Court of King's Bench of Alberta

Citation: CM v Alberta, 2022 ABKB 716

Date: 20221026
Docket: 2203 04046
Registry: Edmonton

Between:

C.M., Litigation Guardian for A.B., S.A., Litigation Guardian for F.S., C.H., Litigation Guardian for G.H., A.B., Litigation Guardian for J.K., R.L., Litigation Guardian for L.M. and Alberta Federation of Labour

Applicants

- and -

His Majesty the King in Right of Alberta

Respondent

Decision
of the
Honourable Justice G.S. Dunlop

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1. Overview

[1] The applicants are children whose parents have been told their children are at heightened risk of severe outcomes if they contract COVID, and the Alberta Federation of Labour. The children's parents are their representatives in this action. The applicants challenge CMOH Order 08-2022 (the Order) by the Chief Medical Officer of Health, Dr. Deena Hinshaw and a statement

by the Minister of Education, Adriana LaGrange (Minister LaGrange's Statement). Both the Order and Minister LaGrange's Statement deal with masking in schools:

- the Order rescinds a previous order requiring masking in schools for grades 4 through 12; and
- Minister LaGrange's Statement asserts that school boards may not impose masking requirements for students.

[2] The applicants submit that the Order was *ultra vires*, made for improper purposes, and unreasonable. The applicants also argue that both the Order and Minister LaGrange's Statement violate sections 7 and 15 of the *Charter.*

[3] CMOH Order 08-2022 is no longer in force. It was initially rescinded and replaced by another order. On June 30, 2022 Dr. Hinshaw rescinded all remaining public health orders.

[4] There is no evidence before me that the Minister of Education has retracted Minister LaGrange's Statement.

[5] The case turns on the reasonableness of CMOH Order 08-2022, the legal effect of Minister LaGrange's Statement, and whether the applicants have proven facts to support their *Charter* claims.

[6] I find that, while the Order was issued by the Chief Medical Officer of Health, that order merely implemented a decision of a committee of cabinet, rather than being the Chief Medical Officer's own decision. The *Public Health Act*, RSA 2000, c P-37 requires that decisions regarding public health orders be made by the Chief Medical Officer of Health, or an authorized delegate. I further find that the Order was based on an unreasonable interpretation of the *Public Health Act*: that the *Act* left final authority for public health orders to elected officials. Consequently, the Order was unreasonable.

[7] I also find that, while Minister LaGrange's Statement on its face appears to prohibit school boards from imposing mask mandates, it does not do so, because the Minister can only do that through a regulation, and the statement was not a regulation.

[8] Lastly, the applicants have failed to prove a *Charter* breach because the evidence before me does not establish that the applicant children, or any other children, are at increased risk of severe outcomes or complications from COVID.

[9] Because the Order has been rescinded and Minister LaGrange's Statement had no legal effect, the appropriate remedy is a declaration that CMOH Order 08-2022 is unreasonable and that Minister LaGrange's Statement did not prohibit school boards from imposing mask mandates.

2. Definitions

[10] In these reasons I refer to the respondent, His Majesty the King in Right of Alberta, as the **Crown**.

[11] Some of the defined terms I used in previous decisions in this action have become confusing as the parties' positions became clearer. I previously referred to the statement by the Minister of Education as the Prohibition, but counsel for the Crown described it as "guidance" in their written submission filed August 12, 2022. Furthermore, in oral submissions on August 18,

2022, counsel for the Crown submitted that the Minister's statement did not prohibit school boards from imposing their own mask mandates. For greater clarity, in these reasons I refer to the February 8, 2022 statement by the Minister of Education as **Minister LaGrange's Statement**.

[12] Similarly, in previous decisions I referred to CMOH Order 08-2022 as the Decision, but counsel for the Crown draws a distinction between a policy decision and the implementation of that decision. The question of who made the decision, as distinct from the order, has become central. To avoid confusion, in these reasons I refer to CMOH Order 08-2022 as the **Order**.

[13] I will also use the following definitions:

Applicants	all of the applicants
Children	the individual applicants
Parents	the Children's parents, who are their litigation representatives
Dr. Hinshaw	Deena Hinshaw, MD, Chief Medical Officer of Health
Minister LaGrange	the Honourable Adriana LaGrange, Minister of Education
Minister Shandro	the Honourable Tyler Shandro, KC, Minister of Justice and Solicitor General for Alberta, Deputy House Leader and Member of Executive Council
PICC	Priorities Implementation Cabinet Committee
Initial Record	Dr. Hinshaw's Certified Record of Proceedings filed April 14, 2022
Amended Record	Dr. Hinshaw's Amended Certified Record of Proceedings filed June 1, 2022
Second Amended Record	Dr. Hinshaw's Amended Amended Certified Record of Proceedings filed July 12, 2022

3. Evidence

[14] The material filed on this application consists of three certified records of proceedings, an *Evidence Act* certificate, twelve affidavits, three transcripts of questioning on affidavit and two sets of undertaking responses. The parties disagree about the evidentiary value of some of this material.

[15] I addressed some of the evidentiary issues in my May 19, 2022 reasons: ***CM v Alberta*** 2022 ABQB 357. Specifically:

- I postponed deciding whether to admit portions of the Applicants' affidavits that the Crown submits are inadmissible hearsay and opinion, leaving that decision to these reasons.

- I declined to admit into evidence in this action an affidavit sworn by Dr. Hinshaw on July 12, 2021 in another action, and which is attached as an exhibit to Gil McGowan's affidavit, filed by the Applicants in this action.

- I provisionally accepted into evidence portions of Mr. McGowan's affidavit and the Parents' affidavits containing information about COVID-19 available to Dr. Hinshaw before she issued the Order, subject to reconsideration in these reasons.

- I admitted into evidence Mr. McGowan's evidence regarding Minister LaGrange's Statement.

- I declined to admit into evidence in this action an Originating Application in another action.

- I declined to admit into evidence the portions of the Parents' affidavits which set out conclusions and argument.

[16] The parties raise the following evidentiary issues:

- The admissibility of hearsay and opinion in the Applicants' affidavits.

- The admissibility of information about COVID-19 set out in the Applicants' affidavits, with respect to judicial review of the Order.

- The admissibility of Dr. Daniel K Benjamin's affidavit, the transcript of his questioning, and his responses to undertakings.

- The admissibility of Dr. Hinshaw's records of proceedings, with respect to the *Charter* issues

[17] I raised another evidentiary issue myself: whether the contents of webpages hyperlinked in the material before me should be admitted into evidence.

3.1 Hearsay and Opinion in the Applicants' Affidavits

[18] Five Children are Applicants. Each Child is represented in this litigation by a Parent. Four of the Parents filed affidavits. Each of the Parents' affidavits includes either what the Parent was told by their Child's treating physicians regarding their Child's vulnerability to COVID-19, or the Parent's understanding of their Child's vulnerability, without reference to advice from a physician. The Crown argues this is inadmissible hearsay. The Applicants respond that it is not tendered for its truth, but as evidence of each Parent's understanding regarding their Child's vulnerability to COVID-19.

[19] I find that the Parents' understanding on this point is relevant to the *Charter* aspects of this action and admissible on that basis. The Children's physicians' advice is not admissible for its truth because those physicians have not provided affidavits and consequently the Crown had no opportunity to question them on their qualifications and their opinions. The Parents' understanding, where is it not attributed to a physician, is expert opinion evidence from a person who is not qualified to provide expert opinion evidence.

[20] Consequently, there is no evidence before me that any of the Children are at heightened risk of severe complications should they contract COVID-19, although there is evidence that their Parents understand that to be the case.

3.2 Information about COVID-19 in the Applicants' affidavits

[21] Dr. Hinshaw's Initial Record filed April 14, 2022, attaches two documents: her Record of Decision – CMOH Order 08-2022 and Minister Shandro's *Evidence Act* certificate. The Initial Record and the attachments total 19 pages.

[22] Dr. Hinshaw's Amended Record, filed June 1, 2022, is 183 pages long. It attaches Minister Shandro's *Evidence Act* certificate and twelve other documents which the Amended Record describes as:

As of January 31, 2022	Jurisdictional scan of masking requirements in other Canadian provinces and territories as well as other countries
February 2022	Guidance for Schools (K-12) and School Buses
January 10, 2022	CMOH Order 02-2022
February 2, 2022	CMOH Order 04-2022
February 7, 2022	Alberta COVID-19 Immunization Program Report (Information as of February 7, 2022
February 7, 2022	Memo from Premier's Office Staff to Premier Kenney Re: Student Masking in School. Copy provided to Dr. Hinshaw
February 7, 2022	COVID-19 – COVID and Schools
February 7, 2022	Email from Scott Fullmer to Dr. Hinshaw and others Re: School Masking Evidence Summary
February 8, 2022	COVID-19 Situation Update – Epidemiology and Surveillance
February 8, 2022	Documents from Alberta Health Internal Dashboard – COVID-19 in Alberta, Analytics and Performance Reporting Branch, Epidemiology and Surveillance Unit.
March 2, 2022	Briefing Note – Advice to Honourable Jason Copping, Minister of Health – COVID-19 Measures in Schools – for information (plus attachments – COVID-19 Measures in Schools Alberta Data and COVID-19 Measures in Schools Literature).
May 31, 2022	Appendix 1 – summarizing context of COVID-19 and evidence relevant to masking in schools at the time of the decision

[23] In compliance with my July 4, 2022 decision, Dr. Hinshaw's Second Amended Record, filed July 12, 2022, attaches two additional documents which the Second Amended Record describes as:

February 8, 2022	Power-Point presentation to Executive Council with information regarding the ongoing COVID-19 Pandemic.
February 8, 2022	The Official Record of Decision consisting of Cabinet meeting minutes arising from the February 8, 2022 meeting where ongoing public health orders were discussed and considered.

[24] The Second Amended Record is 282 pages long.

[25] The Crown submits that I should not consider the information about COVID-19 in Mr. McGowan's affidavit and some of the Parents' affidavits because of the additional material attached to Dr. Hinshaw's amended records. The Crown argues that the evidence on a judicial review should be limited to the record before the decision maker, in this case Dr. Hinshaw. I disagree for four reasons.

[26] First, r 3.22(d) of the Alberta *Rules of Court*, (coming into effect in 2010) provides that the Court may admit additional evidence. The former *Rules of Court* (Alta Reg 390/1968) did not have a similar provision. The traditional categories of admissible additional evidence on a judicial review were based on the former rules. See ***Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission),*** 2006 ABQB 904, per Slatter J (at para 41). These categories were later summarized in ***Swan River First Nation v. Alberta (Ministry of Agriculture and Forestry),*** 2022 ABQB 194 at para 19:

> Traditionally, new or supplemental evidence on judicial review may be admitted to:
>
> a. address standing;
>
> b. show bias or a reasonable apprehension of bias where the facts in support of the allegation do not appear on the record;
>
> c. demonstrate a breach of the rules of natural justice not apparent on the record;
>
> d. reveal the evidence actually placed before the decision maker where the decision maker provided an inadequate or no record of its proceedings.

[27] Additional categories have been judicially recognized***: Swan River First Nation***, at para 59 ("information that was well-known to the parties 'in content and substance' and therefore should have formed part of the Record in the first instance"; ***Andres v University of Lethbridge***, 2020 ABQB 223 at para 8 ("the content and substance of the documents was before the Committee and thus properly formed part of the Record"); ***Cold Lake First Nation v. Alberta (Tourism, Parks and Recreation),*** 2012 ABQB 579 at para 27 (useful contextual information); ***Bergman v Innisfree (Village),*** 2020 ABQB 661, at para 46, (to provide the necessary background and context to a judicial review application and to a related constitutional argument under the *Charter*).

[28] Second, Dr. Hinshaw's Order was not the product of a hearing at which evidence and argument were presented by two or more parties, as is often the case when a decision-maker makes a ruling which is then brought before the Court for review. As contemplated by the *Public*

Health Act, the Order was made by Dr. Hinshaw without any formal hearing at which opposing parties could present evidence and argument. Consequently, there is not a discrete and well-defined body of material available to the Court to assess the reasonableness of the Order. See ***Alberta's Free Roaming Horses Society v Alberta***, 2019 ABQB 714 at para 25. In such circumstances, it may be necessary to reconstruct the record: ***Beaudoin v British Columbia***, 2021 BCSC 512 at para 85.

[29] Dr. Hinshaw acknowledges this fact in paragraph 2 of the Second Amended Record:

> The following are parts of the notice to obtain record of proceedings that cannot be fully complied with and the reasons why:

Paragraph 1(b): The reasons given for the decision or act.	No reasons were given because the exercise of the authority to make a CMOH Order is a delegated legislative function given to medical officers of health, which includes the CMOH, under the Public Health Act.
Paragraph 1(c): The document starting the proceeding.	There is no such document. There is no commencement document that initiates a proceeding that results in the issuance of a CMOH Order. There is in fact no proceeding. Rather, section 29(2.1) of the *Public Health Act* sets out the conditions that must exist in order for the medical officer of health (which includes the CMOH) to take further action.
Paragraph 1(d): The evidence and exhibits filed.	None exist because the process does not allow for it. Although Dr. Hinshaw and her staff, along with staff from Health's Emergency Operations Centre, continually monitor and evaluate emerging scientific data regarding COVID-19 in Alberta, across Canada as well as around the globe to help inform policy options for CMOH Orders, evidence and exhibits are not filed with the CMOH as part of the decision-making process.

[30] Third, Dr. Hinshaw acknowledges at the end of paragraph 2 of her Amended Record and Second Amended Record that the attached documents are not a complete collection of the material she reviewed before making the Order:

> As noted, Dr. Hinshaw and her staff, along with staff from Health's Emergency Operations Centre, continually monitor and evaluate emerging scientific data regarding COVID-19 in Alberta, across Canada as well as around the globe to

> help inform policy options for CMOH Orders. It is not possible to reconstruct every record that may have been reviewed prior to the Decision being made. However, Dr. Hinshaw and her staff have made best efforts to identify and provide the documents and information that were most critical and directly relevant to the Decision.

[31] While the additional material included in Dr. Hinshaw's First and Second Amended Records provides additional information about COVID-19 and government responses to it in Alberta, Canada, and the world, there are obvious omissions, like statements by Dr. Hinshaw and other Alberta government representatives, that are included in Mr. McGowan's and the Parent's affidavits, and which Dr. Hinshaw would have been aware of.

[32] Lastly, the issues raised by the Applicants in their Originating Application include whether:

- Dr. Hinshaw or PICC made the decision to issue the Order,
- Dr. Hinshaw subdelegated her decision-making authority to PICC, and
- the Order was made for an improper purpose.

[33] These are issues on which evidence outside the record may be relevant.

[34] In particular, at the February 10, 2022 press conference, Dr. Hinshaw declined to answer questions about removing the school mask mandate and referred reporters to the Minister of Health. This evidence is relevant to the issues of who made the decision and subdelegation, and is set out in Mr. McGowan's affidavit.

[35] Subject to the exclusions set out in my May 2022 reasons, the affidavits of the Parents and Mr. McGowan are admitted into evidence on both the judicial review and the Charter aspects of this action.

3.3 Dr. Benjamin's Evidence

[36] I address the admissibility of Dr. Benjamin's evidence in section 6.2 of these reasons.

3.4 Dr. Hinshaw's Records of Proceedings as Charter evidence

[37] Neither the Second Amended Record nor any of its attachments, is sworn. Most of the attachments do not indicate who authored them and they are rife with unattributed hearsay and opinion.

[38] For example, Appendix 1 does not state who wrote it and includes the following statement:

> **Negative effects of mask-wearing for children (see TAB 6)**
>
> - Masks can disrupt learning and interfere with children's social, emotional, and speech development by impairing verbal and non-verbal communication, emotional signaling and facial recognition.

[39] Tab 6 is a February 7, 2022 memo to Premier Kenney from "Premier's Office Staff". It includes the same statement quoted above from Appendix 1, without attribution. Later in that memo additional statements are made on this point with hyperlinks to webpages.

[40] Because none of the material included in the Second Amended Record is sworn, the Applicants had no opportunity to question on it.

[41] The Applicants submit that the records of proceedings are not admissible with respect to the *Charter* issues, because they are unsworn and mostly hearsay. The Crown submits that they are admissible, relying on ***Beaudoin***. ***Beaudoin*** is distinguishable in at least two respects: first, the *Charter* issues were considered and decided with reasons by the Provincial Health Officer, and second the record was in the form of an affidavit, sworn by the Acting Deputy Provincial Health Officer: ***Beaudoin*** at para 56 and 90.

[42] I agree with the Applicants that the Initial Record, the Amended Record and the Second Amended Record are not admissible on the *Charter* aspects of this case. It would be fundamentally unfair to permit the Crown to rely on evidence which the Applicants had no opportunity to challenge through questioning. This is particularly so with respect to unattributed hearsay and opinion evidence.

[43] All parties agree that the Initial Record, the Amended Record and the Second Amended Record are admissible on the judicial review aspects of this case. I agree, because that is the scheme created by the *Rules of Court* for judicial review.

3.5 Hyperlinks

[44] Both the Applicants, in their affidavits, and the Crown, in the attachments to the First and Second Amended Records, include hyperlinks to webpages. The contents of those webpages are not admissible evidence because they may not be static. A YouTube video available today may change or be deleted tomorrow. The same is true for any webpage. For a document or a recording to be admissible as evidence, at a minimum I must be confident that what I am looking at is what the person who swore the affidavit or Dr. Hinshaw was looking at. Similarly, anyone reviewing the record of this action in the future, including potentially the Court of Appeal, must have the same confidence. That is simply not possible with a hyperlink to the internet.

4. CMOH Order 08-2022

4.1 Standard and Scope of Review

[45] The Supreme Court of Canada in ***Canada (Minister of Citizenship and Immigration) v Vavilov*** 2019 SCC 65 clarified and simplified the law of judicial review, making reasonableness the general standard of review, subject to exceptions.

[46] The Crown submits that the reasonableness standard articulated in ***Vavilov*** does not apply because the Order is a regulation or executive legislation. In support of this the Crown relies on ***Katz v Ontario (Health and Long-Term Care)***, 2013 SCC 64 (at para 24).

[47] The Applicants agree the Order is executive legislation.

[48] I agree that the Order is executive legislation, similar to a regulation, because it is an instrument of binding, general application that sets a norm or code of conduct (see JM Keyes, *Executive Legislation*, 3d ed (Markham: LexisNexis Canada Inc, 2021) (Keyes), at p. 31 citing ***Reference Re Manitoba Language Rights (No 3)***, [1992] 1 SCR 212 at para 20; Keyes at p. 33, citing ***Re Grey*** [1918] 57 SCR 150 at 170; and Keyes at p. 39, citing ***Northwest Territories Teachers' Association v. Northwest Territories (Commissioner)*** [1997] NWTJ No. 56, 153

DLR (4th) 80 (NWT SC) at par 48. Here, the Order was a mandatory order applicable to everyone in Alberta, setting out a code of conduct for dealing with the COVID pandemic.

[49] I also agree that the legislative nature of the Order limits the scope of judicial review, but I do not agree that the standard of review is something other than reasonableness. As the Supreme Court of Canada wrote in ***West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal*** 2018 SCC 22 at para 9:

> Applying this central teaching of ***Dunsmuir***, this Court has adopted a flexible standard of reasonableness in situations where the enabling statute grants a large discretion to the subordinate body to craft appropriate regulations: see ***Catalyst Paper Corp. v. North Cowichan (District),*** 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 13, 18 and 24; ***Green v. Law Society of Manitoba***, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 20.

[50] Furthermore, as the Court of Appeal of Alberta wrote in ***Koebisch v Rocky View (County)***, 2021 ABCA 265, in the context of a challenge to county bylaws (at para 22):

> ***Vavilov*** did not change the applicable judicial review standard; if anything, ***Vavilov*** reinforced the proper application of the reasonableness standard of review: see also ***1120732 BC Ltd v Whistler (Resort Municipality)***, 2020 BCCA 101, para 51; ***1193652 BC Ltd v New Westminster (City)***, 2021 BCCA 176, para 60.

[51] While the standard of review is reasonableness, the fact that the Order is delegated legislation limits the scope of judicial review to constitutionality or *vires*: ***AB v Northwest Territories (Minister of Education, Culture and Employment*** 2021 NWTCA 8 at para. 45. As stated by the Ontario Superior Court of Justice (Divisional Court) in ***Hudson's Bay Company ULC v Ontario (Attorney General)*** 2020 ONSC 8046 at para. 4:

> Absent a *Charter* challenge, the focus of judicial review of a regulation is narrow. It is not the role of the Court to decide whether s. 2(1)(3), Schedule 2, of O.Reg. 82/20 is effective, overly broad or unduly restrictive. These are policy choices made by the Ontario government during extraordinary times. The Court's role is limited to determining whether the provision at issue is authorized by the ROA [*Reopening Ontario (A Flexible Response to COVID-19) Act*], which it clearly is. The purpose of the ROA is to balance public health and safety measures with economic concerns during the current pandemic.

[52] I address the Applicants' *Charter* challenge to the Order in section 6, below.

[53] On the judicial review aspect of this case, I am limited to considering the *vires* of the Order, that is, whether it is authorized by the *Public Health Act*. This process is described by Rothwell, J. in ***Auer v Auer,*** 2021 ABQB 370 at paras 13, 15 and 16:

> A *vires* review while robust is also tempered by the legislative nature of the decision. Counsel will often use the analogy of peeling back the layers of an onion when encouraging a court to consider an issue. In a *vires* judicial review, the peeling occurs with the same care as an adjudicative decision; however, there are generally less layers to peel. Thus, application of the reasonableness standard in the context of a review for *vires* of a delegated legislation is different because there are no formal reasons issued by the administrative authority.

> ...
>
> It is worthy of note that in ***Vavilov*** at para 66, the Supreme Court endorsed ***West Fraser Mills Ltd v British Columbia*** 2018 SCC 22 [***West Fraser Mills***], which involved a *vires* challenge to regulations passed by the Workers Compensation Board, pursuant to the *BC Workers Compensation Act*, RSBC 1996, c 492. Further, the Court endorsed ***Katz Group Canada Inc v Ontario (Health and Long-Term Care)***, 2013 SCC 64, which similarly considered a challenge to regulations promulgated by Ontario's Lieutenant Governor in Council under Ontario's pharmaceutical regulations that were aimed at improving the affordability of generic drugs: ***Vavilov*** at para 111.
>
> In ***Katz Group*** at paras 24-28, the Supreme Court enunciated the following principles regarding a *vires* challenge:
>
> - Regulations are presumed valid.
> - The onus of establishing invalidity rests with the challenger.
> - An interpretative approach that favours validity is favoured when possible.
> - The inquiry does not involve assessing the policy merits of the regulation to determine whether they are "necessary, wise or effective in practice."
> - The motives for promulgation are irrelevant.
> - The regulations must be "irrelevant," "extraneous" or "completely unrelated" to the statutory purpose in order to be struck down.

[54] Some of the Applicants' submissions go to the merits of the Order. I have not considered those submissions because, as set out in ***Katz,*** I must not review the merits of executive legislation.

[55] In ***Green v Law Society of Manitoba***, 2017 SCC 20 the Supreme Court of Canada describes the application of the reasonableness test in the context of executive legislation (at para 20):

> A law society rule will be set aside only if the rule "is one no reasonable body informed by [the relevant] factors could have [enacted]": ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 24. This means "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature": ***Catalyst Paper***, at para. 25; see also ***Katz Group Canada Inc. v. Ontario (Health and Long-Term Care),*** 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 25.

[56] I also note that the Manitoba Court of Queen's Bench applied the reasonableness standard in determining whether public health orders were *ultra vires* in ***Gateway Bible Baptist Church et al v Manitoba et al*** 2021 MBQB 219 at para. 39 and 341.

4.2 *Public Health Act*

[57] The starting point in considering whether the Order complies with the *Public Health Act* is, of course, the *Act* itself.

[58] Part 3 of the *Public Health Act* deals with communicable diseases and public health emergencies. As defined in s. 1(hh.1), a public health emergency includes "an epidemic or pandemic disease ... that poses a significant risk to the public health". The existence of a public health emergency at the time of the Order is not in dispute.

[59] When there is a public health emergency, s. 29(2.1) gives a medical officer of health (which includes the Chief Medical Officer of Health) the same powers as in s. 29(2) dealing with communicable diseases. Section 29(2) reads:

> **(2)** Where the investigation confirms the presence of a communicable disease, the medical officer of health
>
> (a) shall carry out the measures that the medical officer of health is required by this Act and the regulations to carry out, and
>
> (b) may do any or all of the following:
>
> (i) take whatever steps the medical officer of health considers necessary
>
> (A) to suppress the disease in those who may already have been infected with it,
>
> (B) to protect those who have not already been exposed to the disease,
>
> (C) to break the chain of transmission and prevent spread of the disease, and
>
> (D) to remove the source of infection;
>
> (ii) where the medical officer of health determines that a person or class of persons engaging in the following activities could transmit an infectious agent, prohibit the person or class of persons from engaging in the activity by order, for any period and subject to any conditions that the medical officer of health considers appropriate:
>
> (A) attending a school;
>
> (B) engaging in the occupation of the person or the class of persons, subject to subsection (2.01);
>
> (C) having contact with any persons or any class of persons;
>
> (iii) issue written orders for the decontamination or destruction of any bedding, clothing or other articles that have been contaminated or that the medical officer of health reasonably suspects have been contaminated.
>
> (underlining added)

[60] Section 29(2.1) (b) also empowers a medical officer of health to:

> take whatever other steps are, in the medical officer of health's opinion, necessary in order to lessen the impact of the public health emergency.
>
> (underlining added)

[61] Based on the above wording, the clear intention of the *Public Health Act* is that the orders of the Chief Medical Officer of Health be based on **that officer's** judgment. Further support for this interpretation is found in s 13 of the *Public Health Act*, which sets out specific qualifications for a Chief Medical Officer of Health. That person must be a physician with either a certificate, diploma or degree in public health or must have training and practical experience that the Minister considers to be equivalent to a certificate, diploma or degree in public health. The Chief Medical Officer of Health must also be a fellow of the Royal College of Physicians and Surgeons of Canada.

[62] Although not argued before me, I note for the sake of completeness that s 29(5) of the *Public Health Act* permits a medical officer of health issuing a s. 29 order to "incorporate, adopt or declare in force a code, standard, guideline, schedule or body of rules" including one "developed by the Minister". That does not apply here because there is no evidence of any such code, standard, guideline, schedule or body of rules, and because the Order makes no reference to anything being incorporated, adopted or declared in force.

[63] Sections 13 and 57 of the *Public Health Act* permit the Chief Medical Officer of Health to delegate her powers, as follows:

> 13(3) The Chief Medical Officer may in writing delegate to the Deputy Chief Medical Officer any power, duty or function conferred or imposed on the Chief Medical Officer under this Act or the regulations.
>
> 57 The Chief Medical Officer may in writing delegate to an employee of the Department any of the powers, duties and functions conferred or imposed on the Chief Medical Officer by this Act or the regulations.

[64] There are no other references to delegation of authority in the *Public Health Act.*

[65] Other provinces give emergency powers to a minister or involve a minister in the exercise of the powers along with a medical officer. For example, in Saskatchewan s. 45 of the *Public Health Act*, 1994, SS 1994, c P-37.1, grants the Minister the power to direct the closing of public places, restrict travel, prohibit public gatherings, require immunizations, and impose quarantines. Under s 45(2.2) a medical officer of health, with the approval of the Saskatchewan chief medical officer of health, may make the same orders, but only if the medical officer believes there will be insufficient time for the Minister to make an order, and the medical officer's order terminates 48 hours after it is made unless the Minister extends it.

[66] In Manitoba, under s 67 of the *Public Health Act*, CCSM c P210, the Chief Public Health Officer must obtain the Minister's approval before issuing a direction or order related to a suspected epidemic of a communicable disease.

[67] The Applicants submit that Dr. Hinshaw did not exercise her own judgment in making the Order, particularly as it relates to removing the school mask mandate; rather she implemented a decision of PICC. As set out in the following section, the evidence before me supports that conclusion.

4.3 Who Made the Decision?

[68] The Crown frames the removal of the school mask mandate as a policy decision for elected officials whereas the Dr. Hinshaw's Order operationalized that decision. As set out in Appendix 1 to the Amended Record and the Second Amended Record, under the heading "Decision making process":

> This process involved the CMOH providing advice and recommendations to elected official on how to protect the health of Albertans. Those elected officials took that advice as one part of the considerations in the difficult decisions that they had to make in response to COVID-19. The final policy decision-making authority rested with the elected officials, and those policy decisions were then implemented through the legal instrument of CMOH Orders. In making the CMOH Orders, the CMOH determined how to operationalize each policy decision.

[69] In addition to Appendix 1, I have other evidence regarding who made the decision.

[70] First, Dr. Hinshaw's initial record filed on April 14, 2022 referred to only two documents: a Power-Point presentation to cabinet and cabinet minutes (it later became clear the presentation and the minutes were actually to and of a committee of cabinet, PICC). This implies that those two documents, or the information in them, were the foundation for the Order.

[71] Second, The Power-Point presentation includes at least two references to previous directions from PICC:

> page 23:
>
> Previous PICC direction on the following principles has informed the proposed approaches for easing public health measures.
>
> page 25:
>
> Per previous PICC direction, 3-step approaches to easing are proposed, with a focus on removing the Restrictions Exemptions Program and easing youth masking requirements.

[72] These statements in the Power-Point indicate that the options presented were driven by previous directions of PICC.

[73] Third, the Power-Point presentation sets out three options: Option 1 removes all school requirements including masking in Step 1 and Option 2 removes school masking in Step 2, and other school requirements removed in step 3.

[74] The PICC minutes record a decision to direct the Minister of Health to implement Option 2, but vary Option 2 by removing the school mask mandate at Stage 1, specifically at 11:59 pm on February 13, 2022. Dr. Hinshaw's Order does exactly what PICC directed with respect to removing the school mask mandate, including the specific date and time of that removal.

[75] Fourth, at a press conference on January 5, 2022, Dr. Hinshaw said:

> The use of rapid testing and medical masks, in addition to the measures already in place, will help to protect students and staff as they return to the classroom. Given

> the current situation, I also want to note that I strongly recommend that students in all grades wear masks, including in kindergarten to grade 3.

[76] At the press conference on February 10, 2022, when asked what had changed in the last month or so to make masking for children no longer necessary, Dr. Hinshaw answered: "I would defer to Minister Copping to answer that question." The fact that Dr. Hinshaw declined to explain why she was removing the school mask mandate when a month earlier she recommended that students in all grades wear masks, and the fact that she referred questions to the Minister of Health, who is a member of PICC, supports the conclusion that the decision to remove the school mask mandate was PICC's decision, not Dr. Hinshaw's.

[77] Fifth, Dr. Hinshaw signed the Order on February 10, 2022 but she made it retroactive to February 8, 2022, the date of the PICC meeting.

[78] Sixth, there is a subtle but substantial difference in the preamble to the Order (CMOH Order 08-2022), as compared to a previous order which Dr. Hinshaw includes in her Second Amended Record:

> **CMOH Order 02-2022, January 10, 2022**
>
> Whereas having determined that it is possible to modify certain restrictions while still protecting Alberta from exposure to COVID-19 and preventing the spread of COVID-19, I hereby make the following order (the Order):
>
> **CMOH Order 08-2022, February 10, 2022**
>
> Whereas having determined that certain measures are necessary to protect Albertans from exposure to COVID-19 and to prevent the spread of COVID-19, I hereby make the following order.

[79] It is noteworthy the Dr. Hinshaw did not say in the preamble to Order 08-2022 that she had determined that any modification of her previous orders or reduction in restrictions was necessary or possible, which she did in the preamble to at least one of her previous orders. This implies that she did not make that determination herself.

[80] Finally, there is no evidence that Dr. Hinshaw made the decision, other than the fact that she signed the Order. But, as Dr. Hinshaw makes clear in Appendix 1 to her Second Amended Record, in signing the order, she was implementing policy decisions of elected officials.

[81] Based on the minutes, it appears that Dr. Hinshaw was present at the February 8, 2022 meeting of PICC, but the minutes do not disclose what anyone said at the meeting. The Crown submits that Dr. Hinshaw discussed, consulted, and collaborated with PICC, but there is no evidence before me to support that assertion. Even if consultations occurred and Dr. Hinshaw had input into the decision, it was not her decision. Her Order carried out PICC's decision to the letter. It was Dr. Hinshaw's Order, but not her decision. The evidence establishes, and I find as a fact, that PICC made the decision to remove the school mask mandate and the rest of the Order.

4.4 Reasonableness of Dr. Hinshaw's Interpretation of the *Public Health Act*

[82] Dr. Hinshaw states in Appendix 1 to the Second Amended Record:

> The final policy decision-making authority rested with the elected officials, and those policy decisions were then implemented through the legal instrument of CMOH Orders.

[83] The question for me is not whether that is a correct interpretation of the *Public Health Act*, but whether it is a reasonable interpretation. The issue is framed by the Supreme Court of Canada in ***West Fraser*** at para 10:

> The question before us is whether s. 26.2(1) of the Regulation represents a reasonable exercise of the Board's delegated regulatory authority. Is s. 26.2(1) of the Regulation within the ambit of s. 225 of the Act? Section 225 of the Act is very broad. Section 225(1) empowers the Board to make "regulations *the Board considers necessary or advisable* in relation to occupational health and safety and occupational environment". This makes it clear that the Legislature wanted the Board to decide what was necessary or advisable to achieve the goal of healthy and safe worksites and pass regulations to accomplish just that. The opening words of s. 225(2) — "Without limiting subsection (1)" — confirm that this plenary power is not limited by anything that follows. In short, the Legislature indicated it wanted the Board to enact whatever regulations it deemed necessary to accomplish its goals of workplace health and safety. The delegation of power to the Board could not be broader.
>
> (italics in original; underlining added)

[84] I am mindful of the ***Katz*** principles, including that the Order is presumed to be valid and that I must take a broad and purposive approach to interpreting the Order and the *Public Health Act.* Nevertheless, and with respect, it is simply not reasonable to read s. 29 of the *Public Health Act*, with its repeated references to what the medical officer of health "considers necessary" or "determines", to permit the Chief Medical Officer to make orders at the direction of PICC or any other person or body.

[85] Dr. Hinshaw's interpretation of the *Public Health Act* as leaving final decision-making authority for public health orders with elected officials is contrary to the *Public Health Act* and consequently is unreasonable. The Order was based on that unreasonable interpretation. Because the Order slavishly implemented PICC's decision, I conclude the Order was unreasonable.

4.5 Sub-delegation

[86] The Applicants frame their argument, in part, as improper sub-delegation by Dr. Hinshaw to PICC of the authority of a medical officer to make public health orders during a public health emergency. In response the Crown cites the following statement in JM Keyes, *Executive Legislation* 2d ed (Markham: LexisNexis Canada Inc., 2010) at p. 276:

> Improper subdelegation is a different issue, which does not arise as long as delegates retain decisive involvement in exercising their authority and do not wholly surrender it to some other person or body.

[87] In the Crown's submission the available evidence, including the recitals to the Order, establish that Dr. Hinshaw retained "decisive involvement" during the process leading up to the Order. If "decisive involvement" is the litmus test, it is not met here. As set out in the previous section of these reasons, Dr. Hinshaw was involved at least to the extent of being in attendance, but that involvement was not decisive because the decision was made by PICC.

[88] The *Public Health Act* specifically permits the Chief Medical Officer of Health to delegate her powers in writing to either the Deputy Chief Medical Officer (s. 13) or an employee

of the Department of Health (s. 57). An interpretation of the *Act* as permitting the Chief Medical Officer of Health to delegate her authority to a committee of Cabinet, is not reasonable. There is simply no way to interpret the *Act* as permitting delegation to anyone other than the specifically identified possible delegates. The *Public Health Act* did not authorize Dr. Hinshaw to delegate her powers to PICC.

4.6 Improper or Extraneous Purpose

[89] The Applicants also submit that the Order was made for improper or extraneous purposes, including political considerations such as protests at schools and the blockade at Coutts, Alberta. They argue that those improper purposes can be inferred from the reference to those things in parts of the Second Amended Record, and the absence of any reason to end the school mask mandate at the time of the Order. I disagree.

[90] The Second Amended Record is 282 pages. It includes references to protests at schools and the blockade at Coutts. It also includes detailed information about COVID-19 in Alberta including numbers of cases, hospitalizations and vaccinations and myriad other things that are central to the considerations in s. 29 of the *Public Health Act*. One of the documents is a February 7, 2022 memo to the Premier which includes a section headed "Harmful Effects of Mask Wearing on Children". Based on the extensive record, it is not possible for me to conclude that there was no reason to remove the mask mandate in February 2022, nor is it possible for me to conclude that the Order was made to address the protests and the blockade, and not for other reasons.

4.7 Conclusion on CMOH Order 08-2022

[91] Both a reasonableness analysis as set out in ***Katz*** and ***Green*** and a sub-delegation analysis advanced by the Applicants turn on the interpretation of the governing statute, in this case the *Public Health Act*. Applying a broad and purposive interpretation to both the *Public Health Act* and the Order and starting with the presumption that the Order is valid, the Order was unreasonable because it was the implementation of PICC's judgment and decision, and not that of the Chief Medical Officer of Health. The Order was unreasonable because it was based on an unreasonable interpretation of the *Public Health Act* as giving ultimate decision-making authority over public health orders during a public health emergency to elected officials, specifically PICC.

5. Minister LaGrange's Statement

[92] Counsel for the Crown submits that the Applicants sought only *Charter* relief with respect to Minister LaGrange's Statement, and that consequently the only remedy, if any, I should grant is a declaration based on *Charter* issues. This question was argued on May 17, 2022 and decided in my reasons issued on May 19, 2022: ***CM v Alberta*** 2022 ABQB 357 at para 9 – 17. In summary, the Originating Application includes a claim for a declaration regarding Minister LaGrange's statement at large and not limited to *Charter* relief.

[93] The relevant paragraphs of Minister Lagrange's Statement, dated February 8, 2022 read:

> As I shared in November, I must reiterate that every child in Alberta is entitled to have access to an education program as per Section 3(1) of the *Education Act*; this provision also existed in Section 8 of the previous *School Act*. To be clear, as of

> February 14, 2022 school boards will not be empowered by provincial health order or recommendations from the CMOH to require ECS – grade 12 students to be masked to attend school in person or to ride a school bus. At this time, prevention measures including cohorting, as well as enhanced cleaning and sanitization, will remain in school environments.
>
> As Minister of Education, I take very seriously the responsibility of providing access to education for all students in our province. School authorities cannot deny their students access to in person education due to their personal decision to wear or not to wear a mask in schools. Individual family choices need to be respected and students should not be stigmatized for their choice related to masking going forward, similarly to their personal vaccination status.
>
> (underlining added)

[94] Six months' earlier, at a press conference on August 13, 2021, Minister LaGrange said:

> Throughout the pandemic, we have trusted local school authorities to make decisions that work for their schools and their school communities. School authorities have the ability and the corresponding accountability for any additional local measures they may choose to put in place. This could include physical distancing, cohorting and masking requirements that may exceed provincial guidance."
>
> (underlining added)

[95] During oral argument, I asked counsel for the Crown whether Minister LaGrange's August 13, 2021statement, that school boards could impose mask mandates, was accurate in law at the time and whether that changed after Minister LaGrange's Statement in February 8, 2022. Counsel for the Crown submitted that the statement was accurate in August 2021, and that it did not change after Minister LaGrange's Statement on February 8, 2022, relying on sections 33(1)(d) and 33(2) of the *Education Act*, which state:

> 33(1) A board, as a partner in education, has the responsibility to
>
> …
>
> (d) ensure that each student enrolled in a school operated by the board and each staff member employed by the board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging,
>
> …
>
> (2) A board shall establish, implement and maintain a policy respecting the board's obligation under subsection (1)(d) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour.

[96] The Crown's submissions did not include an explanation why school boards continued to have the authority to impose mask mandates in schools, even after Minister LaGrange's February 8, 2022 Statement. In my view, the answer is in section 51(1) and (2) of the *Education Act:*

> 51(1) A board has the capacity and, subject to this Act and the regulations, the rights, powers and privileges of a natural person.
>
> (2) With respect to any right, power or privilege exercisable by a board, the Minister may, by regulation,
>
> (a) prohibit or restrict the use of the right, power or privilege;
>
> (b) provide that the right, power or privilege is to be exercised subject to any terms or conditions prescribed in the regulations.
>
> (underlining added)

[97] Section 51(2) empowers the Minister of Education to restrict the powers of a school board, but that must be done through a regulation.

[98] The Crown submitted neither evidence nor argument that Minister LaGrange's Statement was a regulation. On its face it was not a regulation. It is not called a regulation and it there is no evidence before me that it was published as the *Regulations Act* requires.

[99] I agree with the Crown's submission that school boards have the authority under the *Education Act* to impose mask mandates and that Minister LaGrange's Statement did not change that. However, the following evidence establishes that many in Alberta, including some school boards and one senior government official, understood that Minister LaGrange had prohibited school boards from imposing mask mandates in schools:

- Minutes of a meeting of the Edmonton Public School Board Trustees on February 15, 2022 which include a resolution to "advocate to the Minister of Education to allow school boards, working with Alberta Health Services, the autonomy to put measures and resources, such as masking, in place based on our local context".
- A February 11, 2022 email from a school district to CH stating "As indicated in a recent letter from the Minister of Education. According to the province, school boards will not have the authority to require students to be masked while attending school or riding a school bus."
- A February 15, 2022 email from the same school district to CH stating "The guidelines created by the Government of Alberta state that masking during the school day remains a personal health choice for students and their parents/guardians."
- The evidence of Susan Novak, in an affidavit dated July 21, 2022, filed in this action by the Crown. Dr. Novak was the Planning Section Chief at the Department of Health Emergency Operations Centre of the Government of Alberta from November 8, 2021 to May 27, 2022. In paragraph 6 of her affidavit Dr. Novak provides this evidence:

  > School boards were not prohibited from taking appropriate actions to protect school children, including following the guidance noted in paragraph 5 above. School boards were simply not permitted to deny in-person learning to students solely on the basis that the student was not masked.
  >
  > (underlining added)

[100] Given the widespread misunderstanding of the legal effect of Minister LaGrange's Statement, it is appropriate for me to issue a declaration on that point.

6. *Charter* Arguments

[101] The Applicants argue that the Order and Minister LaGrange's Statement breach s. 15 of the *Charter* by their adverse effect on the Applicant Children and other children with disabilities. They also submit that the Applicant Children and other disabled children are deprived of life liberty or security of the person by the Order and Minister LaGrange's Statement, contrary to s. 7 of the *Charter*. Fundamental to these claims is the Applicants' allegation that the Applicant Children and other disabled children are at increased risk if they contract COVID. As set out below, the Applicants have not proven that allegation.

6.1 The Applicant Children

[102] Four Parents' affidavits establish that each recalls having been told by physicians that their child is at increased risk of severe illness and complications from COVID-19 or that they have that understanding. Each of those four parents goes on to describe how they and their family have responded to the Order and Minister LaGrange's Statement.

[103] For example, CH states in their affidavit that they decided to send GH to school in January 2022, based in part on the mask mandate then in place. When the mask mandate was lifted pursuant to the Order and Minister LaGrange's Statement, CH initially kept all their children, including GH out of school. After five weeks of searching for an alternative, CH sent their children back to school. As CH states in paragraph 24 of their affidavit:

> Due to G.H.'s disability, I have been forced to risk their health to access public education. When there was just no other option left, we finally sent them back masked and they also go to school later than everyone else to avoid the crowds and then get let off early. They eat lunch alone. They don't participate in anything that requires mingling with other classrooms. Those were the only things we could really think of to protect G.H. and their siblings.

[104] The evidence does not establish that any of the Applicant Children was in fact at heightened risk of any negative outcome should they contract COVID. That is a significant gap in the evidence. If the Parents were misinformed or misunderstood the advice they received or formed a false impression on their own, and their children are at average risk, then the Children have not suffered any adverse impact from the Order and Minister LaGrange's statement as compared to everyone else. Any harm suffered would be the result of the misinformation or misunderstanding.

[105] In that case, the Applicant Children and their Parents had the same choices to make regarding masking and attending school and have been subject to the same risk as everyone else. Consequently, it is essential to the Applicants' claim of adverse effect discrimination, that they adduce evidence, not merely that the Parents have been told that the Children are at increased risk or that they think that, but that the Children actually are. Similarly, it is essential to the s. 7 claim that the Applicants prove a deprivation of life, liberty or security of the person flowing from the lifting of the mask mandate. This would require expert opinion evidence from one or more physicians who have examined the Children, or at a minimum reviewed their medical

records. I have no such evidence before me.

6.2 Dr. Benjamin's Evidence

6.2.1 Threshold Admissibility

[106] In addition to the affidavits of the Parents and Mr. McGowan, the Applicants also provided evidence from Dr. Daniel K. Benjamin, a physician and epidemiologist living and working in North Carolina. He does not practice medicine in Alberta and has no connection with the Applicant Children or other children in Alberta who may be at increased risk if they contract COVID.

[107] Dr. Benjamin provided an 11-page affidavit with 601 pages of exhibits, including his 87-page *curriculum vitae*. He was questioned on that affidavit. The transcript of that questioning is 179 pages. Dr. Benjamin describes himself in the opening paragraphs of his affidavit as follows:

> I, DANIEL K. BENJAMIN, JR., a resident of North Carolina, in the United States of America, am a medical doctor (MD), epidemiologist (PhD) researcher (supported by the National Institute of Health to study transmission of SARS-CoV-2 in schools), scholar, and have experience in being qualified to give, and giving, expert opinion evidence, including with respect to the effectiveness of masks in reducing transmission of SARSCoV2, the virus that causes COVID-19. I make this affidavit and the opinions stated within it based on my education, training and expertise as a pediatric epidemiologist and a doctor of pediatric infectious disease medicine.
>
> 1. In addition to being a board-certified pediatrician, I am a pediatric epidemiologist and a Distinguished Professor of Pediatrics at Duke University, being on faculty in the Divisions of Pediatric Infectious Diseases and Quantitative Sciences within the Department of Pediatrics at Duke University. I am also a Member in the Duke Clinical Research Institute and the Principal Investigator and Chair of the National Institute of Child Health and Human Development's Pediatric Trials Network and have several National Institutes of Health (NIH)-sponsored grants to study SARS-CoV-2 and over a dozen peer-reviewed publications related to SARS-CoV-2 transmission in K-12 public schools.
>
> (underlining added)

[108] The Crown submits that I should either exclude Dr. Benjamin's evidence or give it very little weight for the following reasons:

- The Applicants refused to provide drafts of Dr. Benjamin's file including communications between the Applicants' lawyers and Dr. Benjamin and drafts of his affidavit;
- The Applicants' lawyers improperly influenced Dr. Benjamin;
- Dr. Benjamin is not an independent expert.

[109] Dr. Benjamin's evidence is expert evidence, subject to rules of admissibility set out by the Supreme Court of Canada in ***R v Mohan*** [1994] 2 SCR 9 and ***White Burgess Langille Inman v Abbott and Haliburton Co*** 2015 SCC 23. Admissibility turns on:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule:

(d) a properly qualified expert.

Mohan at para 17

[110] Where an opinion is based on novel science, particular care must be taken to ensure it is reliable: ***Mohan*** at para 32; ***White Burgess*** at para 23.

[111] The Crown's objections are directed at the fourth factor, a properly qualified expert, one aspect of which is that the expert witness be fair, objective and non-partisan: ***White Burgess*** at para. 46 and 53. The Supreme Court of Canada describes the evidentiary process on this point as follows:

> While I would not go so far to hold that he expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.
>
> Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the ***Mohan*** framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.
>
> This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court.
>
> ***White Burgess*** at para 47 - 49

[112] In this case Dr. Benjamin did not testify in either his affidavit or his questioning that he recognizes and accepts his duty to the court to be fair, objective and non-partisan. Consequently, the burden remains on the Applicants to prove that fact.

[113] The Applicants submit that I should find that Dr. Benjamin understands his duty as an expert witness to be fair, objective and non-partisan based on his affirmation of his evidence in his affidavit and on questioning, and the fact that he makes a living in this area in the context of

this being a public case. In addition to those points, I find that the following evidence supports a finding that Dr. Benjamin understands his duty to be fair, objective and non-partisan:

- his professional qualifications set out in the opening paragraphs of his affidavit;
- the fact that he has been qualified to testify as an expert in previous court cases, including one in Canada; and
- his answers during the questioning on his affidavit, most of which suggest he was trying to provide information he thought would be helpful to me in deciding this case.

[114] On the other hand, the following evidence casts doubt on whether Dr. Benjamin understood his duty to the Court:

- He testified that his affidavit was the product of a negotiation in which he and the Applicants' lawyer "came to terms and agreed to a document";
- He (or the Applicants) refused to provide his file on this matter, including earlier versions of his affidavit which he may have signed and communications between him and the Applicants' lawyer;
- He testified he minimized his time on this case;
- He responded sarcastically to a question about whether he had seen the Order;
- He was unable to provide the names of two cases in the United States in which he provided expert evidence about COVID;
- His testimony was combative and condescending, in response to a simple question about whether he had done any studies of COVID transmission in Alberta, asserting that "it's not like the virus passes through customs and is different between the two countries";
- He stated that "distance learning has been a disaster", which was not responsive to the question asked and which is outside his area of expertise;
- He failed to make a record of the Alberta guidance documents he reviewed before preparing his affidavit and consequently was unable to answer that question;
- Dr. Benjamin included (in paragraphs 38 and 39 of his affidavit) opinions about the impact of masking on learning and development, which are outside his expertise.

[115] Given the low threshold at the admissibility stage of the ***Mohan / White Burgess*** analysis, I find that Dr. Benjamin does recognize his duty to the court to be fair, objective, and non-partisan. However, the points listed above are also relevant to the second stage of the admissibility analysis:

> Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following ***Mohan*** which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to

> play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.
>
> ***White Burgess*** at para 54

6.2.2 Masking Reduces COVID Transmission

[116] Dr. Benjamin has researched whether masking reduces the transmission of COVID, particularly in schools, and he concludes that it does. At an interlocutory hearing in this action on May 17, 2022, the Crown was not prepared to concede this point, so I understand why the Applicants included this evidence as part of their case. However, by the time of the hearing in August 2022, the Crown admitted this point in its brief filed on August 12, 2022, at paragraph 42. Consequently, this fact is not in issue, which makes Dr. Benjamin's evidence on this point irrelevant.

6.2.3 Distance Learning and Impact of Masking on Learning

[117] Dr. Benjamin offers his opinions regarding whether masking causes learning loss and whether distance learning has been effective. Both topics are outside his expertise. He is not a properly qualified expert in those areas.

6.2.4 Policy Options

[118] Dr. Benjamin provides his opinions regarding whether and when Alberta should have lifted the mask requirement in schools. He also provides his opinion that decisions on masking in schools should be made by school boards rather that provincial governments. Those are opinions about policy questions, as distinct from opinions about facts. Opinions about policy questions, even when they are well-informed opinions, are not relevant.

6.2.5 Increased Risk of Severe Outcomes or Secondary Complications

[119] Dr. Benjamin did not examine any of the Applicant Children, so he is not able to provide any evidence regarding whether any of them is at increased risk of severe outcomes from COVID-19. However, he does provide evidence regarding children generally. Specifically, he states at paragraphs 17, 24 and 35 of his affidavit:

> 17. We know <u>and/or suspect</u> that some children are at heightened risk if infected with SARS-CoV-2. In my opinion, this includes the risk of death and changes that result in a materially different quality of life for a patient after having contracted the virus.
>
> ...
>
> 24. With respect to vulnerability and risk of severe outcomes for children, we know that "vulnerable" children can include, for example, those who have received solid organ and stem cell ("bone marrow") transplants, are those who are undergoing immunosuppressive treatments for cancer, and those with conditions putting them at elevated risk if they contract a respiratory virus like flu or SARS-CoV-2.
>
> ...

> 35. Based on my research and clinical experience, it is possible to estimate the number of students within a general population who would be particularly vulnerable if they contracted COVID because they would be undergoing cancer treatments, or be a donated organ or marrow recipient. Using the population data referenced above, I would estimate that in or around early February 2022 when the CMOH Order and Prohibition were made, there would have been approximately 2,500 children with this kind of particular vulnerability in Alberta: this includes children who have had solid organ or stem cell transplantation, are receiving cancer chemotherapy, or taking other medicines that severely hinder their response to vaccine and/or mount an effective response to infection with SARS-CoV-2>. Admittedly, this is an estimate based on the information I currently have before me and it is possible not all such children are attending school. Whatever the actual number, however, the facts are that (a) these children are at a very high risk of severe outcomes or secondary complications; and (b) these very high risk children do not include children at modestly increased risk of severe COVID (e.g., children with severe asthma, poorly controlled diabetes, obesity, etc.).
>
> (underlining added)

[120] Dr. Benjamin also made the following statement during questioning on his affidavit, at page 122 of the transcript:

> So what's unique about the solid organ bone marrow transplant, those kids, is that they have difficulty responding to the vaccine, whereas a child who has obesity, for example, although they're more at risk for severe COVID, those children can be unilaterally protected by their parents simply by vaccination.

[121] Dr. Benjamin's phrase "know and/or suspect" in paragraph 17 of his affidavit implies uncertainty regarding the statement that follows: "some children are at heightened risk if infected with SARS-CoV-2". This is not surprising given that the COVID pandemic began in 2020 so the scientific study of the disease, while perhaps extensive, is still in its early stages. This engages the caution articulated by the Supreme Court of Canada in ***Mohan*** and ***White Burgess*** with respect to novel scientific evidence.

[122] Furthermore, Dr. Benjamin does not appear to have expertise regarding which groups of children are at increased risk of severe outcomes should they contract COVID.

[123] Dr. Benjamin testified at page 24 of his questioning transcript that, while he has an established track record of research over 20 years prior to the pandemic:

> COVID was really not – was not part of something that was part of my job description or title or anything that either or Duke ever anticipated having me do, so it was essentially extra add-on work.

[124] Dr. Benjamin acknowledges that his studies of COVID in hospitals and in schools related to the probability of transmission and not to "what happens to the patient after they get sick". Specifically, Dr. Benjamin testified as follows at page 66 and 70 of his questioning transcript:

> Q Okay. And so that's in reference to transmissibility. You had indicated, though, that you were not – if I understood you correctly, you were not

studying what happens when the people get sick. You were studying the probability of transmission versus the effect of transmission. Is that fair?

A It's fair to say – let me make sure I understand – you and I make sure we understand each other.

So we did not – once the kids or the adults in the school get COVID, we then – we do not then follow those people up to – then say, Okay. What fraction of those children or adults go on to become hospitalized? What fraction developed long COVID, et cetera? If that is your question, then yes, you are correct. We did not do that.

...

Q Okay. So if I understand correctly, then, your primary focus has always been on transmission, reducing transmission rates, but not necessarily the effects of the transmission once contracted. Is that fair?

A Well, in the school environment and in the studies provided for this case, your statement's correct. But, you know, I've also done work on what's the efficacy of tests, that's the efficacy of therapeutics, what's – if you randomized a placebo versus product, you know, what's your – how long is your recovery; how soon do you get out of the hospital; proper dosing of COVID medicines for children.

I hold the IND for the Active 1 protocol, which is about 2,000 patients, randomized a product after placebo, in which case a couple of the products actually reduced death in COVID. Our research group has described a lot of the therapeutics used for COVID in children.

But for the articles that are referenced in this particular affidavit, it's limited to transmission, but that's not the limit of my research with COVID.

[125] There is no evidence before me that Dr. Benjamin has done any research regarding whether some children are more likely to suffer severe outcomes if they contract COVID. Furthermore, Dr. Benjamin does not provide the basis for his statements in paragraphs 17, 24 and 35 of his affidavit that children undergoing cancer treatment or who have received organ transplants are at very high risk of severe outcomes or secondary complications should they contract COVID. This contrasts with his opinion that masking reduces COVID transmission in schools which is supported by peer reviewed journal articles, of which Dr. Benjamin was one of the authors and which are attached as exhibits to his affidavit.

[126] Taking my concerns about Dr. Benjamin's understanding and acceptance of his duty to the Court, together with the novelty COVID research, Dr. Benjamin's lack of expertise regarding COVID outcomes for particular groups of children, and his failure to provide the basis for his assertions on this topic, I exercise my gatekeeping discretion to exclude Dr. Benjamin's opinion evidence that children undergoing cancer treatment or who have received organ donations or marrow transplants are at increased risk of severe outcomes or complications from COVID. Given that exclusion, Dr. Benjamin's evidence that there are approximately 2,500 such children in Alberta is irrelevant.

6.2.6 Conclusion Regarding Dr. Benjamin's Evidence

[127] None of Dr. Benjamin's evidence is admissible. His opinion that masking reduces COVID transmission is irrelevant because the Crown concedes that fact. His opinions regarding distance learning and the impact of masking on children are outside his area of expertise. His opinions regarding policy questions do not bear on a fact in issue before me and are consequently irrelevant. The potential helpfulness of his evidence regarding the vulnerability to COVID of children who have received organ donations or are receiving cancer treatment, is outweighed by the significant frailties of that evidence. In that context, his estimation regarding the number of such children in Alberta is irrelevant.

[128] I am not criticizing Dr. Benjamin's work or expertise or questioning his dedication to his profession. My decision is confined to applying the rules of evidence to his testimony in the context of this action.

6.3 The Absence of Evidence to Support the *Charter* relief

[129] The Applicants have not proven that the Order or Minister LaGrange's Statement have any impact on them or any impact on other disabled children. This is fatal to their claim for *Charter* relief:

> Where a person challenging a law's constitutionality fails to provide an adequate factual basis to decide the challenge, the challenge fails. As Cory J. put it on behalf of the Court in ***MacKay v. Manitoba*** [1989] 2 SCR 357 (SCC), at p. 366, "the absence of a factual base is not just a technicality that could be overlooked, but rather *it is a flaw that is fatal to the appellants' position*" (emphasis added).
>
> ***Ernst v Alberta Energy Regulator*** 2017 SCC 1 at para 22

[130] The Applicants' claim for *Charter* relief fails due to lack of evidence. It is consequently not necessary for me to do any analysis of the application of ss. 7, 15 or 1 of the *Charter* to this case.

7. Disposition

[131] The Applicants' Originating Application seeks an order quashing and setting aside Dr. Hinshaw's Order. That aspect of this application is moot now because Dr. Hinshaw has rescinded the order herself. The Applicants also seek an order requiring either the existing Chief Medical Officer of Health or a "new and unbiased" Chief Medical Officer of Health to reconsider the matter and make a new decision. That would not be practical because public health orders must be made based on the situation at the time. The COVID-19 pandemic is at a different stage now than it was in February 2022.

[132] The Applicants also seek declarations regarding both the Order and Minister LaGrange's Statement. For the benefit of the Chief Medical Officer of Health and other medical officers of health in considering future public health orders, I agree that I should make a declaration that provides that the Order was unreasonable because it was based on an interpretation of the *Public Health Act* as giving final authority over public health orders to elected officials.

[133] I also declare that Minister LaGrange's Statement did not prohibit school boards from imposing mask mandates in schools. In my view that declaration is warranted because of the

widespread misunderstanding of the legal effect of Minister LaGrange's Statement, and the fact that, on the evidence before me, that statement has not been rescinded or retracted.

[134] I dismiss the application for *Charter* relief.

[135] If the parties are not able to agree on costs they may contact the Justice Seized Coordinator to schedule a one hour hearing on costs before me.

Heard on the 17th and 18th day of August, 2022.
Dated at the City of Edmonton, Alberta this 26th day of October, 2022.

G.S. Dunlop
J.C.K.B.A.

Appearances:

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