2021 **Yar No. 510031**

SUPREME COURT OF NOVA SCOTIA

Between:

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

Applicants

and

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

Respondents

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

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BACKGROUND

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

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

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

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

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

6. The Amended Notice of Judicial Review, filed by Citizens Alliance of Nova Scotia, a body corporate, (the "Corporate Applicant") refers to iterations of the Order in force between October 1, 2021, and July 6, 2022 (collectively, for purposes of this Brief, all iterations will be referred to as "the Order" or the "PHO"). These appear to be iterations for which the Applicants seek judicial review.

7. On October 27, 2021, the Corporate Applicant filed a Notice for Judicial Review of the Order. A Motion for Directions was scheduled for December 16, 2021.

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

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

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

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

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

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

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

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

16. To date, no such amendments have been made, despite the Corporate Applicant filing additional amendments to the Notice in August, 2023.

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

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

19. On May 13, 2022, Respondents' Counsel emailed the Court seeking information about available dates if the June 10, 2022, Motion for Directions were adjourned to provide further time for the Applicants to respond to the Demands for Particulars and to better

clarify the scope of the judicial review. This request was forwarded to the Honourable Justice John A. Keith, and on May 26, 2022, the Motion for Directions was rescheduled for August 31, 2022.

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

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

22. On August 17, 2022, the Respondents filed their first Mootness Motion, seeking to have this proceeding dismissed as restrictions in the Order as of July 6, 2022 did not affect the Applicants in their private interest capacities.

23. This matter was scheduled for a Motion for Direction, heard on August 31, 2022. The Honourable Justice John Keith declined to set a date for hearing of the Mootness Motion at that time, and set a date for the Respondents to deliver the Record. The Respondents complied. The Respondents understood the intention in delivering the Record was to provide the Applicants the opportunity to review and file any motion they felt was appropriate to supplement the Record. To date, no such motion has been filed.

24. On February 7, 2023, two further motions filed by the Applicants were heard in Halifax. The first was a further amendment to the Notice of Judicial Review, which the Respondents took no position on, while noting that several concerns the Respondents identified with earlier versions remained unaddressed. The second was to add a further Applicant party. The matter was heard in a half-day on February 7, 2023. The Honourable Justice John Keith reserved his decision.

25. On May 23, 2023, the Order was lifted in its entirety. Because the Order was lifted, no restrictions continued at all after May 23, 2023 under the authority of the Order.

26. In August 2023, before Justice Keith rendered his decision respecting the Applicants' motions heard February 7, 2023, in Halifax, the Applicants withdrew their motion to add a party. The Corporate Applicant also expressed its intention to proceed from that point without counsel. The Court later ordered the Applicants to pay $1,300 in costs to the Respondents for the withdrawn motion, following written submissions from all parties.

27. The Corporate Applicant filed a motion for public interest standing on August 25, 2023. This motion was heard in Yarmouth on January 24, 2024. Justice Keith released a written decision in August, 2024, reported as ***Citizens Alliance of Nova Scotia v Nova Scotia***

(Health and Wellness), 2024 NSSC 253 (“***CANS***”) [**TAB 1**], dismissing the Corporate Applicant’s request for public interest standing.

28. Through directions obtained via judicial teleconference on September 13, 2024, the Mootness Motion was scheduled for a full-day hearing in Yarmouth to proceed on December 6, 2024. Additional filing dates were obtained to permit the Respondents to update their original filings from August 17, 2022, to account for factual developments as well as developments in the law since mid-2022.

29. The Respondents do not intend to rely upon the evidence contained in the Affidavit of Vanessa Chouinard, sworn August 16, 2022. The Respondents instead rely upon the evidence of Tara Walsh, sworn October 7, 2024.

30. Similarly, the Respondents rely upon these written submissions with respect to the present motion in place of those filed in August, 2022. These submissions update the applicable law, and also update the arguments to respond to the most recent Amended Notice filed by the Applicants.

ISSUES

31. The Respondents seek to have this matter dismissed as the subject matter set out in the Amended Notice is moot. The Respondents will address the issues as follows:

    a. Should this judicial review be dismissed as moot?
        i. Law of mootness
        ii. The issues raised by the Applicants are moot
            1. Order has not been in effect for seventeen months
            2. Order has not affected Applicants since July, 2022
                a. Corporate Applicant
                b. Minor Applicant
            3. Remedies unavailable
        iii. No adversarial context exists between parties
        iv. Continuing this proceeding is inconsistent with judicial economy
        v. Deference owed to legislative function
        vi. Residual Discretion in recent jurisprudence
            1. Recent Nova Scotia Jurisprudence
            2. Canadian Jurisprudence Considering Moot COVID-19 Matters

ANALYSIS

The law of mootness

32. The leading case on mootness remains ***Borowski v Canada (Attorney General***, [1989] 1 SCR 342 ("***Borowski***") [**TAB 2**]. There, Justice Sopinka commented upon the doctrine of mootness and established a two-part test as follows at paras 15 and 16:

> *15 The doctrine of mootness is an aspect of a general policy or practice that* ***a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.*** *This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly,* ***if, subsequent to the initiation of the action or 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 moot.*** *The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.*
>
> *16 The approach in recent cases involves a* ***two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.*** *The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear.* ***In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test.*** *A court may nonetheless elect to address a moot issue if the circumstances warrant.*
>
> (Emphasis added)

33. In ***Borowski***, *supra*, Justice Sopinka considered several circumstances in which a matter may become moot, including at para 23, where the inapplicability of a statute to the party challenging the legislation was said to render a dispute moot.

34. Justice Sopinka went on in ***Borowski***, *supra*, to consider whether, despite mootness, the court should exercise its discretion to hear the case. His Lordship considered and applied three factors to answer this question: is there an adversarial context or relationship between the parties (***Borowski***, para 31); is hearing the appeal consistent with the need to promote judicial economy and protect scarce judicial resources (***Borowski***, para 34); and the need for the court to demonstrate a measure of awareness of its proper law-making function as an adjudicative, not legislative, branch of government (***Borowski***, para 40).

35. It is respectfully submitted that the two-step framework for determining whether an appeal should be heard in circumstances where it might be moot can be summarized as follows:

    1. Is the appeal moot? Here, the court must assess whether there is still a "live controversy" – which can be established by considering "whether the required tangible and concrete dispute has disappeared and the issues have become academic" (***Borowski***, para 16). If no live controversy remains, the appeal is moot.

    2. If the appeal is moot, the court must consider whether it should nonetheless exercise its discretion to hear the case. In deciding, the court should consider the following factors:

        a. Is there an ongoing adversarial context or relationship between the parties? For example, even if there is no longer a live controversy between the parties regarding the issues on the appeal, the necessary adversarial context might still be present if a resolution of those issues could have collateral consequences for the parties and their relationship.
        b. Is hearing the appeal consistent with the need to promote judicial economy and protect scarce judicial resources? The expenditure of such resources to resolve a moot dispute may be worthwhile if, for example, doing so will still have some practical effect upon the parties' relationship (***Borowski***, para 35); if the case is of a type which is "of a recurring nature but brief duration" (***Borowski***, para. 36), such that the court might never otherwise get the opportunity to weigh in on the issues; or if the issues raised on the appeal are of such public importance that it is worthwhile to hear the matter and settle the state of the law on point (***Borowski***, para 37).
        c. Would hearing the appeal result in the court stepping outside its traditional role, and intrude into the role of the legislative or executive branches?

36. ***Borowski***, *supra*, has been adopted and applied on numerous occasions by this Honourable Court and the Nova Scotia Court of Appeal. For present purposes, the

analysis of the Honourable Justice Peter Rosinski in ***Coaker v Nova Scotia (Attorney General)***, 2018 NSSC 291 ("***Coaker***") [**TAB 3**], is particularly useful, both for its considered analysis of ***Borowski***, *supra*, and its application of the two-part test in the context of that case.

37. In ***Coaker***, *supra*, Justice Rosinski provided a thorough and considered review of the law of mootness beginning at paragraph 14, adopting and applying the analysis from ***Borowski***, *supra*. The *habeas corpus* matter was moot because the unlawful detention was not ongoing at the time of the hearing and there was no remedy the Court could offer (***Coaker***, para 5). However, Justice Rosinski proceeded to the second step of the ***Borowski*** analysis, finding that allegations of ongoing adversarial relationship were speculative (***Coaker***, para 20), that it is not efficient for "the court to comment in a very generalized fashion on when and how "lockdowns" may be imposed in Nova Scotia jails" (***Coaker***, para 30), and that the court should not take on the appearance of a formal inquiry, and should be "very deferential" to decision-makers absent compelling evidence of bad faith (***Coaker***, paras 37 and 38). The *habeas corpus* application was dismissed (***Coaker***, para 42).

38. Justice Rosinski offered a helpful summary of the state of the law of mootness at paras 15 and 16 in ***Coaker***, *supra*, citing and considering ***Borowski***, *supra*, and ***Springhill Institution v Richards***, 2015 NSCA 40 [**TAB 4**]:

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

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

39. Applying the ***Borowski*** test to this judicial review, the Respondents respectfully submit that the subject matter of the judicial review is moot because restrictions affecting the Applicants directly were lifted in July, 2022, and the Order has not been in effect at all since May, 2023. The Respondents also respectfully submit that the Court should not exercise its discretion to hear the matter regardless.

The issues raised by the Applicants are moot

Order has not been in effect for seventeen months

40. As established in the evidence of Tara Walsh, the PHO has not been in effect at all since May 23, 2023. Accordingly, no Nova Scotian, including the Applicants, have been subject to any restrictions under the Orders since they were in effect. The Orders have not affected the Applicants for an even longer period of time – since July 6, 2022.

41. Because the PHO is not in effect, there is no 'live controversy' to be determined.

Order has not affected the Applicants since July 2022

Corporate Applicant

42. Krista Simon ("Ms. Simon"), President of the Corporate Applicant, explained that organization's motivation to seek judicial review in her Affidavit sworn February 9, 2022, as follows:

> *9. CANS has undertaken the application for judicial review because actions taken and Orders, directives and mandates issued by provincial public health officials under the Health Protection Act in response to "COVID-19", and particularly the Order which is the subject of these proceedings, have* ***adversely impacted CANS' ability to fulfill its vision and mission through group social, recreational and educational community-based activities and events by, among other things, requiring the organization to ask for proof vaccination from would-be participants****, which CANS considers an unacceptable violation of people's privacy and Charter rights.*
>
> *10.* ***CANS has, furthermore, undertaken the application for judicial review on behalf of its members whose daily lives, family activities, mental health, physical well-being, exercise of Charter rights and freedoms, employment, and social relations, have been adversely affected by the Order*** *under review and for whom the Order has caused or may cause harm to their health and/or violation of their privacy and Charter rights.*
>
> (Emphasis added)

43. All restrictions affecting the Corporate Applicant were lifted by July 6, 2022. There was no requirement after that time for the organization to confirm proof of vaccination for activities and events. There were no other ongoing provisions at that time, or since, which impacted the Corporate Applicant in its ability to fulfil its vision and mission through such events.

44. Because the Corporate Applicant's concerns as identified in Ms. Simon's affidavit are resolved, their private interest concerns are moot.

Minor Applicant

45. Ms. Simon swore a further Affidavit on March 13, 2022, in support of adding the Minor Applicant, to this proceeding. At para 6 of that Affidavit, Ms. Simon explained the Minor Applicant's motivation to be a party as follows:

> *6. On or about December 3, 2021, J.M., a youth directly and adversely affected by the impugned Order, expressed interest in challenging the impugned Order as* ***it was adversely impacting on his and his family's pursuits since the Order had come into force on October 4, 2021, particularly in relation to its requirement for persons aged 12 and older to provide proof of full vaccination in order to participate in extra-curricular team sports.***
>
> (Emphasis added)

46. The Order did not impact extra-curricular team sports in any way as of July 6, 2022, when restrictions affecting the Corporate Applicant were lifted. The Minor Applicant acknowledged this at para 65 of his own affidavit sworn March 15, 2022, in support of his desire to be added as a party.

47. The only other impact of the Order identified as affecting the Minor Applicant in his affidavit sworn March 15, 2022, was the restriction on visitations to nursing homes he identified at paras 44 through 47, and 65.

48. The Order as of July 6, 2022 did not impact the Minor Applicant's ability to visit a nursing home.

49. For all of the foregoing reasons, the issues impacting the Applicants for which they seek judicial review in their personal capacities were resolved by July 6, 2022. There is no "live controversy", as contemplated by Justice Sopinka in ***Borowski***, *supra*. However, the mootness of this proceeding is also clear from the unavailability of remedies identified in the most recent Amended Notice.

Remedies unavailable

50. At para 26 in ***Borowski***, *supra*, Justice Sopinka determined that the matter before the Court was moot, noting that "*None of the relief claimed in the statement of claim is relevant*". The same can be said in the matter now before this Honourable Court.

51. This Honourable Court has confirmed that the Court should not issue declarations where no live controversy exists between the parties at paras 43 through 46 of ***Alpha Investments Limited v Lunenburg Marine Railway Company***, 2023 NSSC 362 ("***Alpha Investments***") **[TAB 5]**:

[43] The only relief pertinent to the above claims is Alpha's request for declaratory relief. Alpha seeks various declarations at paragraphs 77(a) to (c) concerning the Defendants' alleged oppressive conduct. The other forms of relief, such as a full accounting, repayment of disproportionate benefits, the appointment of independent directors, unwinding or setting aside transactions, and liquidation of LMR and/or LFE, have no relevance to a transaction that did not occur.

[44] The Nova Scotia Court of Appeal recently confirmed that the Courts should not issue declarations related to moot issues. In Schnare v. Schnare, 2023 NSCA 30, Justice Fichaud held that the Court's bases for declining to exercise its discretion to issue a declaration includes that it would not effectively dispose of the issue:

> *23 David Schnare applied for a declaration. A declaration is a discretionary remedy. In determining whether to entertain the application, the court focuses on utility. The court's bases for declining to exercise its discretion include the declaration would not effectively dispose of the issue and there is a more effective alternative remedy:*
>
> *...*
>
> • *In Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12 (CanLII), [2016] 1 S.C.R. 99, Justice Abella for the Court said:*
>
> > *11. ... **A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties** [citations omitted].*
> >
> > *[Emphasis added]*

[45] The full quote from Justice Abella in Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12 (CanLII), [2016] 1 S.C.R. 99 is:

> *11 This Court most recently restated the applicable test for when a declaration should be granted in Canada (Prime Minister) v. Khadr, 2010 SCC 3 (CanLII), [2010] 1 S.C.R. 44. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also Solosky v. The Queen, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; Borowski v. Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342.*

[46] Clearly then, the Court's role is not to issue declarations where there is no utility due to there being no live controversy between the parties.

[47] In Spencer v. Canada (Attorney General), 2023 FCA 8, the Federal Court of Appeal very recently dismissed a claim seeking a declaration on the basis that no live controversy continued to exist. In that case, the claimants sought a declaration that certain quarantine provisions related to the COVID-19 pandemic were invalid. Prior to the appeal being heard, the impugned provisions were terminated. Given the impugned provisions were no longer in effect, the Federal Court of Appeal held, inter alia, that the appeal should be dismissed:

> *5 As the impugned provisions are no longer in effect, we are of the view that these appeals are now moot (Borowski v. Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231). Where declarations are sought as in this case, relief will be granted only if the relief will settle a "live controversy" between the parties (Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11). Although the appellants have a genuine interest in the outcome of the appeals, there is no longer a live controversy between the parties. Therefore, the appeals have become moot.*

[bold in original; underlining added]

52. The excerpts from cases referenced by the Honourable Justice Ann Smith in ***Alpha Investments***, *supra*, establish the principle that declaratory relief is a discretionary remedy (ie – as compared to a remedy as-of-right), and that utility is the driving factor in the Court's analysis of whether to exercise discretion. Consequently, declaratory relief should not be granted with respect to moot issues.

53. In ***Daniels v Canada (Indian Affairs and Northern Development)***, 2016 SCC 12, which was considered by Justice Smith in ***Alpha Investments***, *supra*, the Supreme Court of Canada considered the meaning of "utility" in exercising discretion to provide declaratory relief. In that case, the Court considered three requested declarations, as set out at para 2 in the decision:

> *1. That Métis and non-status Indians are "Indians" under s. 91(24);*
>
> *2. That the federal Crown owes a fiduciary duty to Métis and non-status Indians; and*
>
> *3. That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.*

54. In ***Daniels***, *supra*, at para 11, the SCC defined the concept of a declaration having practical utility as a declaration settling a "live controversy" between the parties. For the first requested declaration in ***Daniels***, *supra*, the SCC found the practical utility requirement to have been met, because, as the SCC noted at paras 12 to 14, the federal and provincial governments had alternately denied legislative authority for non-status Indians and Métis, leaving these communities in a "jurisdictional wasteland". Clearly, judicial clarifying the constitutional responsibilities for these ongoing relationships had practical utility. By contrast, the SCC dismissed the second (***Daniels***, paras 52 and 53) and third (***Daniels***, paras 52 and 56) requested declarations as lacking practical utility, as they simply restated existing law.

55. On the issue of practical utility of declaratory relief in the context of COVID-19 restrictions specifically, the Federal Court of Appeal's decision in ***Spencer v Canada (Attorney General)***, 2023 FCA 8 ("***Spencer***") is particularly on point because the issue and requested relief was similar to what is now before this Honourable Court. In ***Spencer***, at para 3, the FCA explained that the appellants sought declarations that federal quarantine restrictions in response to COVID-19 were invalid either for violating the *Charter* or for being *ultra vires* their authorizing legislation. The FCA confirmed facts very similar to the present case, and in particular, at para 4, confirmed that the impugned provisions ceased to have effect since the appeal had been filed, similar to the PHO no longer being in effect in the present case.

56. The FCA in ***Spencer*** confirmed, at para 5, that declaratory relief is discretionary, and that it requires a "live controversy" between the parties. Because the impugned provisions were not in effect, there was no live controversy, and the matter was moot. The FCA

noted at para 6 that it considered its ability to exercise discretion to hear moot appeals but found that such exercise was not warranted.

57. The lack of practical effect was also considered by the Federal Court in ***Ben Naoum v Canada (Attorney General), 2022 FC 1463 ("Ben Naoum")*** [**TAB 8**], wherein the Court noted at para 41 as follows:

> *[41] As stated above, these proceedings will have no practical effect on the rights of the Applicants. They have obtained the full relief available to them and a decision of the remaining declaratory relief would provide them no practical utility. If they suffered damages as a result of these IOs/MO being in force, they would have to bring an action against the Crown and have their respective rights assessed in light of all the relevant facts.*

58. The Respondents made submissions to the above effect in the course of the Corporate Applicant's motion for public interest standing. In ***CANS***, *supra*, at para 66, the Court declined to comment upon the Applicants' choice of judicial review as their procedural vehicle but noted that it comes with "certain advantages and disadvantages". Respectfully, the limited scope of remedy available through judicial review, offering no prospect of practical utility for the Applicants, is one disadvantage. To seek further remedy, other procedural vehicles have been open to the Applicants, and it was their choice not to pursue such vehicles.

59. In addition to the unavailability of declaratory relief absent a live controversy, the Respondents submit as follows regarding each item of requested relief the Applicants seek:

1. *A declaration that the Impugned Orders are ultra vires the Health Protection Act and that the impugned Order and attached protocol was of no legal force and effect ab initio*

   Respondents' Comment: The Respondents state that this relief is moot as the Order no longer affect the Applicants, as described above. Following ***Spencer***, *supra*, discretion to provide declaratory relief should not be exercised in the absence of a live controversy.

2. *A declaration that in issuing the Impugned Orders, the Respondent, Robert Strang, breached a duty of Procedural Fairness and was a violation of the Applicants' human rights and*

fundamental freedoms manifested in the Canadian Bill of Rights and values protected by the Charter

Respondents' Comment: The Respondents state that this relief is moot as the Order no longer affect the Applicants, as described above. As established in the case law discussed above, and below under the heading "Residual Discretion", discretion to provide declaratory relief should not be exercised in the absence of a live controversy. Moreover, the *Bill of Rights* is a federal statute which does not apply to provincial actions.

3. *A declaration that the Respondent Robert Strang acting as CMOH breached his duty to the Applicants and to the public to act in good faith, and whereby, the CMOH cannot benefit from immunity under s.12 of the Health Protection Act*

Respondents' Comment: The Respondents state that the Applicants have been denied their request for public interest standing in ***CANS***. Accordingly, any consideration of bad faith must be as against the Applicants directly. Where the Order was one of general application, and not directed to the Applicants specifically, the Respondents say the Applicants cannot reasonably establish bad faith through the record in this proceeding. Moreover, any declaration as requested must be with respect to the Applicants, and not the public generally. Where the Applicants seek to deprive the CMOH of statutory protection, they appear to be seeking to establish a fact upon which to ground future legal proceedings. Respectfully, the Applicants selected judicial review as their process instead of an action or application (***CANS***, para 66). It would not be appropriate to attempt to utilize this proceeding as a means to ground future proceedings. As established in the case law discussed below under the heading "Residual Discretion", discretion to provide declaratory relief should not be exercised in the absence of a live controversy. A live controversy does not exist within the context of the proceeding now before the Court.

4. *An order of Prohibition preventing the Respondents from instituting anything but a voluntary immunization program at any time in the future*

> **Respondents' Comment:** The Respondents understand that the Applicants intend to withdraw this requested remedy. The Respondents reserve their right to offer submissions if necessary.

60. Because none of the declaratory relief sought by the Applicants in the Amended Notice is appropriate respecting a moot issue, as further set out below under the heading "Residual Discretion", dismissing this judicial review as moot does not prejudice the Applicants. The declaratory relief they seek would not have any bearing upon the rights of the Applicants, as there is no live controversy.

No adversarial context exists between parties

61. No ongoing adversarial context exists between the Applicants and the Respondents. As described above, the Applicants' rights were not impacted by iterations of the Order after July 6, 2022, and the Order was lifted in its entirety in May 2023. Almost two and a half years have passed since a live adversarial context existed in this matter.

62. In ***Coaker***, *supra*, Justice Rosinski noted at paras 19 and 20 that concerns about collateral rights of inmates such as future security classifications resulting from lockdowns were speculative. The same can be said for any conceivable collateral impacts on the Applicants, though this is also a speculative exercise as the Applicants have not alleged any collateral impacts.

Continuing this proceeding is inconsistent with judicial economy considerations

63. Justice Rosinski offered the following comments in ***Coaker*** with respect to His Lordship's analysis of judicial economy considerations:

> *[29] **I recognize that such lockdowns may be of a "recurring nature, but brief in duration", and therefore generally evasive of judicial review.** However, in Pratt, Justice Chipman has reviewed the same circumstances as of September 17, 2018.*
>
> *[30] Moreover, based on my review of the associated jurisprudence, I conclude that this is not a proper case for this Court to make a declaration about the legality of the lockdown decisions in the circumstances of this case, because **it would require the court to comment in a very generalized fashion on when and how "lockdowns" may be imposed in Nova Scotia jails.***
>
> (Emphasis added)

64. Lockdowns in correctional facilities are recurring phenomena which are typically of brief duration. Their ability to be reviewed by the court is therefore limited because the lockdowns are frequently lifted before the matter can be considered by the court.

65. The PHO is not in the same class as lockdowns at correctional facilities. Public health orders such as the one implemented in response to COVID-19 are not of a "recurring nature" but are the result of exceptional and unique circumstances – in this case, a global pandemic. As discussed further below under the heading "Residual Discretion", Canadian courts have commented on how future pandemic scenarios will be unique and hypothetical opinions on past applications would be ineffective or of little precedential value to such scenarios.

66. The PHO was not evasive of review. It was in place from March, 2020 and no judicial review was sought until October, 2021. The Order remained in effect until May, 2023.

67. After filing the original Notice of Judicial Review, the Applicants delayed taking any meaningful action in this matter to the point the Order complained of no longer affected them, and then until the Order was lifted entirely.

68. The delay in advancing this matter was caused by the Applicants. The initial date for Motion for Directions was December 16, 2021, and was pushed back twice more because they had not delivered responses to the Demands for Particulars. The Applicants failed to bring any motion for a stay of the Order or portions of the Order subject to the review.

69. There were months between October 2021, when the first Notice was filed, and July 6, 2022, when the final restrictions impacting the Applicants were lifted, for this matter to be heard when it may have affected the Applicants, but they took no steps to advance their case. Even in the period from July 6, 2022 to when the Order was lifted in May, 2023, the only substantive steps the Applicants took were a motion to further amend their pleading, and their aborted effort to add a further party.

70. Because the Applicants failed to move this matter forward expeditiously, the restrictions that may have impacted them in October 2021 are no longer in effect, and the requested relief in this proceeding will offer no practical benefit to the Applicants.

71. Additionally, public health orders across the country have already been considered on numerous occasions, so there is no 'gap' in the reported case law respecting application of public health orders generally. This was noted by the Federal Court in ***Ben Naoum***, *supra*, at paras 42 and 43, as follows:

[42] ***In addition, there is no uncertain jurisprudence.*** *These Applications arose in a very specific and exceptional factual context: that of the COVID-19 global pandemic. Deciding these Applications would simply result in applying settled Charter jurisprudence to those exceptional — hopefully not to be repeated — circumstances; that is to a particular epidemiological point in the pandemic that is unlikely to be exactly replicated in the future.* ***Federal and provincial health safety measures, adopted in the context of the pandemic, have been constitutionally challenged across the country as they were in full force and effect (see for example, challenging federal measures:*** *Monsanto v Canada (Health), 2020 FC 1053, Spencer v Canada (Health), 2021 FC 621, Canadian Constitution Foundation v Attorney General of Canada, 2021 ONSC 4744, Turmel v Canada 2021 FC 1095, Wojdan v Canada (Attorney General), 2021 FC 1341, Neri v Canada, 2021 FC 1443, Zbarsky v Canada, 2022 FC 195;* ***and challenging provincial measures:*** *Taylor v Newfoundland and Labrador, 2020 NLSC 125, Ingram v Alberta (Chief Medical Officer of Health), 2020 ABQB 806, Beaudoin v British Columbia, 2021 BCSC 512, Lachance c Procureur général du Québec, 2021 QCCS 4721, Murray et al v Attorney General of New Brunswick, 2022 NBQB 27).*

[43] ***In that sense, the IOs/MO are not evasive of judicial review.***

(Emphasis added)

72. Considering scarce judicial resources, the Applicants' delay in advancing this matter to the point it became moot, the number of iterations of the Order for which they still seek review, the inappropriateness of declaratory relief in a moot proceeding as discussed below under the heading "Residual Discretion", and the fact that the Order hasn't been in effect at all for seventeen months at this point, and the fact that courts across Canada have considered public health orders relating to COVID-19 on numerous occasions already, permitting this matter to proceed despite its mootness would be inconsistent with consideration of judicial economy.

Deference owed to legislative function

73. Although distinguishable for considering the circumstances safety in correctional facilities, several passages in ***Coaker***, *supra*, offer useful analogues to this judicial review:

[35] *As I understand their argument,* ***the applicants are asking the court****:*

1. ***To conclude that the applicants did not receive fundamental procedural and substantive protection consistent with the requirements of section 7 and 12 of the Charter of Rights;*** *[15] is and furthermore*

2. To pass judgment on section 79 of the Correctional Services Regulations by providing "helpful guidance" to correctional facility staff which would ensure that such lockdown decisions in future are made in a more procedurally and substantively fair manner vis-à-vis all inmates affected.

[36] Based on my extensive exposure to such issues, as a lawyer and judge, ***I can confidently state that the ongoing provision for the safety and security of inmates, staff and others in correctional facilities of the size of the Burnside Jail, is one of extreme complexity and difficult to maintain due to ever-changing factors beyond the direct control of the facility's administrators.*** *An ongoing and vexing reality for administrators is that many prisoners are for various reasons "incompatible" with other prisoners, requiring them not to be housed or transported together. An example can be found in the decision of Justice Duncan in relation to his determination of whether a so-called "federal [penitentiary] remand" for an un-convicted prisoner, James (Jimmy) Bernard Melvin Junior, could or should issue: 2016 NSSC 130.*

[37] ***The safety and security of staff and inmates at the CNSCF between September 1 and 24, 2018, was an ever-changing unpredictable situation. Any meaningful examination by the court would take on the appearance of a formal "inquiry" of questions*** *such as: why the superintendent believed it appropriate to lockdown North 3; how he could justify that decision on a day by day basis; what access to supporting information, if any, he relied upon; what information were the inmates entitled to have, and what information did they receive; what opportunities to argue against the continued lockdown should have been afforded to the inmates and were not; and ultimately, were all those decisions between the relevant time period for my purposes, September 17 and September 24, 2018, reasonably justifiable when viewed through the lens of sections 7 and 12 of the Charter of Rights jurisprudence?*

[38] To reiterate, ***absent compelling evidence of bad faith by prison administrators in carrying out their duties, specifically here the imposition of this lockdown, courts should be very deferential to such decision-making.*** *Justice Chipman has already ruled on this in the Pratt matter. There is no hint of such misconduct in the period between September 13 and 24, 2018.*

74. Like the Applicants in ***Coaker***, *supra*, the Applicants in this case cannot be seeking anything more than "helpful guidance". The issues faced by the CMOH throughout the COVID-19 pandemic were "extremely complex" due to "ever changing factors"; in this

case, the epidemiology of COVID-19 and the developing understanding of the virus and effective prevention/treatment options. Like in ***Coaker***, *supra*, any meaningful examination would take on the "appearance of a formal 'inquiry'", which is not the purpose of judicial review. Courts should be deferential to such decisions.

75. The lack of any present government action subject to review also speaks against permitting this matter to proceed. In ***CM v Alberta***, 2024 ABCA 136 ("***CM***") [**TAB 9**], the Alberta Court of Appeal recently cautioned against offering judicial commentary absent extant government action in the following terms at para 53:

> *[53] Ultimately,* ***the appellants seek an opinion from this Court about the constitutional obligations and entitlements of the parties in relation to public health and public education in the absence of extant government action*** *to bring those obligations and entitlements into focus: Borowski at 366.* ***Providing such an opinion does not fall within the judicial competence of this Court and risks an improper incursion into the legislative function.***
>
> (Emphasis added)

76. If the Applicants continue to have concerns about the government's response to the COVID-19 pandemic while the PHO was in effect, they have the ability to contact their elected representatives to discuss. Absent a concrete government action, however, there is no practical outcome available to this proceeding for the Applicants.

Residual Discretion in recent jurisprudence

77. The Court possesses a residual discretion to hear otherwise moot matters in certain circumstances. Recent cases in Nova Scotia where the Court has exercised such discretion demonstrate facts which are readily distinguishable from the present case. There are also numerous cases from across Canada considering mootness in matters treating restrictions arising from COVID-19 public health orders in which courts have generally declined to exercise residual discretion to proceed with moot matters. Each of these categories of cases are considered separately below.

Recent Nova Scotia Jurisprudence

78. The Honourable Justice Joshua Arnold recently considered mootness arguments respecting interpretation of the Chief Electoral Officer's statutory authority in ***Nova Scotia Liberal Party v Chief Electoral Officer***, 2024 NSSC 172 [**TAB 10**]. There, although no live controversy existed, Justice Arnold exercised residual authority to determine the matter regardless because:

a. The Liberal Party would continue to be involved in elections going forward; and
b. The CEO had asserted a position on the use of a power which would come up again, so there was a benefit to the Court clarifying the matter.

79. The elections case differs from the present in several material respects. First, elections happen routinely and therefore the perceived issue would inevitably arise again. That is not the case in this proceeding. The PHO was uniquely tailored to COVID-19, and there is no certainty that any COVID-19 type pandemic will occur again. Moreover, any response to a future pandemic will be responded to by public health officials on the unique circumstances of such pandemic, which it cannot be presumed would mirror those of COVID-19. Where no similar governmental action is in place, nor threatened, nor imminent, the imperative prompting Justice Arnold to proceed despite lack of a live controversy is absent in the present case.

80. Similarly, ***The Canadian Civil Liberties Association v Nova Scotia (Attorney General)***, 2022 NSCA 64 ("***CCLA***") [**TAB 11**] is of no assistance to the Applicants. The Court of Appeal decided to proceed and hear otherwise moot issues because, as noted at para 217, "*...the **process** here involved legal errors that need not recur.*"

81. The nature of these process concerns in ***CCLA*** was summarized at para 35 based on the allegations contained in the Notice of Appeal. All involved concerns about the law of injunctions. The public interest in permitted this moot appeal to proceed was, therefore, in clarifying the common law of injunctions, and not with respect to the PHO or public health considerations. Such common law processes are, accordingly, clearly distinct from the nature of the Order now under review.

Canadian Jurisprudence Considering Moot COVID-19 Matters

82. Of great relevance and utility are numerous cases from across the country where courts have refused to exercise their residual discretion to consider otherwise moot cases specifically involving COVID-19 restrictions. Notably, the requested relief in those cases has generally been declarations, similar to the case now being considered.

83. The FCA's 2023 decision in ***Spencer***, *supra*, continued a trend in earlier jurisprudence from the Federal Court refusing to exercise discretion to hear moot matters. Of particular note is ***Ben Naoum***, *supra*, wherein the Federal Court considered its residual discretion to proceed with judicial review of the constitutionality of federal air and rail sector vaccine mandates which had been repealed (***Ben Naoum***, paras 1 and 3). The Court in ***Ben Naoum***, *supra*, confirmed, at para 32, that seeking declaratory relief does not sustain a moot case:

> *[32] Finally, I agree with the Respondent that* ***requests for declaratory relief cannot sustain a moot case in and of itself*** *and that the declaratory remedies the Applicants seek fail to provide live issues for judicial resolution.* ***Mootness "cannot be avoided" on the basis that declaratory relief is sought*** *(Rebel News Network Ltd v Canada (Leaders' Debates Commission), 2020 FC 1181, at para 42).* ***Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when they settle a "live controversy" between the parties. The Court sees no practical utility in the declaratory reliefs sought by the Applicants.***
>
> (Emphasis added)

84. The Court went on in ***Ben Naoum***, *supra*, to decline to exercise residual discretion to hear a moot case, noting that: "*judicial economy considerations outweigh the alleged important public interest and uncertainty in the law*" (***Ben Naoum***, para 47).

85. At the provincial level, in ***CM***, *supra*, the Alberta Court of Appeal recently dismissed an appeal seeking declaratory relief from a judicial review of the Alberta Chief Medical Officer of Health's decision to end requirements for students to mask in schools, and an associated statement by Alberta's Minister of Education purporting to restrict the ability of school boards to impose masking requirements (***CM***, paras 1 and 2). The Court in CM refused to exercise its discretion to proceed despite mootness of the issues, commenting as follows at paras 50 and 52:

> *[50]* ***The resolution of this dispute would have no practical effect on the rights of the parties. While at some points in the COVID-19 pandemic, health orders may have fit within the "recurring nature but brief duration" category (Kassian at para 41), that is no longer the case,*** *especially with respect to the LaGrange Statement. The subsequently enacted regulation exists as ongoing law (at least until its expiry) and may in time be challenged on constitutional grounds.* ***Such an assessment ought to occur within the factual matrix in which the regulation is ultimately impugned:*** *Harjee at para 7.*
>
> ...
>
> *[52]* ***The appellants may be correct that the ability of school boards to impose mask mandates from time to time to protect vulnerable children raises a question of public importance;*** *this Court's assessment of that issue in the context of the LaGrange Statement would not, however, answer that question.* ***As the Newfoundland Court of Appeal commented in Taylor at para 31, it "will be the specific government response to the particulars of any future pandemic that would be the subject of any future challenge". The constitutional validity of section 3 of the In-Person Learning Regulation would need to be assessed in that context.***

(Emphasis added)

86. In Atlantic Canada, in ***Taylor v Newfoundland and Labrador***, 2023 NLCA 22 ("***Taylor***") [**TAB 12**], the Newfoundland and Labrador Court of Appeal refused to hear an appeal and cross-appeal respecting the constitutionality of that province's public health order respecting COVID-19 for mootness, notwithstanding all parties desired the Court to proceed (***Taylor***, para 1). Notably, the NLCA found in ***Taylor*** at para 30 that there was no certainty that *Charter* analysis of Newfoundland and Labrador's COVID-19 response would be of assistance in assessing the propriety of measures in a future pandemic, and at para 40 considered it inappropriate for the Court to opine on the constitutionality of discontinued government action.

87. Further, in ***Bowen v City of Hamilton***, 2022 ONSC 5977 ("***Bowen***") [**TAB 13**], the Ontario Superior Court of Justice considered a request by eleven municipal employees for declarations that the termination provisions of the City's vaccination policy constituted a violation of the their human rights, their rights to privacy, and their rights to bodily integrity, contrary to s 7 and s 12 of the *Charter* (***Bowen***, para 3). After the record was filed, the termination provisions in the City's policy were suspended (***Bowen***, para 4) and the City sought to have the application dismissed as moot (***Bowen***, para 5).

88. Although the termination provisions considered in ***Bowen***, *supra*, were only suspended, not fully repealed, and the vaccination policy otherwise remained in effect (***Bowen***, paras 18 and 21), the Court found that the issues before it were hypothetical, not tangible and concrete (***Bowen***, para 16), and were moot (***Bowen***, para 22). The Court went on to consider whether it should exercise discretion to continue the application notwithstanding mootness, applying the three-part test in ***Borowski*** and finding all factors favoured dismissal (***Bowen***, para 24). Notably, the Court found that public interest in the Court's views on vaccination policies was not appropriate because it would constitute a hypothetical opinion where the policies were not in effect (***Bowen***, para 29), and that such a hypothetical opinion would be ineffective or of little value to future scenarios involving vaccination policies (***Bowen***, paras 30 and 31). The Court accordingly dismissed the application (***Bowen***, para 33).

89. The logic in ***Bowen***, *supra*, applies equally to the present matter. The PHO was unique to epidemiological circumstances at points in time during the pandemic, and restrictions were varied over time to account for changes in epidemiology. In case of any future pandemic, any restrictions the CMOH will be tailored to the circumstances at that time, which cannot be known in advance. As noted by the Newfoundland and Labrador Court of Appeal at paras 37 and 39 in ***Taylor***, the Court should be especially mindful about pre-empting possible decisions of legislative bodies by dictating the form of legislation it

should enact, by "*telling governments what they can or cannot do in the future, rather than opining on the validity of existing government action.*"

90. A notable exception to the more general refusal of Canadian courts to exercise discretion to proceed in moot matters is ***Kassian v British Columbia***, 2023 BCCA 383 ("***Kassian***") [**TAB 14**]. That appeal considered three separate judicial review matters which had become moot, and considered whether the Court ought to proceed despite the public health orders being rescinded, rendering their subject matter moot.

91. In ***Kassian***, *supra*, the BCCA noted that the decision to hear a moot case must be assessed on the factors specific to the proceeding at hand (at para 36). Applying ***Borowski***, the BCCA exercised discretion to permit certain appeals to proceed to consider a s 7 *Charter* argument respecting the "right to roam" which was treated at first instance by the hearing judge (at paras 42 and 43). As was the case in ***CCLA***, *supra*, the Court of Appeal in ***Kassian***, *supra*, exercised discretion to consider a purely legal issue which had been treated by the superior court and on which the Court of Appeal felt some guidance was required. ***Kassian*** is thereby distinguishable from the matter now before the Court.

92. The Respondents respectfully submit that this Honourable Court should, in this case, hold to the reasoning and dispositions of ***Spencer***, ***Ben-Naoum***, ***Taylor***, ***CM***, and ***Bowen***. The facts and requested relief are similar, particularly in ***Spencer***, and there is no reason to depart from the FCA's reasons to refuse to exercise its residual discretion.

RELIEF SOUGHT

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of October, 2024

Daniel Boyle
Counsel to the Respondents

LIST OF AUTHORITIES

Cases in order of appearance in Brief and Book of Authorities

1- ***Citizens Alliance of Nova Scotia v Nova Scotia (Health and Wellness)***, 2024 NSSC 253

2- ***Borowski v Canada (Attorney General***, [1989] 1 SCR 342

3- ***Coaker v Nova Scotia (Attorney General)***, 2018 NSSC 291

4- ***Springhill Institution v Richards***, 2015 NSCA 40

5- ***Alpha Investments Limited v Lunenburg Marine Railway Company***, 2023 NSSC 362

6- ***Daniels v Canada (Indian Affairs and Northern Development)***, 2016 SCC 12

7- ***Spencer v Canada (Attorney General)***, 2023 FCA 8

8- ***Ben Naoum v Canada (Attorney General)***, 2022 FC 1463

9- ***CM v Alberta***, 2024 ABCA 136

10- ***Nova Scotia Liberal Party v Chief Electoral Officer***, 2024 NSSC 172

11- ***The Canadian Civil Liberties Association v Nova Scotia (Attorney General)***, 2022 NSCA 64

12- ***Taylor v Newfoundland and Labrador***, 2023 NLCA 22

13- ***Bowen v City of Hamilton***, 2022 ONSC 5977

14- ***Kassian v British Columbia***, 2023 BCCA 383