Form 90.06

2026 C.A. No. 551286

Nova Scotia Court of Appeal

REGISTRAR
Nova Scotia Court of Appeal
FEB 24 2026
HALIFAX, N.S.

Between:

Citizens Alliance of Nova Scotia

Appellant

and

Robert Strang acting as Chief Medical Officer of Health of Nova Scotia and Michelle Thompson acting as Minister of Health and Wellness of Nova Scotia and the Attorney General of Nova Scotia representing his majesty the King in right of the Province of Nova Scotia and J.M. by his Litigation Guardian K.M.

Respondent

Notice of Appeal (General)

To: Robert Strang, Chief Medical Officer of Health of Nova Scotia
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And To: Michelle Thompson, Minister of Health and Wellness Nova Scotia
Department of Health and Wellness
1894 Barrington Street, Floor 17,
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And To: Attorney General of Nova Scotia
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Halifax, NS B3J 3J9
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And To: Hugh Robichaud, Solicitor for J.M. by his Litigation Guardian K.M.
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Appellant appeals
The Appellant appeals from the judgment dated January 20, 2026, Supreme Court of Nova Scotia *In toto* in the proceedings in the Supreme Court showing court number YAR 510031 made by Justice John A. Keith .

Order or decision appealed from
The Decision was made on January 20, 2026. It was made at Yarmouth, Nova Scotia.

Grounds of appeal

In reference to the January 20, 2026 Decision of Justice Keith:

1. The Justice erred in the grievous **Misapprehension of Evidence** before him in this matter. The Decision and Reasons For Decision shows no sign of the proper, or indeed any, appreciation of the evidence before Justice Keith in the form of the October 2021 Public Health Order and associated Protocols, the *Health Protection Act (HPA)*, the government document "*A Guide to the Health Protection Act and Regulations* " and the testimony of Tara Walsh given before him all of which provided Material Evidence of Ultra Vires and Bad Faith action.

2. At Paragraph 47 (1), the Appellant notices and asserts the Justice's error in failing to admit parts of the Appellant's affidavit evidence, due to it being in a digital format at the hearing for mootness, which then contributed to his reasoning to find CANS' claim moot. However, it was agreed by the Respondent to accept the electronic filing and they had accessed it on November 22, 2024. Additionally, Justice Keith was copied in this exchange between the parties and his assistant also accessed the files on November 22, 2024, well before the December 6, 2024 hearing constituting acceptance over the format used by the Appellant only to be used against us in the Justice's mootness decision.

3. The Justice **Errored in Law** as he showed no evidence of having at any time considered the actual Statute in question, the *Health Protection Act 2004* , the impugned *Regulations*, or any of its sections that are at the heart of the Ultra Vires allegations and thus the moving cause of the Appellant. Respectfully the Appellant submits this shows *Per Incuriam* in the Judgement and associated Order. This also constitutes a complete failure to Engage with the Position of a Party which is itself an **Error in Law**. This is sharply contrasted to a decision rendered January 6, 2026 orally by Justice Keith in a matter with a virtually identical set of base facts in *Coalition of Interested Advocates v. Judicial Council, Honourable Alain Bégin* in which he closely examined the Statute in question as he most properly should have in this case.

4. The Justice made **Errors in Fact** at Paragraphs 1 and 2, and made statements of purported facts not in evidence or that **Misapprehended the Evidence** before him. The Justice asserts, *"new vaccines were developed to quickly and safely generate widespread immunity against the disease"* There is no evidence in the record that would show the experimental mRNA products caused an immune reaction in a human being, because according to their manufacturers, they do not. There is no evidence in this proceeding that the experimental

mRNA vaccines were safe. It would appear to the Appellant that the Judge is then expressing an *opinion* that he may hold on these matters which would give the appearance of violating the norm of *nemo iudex in sua causa* and thus the Appellant's right to *procedural fairness*.

5. Most egregiously in Paragraph 2 the Justice states, "*the CMOH began to loosen social distancing restrictions for those who were vaccinated*" This is a whimsical interpretation of what the October order iteration created which went far beyond loosening social distancing mandates, containing the worst violation of private rights to date in the form of a "vaccine mandate" and constitutes an **Error in Law** as the Justice misinterpreted the *HPA*. Even when properly implemented, the *HPA* in s. 53 provides only for a voluntary *Immunization* program. The Justice then compounds the **Error in Law** and offends the Appellants rights *audi alteram partem* by improperly asserting, "*Differentiating liberty rights based on vaccination status gave rise to numerous disputes including, for example, disagreements as to when and why individual freedom yields to the common good. This is one such dispute."* Ultra Vires action by the State is not in any way, "one such dispute" it centers on the Rule of Law to which the Appellant has a continuous and constant right and is the foundation of the "common good". Without any further factors, the Bad Faith is inseverable from this sort of egregious Ultra Vires action which insults the basic Rule of Law.

6. The Justice here, and throughout the Reasons for Decision, makes reference to "Vaccine" and "Vaccination". The words "Vaccination" and "Immunization" have different and legally distinct definitions. The *HPA* refers only to Immunization. This constitutes an **Error in Fact** notwithstanding the popular reference to the impugned order as a "vaccine mandate".

7. The Justice makes an **Error of Law** in Paragraph 3 by failing to ascertain what part of section 32 of the *HPA* would allow for the CMOH to issue medical orders to every healthy Individual in the province; there is no authority for the CMOH to mandate any sort of medical care including immunization in section 32 without applying to the courts via s.38 within the Communicable Disease section. The Justice references no powers in the *Emergency Management Act* that would give the CMOH the power to initiate a provincial State of Emergency or do any other particular thing. The Justice Misinterprets Statute by failing to understand and apply the *HPA* to the instant matter. The Justice highlights this with untethered speculation about notional medical advances Paragraph 22 (2) as reasons for finding CANS' claim moot. At Para 22 (2) the Justice launches into the realm of untethered hypothesis about future medical advances without any acknowledgement that at any time in the future the CMOH, an Administrator of the Executive branch is required to act within the Law as created by the Legislative branch and instead mistakenly posits that to restrict the Administrator to the Law would interfere with the Legislature whose Statute he failed to follow. The Appellant asserts this is not mere *obiter dictum* but forms the basis of the decision at least in part.

8. The Justice **Errors in Fact** again in Paragraph 3 by stating, "All iterations of the Impugned Order involved, to varying degrees, forms of differentiation based on vaccination status."

9. The Justice **Errors in Fact** on page 4 in his footnote numbered "2". The Justice asserts that the Appellant struck our claim for an order of prohibition during the Mootness hearing when in fact the Appellant had struck this claimed relief before the Hearing for Public Standing more than a year before.

10. At Paragraph 17 the Justice **Errors in Fact** when he asserts that the Appellant CANS "reversed their position on *Taylor v NFLD*, the Appellant maintained our position that *Taylor* was a constitutional dispute whereas we claim unlawful action. Compounding this error the Justice then takes absolutely no notice of the arguments by the majority of Canada's Attorneys General that the Taylor Matter should be heard to promote clarity of permissible action during a pandemic by Public Health Officials.

11. At Paragraph 22 (2) the Justice **Errors in Law** as he misapplies the *Borowski* test when he states, "*The exercise is almost entirely academic and lacks the existing, real-world connections to have any meaningful factual existence or legal utility."* This Error is, we say, is caused by the Justices lack of appreciation for the factual context of the Amended application and relief sought. This error surfaces in many facets of the Justice's Reasoning including his examination of our capacity under *Borowski* at Paragraphs 47 and 48 where he again asserts that we seek to make voluminous and complex *Charter* arguments and obviously lack capacity to do so. The Appellant seeks simply, and in the amended Application unambiguously, that the Justice examine the *HPA* and compare it to the facts of the impugned Administrators actions and make Judgement as to their ***legality*** and thus under *Vavivlov* Reasonableness of those actions. The Burden on the Appellant is thus well within its ability as the needed facts for fulsome review are already all in evidence.

12. At Paragraphs 32 to 36 the Justice erred in **Mixed Fact and Law** in his analysis of the *CM v Alberta* case ignoring the fact that the Alberta PHOs were found to be null as the CMOH deferred her decisions to a committee of Cabinet an act of which is Ultra Vires the Alberta *Public Health Act* which closely resembles CANS' claim.

13. The Justice made a **Palpable Error in Fact** stating at Paragraph 42 that "CANS dismissed" our council and "elected to self-represent" this error leads to the Justice's untethered analysis of the *Borowski* factor of Adversarial context which is an **Error in Law**.

14. The Justice makes an **Error of Mixed Fact and Law** at Paragraph 48, in asserting The Appellant's amended Application, "still admits of some ambiguity and potential confusion". The Amended Application clearly states that Ultra Vires action is the centre of this matter. At Paragraph 2 the Justice states "differentiating liberty rights based on vaccination status gave rise to numerous disputes including, for example, disagreements as to when and why individual freedom yields to the common good. This is one such dispute". This is again an **Error of Mixed Fact and Law** as our amended Application clearly makes unlawful action, not unconstitutional action/ breach of rights, as the central cause and style of action.

15. The Justice's **Error of Fact** at Paragraph 48 metastasizes and is amplified at Paragraphs 50 and 54 where the Justice wrongly asserts that the Appellant seeks "*an intensive autopsy of*

all decisions made by the CMOH during the course of the pandemic" (50) "*Yet, the Applicants seek to embark on a much more ambitious and wide- ranging inquiry into virtually everything the CMOH decided during the pandemic and the alleged damage inflicted on Nova Scotians – without the more proportionate factual and doctrinal focus found in the cases listed above.*" (54) The Amended Application clearly states we seek review of the October iteration creating a mandate for the injection of experimental mRNA products. The Appellant here notes that Justice Keith's administrative assistant asked for a copy of our Amended Application a mere 8 days before the January 20, 2026 Judgement was delivered and a full 885 days *after* the Amended Application had been filed with the court on August 11, 2023.

16. At Paragraphs 55 and 56 The Justice makes an **Error in Law** in his complete misapplication of the Principle of Judicial economy based on assertion of further legal action against the impugned administrator as an individual that CANS may/may not take.

17. The Justice **Errors in Law** at Paragraph 58 in interpreting Judicial economy as he conflates the Legislative and Executive functions of Government.

18. The Appellant has a **Reasonable Apprehension of Bias** in that the Justice at least seemed to show attention to the CMOH that is beyond the "Deference" owed to the Administrator under *Valvilov*. The Justice at various times improperly ascribes motives for and results emanating from the actions of the impugned administrator that are not in evidence. At various times the Justice's decision shows alarm at the fact that we intend to hold the Administrator, that we say acted outside the Law, to Account. The Appellant respectfully asserts that this at least *gives the Appearance of Bias* which is improper for the court.

19. The Appellant asserts that the fundamental **Errors of Fact and Law** denied the Appellant our rights to **Natural Justice** and **Procedural Fairness** in that they cause contravention of both the pillars of ***audi alteram partem*** as no fair hearing of the Appellant's argument could occur while the Justice fundamentally failed to grasp the actual claim underlying the Applied for Review. The Justice we respectfully say also breaches ***nemo iudex in sua causa .*** The Justice at least appears to show bias against the Appellant for being self represented while showing far more than deference to the Impugned Administrator and by stating things that are not in evidence and not factual that he used to form his decision.

20. Other Grounds as Necessary.

Authority for appeal

1.	Judicature Act 38(1)
2.	Civil Procedure Rules of Nova Scotia, Rule 90.02 (2)

Order requested
The appellant says that the court should issue a **Substitution of Decision** or failing that **Set Aside the Decision** granting the Respondents Motion to Strike as Moot and have the fulsome **Judicial Review** heard in the **Supreme Court**.

In the event that the Court declines to allow the Judicial Review to proceed, an extension of time to file a Statement of Claim, or confirmation that leave is not necessary.

Motion for date and directions
The appeal will be heard on a time and date to be set by a judge of the Court of Appeal. The appellant must not more than eighty days after the date this notice is filed, make a motion to a judge of the Court of Appeal to set that time and date and give directions. You will be notified of the motion.

Contact information
The appellant designates the following address:

91-3045 Robie Street, Unit 5
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Fax: 902.201.2997

Documents delivered to this address will be considered received by the appellant on delivery. Further contact information is available to each party through the prothonotary.

Signature
Signed February 23, 2026

Signature of Appellant
William Ray Litigation Agent for CANS

Registrar's Certificate
I certify that this notice of appeal was filed with the court on , 20 .

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SUPREME COURT OF NOVA SCOTIA

Citation: *Citizens Alliance of Nova Scotia v. Nova Scotia (Health and Wellness)*, 2026 NSSC 21

Date: 20260120
Docket: Yar No. 510031
Registry: Yarmouth

2026 NSSC 21 (CanLII)

Between:

Citizens Alliance of Nova Scotia and J.M., by his Litigation Guardian K.M.

Applicants

v.

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 Queen in Right of the Province of Nova Scotia

Respondents

Decision

Judge:	The Honourable Justice John A. Keith
Heard:	December 6, 2024, in Yarmouth, Nova Scotia
Final Written Submissions:	July 19, 2025
Counsel:	William Ray, Lay Person and Board Member, rep the Applicant, Citizens Alliance of Nova Scotia Hugh Robichaud, for the Applicant, J.M., by his I Guardian K.M. Daniel Boyle, for the Respondents

BY THE COURT:

INTRODUCTION AND BRIEF CONCLUSION

2026 NSSC 21 (CanLII)

[1] In early 2020, the world awoke to a rapidly spreading coronavirus commonly called COVID-19.[1] The outbreak escalated into a pandemic. Governments around the globe implemented various emergency measures, hoping to contain and combat the virus. In a somewhat strange but necessary reversal, demonstrating solidarity with another meant physically separating from one another – more popularly described as "social distancing".

[2] In time, new vaccines were developed to quickly and safely generate widespread immunity against the disease and, it was hoped, accelerate a return to normalcy. However, these vaccines also carried us onto contested legal terrain because governments (including Nova Scotia) began to loosen social distancing restrictions for those who were vaccinated but not for those who refused. Differentiating liberty rights based on vaccination status gave rise to numerous disputes including, for example, disagreements as to when and why individual freedom yields to the common good. This is one such dispute.

[3] In Nova Scotia, on March 22, 2020, the Respondent and Chief Medical Officer of Health for Nova Scotia (Dr. Robert Strang referred to here as the "**CMOH**") issued a Public Health Order (the "**Order**") pursuant to s. 32 of the *Health Protection Act,* SNS 2004, c 4 (the "***HPA***"). On October 1, 2021, the CMOH updated or revised his initial Order (the "**Revised Order**"). A related protocol came into effect on October 4, 2021 (the "**Related Protocol**"). The CMOH further amended the Revised Order and Related Protocol on numerous occasions. For ease of expression and unless otherwise noted, all of these evolving iterations of the Revised Order and Related Protocol are referred to collectively as the "**Impugned Order**". All iterations of the Impugned Order involved, to varying degrees, forms of differentiation based on vaccination status.

[4] On March 21, 2022, the provincial state of emergency was lifted along with the impugned vaccine mandates, subject to limited exceptions for certain high-risk settings such as hospitals and long-term care facilities. On May 23, 2023, the Impugned Order was lifted in its entirety.

[5] The Applicants Citizens Alliance of Nova Scotia ("**CANS**") and J.M. by his Litigation Guardian K.M. ("**J.M.**") say that the Impugned Order trapped them within an illegal immunization mandate. In essence, the Applicants allege that this

[1] The Applicant Citizens Alliance of Nova Scotia refers to the infectious virus as "SARS-COV2" noting that it was a mutation of an early "pandemic level" virus called "SARS-COV1" in 2003. The distinction is made in support of the Applicant's further submission that, therefore, "[t]here was nothing "unique" about it" (CANS' Original Brief at para. 3). Nothing turns on how the virus is named for the purposes of this decision.

Revised Order and Related Protocol were a coercive and unlawful vaccine scheme which imposed severe, unlawful restrictions on persons who were unwilling to submit to the recommended vaccinations or provide proof of immunization.

[6] The Applicants seek judicial review of the Impugned Order. Their claims are specifically aimed at the CMOH. In particular, the Applicants allege that the CMOH lacked the requisite statutory authority under the *HPA* to issue the impugned Order and is *ultra vires*. They generally allege that:

> … the Respondent Robert Strang did not follow the HPA in having the Minister of Health declare a public health emergency under the HPA; and that he acted beyond the authority granted to him by the HPA at section 53 (2) (a) when he created a coercive regime to force the injection of an experimental mRNA product, whereas section 53 (2) (a) clearly restricts his authority to, "establishing a voluntary immunization program for the Province or any part of the Province".
>
> (*Further Amended Notice of Judicial Review* issued August 11, 2023, at p. 4, para. 1)

[7] In support of this general allegation, the Applicants list numerous, more specific allegations at paras. 1.1– 1.12 of the Further Amended Notice of Judicial Review.

[8] The second ground of the Applicants' complaint targets the CMOH more personally. The Applicants allege that, in the circumstances, the CMOH cannot claim the benefit of immunity from liability under s. 12 of the *HPA* because he acted in bad faith when issuing the Impugned Order. They say:

> The impugned Order and the Protocols and policies constitute Acts in Bad Faith on the part of Robert Strang in that he failed in his clear duties outlined by the HPA at section 2 and the Duties of procedural fairness enumerated by the Supreme Court in Doré v Barreau du Quebec; and that he knowingly made false and misleading statements as an act in furtherance of his Ultra Vires coercive mandate regime to force the injection of experimental mRNA products.
>
> (Further Amended Notice of Judicial Review at p. 4, para. 2, with a more specific, subset of reasons given at paras. 2.1 – 2.6)

[9] In other words, the Applicants seek a judicial determination that they may advance additional claims against the CMOH personally for alleged damages caused by the Impugned Order.

[10] By way of remedy, the Applicants seek:

2026 NSSC 21 (CanLII)

1. A declaration that the Order under review is *ultra vires* of the *HPA* and that the impugned Order was of no legal force and effect *ab initio*;
2. A declaration that the Order breached Robert Strang's duty of Procedural Fairness and was a violation of the Applicant's human rights and fundamental freedoms manifested in the Canadian Bill of Rights and Charter values; and
3. A declaration that the CMOH breached his duty to the Applicants to act in good faith and cannot claim the benefit of immunity under s. 12 of the *HPA*.

(Further Amended Notice of Judicial Review, pp. 6 – 7, paras. 1 – 5)[2]

[11] The Respondents bring this motion to dismiss the proceeding as moot. The Applicants oppose the relief sought.

[12] In determining whether a claim is moot, the leading case is *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 ("***Borowski***") where the Supreme Court of Canada established the following two-pronged analysis:

1. The Court first examines "… whether the required tangible and concrete dispute has disappeared and the issues have become academic" (*Borowski* at para. 16).
2. If the claims are moot, *Borowski* recognized a residual discretion to hear the case in any event. The Court exercises that discretion by weighing and balancing the following factors:
    a. Adversarial Context: Whether a genuine dispute remains and will be fully argued;
    b. Judicial Economy: Whether hearing the case will result in a decision that has practical utility, addresses issues of public importance, or prevent time-sensitive issues from evading review; and
    c. The Court's Proper Adjudicative Role: This factor reflects a commitment to judicial restraint and humility. It discourages the issuance of merely advisory opinions and guards against

[2] The Applicants originally sought an "Order of Prohibition preventing the Respondents from instituting anything but a voluntary immunization program at any time in the future" but withdrew that particular remedy during the course of this motion regarding mootness.

2026 NSSC 21 (CanLII)

> encroaching upon functions that are more properly reserved for the legislature or executive branch of government.

[13] Following the *Borowski* framework, this decision first considers the doctrine of mootness in the circumstances of this case. In my view, the issues being raised by the Applicants are moot. The decision continues with an assessment of the Court's residual discretion to hear an otherwise moot case and concludes that the discretion should not be exercised in the circumstances of this case.

[14] One final preliminary issue bears mentioning. In this proceeding, the Respondents originally referred to and relied upon the Newfoundland and Labrador Court of Appeal decision in *Taylor v. Newfoundland and Labrador*, 2023 NLCA 22. The Court of Appeal in *Taylor* concluded that the underlying dispute was moot and did not engage the Court's residual discretion

[15] However, neither party to this proceeding disclosed that:

1. The applicants in *Taylor* sought and were granted leave to appeal to the Supreme Court of Canada (*Canadian Civil Liberties Association, et al v. His Majesty the King in Right of Newfoundland and Labrador, et al*, 2024 CanLII 35287);
2. The Attorney General of Nova Scotia was granted intervenor status at the Supreme Court of Canada for the Taylor appeal; and
3. In written submissions filed with the Supreme Court of Canada prior to the hearing of this matter, the Attorney General of Nova Scotia conceded that the claims were not moot and that there was practical utility in having the Supreme Court of Canada determine the underlying issues. At para. 50 of the factum filed October 15, 2024, the Attorney General of Nova Scotia "…agree[d] with the Respondents' submissions regarding the Borowski criteria in exercising discretion to hear moot cases" (i.e. that the appeal court erred on this issue). It added that "[t]his appeal raises no reason to change those criteria or re-shape them in any meaningful way" (at para. 50). This argument was the opposite of the position initially taken in this proceeding.

2026 NSSC 21 (CanLII)

[16] The appeal has been heard by the Supreme Court of Canada and a decision is pending.

[17] Counsel for the Respondents stated that he was unaware of the position taken in *Taylor* by Nova Scotia's Attorney General before the Supreme Court of Canada. I accept his admission. The parties were asked to file further, post-hearing submissions. Apart from some delay, these additional submissions chiefly demonstrated that the parties reversed their positions on the significance of *Taylor*. The Respondents withdrew their earlier reliance on *Taylor*. By contrast, the Applicants now cited the arguments being made at the Supreme Court of Canada in *Taylor* (including by the Attorney General of Nova Scotia) as supportive of their position. The more substantive implications associated with the *Taylor* decision are addressed below.

2026 NSSC 21 (CanLII)

THE CLAIMS ARE MOOT

[18] The core principle which powers the doctrine of mootness is the notion that the judicial institution is dedicated to the resolution of actual, ongoing conflicts – and not questions that are purely academic or hypothetical or that simply seek an advisory opinion. Subject to exceptional circumstances, the Court generally requires that there be real, practical implications for the parties seeking judicial intervention and a judicial remedy. In this manner, the Court seeks to provide relevant, timely, impactful, and, not unimportantly, just resolutions to existing, real-life disputes.

[19] The Applicants' arguments regarding this preliminary issue are relatively spare. In essence, both CANS and J.M. argue that a resolution of the issues in dispute have practical utility due to their broader public policy significance and the possibility that there will be other pandemics in the future raising the spectre that the CMOH will again overstep his authority (CANS Original Brief at paras. 26 – 28 and J.M. Original Brief at para. 7).

[20] The body of appellate jurisprudence responding to various public health challenges that arose during COVID-19 is relatively recent and rich. The decisions include: *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64 (***CCLA v NS***); *CM v. Alberta,* 2024 ABCA 136 ("***CM***"); *Gateway Bible Baptist Church et al v. Manitoba et al*, 2023 MBCA 56 ("***Gateway Bible***"); *Grandel v. Government of Saskatchewan*, 2024 SKCA 53 ("***Grandel***"); *Kassian v. British Columbia*, 2023 BCCA 383 ("***Kassian***"); *Taylor v. Newfoundland and Labrador*, 2023 NLCA 22*,* leave to appeal to the Supreme

Court of Canada granted (*Canadian Civil Liberties Association, et al v. His Majesty the King in Right of Newfoundland and Labrador, et al*, 2024 CanLII 35287) ("***Taylor***"); *Tatlock v. British Columbia (Attorney General)*, 2025 BCCA 181 ("***Tatlock***"); *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 ("***Beaudoin***"); *Weisenburger v. College of Naturopathic Physicians of British Columbia*, 2025 BCCA 460 ("***Weisenburger***").

[21] In every one of those cases, the underlying dispute was deemed to be moot at the first stage of the *Borowski* test. The reasons vary but they include:

1. The impugned orders no longer existed such that no tangible and concrete dispute remained. By extension, a judicial resolution of the legal issues joined by the proceeding could not affect any parties' existing rights or have any direct, practical consequences for those parties. In short, there was nothing more to remedy.

2. A number of appellate Courts expressed concern around arguments that the statutory authority used in support of an impugned public health order might be re-engaged in the future and wreak some form of speculative harm. Invoking *Borowski's* prohibition on deciding hypothetical or abstract questions (at para. 5), these Courts dismissed the argument that the claims were not moot because of the possibility that the same complaints might be resurrected at another time on another set of facts. Thus, for example, in *Gateway Bible*, the Manitoba Court of Appeal observed: "The only argument advanced by the applicants is that similar orders could be made at any time. That argument does not satisfy me that there continues to be an issue between the parties" (at para. 29). In *Weisenburger*, the British Columbia Court of Appeal recognized that the appellant's underlying constitutional objections to an existing statute but similarly concluded: "Although the power continues to exist in the statute, it is no longer being exercised in response to the Covid-19 public health emergency. How the power is exercised in response to a different matter is for another case" (at para. 47).[3]

[3] For clarity, the possibility of recurrence returns as a relevant factor in the second prong of the *Borowski* test, discussed below.

2026 NSSC 21 (CanLII)

[22] The same concerns arise with equal force here. In my view, the issues are moot for the following reasons:

1. The main controversy between the parties has been resolved by the evolution of circumstances. The fact is that the Impugned Order has not been in effect since May 2023 and any lingering practical effect on either of the Applicants ended as early as July 2022. J.M., a minor child, is no longer confronted by the alleged coercive vaccine mandate and no longer faces the attendant social constraints he challenged. Indeed, in his written submissions, J.M. candidly acknowledged that "The [Impugned Orders] impacting the Minor Applicant have since been lifted and as a result of this intervening act, no longer directly impact him" (J.M.'s Original Brief at para. 5). CANS' organization was born of a desire to collectively challenge the legitimacy of the Impugned Order but, again, that order has been lifted and no longer has any practical legal impact on their organization's operations or the daily lives of anyone.
2. In my view, the timing of any future pandemic, the nature or physical characteristics of the contagion, and its impact on the population at large is highly speculative. Any potential governmental response would be equally hypothetical and dependent on assumptions around the relevant variables which would inform an appropriate response including, the nature and impact of the virus; the current state of medical knowledge/technology to combat the disease; and epidemiological research around containing the disease. The exercise is almost entirely academic and lacks the existing, real-world connections to have any meaningful factual existence or legal utility.

[23] Before leaving this preliminary issue, I am compelled to address the decision of *Nassichuk-Dean v. University of Lethbridge*, 2022 ABKB 629 ("***Nasshichuk-Dean***") relied upon by the Applicants here. In *Nassichuk-Dean*, the applicant was a University student from 2019 to 2021. Following the COVID-19 pandemic, the University moved primarily to online instruction; imposed a mandatory COVID-19 vaccination policy for campus access; and then denied Ms. Nassichuk-Dean's request for an exemption to take an intended course in person.

2026 NSSC 21 (CanLII)

She sought declarations that the policy violated the applicant's right to life, liberty, and security under s. 7 of the *Charter*.

[24] By the time the dispute reached a hearing, the impugned policy rescinded in March 2022. Nevertheless, the Court concluded that the matter was not moot, relying primarily on the Alberta Court of Appeal's decision in *Trang v. Alberta (Edmonton Remand Centre)*, 2005 ABCA 66, leave to appeal to SCC refused, [2005] 2 S.C.R. vii (note) ("**Trang #1**"). The Court in *Nassichuk-Dean* interpreted *Trang #1* as authority for the proposition that "… whether or not the applying parties' *Charter* rights were breached while they were detained remained a live controversy: *Trang* #1, at para 5. The proceedings were therefore not moot" (*Nassichuk-Dean*, at para. 14). The Court went on to conclude at para. 16 that: "… the issue as to whether Ms. Nassichuk-Dean's rights were violated remains a live controversy between the parties. The application is not, therefore, moot."

[25] The Applicants' submissions in this proceeding did not examine subsequent appellate decisions which considered *Trang #1* and, in particular, sought to correct a misconception around the doctrine of mootness that had arisen as a result of *Trang #1*. In my view, that additional level of analysis is instructive.

[26] In *Trang #1*, a number of incarcerated persons filed applications for *habeas corpus* regarding a variety of complaints ranging from the availability of entertainment to how they were being transported to and from judicial proceedings. The Chambers Judge declared certain aspects of the transportation complainant breached the applicants' s. 7 *Charter* rights. The Crown appealed and, in a preliminary motion, asked the Alberta Court of Appeal to dismiss the entire proceeding as moot. The Court of Appeal found that the issues were not moot, but its reasons were brief (six paragraphs) and conclusory. Costigan, J.A. wrote: "There is clearly a live controversy between the parties as to whether or not the respondents' charter rights were breached while they were incarcerated. An action for a declaration may proceed in the absence of a claim for any other remedy" (at para. 5).

[27] At the subsequent, ultimate appeal, the Crown again raised the issue of mootness (*Trang v. Alberta (Director, Edmonton Remand Centre)*, 2007 ABCA 263 and referred to herein as "***Trang #2***"). The Alberta Court of Appeal concluded at para. 12 that "… generally a judicial determination that an action is alive should prevail unless there is a change of circumstances. There being no such change of circumstances, the issue of mootness should not be re-opened at this time."

2026 NSSC 21 (CanLII)

[28] Interestingly, however, even though the Court of Appeal rejected the Crown's attempt to re-animate the mootness argument, it ultimately allowed the appeal and overturned the declaratory relief for reasons closely aligned to the policy rationales underlying mootness. The Court commented that declaratory relief will not be granted where the dispute is academic or where the declaration would have no practical effect on resolving the parties' rights. Although declarations may theoretically be issued without practical consequences, the Court emphasized that this is rare because courts should resolve concrete injuries, conserve limited judicial resources, avoid abstract and context-free rulings, and refrain from intruding into the roles of the executive and legislature. Accordingly, declarations lacking practical utility are seldom granted (at paras. 15 – 16). The Court granted the Crown's appeal and concluded that the declaratory relief must be overturned as inappropriate, unsuitable, and having no practical utility.

[29] More importantly, the Alberta Court of Appeal subsequently clarified *Trang #1* and, in doing so, not only corrected a misconception that had arisen around *Trang #1* and reiterated the overlap that can arise between the mootness analysis and the unavailability of declaratory relief where it would serve no useful purpose in resolving a live dispute.

[30] A brief summary of the facts in *CM* are relevant because this case also involved a challenge of a COVID-19 public health order, as indicated.

[31] In *CM*, Alberta's Chief Medical Officer of Health issued an order ending the COVID-19 mask mandate for K–12 students. The Education Minister issued a statement saying school boards could not impose mask mandates. The applicants, being children with disabilities and complex medical needs, challenged the legality and constitutionality of the order and statement, alleging violations of ss. 7 (life, liberty and security of person) and 15 (equality) of the *Charter*.

[32] The Chambers Judge declared the impugned order unreasonable and improperly implemented cabinet's decision, and found the Education Minister's statement had no legal effect. However, he dismissed the *Charter* claims due to lack of evidence of harm.

[33] By the time of appeal, the impugned order and the Minister's statement had been rescinded, and all masking requirements ended. Nevertheless, on appeal, the affected children sought declarations of unconstitutionality.

2026 NSSC 21 (CanLII)

[34] As indicated, the Court of Appeal took the opportunity to clarify *Trang #1* and emphasized that a request for declaratory relief does not, by itself, avoid mootness. It wrote at paras. 26 - 27:

> … A declaration "may not be granted where the dispute has become academic, or will have no practical effect in resolving any remaining issues between the parties": [Trang #2] at para 15. The Supreme Court in Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12 at para 11 confirmed that a "declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties".
>
> These authorities address the misconception that [Trang #1] means a request for declaratory relief is in and of itself sufficient to avoid issues of mootness. Whether a case creates a live controversy depends on the application of the test from Borowski. If a declaration resolves a live controversy it can be granted, and the case is not moot: The Alberta Teachers' Association v Buffalo Trail Public Schools Regional Division No 28, 2022 ABCA 13 at para 12. If a declaration would not resolve a live controversy, it cannot be granted, and the case is moot."

[35] In *Kassian*, the British Columbia Court of Appeal reached a similar conclusion downplaying the impact of *Trang #1*. It wrote at para. 31: "In my view, [*Trang #1*] and *Schlenker* merely demonstrate that a proceeding that seeks only declaratory relief is not necessarily moot." Similarly, in *Borowski*, Sopinka, J. observed at para. 27 that simply identifying a constitutional question does not elevate an otherwise moot claim into a dispute that demands a judicial answer.

[36] Applying those principles to the facts in *CM*, the Court concluded that the appeal was moot. The impugned order and the Minister's Statement had been rescinded and declared *ultra vires*. They therefore had no ongoing legal existence or effect, rendering a resolution of the constitutional questions purely academic with no practical utility for the parties. These same types of concerns arise here and the decision in *CM* obviously has greater precedential weight than *Nassichuck-Dean.*

THE COURT'S RESIDUAL DISCRETION IS NOT ENGAGED

[37] If the claims are moot, *Borowski* recognized a residual discretion to hear the case in any event. The Court exercises that discretion by weighing and balancing the following factors, described in *C.S.J.L.M. v. Nova Scotia (Community Services)*, 2019 NSCA 59 as "the rationales behind the doctrine of mootness":

1. The necessity for an adversarial context;

2026 NSSC 21 (CanLII)

2. Judicial economy or the importance of conserving scarce judicial resources; and
3. Sensitivity to the Court's proper adjudicative role.

Adversarial context

[38] This factor considers:

1. Whether the parties continue to have a real stake in the outcome and have both the capacity and opportunity to ensure the dispute will be fully and properly argued. This factor examines the moving party's capacity and resources to prosecute an otherwise moot case. In *Kassian*, the British Columbia Court of Appeal wrote at para. 39: "If one party does not have the resources or inclination to make full argument, the Court may be left with an incomplete picture, or may be forced to expend its own resources to research the law."
2. Whether the party advancing the claims legitimately asserts an existing, practical interest in an identifiable "collateral consequence". At para. 20 of *Borowski*, Sopinka, J. offered an example of a "collateral consequence": a dispute had arisen involving a restaurant and liquor license but the restaurant which had been denied the license was subsequently closed. As such, the remedy sought (*mandamus*) was no longer available. Despite that, there were other outstanding prosecutions against the same applicant and involved the same challenged by-law. "Determination of the validity of this by-law was a collateral consequence which provide the appellant with a necessary interest…" (at para. 31). Thus, in *Grandel* and somewhat similar to Sopinka, J's example in *Borowski*, the appellants already had personal standing regarding the public health orders under which they were charged, meaning the strongest possible factual matrix was already before the Court (at para. 43).

[39] The Applicant CANS refers to cases such as *Kassam v. Canada (Minister of Citizenship and Immigration* (1997), 138 F.T.R. 60 (FC – Trial Division) and Jerome, A.C.J.'s comment at para. 10 that an adversarial context was "present

2026 NSSC 21 (CanLII)

based on the fact that the matter was argued with great tenacity by the parties at the hearing." The Applicant CANS submits that:

> … the adversarial context has been demonstrated by the "great tenacity" with which we have advanced our cause of action and through these efforts we have, "established that an adversarial context continues to exist and have built a record upon which meaningful judicial review of the decision " as outlined in *Kassam* and we humbly say that in this matter as in Doucet-Boudreau, 'the appropriate adversarial context persists. The litigants have continued to argue their respective sides vigorously.'"
>
> (CANS' Original Brief at para. 30)

2026 NSSC 21 (CanLII)

[40] There is no doubt that the Applicant CANS is fully committed to the claims it makes against the CMOH and the Impugned Order. There is also no doubt that CANS is resolute in its determination to litigate these claims. The same cannot be said for the Applicant, J.M., who whose engagement has been minimal and effectively limited to expressions of support for CANS. Indeed, J.M.'s written submissions reference adversarial context as a relevant consideration but offers no substantive comment on how it might apply in this case.

[41] Of greater concern is that the presence of an adversarial context is not simply a question of doggedness or tenacity or proven devotion to a cause. It also measures capacity to effectively litigate the legal issues. This is particularly important in matters that are otherwise moot because a party seeks, on an exceptional basis, judicial assistance in resolving important legal matters that do not otherwise constitute a live dispute.

[42] In this case, respectfully, I have concerns. In *Kassam*, *Kassian, Taylor*, *Gateway Bible*, and *CCLA v. Nova Scotia* (i.e. cases where the Court's residual discretion was engaged, the applicants were all sophisticated litigants represented by counsel. By contrast, in this case, CANS terminated its retainer with legal counsel and elected to self-represent. Moreover, while the co-Applicant, J.M., is represented by legal counsel, his role to date has been almost entirely supportive in nature with submissions that slipstream behind CANS without additional, meaningful additional input.

[43] I must pause here to address a concern expressed by CANS's representative on this issue regarding access to justice and whether only litigants who can afford lawyers are granted entry into the temple of justice.

[44] In 2013, the Action Committee on Access to Justice in Civil and Family Matters chaired by Justice Thomas Cromwell of the Supreme Court of Canada

published a report entitled "Access to Civil & Family Justice. A Roadmap for Change". The report began:

> There is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform.
>
> (at p. 1)

2026 NSSC 21 (CanLII)

[45] The problems around access to justice have not disappeared. However, in this case, the CANS and J.M. seek to animate and pursue an otherwise moot case. This is not a situation where a party with an existing cause of action and live dispute is being denied justice because they cannot afford a lawyer. CANS and J.M. seek to litigate claims that are complex and moot. Moreover, the pandemic did not expose problems that CANS was created to confront. Rather, CANS is dedicated to holding responsible persons (i.e. the CMOH) personally accountable for perceived injustices that arose during the pandemic. In other words, to the extent CANS has been wronged, it is because CANS was specifically created to confront alleged wrongs that had occurred. In these much narrower circumstances, an expectation around the capacity (not merely the interest and energy) to litigate justifiably arises.

[46] It is not necessary to detail all the issues which arise in this case regarding capacity. Some of the concerns were identified in an earlier decision in which CANS was denied public interest standing (2024 NSSC 253 at paras. 67 – 70).

[47] In the context of this matter, further issues arose:

1. Problems arose at the hearing regarding affidavit evidence;
2. CANS was also compelled to withdraw its request for an order of Prohibition preventing the Respondents from instituting anything but a voluntary immunization program at any time – acknowledging a significant overreach in respect of matters that were clearly contingent on an indeterminate factual context unfolding in the indeterminate future;

3. Issues around technical expertise are apparent in CANS' submissions. For example, the Applicant relied upon *Kassam*, as indicated, but cited it only as "(1997) FC" (CANS' Original Brief at para. 30). Similarly, CANS relied on a decision cited only as "2024 FC 42" without reference to its style of cause (*Canadian Frontline Nurses v. Canada (Attorney General)*).

[48] There are other issues. The Applicants' Notice for Judicial Review was amended on two occasions and yet still admits of some ambiguity and potential confusion. For example, the Notice describes the Impugned Order as *ultra vires* but also alleges that it breached "Charter values" without referencing which particular *Charter* rights were engaged and informed the unidentified values. This level of ambiguity is particularly problematic in assessing the claims being advanced by J.M., a minor child.

[49] For emphasis, I express appreciation for CANS' demeanour in Court and approach. CANS and its members were consistently and decidedly courteous. They apologized for, and faithfully attempted to remedy, any identified mistakes that arose. I never doubted their continuing respectful engagement with the Court. CANS is self-represented and so the issues that arose are perhaps foreseeable.

[50] The difficulty is that the issues CANS seeks to raise and the evidence it seeks to muster (including an intensive autopsy of all decisions made by the CMOH during the course of the pandemic) require a degree of legal expertise and capacity that I respectfully find is lacking – particularly where:

1. They seek to strip the CMOH of any entitlement to statutory immunity as a prelude to further action in which they intend to hold that individual personally liability for actions taken during the pandemic; and
2. Unlike *Taylor*, for example, CANS was denied public interest standing.

2026 NSSC 21 (CanLII)

Judicial economy

[51] At para. 38 of *Kassian* and para. 19 of *Tatlock*, the British Columbia Court of Appeal both referred back to the appellate decision in *Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild*, 2023 BCCA 77. In that decision, Butler, J.A. summarized the considerations that may arise under this second *Borowski* factor:

> The second Borowski factor of concern for judicial economy will be addressed if "the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it" (*Mapara v. Ferndale Institution*, 2014 BCCA 49 at para. 34), including where:
>
> > a) the court's decision will have some practical effect on the rights of the parties even without the effect of determining the controversy that gave rise to the action;
> >
> > b) the appeal raises an issue of a recurring nature but of necessarily brief duration that might otherwise evade review; or
> >
> > c) the appeal raises an issue of public importance where a resolution is in the public interest.
> >
> > (See also *Weisenburger* at para. 56 and *CM* at para. 36 - 37)

[52] All of the COVID-19 appellate decisions referenced above where the otherwise moot claims were allowed to proceed are distinguishable in important respects.

[53] The underlying facts and claims were more focussed and included distinct, identifiable issues of legal importance that were much narrower than the broad, restrictions that vaccine mandates and related public health orders imposed in a more general fashion on upon the public at large:

1. In *Gateway Bible*, the impugned PHOs were issued between November 11, 2020 and January 8, 2021. They prohibited outdoor gatherings over five people, restricted indoor gatherings at places of worship, and required most worship services to close, save for narrow exceptions. On the issue of judicial economy, the Manitoba Court of Appeal observed that these issues satisfied the *Borowski* requirement for "special circumstances" (at para. 31);

2026 NSSC 21 (CanLII)

2. In *Taylor*, the CMOH imposed a strict travel ban into Newfoundland and Labrador in May 2020. Non resident Kimberley Taylor was twice denied entry while trying to attend her mother's funeral, later granted exemption, and ultimately challenged the restriction's constitutionality once it had ended. The case raised specific issues around the scope and nature of mobility rights under the *Charter* that were both unique to the applicant and of public importance. Similar concerns arose in *Kassian* where the questions included issues around s. 7 of the *Charter* and "a right to roam in public spaces" (at para. 42);
3. In *CCLA v. Nova Scotia*, the case raised fundamental questions around about the proper test for injunctions, the scope of judicial discretion, and the obligations of government on *ex parte* applications. These were issues, Bryson, J.A. determined, were "important from both public and private law perspectives" (para. 23).

[54] Respectfully, none of these compelling and focussed special circumstances arise here. The Applicants have not been charged with any breach of the Impugned Order. Having been denied public interesting standing, CANS' claims to private interest standing are grounded primarily in restrictions on its ability to meet as a group. J.M.'s private interest standing relates primarily to his ability, as a minor child, to participate in sports and other social activities – and related concerns regarding his parents' ability to make medical (i.e. vaccine decisions) on his behalf. Yet, the Applicants seek to embark on a much more ambitious and wide-ranging inquiry into virtually everything the CMOH decided during the pandemic and the alleged damage inflicted on Nova Scotians – without the more proportionate factual and doctrinal focus found in the cases listed above.

[55] Not insignificantly, if the Applicants prevail, they candidly confirm that this proceeding will serve as a prelude for further litigation, holding the CMOH personally liable for his actions. This weighs heavily on the issue of judicial economy as the Court is being asked to not only permit one moot matter to proceed which, if successful, gives rise to a further claim against the current CMOH and involves bad faith allegations which are necessarily personalized and specific to the actions and decisions of that CMOH during that pandemic but not his successors.

2026 NSSC 21 (CanLII)

[56] In my respectful view, continuing this proceeding under these circumstances do not accord with the demands of judicial economy. The issues are not evasive of review as the robust jurisprudence attests. In addition, the questions being raised are more properly and fairly addressed having regard to the relevant context which may exist in the future. To embark on this inquiry at this time involves disputes that are more academic than actual and concerns that are more hypothetical than real.

[57] In my view, these findings are consistent with the problems articulated in other cases where the Court refused to exercise its residual discretion:

1. In *CM*, Alberta ended its mask mandate for elementary schools and high schools. The Education Minister said school boards could not impose their own. Children with disabilities challenged both actions as unconstitutional. The Chambers Judge found the CMOH order unreasonable and the Minister's statement legally ineffective but dismissed *Charter* claims for lack of harm. The applicants appealed. However, by the time of the appeal, the impugned measures were rescinded. Nevertheless, the applicants insisted on proceeding with their requests for declarations of unconstitutionality. Although the claims were more narrowly focussed than the case at bar, the Alberta Court of Appeal dismissed the appeal as moot. On the issue of judicial economy, "[t]he resolution of this dispute would have no practical effect on the rights of the parties…" and that future judicial assessments "ought to occur within the factual matrix in which the regulation is ultimately impugned" (at para. 50). I find the same is the case here.

2. In *Tatlock*, the Provincial Health Officer (PHO) issued public health orders under the *Public Health Act* during the COVID-19 pandemic, continuing vaccination requirements for healthcare workers. The appellants (Tatlock petitioners) lost their jobs because they were unvaccinated for religious or personal reasons. Some worked in remote or administrative roles without patient contact. By the time the matters were heard, the impugned orders were rescinded, and the emergency powers were ended. The British Columbia Court of

2026 NSSC 21 (CanLII)

Appeal cited the existing caselaw and determined that "[i]t is far from clear that the Orders (or their hypothetical future counterparts) are of a brief but recurrent nature that renders them evasive of timely merits review" (at para. 27). Moreover, the Court resisted attempts to determine the sort of broad issues raised without additional factual and legal focus. On the contrary, the Court concluded at para. 35:

> … the analysis required to decide the broad constitutional and administrative law issues raised by the appellants would be so case-specific that it would be of very limited legal or practical significance beyond the current context. The Court's decision would be largely dependent upon the factual matrix that was before the PHO at the time she made the Orders, with the public health emergency that grounded them no longer in existence … While the analysis is within the context of a well-established legal framework, the question whether a given administrative action represents a proportionate reconciliation between Charter rights and a decision-maker's statutory mandate is inherently case-specific. This is especially so in the context of public health, where courts should be wary of re-weighing scientific evidence and acting as "armchair epidemiologist[s]".

In my respectful view, these comments apply with equal force here.

3. In *Grandel*, the CMOH issued public health orders restricting the ability of persons to gather outdoors. These restrictions again evolved over time, including a 30 person gathering limit from June to December 2020 and a subsequent 10 person limit from December 17, 2020 to May 30, 2021. Certain protestors charged with breaching the 10-person limit challenged the public health order. It was acknowledged that they had a personal interest in (and standing to challenge) the tickets issues for breach of the 10-person limit. However, they also sought to challenge the earlier public health order creating a 30-person limit on outdoor gatherings. And they sought a declaration that all outdoor gathering restrictions were unconstitutional under s. 2 (expression, assembly, and association). The Saskatchewan Court of Appeal determined that judicial economy weighed strongly against expanding the case to include a

2026 NSSC 21 (CanLII)

challenge of the 30-person restrictions. The Court stressed that adjudicating expired restrictions would divert scarce judicial resources. The applicants already had standing to defend their personal interests and challenge the public health order restricting outdoor gathering to no more than 10 people. The Court could not see that the applicants had any remaining interest in contesting expired public health orders that they did not breach and concluded that the matter was not "of sufficient importance to justify the consumption of scarce judicial resources" (at para. 42).

4. In *Beaudoin*, the dispute again related to outdoor gatherings. On the issue of judicial economy, the British Columbia Court of Appeal wrote at para. 173: "… the nature and complexity of the pandemic continues to change and, in my view, it would be unwise to make broad constitutional pronouncements in a factual vacuum and in the face of an uncertain future." Again, in my view, the same concerns arise here – particularly given the much broader inquiry and declaratory relief being sought.

The Court's Judicative Role

[58] The democratic boundaries which constrain the judicative function and divide the Court from the legislature also weighs against the Applicants, in my view. In the circumstances, the allegations in the pleadings and the allegations that the CMOH's actions were *ultra vires* appear more in the nature of a public inquiry or reference than an attempt to address a private wrong. And that what is being asked of the Court is more akin to a request for an advisory opinion – including the attempt to strip the CMOH of immunity as a precursor to further litigation. It also unduly risks intruding on the legislative function and its ability to respond to future pandemics having regard to the facts on the ground at that time.

[59] These reasons should not be seen as undervaluing the issues raised by CANS or J.M. – or rejecting them as unimportant. They should also not be interpreted as a casual dismissal of the profound sense of injustice that CANS and J.M. may associate with the Impugned Order. At the same time, *Borowski* also call for

2026 NSSC 21 (CanLII)

judicial humility in recognizing and respecting the legislature and preserving its authority to act in moments of crisis.

CONCLUSION

[60] The Application is dismissed.

[61] Although the Respondents were successful, I would not make any order as to costs. The issues and underlying circumstances were sufficiently novel as to require all parties to bear their own costs, in the circumstances. I also have concerns around delay and unnecessary costs related to the issues identified in paras. 14 - 17 above regarding *Taylor* which may be attributed to the Respondents but cannot be reasonably laid at the Applicants' feet.

Keith, J.

2026 NSSC 21 (CanLII)