great antiquity and continues to have importance. Definition of what

constitutes a public nuisance is a difficult aspect of substantive law. Lord Denning's explanation has been quoted with approval by Canadian courts:

> The classic statement of the difference [between public and private nuisances] [*Sharpe*'s brackets] is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much … I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large. [*A.G. ex rel. Glamorgan County Council and Pontardawe Rural District Council v. P.Y.A. Quarries Ltd.*, [1957] 1 All E.R. 894 (C.A.), at p. 908]

The term has been used to describe a **wide variety of public wrongs ranging** from interference with uses of land similar to private nuisance but affecting many people **to cases involving** a more general interference with public convenience, **health or safety** …

…

3.4 Discretion

…

The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. **It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds.** In one case, it was held that "the general rule no longer operates, the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land.". In another case, Devlin J. held that although the court retains a discretion, once the Attorney General has determined that injunctive relief is the most appropriate mode of enforcing the law, "this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances".

…

3.6 Enjoining "flouters"

Although English cases are more common, there are also many Canadian decisions in which **injunctions have been granted to enforce penal legislation.** The most

> common situation is one **where the law has been "flouted"** and the statutory penalty has proved to be an inadequate sanction.
>
> …
>
> The rationale in this type of case seems clear: despite the absence of actual or threatened injury to persons or property, the public's interest in seeing the law obeyed justifies equitable intervention where the defendant is a persistent offender who will not be stopped by penalties imposed by statute.
>
> …
>
> 3.7 Danger to public safety
>
> Injunctions have also been granted where there is an immediate threat or danger to public safety which would not be met by the ordinary process or procedure prescribed by statute.
>
> [bolding added]

[254] The Supreme Court of Canada has affirmed that (1) the Attorney General may apply to enjoin the infringement of a statute further to the Crown's parens patriae jurisdiction and, (2) unless there is an "adequate" alternative remedy, the superior court has discretion to enjoin an illegality, statutory or civil, in the exercise of the court's inherent jurisdiction to maintain the rule of law: People's Holding Co. v. Attorney General of Quebec, 1931 CanLII 66 (SCC), [1931] S.C.R. 452, at p. 458, per Rinfret J. for the Court (respecting the parens patriae jurisdiction); MacMillan Bloedel Ltd. v. Simpson, 1996 CanLII 165 (SCC), [1996] 2 S.C.R. 1048, paras. 15, 20-21, 33, per McLachlin J. (as she then was) for the Court; Brotherhood of Maintenance of Way Employees Canadian Pacific System. v. Canadian Pacific Ltd., 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495, paras. 5-9, 16, per McLachlin J. (as she then was) for the Court; St. Anne Nackawic Pulp & Paper Co. v. Canadian Paperworkers Union, Local 219, 1986 CanLII 71 (SCC), [1986] 1 S.C.R. 704, paras. 28-30, 34, per Estey J. for the Court; Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, paras. 57, 67, per McLachlin J. (as she then was) for the Court; New Brunswick v. O'Leary, 1995 CanLII 109 (SCC), [1995] 2 S.C.R. 967, para. 3, per McLachlin J. (as she then was) for the Court.

[255] To the extent the delay to enforce the alternative statutory remedy risks interim harm, the statutory remedy inadequately serves the interim period, and the court may enjoin the illegal activity. This proposition is supported by the following authorities.

[My italicization and bolding added]

i) A sufficient "adversarial context"?[25]

[72] The NSCLA is not challenging the validity of the declarations of a Provincial State of Emergency, pursuant to which the challenged Directions were issued.

[73] The Ministerial Directions prohibited any person in Nova Scotia from being involved in relation to "a partial or complete blockade of the normal flow of vehicle traffic on a road, street or highway in the Province" [Highway Blockade Ban] **or** "operating a vehicle or putting any item in such a manner as to create or contribute to a partial or complete blockade of the normal flow of vehicle traffic on a road, street or highway in the Province, including municipal roads, streets and highways" [Road Blockade Ban].

[74] Although not a determinative factor, not one individual has come forward as a co - applicant.

[75] The NSCLA argues that the controversy can be argued on the face of the Ministerial Directions.

[76] The parties here are the Province, and the NSCLA, which says it speaks in support of the civil liberties of all Nova Scotians.[26]

[77] However, merely having an interest in an expired "live controversy" is not the same as having a direct stake in it.

[78] On the other hand, the NSCLA is prepared to fully address the evidence and arguments to be made in this Application (as noted in *Doucet- Boudreau*, *supra*, at para. 19: "In this case, the appropriate adversarial context persists. The litigants have continued to argue their respective sides vigorously").

[79] Taking a purposive examination of the issue, I conclude that there is a sufficient thread of an adversarial context in the circumstances here.

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[25] Although in context of injunctive relief, Justice Fichaud's reasons point out that in a case such as the Freedom Convoy circumstances, if traffic was impeded by protestors, the Province could have sought an injunction to resolve such "public nuisance", provided the "nuisance" is somewhat precisely identifiable as to time and place.

[26] There is no evidence as to what number of Nova Scotians may have thereby experienced their "civil liberties" were materially diminished by these 2 Directions.

[80] That is, "despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail." (*Borowski, supra*, at pp. 358-9).

ii) The circumstances of the dispute do not justify applying scarce judicial resources to its resolution

[81] Although I am satisfied that the NSCLA has taken on this dispute in a good faith effort to argue against the Ministerial Directions on behalf of all Nova Scotians, I do not agree with it that "the consideration of whether the issuance of the Directives was compliant with the *Charter* warrants the use of judicial resources."[27]

[82] The NSCLA characterizes the core of the dispute here, as related to:

> The question of under what circumstances the Province may lawfully resort to the use of Executive Directives under Emergency legislation for the purpose of limiting otherwise *Charter*-protected freedom of assembly and expression throughout the Province for an indefinite period, [and] is a proper question for this Honourable Court to address in the case at Bar.

[83] Not every expired "live controversy" that had "important" issues embedded in it will be heard by courts.[28]

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[27] I bear in mind the present state of our civil and criminal dockets (*R. v. Jordan*, 2016 SCC 27; *R. v. Hanan*, 2023 SCC 12), particularly in Halifax where this matter is being heard.

[28] I have carefully examined Justice Perell's decision in *Harjee v. Ontario*, 2022 ONSC 7033, upon which the NSCLA relies. It is not binding on me, nor is it persuasive insofar as the issues in this case are concerned. I note that it involved a *Charter*-based challenge to the requirement for all persons to have a so-called "vaccine passport". That emergency regulation prohibited persons without same from entering public places where many people might gather. It was enacted in the Fall of 2021 and ultimately revoked in the Spring of 2022. The applicant individuals sought a declaration that the regulation contravened sections 2(a), 7, 8, and 15 of the *Charter*. Justice Perell dismissed the application because the evidence did "not demonstrate a contravention of freedom of religion, the right to life liberty and security of the person, or discrimination based on religion or disability." In his consideration of whether the application was moot, he noted that as of March 1, 2022, the vaccine passport requirement was no longer enforced and the regulation itself was repealed on April 27, 2022. He stated that "court should grant relief only if it will have a practical effect… This court has had the benefit of the full evidentiary record, including expert evidence, that has been subject to intense cross-examination. Ontario did not move to have the application quashed for mootness and Ontario was prepared to argue the motion on its merits. In these circumstances, I choose to exercise my discretion to hear the application. Given the ongoing risk posed by Covid 19 outbreaks and the possibility that the proof of vaccination orders will be reintroduced, the necessary adversarial context exists to allow the court to make a fully considered decision that may have practical consequences." (paras. 2-7 and 23-25). Notably, sections 2(b) and (c) of the *Charter* were **not** an issue as they are here. Vaccine passport requirements were at issue. **Mootness was not disputed nor raised as an objection to the court hearing the merits of the matter.**

[84] I consider, *inter alia*, that:

-the evidence underlying the factual basis for the Application herein is superficially not compelling;

-the Directions were created pursuant to the Provincial State of Emergency with a specific purpose in mind (addressing serious disruptions on public roads arising from protests associated with the so-called Freedom Convoy and its local iterations over a relatively short period of time, i.e. January 27 – March 20, 2022);

-the Provincial State of Emergency commenced in March 2020 and ended in March 20, 2022;

-there have not before, or since, been such Directions issued;

-there is no evidence of any individual co-applicant or persons who were materially affected by the Directions;

-the circumstances here are not "of a recurring nature, but brief duration" and thereby "evasive of review" (as referred to for example in *Doucet-Boudreau*, *supra*, at paras. 20-21. As noted, Emergency Ministerial Directions of this nature were only issued for two consecutive periods of time: January 28 – February 4, 2022; and February 4 – March 20, 2022. These Directions are not analogous to other cases cited in the jurisprudence

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Nevertheless, it is of interest what he said at paragraph 61: "In the immediate case, the impugned provisions of Ontario regulation 364/20 did not engage the applicant's *Charter* s. 2(a) right to freedom of religion. While the proof of vaccination requirement imposes the consequence of not attending the specified businesses or organizations as a result of adherence to a religious objection to vaccination, it in no way constrains the applicant's ability to hold or observe their religious beliefs… There is no legislative or administrative action that could reasonably be said to have interfered with their beliefs. The applicants are not being compelled to be vaccinated, which would be contrary to their religious belief. What the proof of vaccination requirement did is that it required operators of specified businesses or organizations to deny entry to those who could not provoke provide proof of Covid 19 vaccination. This denial of entry does not interfere with the applicant's religious beliefs or practices." In Nova Scotia, the emergency Directions, may have constrained persons from their chosen manner of freedom of expression, i.e., blockading public streets, roads and highways, but strictly speaking Nova Scotians remained free to exercise their freedom of expression and freedom of peaceful assembly in all respects otherwise. Arguably, if Nova Scotians voluntarily chose to exercise those rights by blockading streets roads and highways, which is also contrary to the law (see the *Motor Vehicle Act*, and can be expected to create a "public nuisance" on public roads – see *CCLA* at paras. 252-254 per Fichaud JA) in any event, can it reasonably be said that their s. 2 *Charter* freedoms have been violated? I only ask this rhetorically, rather than as a statement of my conclusions regarding the merits of this matter. [My underlining added]

where the recurrence of such specific circumstances is realistically expected, and therefore gives impetus for courts to consider an otherwise moot matter;

-as the court stated in *Borowski*, *supra*, at paras. 34-37*:* "It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants… There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law." I doubt that there will be any meaningful or serious uncertainty in the law should I decline to hear the merits of this Application. Moreover, in any event, I cannot think of any material "social cost" of the claimed continued uncertainty in the law, as suggested by the Applicant - the case at Bar presents no "issue of public importance [for] which a resolution is in the public interest";

-similarly, while in *CCLA*, our Court of Appeal (Beveridge JA at para. 24 and Fichaud JA at paras. 215-217) accepted that the moot appeal there should be heard to establish a "legal precedent to govern a future controversy with its own facts" per Fichaud JA, para. 216 thereof notes that: "The Attorney General takes no position on the issues of mootness and issue estoppel.");

-the circumstances in the case at Bar do not provide a suitable foundation for a "legal precedent to govern a future controversy with its own facts". I bear in mind what were the issues before the court in *CCLA*:

[Para. 219 *CCLA*] …

Issue #1 – the judge below erred in accepting the evidence of a named party as independent expert evidence

Issue#2– the judge below erred in granting a final *quia timet* injunction, in the absence of any legal authority and on the basis of the wrong legal test

Issue#3– the judge below erred in granting an injunction order against all Nova Scotians without any evidence that such a remedy was warranted

Issue #4– the judge below erred by failing to consider whether the Injunction Order infringed the *Charter* rights of all Nova Scotians in a manner that was justified

And conclude that the circumstances of the dispute do not justify applying scarce judicial resources to its resolution.[29]

iii) there is real concern that hearing this case on the merits, without a more meaningful and robust factual record, would bring the court unnecessarily close to intruding into the role of the Legislative and Executive branch of government

[85] By their nature, emergency powers arise from extraordinary circumstances. Such times require decisive action. Decisive decision-making in such circumstances is for good reason frequently exercised by the Executive branch. The persons wielding those powers may have to: rely on imperfect information; make decisions that cannot be nuanced given the circumstances; yet make those decisions more quickly than otherwise would be the case.

[86] Such decisions can be judged by the political process as well, although the judicial process provides a different approach which arguably more precisely scrutinizes the decision-making.

[87] Nevertheless, in proper cases, courts have a responsibility to take on the challenge and address the underlying issues, and not defer to the "court of public opinion".

[88] These are not circumstances in which the Court should take on this challenge. Judicial comment regarding the constitutional validity of long past Executive decision-making taken in extraordinary circumstances, unlikely to be repeated, which comment would be of little if any practical application in future, and could unduly limit Executive decision-making in unrelated circumstances in future, should be avoided.

Conclusion

[89] I have concluded that the NSCLA should not be granted public interest standing.

[90] Independently of that conclusion, I have also concluded that the court should not hear the matter on the merits, because the exceptional circumstances required for it to hear a "moot" matter have not been demonstrated.

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[29] In saying this, I am considering not only the hearing before me, but any potential appeals thereof.

[91] Cumulatively these conclusions reinforce each other, and I dismiss the Application by the NSCLA .

[92] If the parties are unable to agree on costs, I will receive their submissions within 20 days of the release of this decision.

Rosinski, J.