

Clerk's Stamp

COURT FILE NO. 2001-14300
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
APPLICANTS REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER
RESPONDENTS HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

DOCUMENT **WRITTEN ARGUMENTS OF THE APPLICANTS REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS, and TORRY TANNER IN SUPPORT OF AN APPLICATION UNDER RULE 9.13**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Rath & Company Barristers & Solicitors 282050 Hwy 22 W Foothills, AB, T0L 1W2
Justice Centre for Constitutional Freedoms #253, 7620 Elbow Drive SW Calgary, AB, T2V 1K2

c/o: Jeffrey R. W. Rath Phone: 403-931-4047 Fax: 403-931-4048 Email : jrath@rathandcompany.com
c/o: Leighton B.U. Grey, Q.C. Phone: 403-475-3622 Fax: 587-352-3233 Email: lgrey@gwsllp.ca

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

Contents

I.	INTRODUCTION.....	3
II.	FACTUAL AND PROCEDURAL BACKGROUND	3
a.	Evidence of Dr. Deena Hinshaw In This Proceeding	4
b.	Applicants’ Discovery of Relevant and Material Evidence.....	6
c.	Contents of the Documents	7
III.	ISSUES	13
IV.	LAW	14
a.	Re-opening a Case.....	14
b.	Cabinet Confidentiality or Public Interest Immunity	16
V.	ARGUMENT	18
a.	Did the Applicants Exercise Due Diligence to Discover the Evidence?.....	19
b.	Is the New Evidence Credible?	19
c.	Would the Evidence Have Been Practically Conclusive?.....	19
d.	Is the Evidence Admissible Under the Ordinary Rules of Evidence?.....	20
i.	Cabinet Confidentiality or Public Interest Immunity	20
ii.	Relevancy.....	20
1.	Credibility and Competence of Dr. Hinshaw	21
2.	Professional Obligations of Dr. Hinshaw.....	23
3.	Political Decisions Not Medical Decisions.....	26
4.	Misleading Evidence of Dr. Hinshaw	28
5.	Inconsistent Evidence of Dr. Hinshaw	30
6.	Least Intrusive Means Necessary	31
VI.	RELIEF SOUGHT	32
VII.	LIST OF AUTHORITIES	34

I. INTRODUCTION

1. These written submissions are provided by Rebecca Marie Ingram, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner (“**Applicants**”) in support of an application under Rule 9.13 seeking leave of this Honourable Court to adduce evidence that at all material times was known to Her Majesty the Queen in Right of the Province of Alberta and the Chief Medical Officer of Health (“**Respondents**”), but not known to the Applicants until July 13, 2022 (“**Application**”).
2. In support of this Application, the Applicants rely on the Affidavit of Tracey Bradley sworn on July 25, 2022.
3. In support of this Application, the Applicants also rely on the Affidavit of Lesley Doucet affirmed on August 10, 2022.

II. FACTUAL AND PROCEDURAL BACKGROUND

4. The Applicants filed their Pre-Trial Factums on September 1, 2021, and their Pre-Trial Reply Briefs on September 21, 2021.
5. The Respondents filed the Brief of Law on September 14, 2021.
6. The hearing in this case occurred over 14 days in February and April 2022 before the Honourable Madam Justice Romaine (“**Hearing**”).
7. The Applicants filed their Final Written Submissions on June 13, 2022, and their Reply to Respondents’ Final Argument on July 28, 2022.
8. The Respondents filed the Final Argument on July 13, 2022.
9. On July 25, 2022, the subject matter of this Application was disclosed to this Honourable Court and the Respondents when the Applicants sent an unfiled Notice of Application and unfiled affidavit in support to this Honourable Court and the Respondents.
10. The effectiveness and effects of non-pharmaceutical interventions (“**NPI’s**”) implemented by the Respondents is a central issue in this action.
11. Masking is a form of NPI that was the subject of numerous public health orders (“**CMOH Orders**”) at issue in this case. Under the CMOH Orders, mandatory province wide masking was in effect.

12. Not following mandatory restrictions, including masking, could result in fines of \$1,000 per ticketed offence and up to \$100,000 through the courts.¹

a. Evidence of Dr. Deena Hinshaw In This Proceeding

13. Dr. Deena Hinshaw (“**Dr. Hinshaw**”), as the Chief Medical Officer of Health for the Province of Alberta, provided affidavit evidence in this proceeding in two affidavits affirmed on December 18, 2020, and on July 12, 2021. Dr. Hinshaw also provided oral evidence before this Honourable Court on April 4, 5, 6, and 7, 2022.

14. Dr. Hinshaw gave evidence in relation to the NPI of masking in her two affidavits and under cross-examination.

15. Under cross-examination, Dr. Hinshaw was asked specifically about the harms caused to children as a result of wearing masks and testified that “there was no evidence regarding serious health outcomes or adverse outcomes from wearing masks”:²

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

¹ Affidavit of Dr. Deena Hinshaw, affirmed July 21, 2021, at para 193.

² Transcript of Proceedings, April 5, 2022, p. 88/31 to p. 89/12 (emphasis added).

harms review was to look at any - any published literature that documented harms from wearing masks.

16. As will be detailed later in the “Contents of the Documents” portion of this Brief³, Dr. Hinshaw’s testimony before this Honourable Court on mask harms is patently false. Contrary to her evidence under cross-examination there were numerous scientific studies and published evidence related to harms including those which outlined the deleterious effects of mask wearing on mental health available at that time.
17. Under cross-examination on April 6, 2022, counsel for the Applicants asked Dr. Hinshaw questions related to the implementation of NPIs. Dr. 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 your recommendations?”⁴
18. Counsel for the Respondents objected to that line of questioning on the basis of public interest immunity or cabinet confidentiality (“**Objection**”).
19. In support of their Objection, Counsel for the Respondents produced an unfiled Certificate of a Member of the Executive Council sworn on February 17, 2022, and signed by the Honourable Sonya Savage as Acting Minister of Justice and Solicitor General of Alberta which states that Dr. Hinshaw’s discussions with Cabinet involve Cabinet’s considerations in making decisions on how to respond to the COVID-19 pandemic, which involve ongoing important and significant public policy issues (“**Certificate**”).
20. The Respondents did not produce an affidavit in support of their Objection.
21. Following submissions on cabinet confidentiality by all counsel, on April 7, 2022, this Honourable Court questioned Dr. Hinshaw *in camera* and asked her the following questions (“**Questions**”):
 - a. Did the Premier and Cabinet, including the PICC and the EMCC (“Cabinet”) ever direct you, Dr. Hinshaw, to impose more severe restrictions in your CMOH orders than you had recommended to them?

³ See paras 29-44 of this Brief.

⁴ Transcript of Proceedings, April 6, 2022, p.84/26-28.

- b. 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?
 - c. Did you ever recommend to Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet?
22. On April 7, 2022, when this Honourable Court asked Dr. Hinshaw the Questions *in camera*, Dr. Hinshaw testified “no” to all three Questions.
23. On April 26, 2022, this Honourable Court ordered that Dr. Hinshaw’s answers to the Questions form part of the Hearing record.⁵
24. In addition to questions regarding the harms of NPI’s, during her cross-examination Dr. Hinshaw was questioned on numerous public statements she made at press conferences. Dr. Hinshaw was also examined on psychological and behaviour modification strategies implemented by the Respondents on the population. Dr. Hinshaw testified to messaging and communications campaigns launched by the Respondents to influence the behaviour of the Applicants and “interventions to try to influence people’s behaviour.”⁶

b. Applicants’ Discovery of Relevant and Material Evidence

25. On July 4, 2022, the Honourable Justice G. S. Dunlop made a ruling on public interest immunity in Court of Queen’s Bench of Alberta Action No. 2203-04046. In that ruling, the Honourable Justice G. S. Dunlop ordered Dr. Hinshaw to file a further Amended Certified Record of Proceedings attaching a PowerPoint presentation and Cabinet minutes (“**Dunlop Order**”).⁷
26. Pursuant to the Dunlop Order, an Amended Amended Certified Record of Proceedings was filed in that action on July 12, 2022.⁸ It was made publicly available on July 13, 2022 (“**Documents**”).

⁵ *Ingram v. Alberta (Chief Medical Officer of Health)*, [“**Ingram**”], 2022 ABQB 311(CanLII).

⁶ Transcript of Proceedings, April 4, 2022, p. 89/8-9.

⁷ Affidavit of Tracey Bradley, sworn on July 25, 2022, Exhibit “A”.

⁸ *Ibid*, Exhibit “B”.

27. The Applicants only became aware of the Documents and their contents on July 13, 2022, when they became publicly available.
28. Despite portions of the information, data and scientific evidence contained within the Documents being available to the Respondents as early as November 18, 2020,⁹ and the contents of the Documents being in the possession, custody, or control of the Respondents at material times, the Documents were not disclosed to the Applicants.

c. Contents of the Documents

29. The Documents contain an email dated February 7, 2022, from Scott Fulmer, Acting Director of Health Evidence and Policy for Alberta, to Dr. Hinshaw and members of Alberta Health entitled “School Masking Evidence Summary” (“**Email**”).¹⁰
30. The Email states: “we went back through the evidence on school transmission and found the new material on how effective in schools some of the mitigation measures have been in the literature.”¹¹
31. While Scott Fulmer submits 22 studies to Dr. Hinshaw as a review of “new” material, thirteen of the studies are from June 8, 2021, or earlier, eight are from August 2021 onward and one date is indeterminable. Of the eight that are after July 12, 2021, one has “numerous flaws”¹² and another did not control for important differences in vaccination rates.¹³
32. The Email contains thirteen studies published before July 12, 2021:¹⁴
- a. European Centre for Disease Control and Prevention, published on July 8, 2021;¹⁵
 - b. Cochrane Literature Review, December 2020;¹⁶

⁹ *Ibid*, Exhibit “B”, at Tab 8 of the Documents, Email from Scott Fulmer to Dr. Hinshaw et al. dated February 7, 2022, summarizing scientific studies including the Denmark RCT, A. Bundgaard et al., Spring 2020, published on November 18, 2020. [Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers : A Randomized Controlled Trial - PubMed \(nih.gov\)](#)

¹⁰ *Ibid*, Exhibit “B”, at Tab 8 of the Documents.

¹¹ *Ibid*, Exhibit “B”, at Tab 8 of the Documents, page 1 of the Email.

¹² *Ibid*, Exhibit “B”, at Tab 8 of the Documents, page 8 of the Email: Arizona CDC study, M. Jehn et al., October 2021.

¹³ *Ibid*, Exhibit “B”, at Tab 8 of the Documents, page 8 of the Email., USA CDC study, S.E. Budzyn et al., October 2021.

¹⁴ *Ibid*, Exhibit “B”, at Tab 8 of the Documents; listed as they appear in the Email.

¹⁵ [COVID-19 in children and the role of school settings in transmission - second update \(europa.eu\)](#)

¹⁶ [Measures implemented in the school setting to contain the COVID-19 pandemic: a rapid scoping review - Krishnaratne, S - 2020 | Cochrane Library](#)

- c. Vancouver seroprevalence study, Goldfarb et al., October 2020 to May 2021, published on June 18, 2021;¹⁷
- d. Georgia CDC Study: USA, Gettings, J.R., et al., December 2020 to January 2021, published on February 26, 2021;¹⁸
- e. Italy, Gandini et al., September 30, 2020 to February 2021, published on March 26, 2021;¹⁹
- f. Utah: USA, R.B. Hershov et al, December 2020 to January 2021 published on March 26, 2021;²⁰
- g. Florida, New York, Massachusetts: USA, E. Oster et al, 2020- 2021, published on May 21, 2021;²¹
- h. USA All States, J. Lessler et al., December 2020 to February 2021, published on April 29, 2021;²²
- i. Science Magazine Summary on in-person schooling, April 29, 2021;²³
- j. Denmark RCT, A. Bundgaard et al., Spring 2020, published on November 18, 2020;²⁴
- k. California Study: D. Cooper et al., Autumn to Winter 2020, published on June 16, 2021;²⁵

¹⁷ [SARS-CoV-2 seroprevalence among Vancouver public school staff in British Columbia, Canada \(medrxiv.org\)](https://www.medrxiv.org/content/10.1101/2021.06.18.21264441v1)

¹⁸ [Clusters of SARS-CoV-2 Infection Among Elementary School Educators and Students in One School District — Georgia, December 2020–January 2021 | MMWR \(cdc.gov\)](https://www.cdc.gov/mmwr/preview/mmwrhtml/6001a1.htm)

¹⁹ [A cross-sectional and prospective cohort study of the role of schools in the SARS-CoV-2 second wave in Italy - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/35014441/)

²⁰ [Low SARS-CoV-2 Transmission in Elementary Schools — Salt Lake County, Utah, December 3, 2020–January 31, 2021 | MMWR \(cdc.gov\)](https://www.cdc.gov/mmwr/preview/mmwrhtml/6001a1.htm)

²¹ [COVID-19 Mitigation Practices and COVID-19 Rates in Schools: Report on Data from Florida, New York and Massachusetts | medRxiv](https://www.medrxiv.org/content/10.1101/2021.05.14.21254441v1)

²² [Household COVID-19 risk and in-person schooling \(saocamilosp.br\)](https://saocamilosp.br/en/2021/04/29/household-covid-19-risk-and-in-person-schooling/)

²³ [Household COVID-19 risk and in-person schooling | Science](https://www.science.org/doi/10.1126/science.abc.2021.04.29.417144)

²⁴ [Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers : A Randomized Controlled Trial - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/35014441/)

²⁵ [SARS-CoV-2 Acquisition and Immune Pathogenesis Among School-Aged Learners in Four Diverse Schools - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/35014441/)

- l. Germany Study: Theuring et al., November 2020 published on January 29, 2021;²⁶
and
 - m. US Summer Camp Study, Summer 2020, posted on February 22, 2021.²⁷
33. The Email contains eight studies published after July 12, 2021.²⁸
- a. The Evergreen McMaster University Study, August 2021;
 - b. Bangladesh Study, J. Abaluck et al., September 1, 2021;
 - c. Alachua County Florida, October 31, 2021;
 - d. Arizona CDC study, M. Jehn et al., October 2021;
 - e. USA CDC study, S.E. Budzyn et al., October 2021;
 - f. Cass County, North Dakota Study, Tracy Hogg, December 2021;
 - g. Tennessee Study published in the Atlantic, January 26, 2022; and
 - h. UK PHE In the School Setting, January 2022.
34. The Email contains one study that has no date provided:²⁹
- a. UK PHE in the Community.
35. As disclosed in the Documents, on February 7, 2022, the Premier’s Office sent a memo to the Honourable Jason Kenney, Premier of the Province of Alberta. A copy of the memo was provided to the Respondent, Dr. Hinshaw as the Chief Medical Officer of Health (“**Memo**”).³⁰
36. The Memo included the findings of scientific studies on masking from data available to the Respondents as early as February 26, 2021, analyzing data available from December 2020.³¹

²⁶ [SARS-CoV-2 infection and transmission in school settings during the second wave in Berlin, Germany: a cross-sectional study | NCRC \(jhsph.edu\)](#)

²⁷ [Effectiveness of Non-Pharmaceutical Interventions on Child and Staff COVID-19 Cases in US Summer Camps | medRxiv](#)

²⁸ Affidavit of Tracey Bradley, sworn on July 25, 2022, Exhibit “B”, at Tab 8 of the Documents.

²⁹ *Ibid*, Exhibit “B”, at Tab 8 of the Documents.

³⁰ *Ibid*, Exhibit “B”, at Tab 6 of the Documents.

³¹ Georgia CDC Study: USA, Gettings, J.R., et al., December 2020 to January 2021, published on February 26 2021, referred to in the Email and the Memo.

37. The Memo states that children and young people are:

at very low risk of severe outcomes from COVID infection. In Alberta, case, hospitalization and ICU, and death rates per 100 cases for school-aged children (ages 5 to 19) are 0.47, 0.07, and 0.004, respectively. An Albertan aged 5 to 19 infected with COVID is about 223 times less likely to die from COVID than an Albertan 20 years of age or older.³²

38. The Memo also states that:³³

- a. there is insufficient direct evidence of the effectiveness of face masks in reducing COVID-19 transmission in education settings;
- b. research supporting mask use in schools has limitations that make the pool of evidence weak and the benefits of masking children unclear;
- c. there are harmful effects of mask wearing on children;
- d. masks block emotional signalling between teachers and students;
- e. emotions are a major driver of group cohesion;
- f. masks can:
 - i. disrupt learning;
 - ii. interfere with children's social development;
 - iii. interfere with children's emotional development;
 - iv. interfere with children's speech development;
 - v. impair verbal communication;
 - vi. impair non-verbal communication; and
 - vii. impair facial recognition;

³² Affidavit of Tracey Bradley, sworn on July 25, 2022, Exhibit "B", at Tab 6 of the Documents.

³³ *Ibid*, Exhibit "B", at Tab 6 of the Documents.

- g. physical side effects of masks include:
 - i. headaches;
 - ii. dermatitis with rashes and redness; and
 - iii. discomfort;
- h. young children need to see full faces to learn language and identify emotions; and
- i. masks can be especially detrimental to students with hearing impairments.

39. To support the conclusions on mask harms within the Memo, numerous hyperlinks are used. As the publicly available Documents are scanned PDF copies, the Applicants have no access to the original hyperlinked sources. However, through cross-referencing the contents of the Memo with the contents of the Email, at least two sources from the Memo can be verified as being available to the Respondents in February 2021 and March 2021 respectively.³⁴

40. On February 8, 2022, the Priorities Implementation Cabinet Committee (“**PICC**”) met to discuss easing restrictions. PICC reviewed a PowerPoint presentation with data and recommendations entitled “Endemic Planning - Easing Public Health Measures: Priorities Implementation Cabinet Committee” (“**PowerPoint Presentation**”).³⁵

41. The PowerPoint Presentation was prepared by Dr. Hinshaw.³⁶

42. The PowerPoint Presentation states that three approaches have been developed for consideration (“**Three Options**”).³⁷

- a. The first approach includes a significant easing in step 1: any potential impacts of the initial easing can be monitored and adjusted for before moving to the next step (e.g., delayed entry into subsequent steps) (“**First Option**”).

³⁴ “2021 CDC Study” at page 2 of the Memo, published on February 26, 2021 [Clusters of SARS-CoV-2 Infection Among Elementary School Educators and Students in One School District — Georgia, December 2020–January 2021 | MMWR \(cdc.gov\)](#) and the “Utah Study” at page 3 of the Memo, published on March 26, 2021; [Low SARS-CoV-2 Transmission in Elementary Schools — Salt Lake County, Utah, December 3, 2020–January 31, 2021 | MMWR \(cdc.gov\)](#)

³⁵ Affidavit of Tracey Bradley, sworn on July 25, 2022, Exhibit “B”, at Tab 13 of the Documents..

³⁶ [C.M. v Alberta, 2022 ABQB 462 \(CanLII\)](#), [“**C.M.**”], at para 9.

³⁷ Affidavit of Tracey Bradley, sworn on July 25, 2022, Exhibit “B”, at Tab 13 of the Documents, at page 25 of the PowerPoint Presentation, emphasis added.

- b. The second approach includes a moderate easing between all steps: any potential impacts more likely to be adjusted for throughout each step (e.g., able to enter subsequent steps without significant delays) (“**Second Option**”).
- c. The third approach would be defined by the specific measures that PICC chooses. (“**Third Option**”).

43. The PowerPoint Presentation prepared by Dr. Hinshaw included scientific data and scientific evidence. However, it also included numerous political statements that are not founded in science, such as:

- a. masking is a physical and visual reminder of risk and potential for transmission;³⁸
- b. endemic phase characterized by . . . increased public “tolerance” of the disease;³⁹
- c. Alberta will be a leader in entering the endemic space, balancing the risks and benefits to easing before other Canadian jurisdictions;⁴⁰
- d. per previous PICC direction, 3-step approaches to easing are proposed, with a focus on removing the Restrictions Exemption Program and easing youth masking requirements;⁴¹
- e. when considering the First Option, the pros and cons included:⁴²
 - i. Alberta is a leader in reopening; and
 - ii. easings will be ahead of most Canadian jurisdictions;
- f. when considering the Second Option, the pros and cons included:⁴³
 - i. Alberta is still a leader in reopening while minimizing any potential exit waves;
 - ii. easings will be ahead of most Canadian jurisdictions; and
 - iii. some Albertans may not be satisfied with the pace or sequencing of easings;

³⁸ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 46 of the PowerPoint Presentation.

³⁹ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 4 of the PowerPoint Presentation.

⁴⁰ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 23 of the PowerPoint Presentation.

⁴¹ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 25 of the PowerPoint Presentation.

⁴² *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 28 of the PowerPoint Presentation.

⁴³ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 30 of the PowerPoint Presentation.

- g. when considering the Third Option, the pros and cons included:⁴⁴
 - i. potentially more responsive to public opinion; and
 - ii. some Albertans may not be satisfied with the pace or sequencing of easings;
- h. public communications of easings: announce as a “bold but prudent approach” and support it with advertising;⁴⁵
- i. indicators of endemic phase: the public is increasingly tolerant of the disease; and⁴⁶
- j. mask requirements for schools was a divisive issue in some communities as increasing numbers of parents and students were protesting mask mandates, including protests staged at schools.⁴⁷

44. Following the PowerPoint Presentation as presented by Dr. Hinshaw, PICC directed the Minister of Health and the CMOH to implement the Second Option to moderately ease public restrictions.⁴⁸

III. ISSUES

45. The issues for determination on this Application are whether the Court is satisfied there are reasons to hear more evidence in this matter, particularly:
- a. An Order that the Documents that were publicly made available on July 13, 2022, by order of the Honourable Justice Dunlop, be admitted as evidence in this matter;
 - b. An Order that the Respondent, Dr. Hinshaw, the Chief Medical Officer of Health for the province of Alberta, appear before this Honourable Court and return for cross-examination by the Applicants on the Documents and issues arising therefrom;
 - c. An Order that prior to the recross-examination of Dr. Hinshaw, the Chief Medical Officer of Health for the province of Alberta, the Respondents provide the Applicants with all of the data and scientific analysis Dr. Hinshaw relied on when making her recommendations to Cabinet regarding the CMOH Orders;

⁴⁴ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 30 of the PowerPoint Presentation.

⁴⁵ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 34 of the PowerPoint Presentation.

⁴⁶ *Ibid*, Exhibit “B”, at Tab 13 of the Documents, at page 77 of the PowerPoint Presentation.

⁴⁷ *Ibid*, Exhibit “B”, at Tab 12 of the Documents, Appendix 1.

⁴⁸ *Ibid*, Exhibit “B”, at Tab 14 of the Documents.

- d. An Order that prior to the recross-examination of Dr. Hinshaw, the Chief Medical Officer of Health for the province of Alberta, the Respondents provide the Applicants with all of the recommendations Dr. Hinshaw made to Cabinet regarding the implementation of the CMOH Orders; and
- e. An Order that the Respondent, Dr. Hinshaw, the Chief Medical Officer of Health for the Province of Alberta, answer questions related to issues arising from the Documents that were objected to by Counsel for the Respondents on the basis of cabinet confidentiality.

IV. LAW

a. Re-opening a Case

46. Rule 9.13 of the Alberta Rules of Court reads:⁴⁹

9.13 At any time before a judgment or order is entered, the Court may

- (a) vary the judgment or order, or
- (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

47. After a trial, but before the entry of an order, the court has discretion to admit fresh evidence. This discretion is so broad that it applies even after the court issues a decision. To exercise this discretion, the court must be satisfied that reasonable diligence was exercised to discover the evidence.

48. The court can adduce new evidence even after an order is drafted and signed, but not after an order has been entered. Once an order has been entered it is final. The only available recourse is to appeal.

49. The onus is on the applicant to establish that there are exceptional circumstances.

50. The test for adducing new evidence after trial is explained in *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*:⁵⁰

⁴⁹ *Alberta Rules of Court*, Alta Reg, 124/2010.

⁵⁰ [2008 ABQB 142 \(CanLII\) \[Stone\]](#), at para 37-38.

The test ... requires the original trier of fact to review the evidence tendered and the circumstances, and to exercise his or her discretion as to its admissibility on the motion. Only he or she can fairly judge whether the evidence should be considered, and whether it may have an effect or impact on the previously-rendered decision.

51. The Court went on to state that:

The jurisdiction for a chambers judge or a trial judge to hear further submissions or receive further evidence after the hearing, and even after the issuance of the decision, but before the entry of the formal Order of Judgment, is very broad. It is accurately described as being “unfettered”, although cautions are placed on that width to avoid an abuse of the Court's processes but in any event to avoid a miscarriage of justice.⁵¹

52. In *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*,⁵² The Supreme Court of Canada considered the adduction of new evidence and referred to Lord Denning in *Ladd v.*

Marshall:⁵³

To justify the reception of fresh evidence . . . 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 results 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.

53. The Alberta Court of Appeal decision *Alberta (Child, Youth and Family Enhancement, Director) v. B.M.*⁵⁴ is binding on this Honourable Court. In *B.M.*, Justice Côté states that the rules governing applications for fresh evidence at trial “... are very similar to the well-known rules for receiving new evidence on appeal to the Court of Appeal.”⁵⁵

54. According to *B.M.*, for a court to admit fresh evidence at trial or appeal, there are four requirements:⁵⁶

⁵¹ *Ibid.*, at para 40.

⁵² [2001 SCC 59 \[Sagaz\]](#).

⁵³ *Ibid.*, at para 63.

⁵⁴ [2009 ABCA 258 \(CanLII\) \[B.M.\]](#).

⁵⁵ *Ibid.*, at para 12.

⁵⁶ *Ibid.*, at para 12.

- a. Could the evidence have been obtained earlier if due diligence had been observed? That the evidence was available to the applicant but not looked for because it was hard to access and because other matters pressed, is fatal.
- b. Is the evidence credible?
- c. Would the evidence have been practically conclusive in producing the opposite result to that earlier pronounced? A debatable matter of opinion is not sufficient. Nor is controvertible evidence which would open up an extremely complex and convoluted exercise.
- d. Is the evidence in its present form admissible under the ordinary rules of evidence?

55. In reviewing the criteria established in *B.M.*, in *Aubin v. Petrone*⁵⁷ the court considered the following additional factors:⁵⁸

- a. the desirability of avoiding unnecessary and costly appeals;
- b. the desirability of the appeal court having a fully developed factual legal record;
- c. the need for finality and certainty in legal proceedings;
- d. that errors to be corrected should be objectively demonstrable;
- e. the rule is not a vehicle for seeking reconsideration of a judgment call; and
- f. the threshold for a court to exercise its discretion should be high to avoid applications which are in reality, a “second kick at the can.”

b. Cabinet Confidentiality or Public Interest Immunity

56. In *Ingram v. Alberta (Chief Medical Officer of Health)*⁵⁹ the issue of public interest immunity was addressed. This Honourable Court stated that:

questions posed to Dr. Hinshaw and the answers she gave do not reveal disagreements among ministers or the views of individual ministers. They do not directly reveal considerations put before Cabinet, other than to reveal whether or not Cabinet directed Dr. Hinshaw to impose limitations in the impugned Orders

⁵⁷ [2020 ABQB 708 \[Aubin\]](#).

⁵⁸ *Ibid.*, at para 7.

⁵⁹ 2022 ABQB 311 [*Ingram*].

that were more restrictive than she had recommended. They do not reveal the specifics of her recommendations.

57. In the very recent decision, *C.M.*, the issue of public interest immunity arose in relation to Dr. Hinshaw's orders under the *Public Health Act*.⁶⁰ As in these proceedings, in support of its claim for cabinet confidentiality, the Crown submitted a certificate signed by a Cabinet Minister. The Crown did not provide an affidavit.
58. In *C.M.* the court reviewed the leading Supreme Court of Canada decision on public interest immunity: *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*.⁶¹
59. Relying on *Provincial Court Judges'*, the court found that in order to claim public interest immunity, the Crown has the burden of proving that public interest immunity applies. To discharge that burden, the Crown should put in a detailed affidavit to support its claim.⁶²

The Crown has the burden of proving that public interest immunity applies and it should put in a detailed affidavit to support its claim: *Provincial Court Judges'* at para 102. In this case the Crown did not file an affidavit. The only evidence I have relevant to public interest immunity is Minister Shandro's certificate and the documents themselves. Minister Shandro has an obligation to "be as helpful as possible in identifying the interest sought to be protected": *Carey* at para 40.

60. With respect to asserting public interest immunity regarding the evidence of Dr. Hinshaw as the Chief Medical Officer of Health for Alberta, *C.M.* held that:

As to the materials prepared for Cabinet's consideration, there is no evidence before me to support the conclusion that documents provided by the Chief Medical Officer of Health to Cabinet must be kept secret to ensure she will freely and honestly provide information and recommendations in the future. On the contrary, given her statutory powers and duties under the *Public Health Act*, RSA 2000, c. P-37 and her professional obligations as a physician, I would expect her to be candid and complete, regardless of any potential future public disclosure.⁶³

⁶⁰ *Public Health Act*, RSA 2000, c.P-37.

⁶¹ [2020 SCC 20 \[Provincial Court Judges'\]](#).

⁶² *C.M.*, at para 6.

⁶³ *Ibid*, at para 10.

V. ARGUMENT

61. When applying the analysis of *B.M.* and *Aubin* to this Application, this Honourable Court must exercise its discretion to adduce the new evidence and require Dr. Hinshaw to attend cross-examination on the new evidence and to answer questions related to issues arising from the Documents that were objected to by Counsel for the Respondents on the basis of cabinet confidentiality.
62. As in *B.M.*, this is not the case of a “losing party [advancing] a new argument which he or she simply did not think of before.”⁶⁴
63. Procedural fairness requires that the trial be reopened, and the new evidence adduced. These are exceptional circumstances. The facts and issues of this case have resulted in unprecedented violations of rights and freedoms of the Applicants and all Albertans.
64. It is exceedingly rare that the Applicants could be afforded the opportunity to review relevant and material evidence held in the exclusive possession of the opposing party. The Applicants’ discovery of the new evidence could not have occurred prior to July 13, 2022.
65. Through the disclosure of the Documents, it has now come to light that Dr. Hinshaw was not candid and forthright with this Honourable Court. Dr. Hinshaw and the Respondents’ expert witnesses failed to disclose evidence that was relevant and material to issues at the very center of this proceeding: the demonstrable and known harms of imposing NPI’s upon the population.
66. The new evidence that the Applicants have only recently discovered reveals serious credibility issues with the entirety of the testimony and evidence of Dr. Hinshaw.
67. Despite their duties of utmost candour to this Honourable Court, neither Dr. Hinshaw nor the Respondents’ expert witnesses provided the information contained within the Documents to the Court.
68. It was only after Dr. Hinshaw was compelled by a court order in recent days that this disclosure was known to the Applicants.

⁶⁴ *B.M.*, at para 11.

69. This disclosure reveals the lack of transparency in Dr. Hinshaw's evidence in this proceeding. It is incumbent upon her to be honest and truthful. Her denial of any effects of masking on children's psychological health, psychiatric health, and social development before this Honourable Court is inconsistent with the Documents and in particular, the Memo she was provided a copy of.

70. Consequently, the Applicants in this proceeding have been severely prejudiced by the conduct of Dr. Hinshaw and Alberta. The Applicants have not been afforded the opportunity to properly cross-examine Dr. Hinshaw or Alberta's expert witnesses. Further, this Honourable Court has been deprived of the opportunity to weigh relevant and material evidence that goes to fundamental and salient issues of the Applicants' case.

a. Did the Applicants Exercise Due Diligence to Discover the Evidence?

71. The Applicants exercised due diligence to discover the evidence. There is nothing more the Applicants could have done to obtain the evidence earlier than July 13, 2022. In fact the evidence was not even available to the Applicants until the Respondents were compelled by court order to make the evidence public.

72. The Applicants asked Dr. Hinshaw questions on cross-examination pertaining to issues in the new evidence, but Dr. Hinshaw did not disclose the new evidence. Further, the Applicants were precluded from fully questioning Dr. Hinshaw on issues revealed in the new evidence due to numerous objections and interruptions by the Respondents' Counsel.

b. Is the New Evidence Credible?

73. The new evidence is credible. The Respondents are the source of the evidence and produced it pursuant to an order of this Honourable Court in another action.

c. Would the Evidence Have Been Practically Conclusive?

74. When the new evidence was revealed to the Applicants and the Applicants notified this Honourable Court and the Respondents about this Application, a decision by this Honourable Court had not been reached. While the evidence and Hearing in this proceeding have concluded, as far as the Applicants are aware, the court has not come to a final ruling in this case. It is, therefore, difficult to assess the effect this evidence will have on this Honourable Courts' final decision.

75. The new evidence was discovered by the Applicants on July 13, 2022, the same day the Respondents filed their Final Argument, but before the Applicants filed their Reply to Respondents' Final Argument on July 28, 2022.

76. On July 25, 2022, before the closing of final arguments, the Applicants put this Honourable Court and the Respondents on notice about the discovery of the new evidence and the Applicants' intention to seek this Honourable Court's direction in that regard.

d. Is the Evidence Admissible Under the Ordinary Rules of Evidence?

77. The evidence in its present form is admissible under the ordinary rules of evidence. The Documents contain information that is relevant and material to key issues in these proceedings, the Documents are not covered by cabinet confidentiality,⁶⁵ and the Documents are not bound by any other limiting evidentiary rules.

i. Cabinet Confidentiality or Public Interest Immunity

78. Contrary to the Supreme Court of Canada's guidance in *Provincial Court Judges*, in this case the Crown did not file an affidavit to assert public interest immunity in support of its Objection on April 6, 2022. All this Honourable Court had to rely on was the Certificate.

79. Dr. Hinshaw is not a member of Cabinet. Therefore, any documents she has must not be kept secret to ensure that "she will freely and honestly provide information and recommendations in the future."⁶⁶ Dr. Hinshaw is bound by her professional obligations as a physician and she is "expect[ed] to be candid and complete, regardless of any future public disclosure."⁶⁷

80. The Documents reveal that relevant and material evidence was hidden from Albertans in *C.M.* It was only after the Respondents were compelled by an order of the court, that they were revealed. What other relevant evidence have the Respondents hidden from the Applicants based on their assertion of "cabinet confidentiality"?

ii. Relevancy

81. The Documents and questions to Dr. Hinshaw arising therefrom are relevant and material to issues in this case. The harms of all NPI's and whether the government applied the least

⁶⁵ As ordered by the court in *C.M.*

⁶⁶ *C.M.*, at para 10.

⁶⁷ *Ibid.*

intrusive measures are central to the Applicants' case. The Documents contain relevant information delineating those harms and whether Cabinet consistently opted for the most minimally invasive options was not disclosed by the Respondents at any time during these proceedings.

82. The issues raised in the Documents are not constrained by time. Relevancy of the Documents goes to the entirety of Dr. Hinshaw's credibility and competency throughout the entirety of her time as Chief Medical Officer of Health for Alberta.

1. Credibility and Competence of Dr. Hinshaw

83. When rights and freedoms are restricted, courts should be cautious in deferring to governmental authority. Not long ago, Canadian governments, through state funded residential schools, believed it was beneficial to "beat the Indian out of the child" and consequently "solve what was referred to as the "Indian problem." "Indianness" was not to be tolerated; rather it was to be eliminated."⁶⁸

84. The former Chief Justice of the Supreme Court of Canada, Justice Beverly McLachlin, has openly stated that the government of Canada was involved in cultural genocide against Indian people under the guise of child welfare. In what world should courts not forever be skeptical of any Canadian government seeking to truncate basic human rights under the guise of emergency powers.

85. While government is engaged in the business of child welfare, it would be preposterous for courts to give deference to them on that basis by refusing to interfere with the government's position on child welfare in the case of abusing Indian children.

86. In *J.N. v. C.G.*⁶⁹ Mr. Justice Pazaratz of the Ontario Superior Court General Division reviewed recent Canadian history where governments and their experts were trusted, government authority was deferred to, and Canadian's rights and freedoms were violated:⁷⁰

⁶⁸ <https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>: quote from the Chief Justice of the Supreme Court of Canada (as she then was) Madam Justice Beverley McLachlin referring to a quote from Sir John. A. MacDonald, former Prime Minister of Canada.

⁶⁹ [2022 ONSC 1198 \(CanLII\) \[J.N.\]](#).

⁷⁰ *Ibid*, at para 67.

Did the Motherisk inquiry teach us nothing about blind deference to “experts”? Thousands of child protection cases were tainted – and lives potentially ruined – because year after year courts routinely accepted and acted upon substance abuse testing which turned out to be incompetent.

What about the Residential School system? For decades the government assured us that taking Indigenous children away – and being wilfully blind to their abuse – was the right thing to do. We’re still finding children’s bodies.

How about sterilizing Eskimo women? The same thing. The government knew best.

Japanese and Chinese internment camps during World War Two? The government told us it was an emergency and had to be done. Emergencies can be used by governments to justify a lot of things that later turn out to be wrong.

Few people remember Thalidomide. It was an experimental drug approved by Canada and countries throughout the world in the late 1950’s. It was supposed to treat cancer and some skin conditions. Instead, it caused thousands of birth defects and dead babies before it was withdrawn from the market. But for a period of time government experts said it was perfectly safe.

On social issues the government has fared no better. For more than a century, courts took judicial notice of the fact that it was ridiculous to think two people of the same sex could get married. At any given moment, how many active complaints are before the courts across the Country, alleging government breaches of *Charter* Rights? These are vitally important debates which need to be fully canvassed.

The list of grievous government mistakes and miscalculations is both endless and notorious. Catching and correcting those mistakes is one of the most important functions of an independent judiciary.

And throughout history, the people who held government to account have always been regarded as heroes – not subversives.

When our government serially pays out billions of dollars to apologize for unthinkable historic violations of human rights and security – how can we possibly presume that today’s government “experts” are infallible?

Nobody is infallible.

And nobody who controls other people's lives – *children's lives* – should be beyond scrutiny, or impervious to review.

2. Professional Obligations of Dr. Hinshaw

87. The Documents have revealed concerning and troubling revelations of the Respondent's evidence. The Documents demonstrate that Dr. Hinshaw imposed restrictions based on improper data and science and that her recommendations to Cabinet included numerous political statements that are not in keeping with her professional obligations as a physician.

88. Dr. Hinshaw is obligated to follow professional standards of care. The College of Physicians and Surgeons of Alberta ("CPSA") and the Canadian Medical Association ("CMA") Code of Ethics include:⁷¹

- a. The patient-physician relationship is at the heart of the practice of medicine. It is a relationship of trust that recognizes the inherent vulnerability of the patient even as the patient is an active participant in their own care; and
- b. The physician owes a duty of loyalty to protect and further the patient's best interests and goals of care by using the physician's expertise, knowledge, and prudent clinical judgment.

89. In particular, the CPSA delineates the following obligations regarding informed consent:⁷²

- a. a patient's informed consent is required prior to examination, assessment, treatment or procedure;
- b. a decision maker must be aware of his or her right to withdraw consent at any time;
- c. the patient must be free of undue influence, duress or coercion in making the consent decision;
- d. the patient receives a proper explanation that includes, but is not limited to:
 - i. diagnosis reached;
 - ii. advised interventions and treatment;

⁷¹ [CMA CODE OF ETHICS AND PROFESSIONALISM - PD19-03.pdf](#) at C: Professional Responsibilities; Members of the CPSA must comply with the CMA Code of Ethics and Professionalism adopted by the CPSA in accordance with section 133 of the *Health Professions Act*, RSA 2000, c.H-7 and the CPSA Bylaws: [Code of Ethics - College of Physicians & Surgeons of Alberta | CPSA](#)

⁷² [Informed-Consent.pdf \(cpsa.ca\)](#)

- iii. exact nature and anticipated benefits of the proposed examination, assessment, treatment of procedure;
 - iv. common risks and significant risks;
 - v. reasonable alternative treatments available, and the associated common risks and significant risks;
 - vi. natural history of the condition and consequences of forgoing treatment; and
- e. the patient demonstrates a reasonable understanding of the information provided and the reasonably foreseeable consequences of both a decision and failure to make a decision.

90. The policies of Alberta Health Services (“AHS”) regarding informed consent and freedom from coercion are that any medical intervention or procedure requires the fully informed consent of the patient.⁷³ Informed consent must be voluntary. The Patient shall have the opportunity, without undue influence, to accept or refuse a treatment or procedure.⁷⁴

91. Dr. Hinshaw is imposing restrictive measures on Albertans that are coercive. Based on the PowerPoint Presentation, it is clear that she engaged in the intentional psychological manipulation of the citizens of Alberta by intentionally elevating societal fear around the virus to a fever pitch. The Documents show that while mask wearing was not effective in reducing in-school transmission, it was effective in Dr. Hinshaw’s mind in conveying “a physical and visual reminder” to the public of an invisible and serious threat. Deliberately terrorizing the public does not align with Dr. Hinshaw’s obligations as a physician to do no harm and to not add to psychologically driven suicides in the province of Alberta.

92. Dr. Hinshaw publicly referred to coercive programs like the Restrictions Exemption Program as “structural encouragement.”⁷⁵ The Restrictions Exemption Program violated the civil rights of Albertans by denying the rights of access to public facilities like restaurants and sports venues to the unvaccinated. Before this Honourable Court under cross-examination,

⁷³ [AHS Consent to Treatment/Procedure\(s\) Policy Summary Sheet \(albertahealthservices.ca\); CONSENT TO TREATMENT/PROCEDURE\(S\) policy PRR-01 \(ahsnet.ca\)](#)

⁷⁴ [CONSENT TO TREATMENT/PROCEDURE\(S\) policy PRR-01 \(ahsnet.ca\)](#); at page 7.

⁷⁵ Affidavit of Lesley Doucet, affirmed on August 10, 2022.

Dr. Hinshaw claims to not recall using this unique phrase.⁷⁶ This should raise serious questions regarding the credibility of Dr. Hinshaw.

93. On the eve of the vaccination rollout for children aged 5 to 11, Dr. Hinshaw publicly announced a pediatric death related to the virus.⁷⁷ Her announcement planted seeds of fear in the hearts and minds of parents who would be emotionally compelled to vaccinate their children though the incontrovertible evidence of serious outcomes and death in children is so immeasurable it is statistically insignificant.⁷⁸ All of the foregoing evidence reveals that Dr. Hinshaw is using her position of trust and authority for politically expedient purposes rather than *bona fide* medical purposes.
94. Dr. Hinshaw claims to have relied on the advice of the Scientific Advisory Group. These claims are now brought into question by the recent release of the materials and Documents pursuant to the Dunlop Order.
95. During cross-examination by Mr. Grey, Dr. Hinshaw was asked questions related to a document produced by the Scientific Advisory Group containing the “Behaviour Change Wheel”.⁷⁹ This document detailed ways in which the public could be psychologically manipulated into complying with the messaging of the Respondents.
96. These examples beg the question: how much of the Respondents’ conduct was about public health and how much of the Respondents’ conduct was about deliberately manipulating people’s fear and emotions.
97. Dr. Hinshaw claims that the people of Alberta are her patients.⁸⁰ This is not the type of candour or professionalism one expects from a physician who is seeking the full and informed consent of her patient. This Honourable Court must assess the conduct of Dr. Hinshaw and determine if it is in keeping with her professional obligations as a physician.

⁷⁶ Transcript of Proceedings, April 6, 2022 at p. 108/15-33.

⁷⁷ *Ibid*, at p. 106/31-34 and p. 108/1-6.

⁷⁸ Affidavit of Tracey Bradley, sworn on July 25, 2022, Exhibit “B”, at Tab 6 of the Documents.

⁷⁹ Transcript of Proceedings, April 4, 2022, p. 88/35 to p. 89/2.

⁸⁰ Affidavit of Dr. Deena Hinshaw, affirmed July 12, 2021 at para 17.

3. Political Decisions Not Medical Decisions

98. The Documents are revealing. When it was politically expedient for the Respondents to rescind masking restrictions for Albertans, they were able to find the justification to support their decision within hours while utilizing, in large part, data that pre-dated the CMOH Orders at issue in the case.

99. To further demonstrate the political nature of the Respondents' decisions at issue in this case, in *C.M.* before Justice Dunlop, the Respondents are arguing the opposite position from the position they are taking in this case.

100. The Supreme Court of Canada has committed extensively on the “honor of the Crown” in the context of aboriginal cases.⁸¹ Similarly, in the context of public interest litigation, the Crown should not be seen as taking one position in one case and the opposite position in another. The Crown has not appealed the decision of Justice Dunlop and the Dunlop Order. To that extent, the decision of Justice Dunlop and the Dunlop Order must be taken to be the law that the Crown itself believes should apply.

101. In the Documents, Dr. Hinshaw advised Cabinet that while masks are harmful and not efficacious, they are “a physical and visual reminder of risk”. In following advice that was not efficacious but was purposely intended to be “a physical and visual reminder of risk”, this Honourable Court should consider the degree to which the entire Court of Queen’s Bench of Alberta has been duped by the CMOH into acting as an agent of fear and oppression as opposed to a bastion of civil rights.

102. Were all of the NPI’s implemented by the Respondents with similar rationale? Did Dr. Hinshaw advise Cabinet that even though efficacy is not clear, Albertans should be isolated from loved one’s during the Christmas season because it will emphasize to Albertans that they should be afraid? Was the process of shutting down restaurants, prohibiting socialization, shutting people up in their homes, limiting Albertans to “cohorts”, banning youth sporting activities, and restricting church gatherings useful in reinforcing to Albertans

⁸¹ *Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)* 2014 SCC 48 [Grassy Narrows].

that they should be fearful? One is left to wonder how much of these decisions were based on actual public health and how much of these decisions were used as an exercise in terrorizing the population of Alberta.

103. There is some question as to the degree to which this Honourable Court should rely on any of Dr. Hinshaw's decisions or any of her evidence. It is evident from the Documents that her opinions and views on NPI's changed. The information in the Documents undermines all of Dr. Hinshaw's decisions at issue in this case. The Applicants must be afforded the chance to cross-examination Dr. Hinshaw on these issues.
104. Had Dr. Hinshaw been answering Mr. Rath's masking harms questions candidly, her answer may have reflected the following: "at the time the CMOH Orders were brought in, we had data that suggested that masking was harmful, but subsequently decided that it was useful to instil fear in the public by forcing every member of the public into acting as an agent of fear, absent the ability to decline this imposition of government servitude." While a perfectly acceptable answer which tracks with the evidence seeking to be admitted in this Application, this candour was lacking. Instead, Dr. Hinshaw was clearly being evasive and manipulating the information she was providing to this Honourable Court knowing that other contrary information existed that predated the CMOH Orders in this case which was hidden from this Honourable Court.
105. The PowerPoint Presentation expressly reveals that even when preparing a list of options for Cabinet consideration to ease measures, prior to determining any recommendations, Dr. Hinshaw was first directed by PICC to remove the Restrictions Exemption Program and youth masking requirements.⁸² This is further evidence that Dr. Hinshaw's recommendations were political and not for *bona fide* medical purposes.
106. This Honourable Court should not be comfortable in making a ruling in favour of the Respondents without first seeing every single menu of recommendations that Dr. Hinshaw presented to Cabinet regarding every single impugned CMOH Order in this case.

⁸²Affidavit of Tracey Bradley sworn on July 25, 2022, Exhibit "B", at Tab 13 of the Documents, at page 25 of the PowerPoint Presentation.

107. The foregoing goes directly to the issues of candour in and around Dr. Hinshaw's evidence and calls into question the entirety of the Respondents' evidence in this case regarding all NPI's at issue.
108. None of this evidence would offend cabinet confidentiality. Any documents or materials provided to Cabinet by the CMOH are not covered by cabinet confidentiality. They do not reveal any Cabinet deliberations. Further, as Dr. Hinshaw is acting in accordance with her duties as the CMOH, her evidence is not protected under the same considerations. Dr. Hinshaw is not a politician and must discharge her duties ethically and professionally regardless of future public disclosure.

4. Misleading Evidence of Dr. Hinshaw

109. The Documents reveal that Dr. Hinshaw's testimony under cross-examination regarding mask harms is demonstrably false. The Documents reveal that "at that time" there were numerous studies and published evidence related to harms and serious health outcomes from wearing masks. The Documents reveal at least thirteen studies were available to the Respondents "at that time".
110. The Documents have also revealed that Dr. Hinshaw was not forthcoming during *in camera* questioning by this Honourable Court. Dr. Hinshaw's response to the third question in particular is demonstrably false.
111. Contrary to her testimony, Dr. Hinshaw did recommend loosening restrictions to Cabinet. This is readily apparent from the PowerPoint Presentation she prepared for PICC. However, in her evidence, Dr. Hinshaw denied that she ever recommended to Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet.
112. The Three Options in the PowerPoint Presentation clearly reveal that Dr. Hinshaw recommended significant loosening of restrictions in the First Option and that Cabinet refused her recommendation by choosing a more restrictive approach in the Second Option.
113. Further, in answering the Questions *in camera*, Dr. Hinshaw's answers lead one to believe that Dr. Hinshaw made a single recommendation to Cabinet and that Cabinet

invariably followed that single recommendation. Dr. Hinshaw's answers to the Questions are, in themselves, completely lacking candour and demonstrably false.

114. As can be seen from the PowerPoint Presentation, Dr. Hinshaw provided Cabinet with a range of options and then Cabinet chose the middle option. This Honourable Court needs to take notice of when Cabinet chooses the middle option, Cabinet is both ignoring the least intrusive option and the most intrusive option in every such case which calls into question every answer that Dr. Hinshaw provided *in camera*. This is not a situation, as is suggested by her evidence, where Cabinet invariably does what Dr. Hinshaw recommends. It suggests that Dr. Hinshaw is acting like a cocktail server taking a drink order from a menu of drink choices and serving exactly what the Sky Palace customer demands.
115. Rather, Dr. Hinshaw provided Cabinet with a variety of choices, allowing Cabinet to treat public health like an "à la carte menu." Cabinet's choice from a range of options would then be implemented by a CMOH Order. This is not exercising professional judgment.
116. The Documents reveal that PICC expressly directed Dr. Hinshaw to remove the Restrictions Exemption Program and youth masking. This is a clear direction from PICC to Dr. Hinshaw as the CMOH to do the political bidding of Cabinet and to ultimately galvanize it with a CMOH order reflecting the same. Therefore, when Dr. Hinshaw provides the Three Options to PICC in the PowerPoint Presentation and those options include the removal of both the Restrictions Exemption Program and youth masking, these recommendations are not based on her professional judgment as CMOH. They are clearly based on the direction of Cabinet. If Cabinet directed Dr. Hinshaw to remove restrictions entirely, would she have cast her professional opinion aside and simply signed the bottom of a CMOH Order to comply with Cabinet's direction?
117. Further, based on the PowerPoint Presentations, while Dr. Hinshaw provided a range of options for Cabinet to select from Cabinet did not choose the least intrusive option. They chose the politically expedient one.
118. The Applicants must be afforded the opportunity to cross-examine Dr. Hinshaw on whether her Cabinet recommendations in this case were presented in the same format as they were presented in the PowerPoint Presentation.

119. In terms of the *Charter* analysis in this case, from what is revealed in the Documents and the evidentiary disclosure pursuant to the Dunlop Order, the Respondents were not selecting the least intrusive means necessary. Dr. Hinshaw was presenting a range of recommendations that included a lesser intrusive means, however, Cabinet chose the more restrictive measure.
120. As a medical professional and CMOH, Dr. Hinshaw should not have presented any recommendations to Cabinet that she disagreed with. Therefore, the extent to which Cabinet did not select the least intrusive means every single time, demonstrates the degree to which the CMOH Orders in this case violate the *Charter* and cannot be saved by s.1.
121. In providing her range of recommendations, Dr. Hinshaw presented the least intrusive means necessary to Cabinet. However, Cabinet rejected that option, selecting a more restrictive one. It is therefore necessary to have full transparency and full disclosure into every time Dr. Hinshaw provided recommendations to Cabinet for the CMOH Orders to determine how the CMOH Orders in this case were actually implemented.

5. Inconsistent Evidence of Dr. Hinshaw

122. When looking at the totality of the oral evidence of Dr. Hinshaw, when cross-examined by Counsel for the Applicants, Dr. Hinshaw continuously provides extensive, verbose and descriptive answers to questions. Even in cases where the response calls for a simple “yes” or “no”, Dr. Hinshaw provides qualifications and equivocations to questions asked by Counsel for the Applicants. However, Dr. Hinshaw’s evidence *in camera* before Madam Justice Romaine is a marked departure from this well-established pattern. Without exception, every response to the *in camera* questions is the single word response: “no.”
123. It is troubling that Dr. Hinshaw’s *in camera* evidence to three extensive questions is three single word responses. This is a significant contrast to her days’ worth of loquacious testimony. While *in camera*, Dr. Hinshaw responds uncharacteristically and without explanation or qualification. On its face, this alone raises suspicion as to the candour and truthfulness of Dr. Hinshaw’s responses *in camera* and the totality of her evidence before this Honourable Court.
124. In addition to the lack of candour, there are serious concerns that Dr. Hinshaw’s answers were not truthful. This is clearly demonstrated in her statements *in camera* and while under

cross examination in open court. The Applicants must be provided an opportunity to cross-examine Dr. Hinshaw on the glaringly obvious inconsistencies and demonstrably false statements in her evidence.

125. The responses to questions *in camera* and in open court provided by Dr. Hinshaw are patently false and raise a concern on a *prima facie* basis that Dr. Hinshaw has committed perjury.⁸³
126. When asked “[d]id you ever recommend to Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet?” Her response of “no” is false.
127. Dr. Hinshaw’s testimony under cross-examination that “there was no evidence regarding serious health outcomes or adverse outcomes from wearing masks”⁸⁴ is also clearly false.
128. Further, it beggars belief that someone who has cleverly coined the euphemism “structural encouragement” as a synonym for the coercive removal of civil rights in a province would not remember having coined that phrase or utilized that phrase in public at a press conference.
129. All of this calls into question both the veracity and candour of the evidence provided by Dr. Hinshaw and requires that Dr. Hinshaw be given the opportunity to explain herself to this Honourable Court. In all fairness to Dr. Hinshaw, she should be permitted to return before this Honourable Court to clarify her responses.

6. Least Intrusive Means Necessary

130. If Dr. Hinshaw were actually discharging her duties as the CMOH, Dr. Hinshaw would have exercised her best medical judgment, developed all CMOH Orders to reflect that medical judgment and then advise of the orders she intended to implement in the same manner as a judge pronouncing a judgment. Dr. Hinshaw is medical professional and a statutory decision maker, not a cocktail server taking a drink order from a bar menu.

⁸³ *Criminal Code of Canada*, RSC, 1985, c-46: Section 131(1): Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

⁸⁴ Transcript of Proceedings, April 5, 2022, p. 88/31 to p. 89/12 (emphasis added).

131. From a *Charter* perspective, absent the Documents and the recently disclosed evidence this case would be more difficult for the Applicants. Unfortunately for the Respondents, the disclosure of the Documents has revealed that Dr. Hinshaw is lacking in candour and that portions of her testimony before this Honourable Court are demonstrably false.

132. The Documents explicitly reveal that unlike the repeated and numerous assertions of the Respondents to the contrary, the Respondents did not choose the least intrusive means necessary when violating the Applicants' *Charter* rights and freedoms.

VI. RELIEF SOUGHT

133. An Order that the Documents that were publicly made available on July 13, 2022, by order of the Honourable Justice Dunlop, be admitted as evidence in this matter;

134. An Order that the Respondent, Dr. Hinshaw, the Chief Medical Officer of Health for the province of Alberta, appear before this Honourable Court and return for cross-examination by the Applicants on the Documents and issues arising therefrom;

135. An Order that prior to the recross-examination of Dr. Hinshaw, the Chief Medical Officer of Health for the province of Alberta, the Respondents provide the Applicants with all of the data and scientific analysis Dr. Hinshaw relied on when making her recommendations to Cabinet regarding the CMOH Orders;

136. An Order that prior to the recross-examination of Dr. Hinshaw, the Chief Medical Officer of Health for the province of Alberta, the Respondents provide the Applicants with all of the recommendations Dr. Hinshaw made to Cabinet regarding the implementation of the CMOH Orders;

137. An Order that the Respondent, Dr. Hinshaw, the Chief Medical Officer of Health for the Province of Alberta, answer questions related to issues arising from the Documents that were objected to by Counsel for the Respondents on the basis of cabinet confidentiality; and

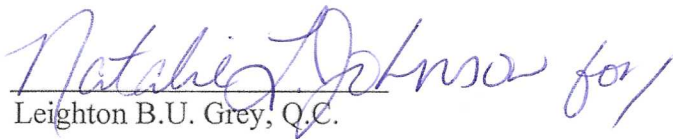
138. Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th day of August 2022:



Jeffrey R. W. Rath

Counsel for the Applicant, Rebecca Marie Ingram.



Natalie Johnson for
Leighton B.U. Grey, Q.C.

Counsel for the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws
and Torry Tanner.

VII. LIST OF AUTHORITIES

TAB	NAME AND CITATION
CASE LAW	
1.	<i>Stone Sapphire Ltd. v. Transglobal Communications Group Inc.</i>, 2008 ABQB 142
2.	<i>67112 Ontario Ltd. v. Sagaz Industries</i>; 2001 SCC 59
3.	<i>Alberta (Child, Youth and Family Enhancement, Director) v. B.M.</i>, 2009 ABCA 258
4.	<i>Aubin v Petrone</i>, 2020 ABQB 708
5.	<i>British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia</i>, 2020 SCC 20
6.	<i>CM v Alberta</i>, 2022 ABQB 462
7.	<i>J.N. v. C.G.</i>, 2022 ONSC 1198
8.	<i>Ladd v. Marshall</i>[1954] EWCA Civ1
9.	<i>Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)</i> 2014 SCC 48.
SECONDARY SOURCES	
10.	Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers : A Randomized Controlled Trial - PubMed (nih.gov)
11.	COVID-19 in children and the role of school settings in transmission - second update (europa.eu)
12.	Measures implemented in the school setting to contain the COVID-19 pandemic: a rapid scoping review - Krishnaratne, S - 2020 Cochrane Library
13.	SARS-CoV-2 seroprevalence among Vancouver public school staff in British Columbia, Canada (medrxiv.org)
14.	Clusters of SARS-CoV-2 Infection Among Elementary School Educators and Students in One School District — Georgia, December 2020–January 2021 MMWR (cdc.gov)
15.	A cross-sectional and prospective cohort study of the role of schools in the SARS-CoV-2 second wave in Italy - PubMed (nih.gov)
16.	Low SARS-CoV-2 Transmission in Elementary Schools — Salt Lake County, Utah, December 3, 2020–January 31, 2021 MMWR (cdc.gov)

17.	COVID-19 Mitigation Practices and COVID-19 Rates in Schools: Report on Data from Florida, New York and Massachusetts medRxiv
18.	Household COVID-19 risk and in-person schooling (saocamilo-sp.br)
19.	SARS-CoV-2 Acquisition and Immune Pathogenesis Among School-Aged Learners in Four Diverse Schools - PubMed (nih.gov)
20.	SARS-CoV-2 infection and transmission in school settings during the second wave in Berlin, Germany: a cross-sectional study NCRC (jhsp.edu)
21.	Effectiveness of Non-Pharmaceutical Interventions on Child and Staff COVID-19 Cases in US Summer Camps medRxiv
22.	https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/
23.	Code of Ethics - College of Physicians & Surgeons of Alberta CPSA
24.	Informed-Consent.pdf (cpsa.ca)
25.	AHS Consent to Treatment/Procedure(s) Policy Summary Sheet (albertahealthservices.ca)
26.	CONSENT TO TREATMENT/PROCEDURE(S) policy PRR-01 (ahsnet.ca)