Court of Queen's Bench of Alberta

Citation: Ingram v Alberta (Chief Medical Officer of Health), 2022 ABQB 595

Date:
Docket: 2001 14300
Registry: Calgary

Between:

Rebecca Marie Ingram, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner

Applicants

- and -

Her Majesty the Queen In Right of the Province of Alberta and the Chief Medical Officer of Health

Respondents

Reasons for Decision
of the
Honourable Justice B.E. Romaine

I. Introduction and Relevant Background

[1] This action involves a constitutional challenge to certain orders made by the Chief Medical Officer of Health for Alberta (CMOH) under the *Public Health Act* , RSA 2000, c P-37 with respect to the COVID-19 pandemic (the "impugned Orders"). The matter was heard over 14 days in February and April 2022. After the hearing, the parties submitted their final written submissions: the Applicants on June 13, 2022, the Respondents on July 13, 2022 and the Applicants in reply on July 28, 2022.

[2] While being cross-examined during the hearing, the CMOH, Dr. Deena Hinshaw, was asked "can you tell us what recommendations you made to Cabinet that were either ignored or where you were given instructions opposite to recommendations?"

[3] Counsel for the Respondents objected to the question, citing public interest immunity.

[4] After hearing submissions on the issue, I proposed to counsel that I would ask Dr. Hinshaw three specific questions in an *in camera* hearing that would enable me to address the factors relevant to balancing the public interests in confidentiality and disclosure concerning public decision-making referred to by the Supreme Court in ***British Columbia (AG) v Provincial Court Judges' Association of British Columbia***, 2020 SCC 20 at para 101 ("***BC Judges***").

[5] Counsel for both parties agreed to this process. Counsel for the Respondents asked that if I decided that public interest immunity did not apply, and intended to disclose the answers to the questions, I would advise them in advance so that they could consider applying for a stay from the Court of Appeal.

[6] This Court's decision on the issue is found in ***Ingram v Alberta (Chief Medical Office of Health)***, 2022 ABQB 311 (the "public interest immunity decision").

[7] The questions that I asked Dr. Hinshaw are as follows:

1. Did the Premier and Cabinet, including the PICC [Priorities Implementation Cabinet Committee] and the EMCC [Emergency Management Cabinet Committee] (the "Cabinet") ever direct you, Dr. Hinshaw, to impose more severe restrictions in your CMOH orders than you had recommended to them?
2. Did Cabinet ever direct you to impose more severe restrictions on particular groups such as churches, gyms, schools, and small businesses than you had recommended to them?
3. Did you ever recommend to the Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet?

[8] I found that a strong countervailing public interest in disclosure of certain information existed. I noted that this is an important case involving the constitutionality of CMOH Orders that the Applicants allege infringed their *Charter* rights. A determination of whether or not Cabinet directed Dr. Hinshaw to impose restrictions more severe than her recommendations or targeted specific groups of citizens is necessary to ensure that the case can be adequately and fairly presented and to ensure that this Court is able to conduct a meaningful analysis of potential *Charter* breaches and of the limit on rights set out in section 1 of the *Charter*.

[9] I found it was not necessary to decide whether public interest immunity applies to protect the process of democratic governance by allowing Cabinet members to be free and candid among themselves during their deliberations. The limited nature of the questions and the fact that the answers would not disclose "deliberations" of Cabinet or information that would offend the underlying purpose of public interest immunity, the protection of the process of democratic governance, were not issues that this Court was required to address in the circumstances.

[10] I found that, whether or not the evidence falls within the scope of public interest immunity, it was admissible as both relevant and necessary to fairly dispose of this case and to assist the Court in determining the facts upon which the decision in the case will depend. In the

context of this specific evidence and this specific caseI found that the public interest in disclosing Dr. Hinshaw's answers to the questions posed by the Court outweighed the public interest in keeping the evidence confidential.

[11] Counsel for the Respondents did not appeal, and the answers to the three questions, in every case "no", were made part of the evidentiary record.

[12] In an entirely different action, ***CM v Alberta***, which appears to involve a constitutional challenge and judicial review of the CMOH's decisions to lift the school masking mandate in CMOH Order 08-2022 in February, 2022, an Amended Amended Certified Record of Proceedings was filed on July 12, 2022, adding two additional documents to the Amended Certified Record of Proceedings previously filed on June 1, 2022:

1. a PowerPoint presentation by Dr. Hinshaw to the Executive Council with information regarding the ongoing COVID-19 Pandemic, dated February 8, 2022 (the "PowerPoint"), and
2. the Official Record of Decision consisting of Cabinet meeting minutes arising from the February 8, 2022 meeting and dated the same, where ongoing public health orders were discussed and considered (the "Cabinet minutes").

[13] The previous Amended Certificate of Proceedings in ***CM v Alberta*** had included two other documents:

1. a memo from the Premier's office staff to Premier Kenney with respect to student masking in school, a copy of which was provided to Dr. Hinshaw, dated February 7, 2022 (the "Premier's Staff Memo"), and;
2. an email from Scott Fulmer, at the time the Acting Director, Health Evidence and Policy Research and Innovation Branch Health Standards, to Dr. Hinshaw and others with respect to school masking setting out a summary evidence, dated February 7, 2022 (the "Fulmer Email").

[14] The Amended and the Amended Amended Certificates of Proceedings were filed in accordance with decisions of Dunlop, J. in the ***CM v Alberta*** matter, found at 2022 ABQB 462 and 2022 ABQB 357 (the "earlier decision"), in which he concluded that nothing in the PowerPoint or the Cabinet minutes was immune from productions based on the public interest.

[15] The earlier decision appears to have nothing to do with public interest immunity. While Dunlop, J. directed Dr. Hinshaw to file a more fulsome Certificate of Proceedings, there was no specific mention of the Premier's Staff Memo on the Fulmer Email.

[16] It is noteworthy that in the application that led to the earlier decision, the Applicants sought to admit an affidavit sworn by Dr. Hinshaw in this action. Dunlop, J. found that it was not appropriate to admit that affidavit as it:

- addressed issues in another action which may overlap but are not the same as the issues in the ***CM v Alberta*** action;
- responds to or refers to other affidavits filed in the [this] Ingram Action which are not before him and which neither the Applicants nor the Crown have sought to have entered into evidence in [the ***CM v Alberta***] action;

- may include some things that are relevant to the ***CM v Alberta*** decision, but which would be incomplete and might be misleading, given the passage of time and changes in the COVID-19 pandemic between July 2021 and February 2022;
- includes a large volume of completely irrelevant material; and
- might open the door to questioning of Dr. Hinshaw with potential to prolong, distract, and frustrate the ***CM v Alberta*** action (paras 51-54 of the earlier decision).

[17] The Applicants apply to have the entirety of the documents listed in the Amended Amended Certificate Proceedings in the ***CM v Alberta*** action (the "Documents") admitted as evidence is this case, that the CMOH for Alberta, be recalled to answer questions related to these documents, that prior to being recalled for further cross-examination, she provide the Applicants with all recommendations that she made to Cabinet regarding the implementation of the CMOH Orders, and that she answer questions relating to "issues" arising from the Documents that were objected to by counsel to the Respondents on the basis of cabinet confidentiality.

[18] The Applicants ground their application, although not specified in the application itself, on Rule 9.13. The Applicants also submit that the Documents set out "fresh evidence" that should be admitted.

[19] As a preliminary matter, the following facts are useful to set the context of this application:

a) The constitutional challenge in this hearing relates to specific CMOH Orders all dated prior to July, 2021, not to all the orders made under the ***Public Health Act*** with respect to the COVID-19 pandemic;

b) the questions posed to Dr. Hinshaw in the public immunity decision referred to the impugned Orders, not all of the CMOH Orders relating to the pandemic. As I have commented on several occasions during the hearing and in that decision, this case is not a public inquiry into the decisions and behaviour of the Alberta government during the pandemic. The constitutional issues before me are narrower; and

c) the issue in ***CM v Alberta*** concerned the disclosure of two specific documents. The issue in this action was whether counsel for the Applicants' open-ended question ("can you tell us what recommendation you made to Cabinet that were either ignored or where you were given instructions opposite to your recommendations?") would be allowed.

II. Analysis

A. Rule 9.13 – Overview

[20] Rule 9.13 provides that, at any time before a judgment on order is entered or on application, the Court may vary it, and if the Court is satisfied that there is good reason to do so, hear more evidence and change or modify its order or judgment or its reasons.

[21] The Respondents submit that the *Rule* does not apply as there is not yet any judgment or order in this case. Given my decision on the merits of the application, it is not necessary that I address this issue.

[22] One thing is clear: the Court must be satisfied that there is good reason to hear more evidence and/or to change its decision or reasons.

[23] The onus of satisfying this requirement is on the Applicants. As the Applicants concede, they must establish that there are exceptional circumstances to justify a re-opening of the hearing. The Court's discretion to do so must be exercised "sparingly and with the greatest care": ***671122 Ontario Ltd v Sagaz Industries Inc,*** 2001 SCC 59 at para 61.

[24] In ***Sagaz***, the Supreme Court at para 63 noted with approval the comments of the UK Court of Appeal in ***Ladd v Marshall*** as follows:

> It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[25] The Alberta Court of Appeal considered *Rule* 9.13 in ***CZ v RB***, 2019 ABCA 445. The Court noted that the *Rule* should be used sparingly, and that it was never intended "to shore up evidential gaps": paras 25 and 27.

[26] The Court set out the test for whether to admit further evidence or to vary a pronounced judgment or order at para 27 as follows:

1. Could the evidence have been obtained earlier if due diligence had been observed?
2. Is the evidence credible?
3. Would the evidence have been practically conclusive in producing the opposite result to that earlier pronounced?
4. Is the evidence in its present form admissible under the ordinary rules of evidence?

[27] In ***Aubin v Petrone***, the Court included the following objectives, among others, in deciding whether there is good reason to hear more evidence and change its order:

- errors to be corrected should be objectively demonstrable (such as an incorrect statement of law or interpretation of a contract that all parties agree is incorrect);
- the rule is not a vehicle for seeking consideration of a judgment call; and
- the threshold for a court to exercise its discretion should be high to avoid applications that are in reality, a 'second kick at the can'. [emphasis added]

See 2020 ABQB 708 at para 7.

[28] Authorities are consistent that the need for finality and certainty in legal proceedings is a factor to be considered by a Court exercising its discretion under Rule 9.13, and that this objective may weigh against re-opening a decision as well as re-opening one: ***Lewis Estates Communities Inc v Brownlee LLP***, 2013 ABQB 731 at para 31.

B. Nature of the new evidence

[29] Before turning to the tests relating to whether to admit new evidence or to vary a previous decision, the following comments on the submissions of the Applicants are necessary. The Applicants submit that evidence given by Dr. Hinshaw in cross-examination about harms caused to children as a result of wearing masks was "patently false". They rely on the following exchanges with counsel during the hearing:

> **Mr. Rath**: Do you recall any evidence reviews with regard to potential psychological harm that occur...in elementary school children that were being forced to wear masks in school with regard to their...social development or their psychological health?
>
> **Dr. Hinshaw**: We did ask the Scientific Advisory Group to review all available evidence with respect to potential harms of masking and so that review was done with all available published evidence at that time and concluded that there – at that time there was no evidence regarding serious health outcomes or adverse health outcomes from wearing masks. So that... review was done to inform the masking policy.
>
> **Mr. Rath**: [...]specifically I'm talking about psychological harm and psychiatric harm. Do you recall any specific information that was...considered in that regard?
>
> **Dr. Hinshaw**: The Scientific Advisory Group would have looked at all published evidence related to harm so that would have included, if there had been publications related to harms and mental health, that would have been included in that review.
>
> **Mr. Rath**: But, again, on that Scientific Advisory Group you had no psychologists or psychiatrists, so you had no specialists in those fields providing you input from that group, that's correct, yes?
>
> **Dr. Hinshaw**: That's correct. And at the same time, that particular group is well versed in the scientific method in reading evidence and their scope of that particular masking harms review was to look at...any published literature that documented harms from wearing masks. [emphasis added]

Dr. Hinshaw Cross-Examination, transcript at 88-89.

[30] However, as noted by the Respondents, this excerpt does not include the entire exchange between Dr. Hinshaw and Mr. Rath on this issue.

[31] Before the excerpt, the following exchange is relevant:

> **Mr. Rath**: So, in that regard, Dr. Hinshaw, is it fair to say that with regard to the orders that you were promulgating in terms of the input from the Scientific

> Advisory Group that you were not receiving any input as to the psychological or psychiatric impact of these orders on the broader Alberta population?
>
> **Dr. Hinshaw**: It's true that that particular group did not have the expertise. I am sorry, I can't recall whether or not they did any evidence reviews that were specific to mental health. I would have to look back at the reviews that they did and the timeframe that they did them to be able say whether or not they provided a review of evidence related to mental health. It's possible that – again, I simply don't recall. If they had done a specific review, they could have had an individual come for a specialized area of expertise in that particular topic. So I would have to go back and check the list of evidence reviews to be able to answer that question. [emphasis added]

Dr. Hinshaw Cross-Examination, transcript at 88.

[32] The following exchange after the excerpt is also relevant:

> **Mr. Rath**: So with regard to your review of that information, do you recall any specific sections in the report provided to you that spoke to psychiatric or psychological harms provided –caused to children as a result of wearing masks?
>
> **Dr. Hinshaw**: I would need to go back and read that review again to be able to answer that question. Again, I don't recall what specific sections they divided their report into. [emphasis added]

Dr. Hinshaw Cross-Examination, transcript at 89

[33] The Applicants submit that Dr. Hinshaw testified that there was no evidence regarding serious health outcomes or adverse outcomes from wearing masks. This is a clear misrepresentation of her testimony. In summary, and read in context, Dr. Hinshaw's testimony was that:

a) the Scientific Advisory Group ("SAG") was asked to review all evidence with respect to the potential harms of masking;

b) the review was done with all available published evidence at the time;

c) the SAG concluded that at that time there was no evidence regarding serious health outcomes or adverse health outcomes from wearing masks;

d) specifically with respect to psychological and psychiatric harm, the SAG would have looked at all published evidence related to harms, which would have included publication related to harms and mental health if there had been publications;

e) the SAG is well-versed is the scientific method in reading evidence;

f) Dr. Hinshaw could not recall if the SAG did any evidence reviews that were specific to mental health. She would have to look back at the reviews that it did and the timeframe in which it did them to be able to say whether or not SAG provided a review of evidence related to mental health; and

g) specifically with respect to a report from SAG, she would have to go back to the report to answer the question of whether she recalled any specific sections that

spoke to psychiatric or psychological harms caused to children as a result of wearing masks.

[34] Nowhere does Dr. Hinshaw say, or even imply, that there was no evidence of harm.

[35] The Applicants also submit that the Documents "reveal [a] lack of transparency in Dr. Hinshaw's evidence in this proceeding citing" her denial of any effects of masking on children's psychological health, psychiatric health and social development." First, there was no such denial. Second, the Premier's Staff Memo dated February 7, 2022 states that there is insufficient direct evidence of the effectiveness of face masks in reducing COVID-19 transmission in education settings, and that existing research supporting mask use in schools has limitations that make the pool of evidence weak and the benefits of masking children unclear.

[36] It also states that 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, citing a survey, and notes, without attribution that "physical side effects of mask use include headaches, dermatitis with rashes and redness and discomfort.

[37] The memo refers to 2022 evidence and articles that did not exist in the relevant time period of the impugned Orders, and notes that in such study, evidence for masking students in schools to reduce the spread of COVID is "not conclusive" and that "[e]xisitng studies are largely observational and therefore prone to bias". One such study ultimately concluded that the evidence taken together was in favour of masking in schools. It referred to two 2021 studies referring specifically to school masking and to non-peer reviewed and/or non-academic evidence. The memo refers to litigations "that make the proof of evidence weak and the benefits of making unclean".

[38] It should be noted that the memo is not from the SAG or Dr. Hinshaw, and does not, in any event, refer to the harms of masking in public or in community settings, which is the only possible issue of relevance in this hearing.

[39] The Fulmer Email dated February 7, 2022, which was copied to Dr. Hinshaw, advises that "we" went back through the evidence on school transmission and found new materials on how effective in schools some of the mitigation measures have been in the literature.

[40] In summary, the Fulmer Email concludes that:

1. according to the research literature, wearing masks can be effective in contributing to reducing transmission of COVID-19 in public and community settings. This is informed by a range of research, including randomised control trials, contact tracing studies, and observational studies;
2. the evidence for protection from masks, in schools is less direct… it might be small but taken together supports the conclusion that face coverings in schools can contribute as part of a host of measures to reduce transmission. What data does exist has been interpreted into guidance in many different ways. The World Health Organization, for example, does not recommend masks for children under age 6. The European Centre for Disease Prevention and Control recommends against the use of masks for any children in primary school. In North America masking in schools was part of public health guidelines as schools returned after the first and second waves;

3. studies find that transmission in schools has remained limited and comparable to the wider community under a wide range of prevention measures such as masking, cohorting, cancelling higher-risk activities, distancing, hygiene protocols, reduced class size and enhanced ventilation; and
4. the studies available were performed prior to the emergence of the Omicron variant of concern.

[41] The Fulmer Email itself does not suggest that wearing masks in public or in community settings is harmful enough to offset the goal of reducing transmission of COVID-19. In fact, it concludes in the summary that masking in schools can contribute to reducing transmission.

[42] The email refers to a number of studies, some of which pre-date July, 2021.

[43] It does not contradict Dr. Hinshaw's testimony during the hearing; which, as noted previously dealt with the impugned Orders.

[44] The Applicants submit that the Respondents had an obligation to bring the studies and articles dated before July, 2021 to the attention of the Applicants. However, these articles were publicly available before the hearing and could have been disclosed by the Applicants or their experts with reasonable diligence, and relevant studies could have been the subject of cross-examination of Dr. Hinshaw or the Respondents' witnesses.

[45] The PowerPoint presentation is a presentation made by Dr. Hinshaw to the Priorities Implementation Cabinet Committee ("PICC") on February 8, 2022, which includes data and recommendations by Dr. Hinshaw. The Applicants assert that it includes "numerous political statements that are not founded in science". Of the many examples they cite, most are merely statements of fact. Only a few can be considered "political statements", for instance the comment that "Alberta will be a leader in entering the endemic space, balancing the risks and benefits to acting before other Canadian jurisdictions "and references to Alberta being a leader in "reopening" and "easing". These could be considered political; they could also be considered matters of fact that could be verified by comparison with other provinces. There is nothing in the PowerPoint that is inconsistent with Dr. Hinshaw's evidence in this hearing, and at any rate, the PowerPoint presentation relates to COVID orders made months after the impugned Orders.

[46] The Applicants' also assert that the fact that the PowerPoint presents three options to the PICC and that Cabinet chose the second option is an indication that Dr. Hinshaw lied to this Court when she answered "no" to the question of whether Cabinet directed her to impose more severe restrictions in her CMOH orders than she had recommended to them, as it is an indicator that Cabinet "rejected" her recommendations with respect to the other two options, one of which was less restrictive.

[47] This is fallacious sophistry. The three options were all recommended by Dr. Hinshaw, with analysis of the pros and cons of each one, and Cabinet chose one. This is not inconsistent with Dr. Hinshaw's evidence.

[48] The Cabinet Minutes merely record Cabinet's decision on the new orders: they have no relevance to the impugned Orders.

[49] The Applicants submit that the PowerPoint and the Cabinet Minutes are evidence that Alberta did not always choose the least restrictive means when violating rights and freedoms. While it may be arguable that this was the result of Cabinet's choice of Option 2 in the case of

school masking, the Documents only indicate the choice made by Cabinet with respect to the February orders, months after the impugned Orders and at a different stage of the pandemic. As noted by the Respondents, Dr. Hinshaw's evidence, in summary, is that the impugned Orders employed the least restrictive means necessary, used voluntary measures where possible and only resorted to mandatory orders when voluntary measures were insufficient. Option 2, chosen by Cabinet may be more restrictive than Option 1, but makes school masking, the specific issue in ***CM v Alberta***, voluntary.

[50] The Applicants mischaracterize the Respondents' comments about the Documents. The Respondents do not argue that the Documents are unreliable, only that they are irrelevant to the issues in this hearing for a number of reasons, and that they do not provide evidence that Dr. Hinshaw's testimony was untruthful or inconsistent. The Applicants also submit that the Documents are relevant because they indicate that the final decision on CMOH Orders rests on Cabinet rather than on Dr. Hinshaw. Dr. Hinshaw has been candid and consistent in her testimony in this hearing with respect to the procedure followed in enacting the impugned Orders, and the Documents neither contradict her testimony on this issue nor add to it.

[51] The Applicants submit that the Documents provided "context" to the attached articles, news reports and studies. The Documents are not necessary to provide any context to the cited articles, other than the recommendations they gave rise to with respect to the February, 2022 orders.

C. Could the evidence have been obtained earlier if due diligence had been observed?

[52] The Applicants failed to observe reasonable due diligence with respect to the Documents that pre-dated July, 2021 and that were publicly available. The suggestion that the onus was on the Respondents to disclose this material is incorrect. Therefore, failure to meet this first requirement of the test in fatal to the application with respect to this category of Documents. As noted by Côté J. at paras 31 and 32 of ***Alberta (Child, Youth and Family Enhancement, Director) v BM***, 2009 ABCA 258 :

> In my view, due diligence is one of the criteria to be weighed when deciding whether to take the rare step of reopening a pronounced decision. […]There is already far too much tendency in Alberta in the last ten years to relitigate decided points.
>
> The matter is even clearer when the issue is adducing new evidence not adduced at the first hearing. Case law is unanimous that that is the first hurdle to be overcome when someone seeks to adduce new evidence to reopen a pronounced decision[...].

D. Is the evidence credible?

[53] This is not an issue in this case except to note that it has been mischaracterized by the Applicants.

E. Would the evidence have been practically conclusive in producing the appropriate result to that earlier pronounced?

[54] The Applicants submit in that this Court "has taken a narrow view on the issue of Cabinet Confidentially", and that Dunlop, J. "has taken a broad view...and ordered an expansion release of information". I must disagree with this characterization.

[55] A careful reading of Dunlop, J.'s oral reasons of June 27, 2022, followed by his second decision in ***CM*** discloses that Dunlop, J. followed the same precedents and employed much the same procedure as this Court did in the public interest immunity decision. Dunlop, J. in fact referred to my earlier decision in several passages of his decisions. As I did, he applied the same factors, and reached many of the same conclusions, with differences attributable to the case before him. A major difference is that in ***CM v Alberta***, the Crown conceded that the documents in question were relevant.

[56] With respect to the six factors relevant to public interest immunity identified by the Supreme Court in ***Carey v Ontario*****,** [1986] 2 SCR 637, Dunlop, J. was informed by the contents of the documents that he had before him. He also concluded, as I did in my earlier decision, that the administration of justice favoured disclosure.

[57] There is no obvious error of fact that both parties agree on in this case or that is objectively demonstratable. As noted previously, there is nothing in the Documents that supports the Applicants' assertion that they contradict Dr. Hinshaw's testimony, that she failed to be candid with the Court or that she attempted to mislead the Court, as the Applicants suggest.

[58] I find that the evidence in the Documents would not be conclusive in producing a different result with respect to this Court's public interest immunity decision. The application must fail because the Documents properly characterized are not relevant, as they deal with school masking, which is not an issue in this case, and the remaining Documents that have not been excluded on the basis of lack of diligence date from outside the relevant period for this action.

[59] I find that this application, is as previous courts have characterized it, is an attempt at a "second kick at the can". There is no reason, let along any exceptional circumstance, to reopen this hearing. Given my decisions on the first and third, principles set out in ***CZ v RB***, there is no need to address the fourth factor.

F. Additional Issues

[60] The Respondents submit that recalling Dr. Hinshaw to cross-examine her on the documents would offend the well-known rule in ***Browne v Dunn***. I agree. The Applicants had opportunities to put in any relevant pre-July, 2021 evidence to Dr. Hinshaw during the hearing, and they did not seek to put in the publicly available Documents. They had an ample opportunity to question her on credibility. Although the Applicants submit that they were precluded from questioning Dr. Hinshaw on "issues revealed in the new evidence" this is not quite accurate. The Applicants were allowed initial questions on masking of children, but a later question specifically relating to school masking was disallowed on the basis that it was speculative, lacked an evidentiary basis and was irrelevant. That question, "Dr. Hinshaw, are you aware that there are currently children in schools that are afraid to remove their masks out of fear that they might die?" was quite properly objected to by counsel for the Respondents, and there was no further attempt to pursue the subject.

[61] The Applicants suggest, without authority that the rule is ***Browne v Dunn*** does not apply to *Charter* litigation. I disagree.

[62] The Respondents also submit that recalling Dr. Hinshaw for further cross-examination would offend the collateral fact rule. I must agree with this submission as well. As noted previously, the Documents are not relevant to the issue in this hearing and the only possible

reason that they may be put to Dr. Hinshaw is in order to impeach her credibility. As noted in Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 6th ed. Toronto: LexisNexis, 2022 at 1379, "with respect to questions which are directed solely to impeaching a witness' credibility, the answers must, save for certain common law and statutory exceptions, be accepted as final."

[63] Given my decision, it is not necessary to address whether this application is non-compliant with the Oral Hearing Order, as is the Respondents submission that the discovery and disclosure rules do not apply to this action.

[64] The Applicants speculate that, in answering the third question posed in the hearing, Dr. Hinshaw meant to refer to all of the COVID orders that she had signed, rather than the impugned Orders that are the subject of this hearing. This speculation is unfounded. In the course of discussing the questions that would be put to Dr. Hinshaw by the Court prior to the in-camera hearing, I made it clear that the question would only relate to the impugned Orders.

[65] I must also make it clear that I did not, as suggested by the Applicants, direct Dr. Hinshaw to answer the questions with a "yes" or "no", or in any other fashion. This speculation is also unfounded. It is noteworthy that the parties agreed to the procedure that was followed and the text of the questions before they were posed to Dr. Hinshaw.

G. Allegations concerning Dr. Hinshaw

[66] The Appellants in this application make serious allegations against Dr. Hinshaw and the other Respondents that deserve some comment.

[67] I have already noted that I found no material contradictions between Dr. Hinshaw's testimony during the hearing and the Documents relied upon by the Appellants to reopen the hearing. However, the Appellants, with no justification, submit that Dr. Hinshaw "could not find the time to review scientific evidence". They insist that the articles referred to in the Documents "was completely ignored by SAG and Dr. Hinshaw", that either she was untruthful in her answers on that the SAG was incompetent and unreliable and that she was engaged in an exercise of hiding information from the Court. None of this has been established by the evidence. The Appellants' brief makes even more serious allegations with respect to Dr. Hinshaw and the remaining Respondents that are inappropriate to report, all without any basis in the evidence.

[68] It is counsel's job to make comments on the credibility of witnesses, and the Court's job to make such findings.

[69] This is, as Paciocco and Stresser note "a vital part of the adversarial process". As the Supreme Court noted with respect to cross-examination in ***R v Lyttle***, 2004 SCC 5 at para 48, a cross-examiner must have a "good faith basis" for a suggestion:

> The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited

[70] These comments apply in my view to comments on availability of argument. It is entirely fair and reasonable to make comments concerning the possibility of contradictions between Dr. Hinshaw's testimony and the Documents if is not consistent with the good faith basis to make comments that are reckless as that cross the line into politic of rhetoric.

[71] This decision does not deal with the credibility of Dr. Hinshaw's evidence generally: I must make findings of credibility or liability about all of the witnesses at the hearing. I note these comments only with respect to the allegations made by the Appellants in this application.

H. Conclusion

[72] The application is dismissed. The new evidence proffered by the appellants in support of the application to reopen the hearing and to recall Dr. Hinshaw for further cross-examination does not impeach the credibility of Dr. Hinshaw, is irrelevant to the issues that are the subject of the hearing and would not be determinative in changing the outcome of this Court's previous decision on public interest immunity.

[73] The submissions of the Appellants are based on a mischaracterization of Dr. Hinshaw's evidence and of the nature of the documents sought to be introduced as fresh evidence.

Heard on the 26th day of August, 2022.
Dated at the City of Calgary, Alberta this 2nd day of September, 2022.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Jeffrey R.W. Rath & Kathryn Newton
for the Applicant, Rebecca Marie Ingram

Leighton Grey, QC & Tamer Obeidat
For the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Tony Tanner

Nicholas Parker, Nicholas Trofimuk, Brooklyn LeClair & David Kamal
for the Respondents