Action No.: 2001-14300
E-File Name: CVQ22INGRAMR
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF 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

P R O C E E D I N G S

Calgary, Alberta
August 26, 2022

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392
Email: TMS.Calgary@just.gov.ab.ca

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N. L. Johnson (remote appearance)	For Heights Baptist Church and Northside Baptist Church
N. Parker (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer
N. Trofimuk (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer
E. Kay	Court Clerk

THE COURT: Good morning.

MR. PARKER: Good morning.

THE COURT: Are we --

MR. RATH: Good morning, Madam Justice.

THE COURT: Are we ready to proceed?

MS. JOHNSON: Yes, Madam Justice.

THE COURT: Who is going to lead off?

MS. JOHNSON: Madam Justice, it's Natalie Johnson for the applicants. I'll be starting off.

THE COURT: Okay.

MR. RATH: Madam Justice, this is Mr. Rath. So Ms. Johnson will be making the -- the application and she -- I might have a few words to say at the end of her presentation this morning, on behalf of Ms. Ingram, and then following my friend's

presentation, I'll be making my reply. But I'm not sure how long my friends will be. Just for the convenience of (INDISCERNIBLE) between Ms. Johnson and myself (INDISCERNIBLE) an hour (INDISCERNIBLE) scheduled for a full day. Just for your own convenience (INDISCERNIBLE) depending on my friend (INDISCERNIBLE) I'm doubtful that we (INDISCERNIBLE). Thank you.

THE COURT: Thank you.

THE COURT CLERK: And just before we get started, My Lady, I'm having some issues with my FTR. I need one minute to just shut down and (INDISCERNIBLE) with it.

THE COURT: Okay. Thank you. I don't know whether you heard, but we have to shut down the FTR for a minute and restart it, so just give us a minute. Thank you.

(ADJOURNMENT)

THE COURT CLERK: This is a test. This is a test. I believe we have it back, My Lady.

THE COURT: Okay. Thank you. Can everybody hear me now?

MR. PARKER: I can hear you fine, Justice Romaine, that's Mr. Parker for the respondents. And we'll estimate approximately an hour for our submissions as well.

THE COURT: Okay. Thank you. Okay. Ms. Johnson.

Submissions by Ms. Johnson

MS. JOHNSON: Good morning, My Lady. We are here before you today on an application arising out of a court ordered disclosure in a case that's before this Court, *C.M. v Alberta*, and I'll be referring to that case as *C.M.*. That's a case with respect to a challenge of the CMOH order 08-2022 in its entirety, related to removal of restrictions, including public masking and school masking and the restrictions exemptions program. The documents that were publicly made available in that case, in an AACRP, was filed on July 12th, 2022, by order of Justice Dunlop, and we're asking that they be admitted as evidence.

MR. RATH: Madam Justice, this is Mr. Rath. I don't want to

interrupt, but we're getting some sort of microphone noise again at our end that we were going through the last time, I think. It's -- it's kind of a squeaking sound coming over the audio and I don't know if it's going to interfere with the recording or not.

THE COURT CLERK: It's not -- there's nothing on the recording. I'm not sure what it is. I've muted every microphone I can in this courtroom.

THE COURT: Okay. I don't --

MR. RATH: Thank you.

THE COURT: Perhaps, I don't like to do this, but if you mute me and then I --

MR. RATH: It's -- whatever it was -- whatever it is, My Lady, it's stopped now.

THE COURT: Oh.

MR. RATH: Oh, no, now it's started again.

THE COURT: Okay. Okay. Great. Thanks. Okay. Go ahead.

MS. JOHNSON: Okay. We are asking that the documents that were produced in that action on July 12th, 2022 be admitted in this matter, that Dr. Hinshaw return for re-cross-examination on issues arising from those documents, that prior to re-cross-examination, Dr. Hinshaw provide the applicants with the data and scientific analysis she relied on making her recommendations for the CMOH orders in this case, that Dr. Hinshaw provide the applicants with her recommendations she made to Cabinet regarding the CMOH orders in this case, and that she answer questions that counsel for Alberta objected to on the basis of public interest immunity or Cabinet confidentiality.

We rely in this application on three affidavits. The first is the affidavit of Tracey Bradley, which was sworn July 25th, 2022 and the affidavits of Leslie Doucette (phonetic), affirmed August 10th, 2022 and August 24th, 2022. In the case of *C.M.* that's still before this Court, they are challenging, as I said, the entirety of CMOH order 08-2022. On July 13th, 2022, the applicants in this case became aware of those documents that were ordered disclosed after a second interlocutory application before Justice Dunlop. After reviewing the AACRP in that proceeding, we have serious concerns with the evidence of Alberta and the evidence of Dr. Hinshaw in this case.

On July 25th, 2022, we notified the Court and the respondents of our intention to seek this admission. It's notable that there were two separate interlocutory applications in *C.M.* required for disclosure for Alberta to comply, and it's important we take a relevant 10,000 foot view of the facts in both cases. In *C.M.*, on February 19th, 2022, the applicants in that case served a notice to obtain record of proceedings on Alberta, Dr. Hinshaw. In *Ingram*, in this case, from April 4th to April 7th, 2022, Dr. Hinshaw gave evidence. Following Dr. Hinshaw's oral evidence in this case and nearly 2 months after the request in *C.M.*, Alberta complied -- or provided documents to the applicants in *C.M.* on April 14th, 2022, and it was only after the closure of the evidence in this case that they provided those documents.

On May 17th, 2022 was the first of two interlocutory applications in *C.M.* and in that case, the applicants were seeking to have some evidence admitted and at that time, Justice Dunlop on his own motion, not the motion of the applicants, on his own motion required Alberta to amend their certified record of proceedings because it was deficient and didn't disclose all the documents that they had. So the order was by Justice Dunlop to file an amended certificate by May 27th. On June 1st, Alberta filed in that proceeding. The applicants in that case were not satisfied with the disclosure so then they brought their own second -- the second interlocutory application and requested that Dr. Hinshaw's records -- and then again, on June 27th, 2022, Justice Dunlop ordered the disclosure of those documents, and from the disclosure of those documents came the filed AACRP at issue in this case, on July 12th.

The documents that we're looking at in this application are the entirety of the AACRP, and portions of the data and scientific evidence contained within hyperlinks in those documents of Alberta were available to Alberta as early as November 18th, 2020. We are seeking the entirety of the AACRP, including an email, I'll refer to it as the email, on -- dated February 7th, 2022 from Scott Forner (phonetic), Acting Director of Health Evidence and Policy for Alberta, Dr. Hinshaw and members of Alberta Health, which is at tab 8 of the AACRP; a memo, which I'll refer to as the memo, dated February 7th, 2022 from the premier's office to Premier Kenney with a copy to Dr. Hinshaw, which is at tab 6 of the AACRP; a PowerPoint presentation (INDISCERNIBLE) 13 of the AACRP, which was prepared by Dr. Hinshaw and presented to the Priorities Implementation Cabinet Committee, or the PICC. Also, we are looking at the official record of decision of the PICC minutes, dated February 8th, which is tab 14.

So this -- this case in *Ingram* and in *C.M.* is a *Charter* challenge of CMOH orders. In our case, it's with respect to orders implemented in 2022 and to July 12th, 2021 -- or, sorry, it's starting in 2020 to July 12th, 2021, the effectiveness and effects of non-pharmaceutical interventions by the respondents upon the applicants essential to this action. Masking is a form of non-pharmaceutical interventions that was the subject of CMOH orders and was mandatory with fines that were very substantial for non-compliance. The applicants,

Northside Baptist Church and Heights Baptist Church, who are my clients, have provided uncontested affidavit evidence that their *Charter* rights and freedoms have been breached by, among other things, masking. Alberta did not cross-examine the applicants on this issue and has admitted in their pretrial factum, which was filed September 14th, 2021, at paragraphs 20 and 24, that masking violated their *Charter* rights.

As this is a *Charter* challenge, once a breach is proven by the applicants, the onus shifts to Alberta, under a section 1 analysis. To appropriately discharge this onus, Alberta must prove they used the least restrictive means necessary in breaching the applicants' *Charter* rights and freedoms. Dr. Hinshaw's evidence in the proceeding came through two affidavits and oral hearing, affidavits December 18th, 2020 and July 12th, 2021. She gave evidence about masking in her affidavit and on her oral examination. So under cross-examination, counsel for the applicants asked Dr. Hinshaw specifically about the harms to children with respect to masking and Dr. Hinshaw testified on April 5th, 2022 there was no evidence regarding serious health outcomes or adverse health outcomes from wearing masks. When she was further asked by counsel, Mr. Rath --

THE COURT: Excuse me, Ms. Johnson. You know, we should be --

MS. JOHNSON: Yeah.

THE COURT: -- very careful as to what she testified. If she testified at that time and impliedly in the context of the fact of the specific impugned orders that were before me in this hearing, she indicated that at that time, there was no evidence.

THE COURT CLERK: My Lady --

MS. JOHNSON: Correct. Yeah.

THE COURT CLERK: -- (INDISCERNIBLE) is not picking you up.

THE COURT: Oh.

THE COURT CLERK: Your microphone is actually right here.

THE COURT: Okay. I'm sorry, but madam clerk tells me I'm too far from the microphone. Were you able to hear me?

MS. JOHNSON: Yes I was, My Lady.

THE COURT: Okay. Thank you.

MS. JOHNSON: Thank you. Yes, you are correct, My Lady. She did say at that time there was no evidence regarding serious health outcomes and adverse health outcomes from wearing masks, and during the time of the impugned orders in this case, in that context, she was asked those questions. She said, when asked if there was any information that was considered in that regard with respect to psychological or psychiatric harm, Dr. Hinshaw responded: (as read)

> 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.

She was asked again by Mr. Rath: (as read)

> 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?

And Ms. -- Dr. Hinshaw replied: (as read)

> That's correct. And at the same time, that particular group is well versed in the scientific method in reading evidence, and the scope of that particular masking harms review was to look at any -- any published literature that documented harms from wearing masks.

On April 6th, 2022, Dr. Hinshaw was asked a question that -- following -- arose an objection with respect to Cabinet confidentiality. The question was: (as read)

> Can you tell us what recommendations you made to Cabinet that were either ignored or where you were given instructions opposite to your recommendations?

To support their objection, Alberta produced an unfiled certificate of a member of the Executive Council, sworn on February 17th, 2022 by Acting Justice Minister Sonya Savage. The respondents did not produce an affidavit in support of that objection.

On April 7th, 2022, three in-camera questions of Dr. Hinshaw were asked, following submissions by counsel on Cabinet confidentiality. Dr. (INDISCERNIBLE) answers to those questions was no, to all three. On April 26th, 2022, this Court ordered that Dr.

Hinshaw's answers and those questions form part of the hearing record.

With respect to the evidence in the AACRP, portions of the information, data and scientific evidence have been available to Alberta since November 18th, 2020, when you go through the hyperlinks to the sources that they're cited. The documents reveal numerous adverse health outcomes and harms from masks, on numerous scientific studies pre-dating July 12th, 2021, including respiratory tract and skin microorganism self-contamination and the detrimental effects of face masks on cognition, social interaction, emotional bonding and emotional development of adults and children. The email from Scott Forner submits 22 studies to Dr. Hinshaw and, while in his summary he says it's a review of new evidence, 13 of the 22 studies are from June 8th -- prior to June 8th, 2021.

With respect to the memo that was provided to the premier, there are numerous hyperlinks used that reference numerous studies available prior to July 12th, 2021. Alberta suggests in its written argument in this application that the memo provided to the premier is unreliable as it contains news articles and was not prepared by Dr. Hinshaw or the scientific advisory group, yet this is the memo that Alberta criticizes here in this application, but it's the same memo that the PICC relied on in February this year to rescind masking, and it is the same memo that Alberta is currently defending before Justice Dunlop. It is disingenuous for Alberta to minimize the importance and reliability of the memo in this case, while relying on its importance and reliability in another. Alberta cannot (INDISCERNIBLE) arguing contradictory things before this Court.

With respect to the PowerPoint presentation at tab 13 of the AACRP, it reveals that Dr. Hinshaw provided Cabinet with three options. The first approach was a significant easing of restrictions, the second approach was a longer easing and the third approach was to be defined by members that the PICC chose. The PICC rejected the first option to significantly ease restrictions on Albertans and directed the CMOH to implement the second option to only moderately ease restrictions on Albertans. The PowerPoint also included numerous political statements that are not founded in science, such as: (as read)

> Masking is a physical and visual reminder of risk and potential for transmission;
>
> Endemic phase characterized by increased public tolerance of the disease;
>
> Alberta will be a leader in entering the endemic phase before other Canadian jurisdictions;
>
> Some Albertans may not be satisfied with the pacing of the

> easings;
>
> Public communications of easings were to be announced as a bold but prudent approach and to be supported with advertising;
>
> Indicators of the endemic phase, where the public is becoming increasingly tolerant of the disease.

And, from appendix 1 at tab 12 of the AACRP, and it is unclear who authored this document from the government, it states: (as read)

> Mask requirements for schools were a divisive issue in some communities, as increasing numbers of parents and students were protesting mask mandates, including protests staged at schools.

Contrary to the respondents' written arguments --

THE COURT: Excuse me.

MS. JOHNSON: -- in this case --

THE COURT: Ms. Johnson, I'm sorry.

MS. JOHNSON: Yes, Ma'am.

THE COURT: You've characterized those all as political statements. Are some of them not just statements of fact?

MS. JOHNSON: Yes, I would submit they are statements of fact, but they're also not medically based, when Dr. Hinshaw is the CMOH providing medical advice to Cabinet on what to do with Albertans. I submit that she is not a politician, and she shouldn't be stating things that are not -- that are within the realm of the politicians to decide.

THE COURT: Okay.

MS. JOHNSON: Contrary to the respondents' written argument, the documents reveal relevant and material evidence in this case beyond the now issue of school masking. It reveals medical and scientific evidence in the AACRP, addresses the efficacy of masking regardless of one's age, it reveals that masks have adverse health effects to both adults and children and, very importantly, it reveals the actual decision

making process of CMOH orders.

Masking is relevant to our case, as I've mentioned. My clients, the church, they are a congregation of Christians who comprise Albertans of all ages, including school aged children. Their uncontested evidence is that masking violates their section 2(a) *Charter* rights. Wearing a mask violates their sincerely held religious beliefs in a way that is more than trivial or insubstantial. Alberta has conceded that mandatory masking orders are breaches of their *Charter* rights and the onus is now on Alberta to prove that those breaches are justified by section 1, which is a central issue to the documents, and particularly the PowerPoint and the PICC minutes of the AACRP.

With respect to reopening a case, the *Rules of Court*, in general, must be applied with fairness and justice in the purpose and intention under rule 1.2:

> … to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way …

To:

> … refrain from … taking proceedings that do not further the purpose or the intention of the rules …

And:

> … the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing.

Rule 9.13 of the *Alberta Rules of Court* reads:

> At any time before a judgment or order is entered, the Court may vary the judgment or order, or 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.

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. The Court has inherent jurisdiction to admit new evidence at any time, even if a judgment has not been reached. To exercise this discretion, the Court must be satisfied that reasonable diligence was exercised to discover the evidence. The leading case is from the

Supreme Court of Canada, which is at tab 2 of our materials, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* In considering new evidence, it referred to Lord Denning in *Ladd v. Marshall*, at paragraph 63:

> To justify the reception of fresh evidence, three conditions must be fulfilled: it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; 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; 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.

In this Court, Alberta Queen's Bench reviewed the test for adducing new evidence after trial, in *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, at tab 1 of our materials. 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 the admissibility …

The Court went on to state:

> 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”.

And that's at paragraph 40 of that case.

The Alberta Court of Appeal in *Alberta v. B.M.*, which is tab 3 of our written materials, Justice Côté reviewed the rules and said the rules governing admission of new evidence at trial is similar to new evidence on (INDISCERNIBLE) Court of Appeal. And the test he -- he circumscribed, at paragraph 12, is, firstly:

> Could the evidence have been obtained earlier if due diligence had been observed?
>
> Is the evidence credible?

> Would the evidence have been practically conclusive in producing an opposite result to that earlier pronounced?
>
> Is the evidence in its present form admissible under the ordinary rules of evidence?

In reviewing that case, Court of Queen's Bench in *Aubin v Petrone*, which is tab 4 of our materials, at paragraph 7, the Court considered the following additional factors:

> The desirability of avoiding unnecessary and costly appeals;
>
> The desirability of the appeal court having a fully developed factual and legal record;
>
> The need for finality and certainty in legal proceedings;
>
> That errors to be corrected should be objectively demonstrable;
>
> The rule is not a vehicle for reconsidering 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'.

This Court has inherent jurisdiction to determine the issues in this matter and to determine whether there is a good reason to adduce this new evidence. While this is an unusual power, in this case, it is our submission, these are exceptional circumstances that require this Court to exercise its inherent jurisdiction to grant this application.

THE COURT: Ms. Johnson --

MS. JOHNSON: Alberta suggests --

THE COURT: (INDISCERNIBLE)

MS. JOHNSON: Yes, Ma'am.

THE COURT: You've gone through the case law with respect to fresh evidence and thank you for that. How could the applicant satisfy the condition that the evidence could not have been obtained with reasonable diligence? I'm talking about the articles that were hyperlinked to the memo.

MS. JOHNSON: Our submission with respect to that is, it's the context with which we attempted at the cross-examination to put those questions to Dr. Hinshaw. Give me one moment, My Lady. When questions were provided -- or, asked of Dr. Hinshaw, they were rejected repeatedly by respondents' counsel and the issue was attempted to be canvassed with her. The other thing that is concerning to us is that those documents were not even in her mind or provided to Cabinet when she was making the orders in this case. Her evidence is there was no -- they -- they did a review of everything at that time, the scientific advisory group did, and there was no evidence. So if that's her evidence, then she's not providing that to Cabinet as well, which goes to all of her orders.

With respect to Alberta's assertion that evidence cannot be admitted because there is no decision yet, pursuant to the purpose and intentions of the *Rules of Court*, the court process must be done in a timely fashion and cost-effective way, without drawing out the litigation process. Taken to its logical conclusion, Alberta's assertion would have the applicants sit on this information and wait until your decision is rendered and then seek leave of the Court to apply to have this evidence admitted, and this argument flies in the face of the purpose of the *Rules of Court*.

Alberta suggests that if the AACRP is admitted, the memo and the emails should not be, as the applicants did not exercise due diligence in their discovery. Alberta's conduct in *C.M.* and this case are relevant with respect to that. In *C.M.*, Alberta did not produce a proper certified record of proceedings in the first instance and, in fact, Justice Dunlop on his own motion ordered Alberta to do it. The conduct of Alberta in *C.M.* required the applicants to bring another interlocutory application to compel production of the records. Alberta's conduct in *C.M.*, when taken in the context of this case, are concerning to the applicants. When one compares the timelines and conduct, questions are raised. It reveals Alberta waited until it was most advantageous in both cases to fulfill its legal obligation. They didn't provide any documents in *C.M.* until Dr. Hinshaw had provided her oral evidence here because then the evidence was done and -- and they delayed, even though they were served in February with a notice to comply.

Further, the very first decision of Justice Dunlop in *C.M.* must be reviewed, and the comments from Justice Dunlop in the rulings are very instructive. In the first case of *C.M.*, at paragraph 19 to 21, Justice Dunlop notes that when Alberta filed their Form 9, in compliance with rule 3.18, Dr. Hinshaw unilaterally removed paragraphs 1(b), 1(c), 1(d) and 1(e). That is found at paragraph 21 of the first *C.M.* case. Justice Dunlop says, in paragraph 22:

> Nothing in the Rules authorizes parties to unilaterally modify Forms 8 or 9. Furthermore, regardless of any modifications to Form 9, the respondent remains obligated by r. 3.18 and r. 3.19 to

> send to the Clerk the items …

That were deleted.

Justice Dunlop further does not mince words, at paragraphs 28 and 29, about the disclosure of Alberta. Justice Dunlop says, at paragraph 28 (sic):

> That opening paragraph …

Of Dr. Hinshaw's decision:

> … and those that immediately follow it, each of which starts with the word "Whereas" can be seen as setting out Dr. Hinshaw's reasons for the Decision, which is one of the things a respondent is required to include in a Certified Record of Proceedings. Those opening paragraphs also suggest that there would be a large volume of material in Dr. Hinshaw's possession beyond a Power-Point presentation and Cabinet minutes that would be evidence and exhibits, or relevant to the Decision. Perhaps that material is too voluminous or cumbersome to produce, but the Certified Record of Proceedings does not say so. Instead, Dr. Hinshaw has certified she has only three documents relevant to her Decision. With respect, that is hard to believe.

It is extremely rare that the same (INDISCERNIBLE) with the same party, with the same issues related to *Charter* breaches of citizens, would comment on the unbelievability of Alberta's disclosure.

And in terms of the applicants' knowledge of the AACRP in this case, the applicants only became aware of the memo email contained in the AACRP on July 13th, 2022, when it was publicly made available. Once we were made aware, we used reasonable diligence to obtain true copies of the documents with the hyperlinks active, and were unable to receive true copies of the documents, even from the Court. We requested them on August 8th, 2022. They were -- the hyperlinks weren't working. We finally received them on August 15th from the Court. They weren't working, and we requested them of respondents' counsel in this case and they provided them with active hyperlinks working.

As the documents in the AACRP are within the power and control of Alberta, only Alberta knows if there are any other documents that were withheld from the applicants in this case, based on the untested assertion of public interest immunity. Is the new evidence credible? As far as I understand, this issue has not been contested. This evidence is credible. It was

-- it was disclosed pursuant to a court order by Justice Dunlop. Would the evidence have been practically conclusive? With that -- respect to that point, 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 for us to assess how this evidence would affect this Honourable Court's decision. Is the evidence admissible under ordinary rules of evidence? The evidence in its present form is admissible.

The documents are not covered by Cabinet confidentiality, as they have -- that's already the ruling of Justice Dunlop. The documents are not bound by any other limiting evidentiary rules. None of this evidence is covered by Cabinet confidentiality because, according to Justice Dunlop in the second *C.M.* case, they do not reveal any Cabinet deliberations. Dr. Hinshaw is acting in accordance with her duties as Chief Medical Officer of Health. Her evidence is not protected by the same considerations. Dr. Hinshaw is not a politician and Dr. Hinshaw must discharge her duties ethically and professionally, regardless of public disclosure. As in this case, in *C.M.*, Alberta argued public interest immunity regarding Dr. Hinshaw's orders under the *Public Health Act*.

And Alberta did not produce an affidavit in that case or this case, and only submitted a certificate signed by a Cabinet minister. In reviewing that certificate, Justice Dunlop applied a Supreme Court decision of the Provincial Court Judges' Association of British Columbia and in his ruling, his second ruling, at tab 6 of our materials, paragraph 5, he states:

> 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".

Quoting from a case, *Carey*, at paragraph 40.

In *C.M.*, regarding Alberta's assertion of public interest immunity, they -- or, Justice Dunlop, held at paragraph 10:

> 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*, and her professional obligations as a physician, I would expect her to be candid and complete, regardless of any potential future public disclosure.

With respect to the collateral facts rule and the *Browne v. Dunn* rule, in our submission, *Browne v. Dunn* does not apply. These were documents that Alberta had available to them. At no time did we have these documents or sit on them or try to use them later on without trying to put them to Dr. Hinshaw in cross-examination. We did question Dr. Hinshaw on masking, so this is not a second kick at the can, splitting our case, reconsidering a judgment call or trying out a new way of cross-examination. Dr. Hinshaw was asked questions and gave answers. Those questions were repeatedly objected to (INDISCERNIBLE) by its counsel and now, in light of what's been disclosed in the other court case, this has the appearance of an attempt to hide relevant information from this Honourable Court. This is not a case where the applicants did not attempt to canvass the issue. This is a case where Dr. Hinshaw was lacking in candour with her answers. We did not have the context of the memo which reveals that there were reams of evidence available to Alberta prior to the imposition of the impugned orders. The hyperlinks to sources within the memo were available to Alberta and were completely ignored by the scientific advisory group and Dr. Hinshaw.

This contextual situation and evidence was not available to the applicants or this Honourable Court either, at the time the objections were made, at the time the objections were ruled upon or prior to this information being ordered released by Justice Dunlop. The evidence that the applicants did not have prior to the order was contrary to Dr. Hinshaw's evidence. By suggesting the applicants are taking a second kick at the can, splitting the case, reconsidering a judgment call or testing out a new cross-examination technique is simply the government attempting to blame the applicants for not discharging the obligations under section 1 of the *Charter*. The onus and proof is on Alberta to show that they used the least restrictive means necessary, and that onus and proof is always on the government.

The rule of *Browne v. Dunn* was never intended to obviate the government of its obligations under section 1 of the *Charter*, nor was the rule of *Browne v. Dunn* designed to shield the government from a lack of candour with the Court, when prior to a decision being made, evidence comes to light that unequivocally indicates that government witnesses or government counsel have been less than candid with the Court. The rule of *Browne v. Dunn* has no application here.

With respect to Dr. Hinshaw's professional obligations, the documents reveal that Dr.

Hinshaw imposed restrictions on Albertans, based on improper data and science. Further, that the scientific advisory group that she stated she relied upon was not providing her the information. Dr. Hinshaw's recommendations to Cabinet --

THE COURT: Excuse me, Ms. Johnson.

MS. JOHNSON: -- were three --

THE COURT: Where --

MS. JOHNSON: Yes, Ma'am.

THE COURT: Where is the evidence that SAG did not provide Dr. Hinshaw with this information?

MS. JOHNSON: I would -- Madam Justice, I would take you back to Dr. Hinshaw's own testimony, that she said that the scientific -- the scientific advisory group reviewed all available evidence, and it was on April 5th, in a transcript of proceedings. I'll direct you there.

THE COURT: Okay.

MS. JOHNSON: April 5th, the transcript of proceedings --

THE COURT: Yes. And I'm --

MS. JOHNSON: I have --

THE COURT: -- looking at --

MS. JOHNSON: -- it cited in -- page 88.

THE COURT: Yes.

MS. JOHNSON: And line -- if you start at line 31, that was the beginning of the questioning from Mr. Rath.

THE COURT: I thought that probably this began at page 88, lines 22 to 29.

MS. JOHNSON: Okay, My Lady.

THE COURT: Okay. And then Dr. Hinshaw clarified several times that she did not recall specifically what SAG found, and she said that she would have to look back at the reviews and the timeframe to say whether or not they provided a review of evidence related to mental health. She said: (as read)

> It's possible. Again, I simply don't recall. I'd have to go back and check the list of evidence reviews to be able to answer that question.

And then she again said, with respect to to the psychological harms caused to children as a result of wearing masks, she said, "I would need to go back and read that review again to be able to answer that question."

Okay. So and then you were going to read me something from the following page; is that correct, or?

MS. JOHNSON: Yes, My Lady. So I'm referring to page 88, line 31.

THE COURT: Okay. Go ahead.

MS. JOHNSON: I'm just getting my bearings, My Lady. So when Mr. Rath asked the question, I believe it's line 41: (as read)

> Q Specifically, I'm talking about psychological harm and psychiatric harm. Do you recall any specific information that was considered in that regard?
> A 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.
>
> Q 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?
> A That's correct. And at that 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 -- any published literature that documented harms from

wearing masks.

THE COURT: Yes. And I ask you to go back to page 89, lines 31 through 38. I'm not sure who was asking the question: (as read)

> Q Do you recall any evidence reviews with regard to potential psychological harm that occurred in elementary school children that were being forced to wear masks?
> A We did ask the scientific advisory group to review all available evidence with respect to potential harms of maskings, 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 how does that support your submission that SAG wasn't doing its job?

MS. JOHNSON: Well, because, My Lady, we have no idea whether that information was provided to Cabinet and what Cabinet was relying on. We have no idea what Dr. Hinshaw told Cabinet with respect to recommendations of masking. And what she has now said, in our -- in this hearing, in this court, is contrary to the AACRP, when there was studies that were available and, in fact, the studies that were -- the studies that were used to rescind the masking mandate in Alberta were studies that were available during the relevant time and if -- and if the scientific advisory group -- if Dr. Hinshaw testified in this court and she did not have any information from the scientific advisory group, it's our submission they were not providing her the information or doing her -- their job properly for -- to give her the proper advice.

THE COURT: I see that the answer is that they had reviewed all of the available published evidence at that time and --

MS. JOHNSON: Yes.

THE COURT: -- came to the conclusion that there was no evidence regarding serious health outcomes or adverse health outcomes from wearing masks. So, you know, the SAG, of course has --

MS. JOHNSON: But, My Lady --

THE COURT: -- an obligation, you know, yes, you're right, the SAG had a duty to collect scientific information. I can't say that it had a duty to accept all

scientific information as being equally credible or --

MS. JOHNSON: Okay.

THE COURT: -- without flaws. So all she is saying there is there was a conclusion that there was no evidence regarding serious health outcomes or adverse health outcomes from wearing masks.

MS. JOHNSON: My Lady, I would submit, in that case, and that's completely contradictory to what happened in the *C.M.* case, because the hyperlinks in the memo and the email in the AACRP are linked to studies that were (INDISCERNIBLE) orders in this case. Those studies are there, so they're using those studies to make the decision in February to rescind masking. So I submit it is relevant and it does contradict what Dr. Hinshaw believed the scientific advisory group was providing her information on.

THE COURT: Well, you're talking about a different timeframe, are you not?

MR. RATH: No.

MS. JOHNSON: No, My Lady. It's --

THE COURT: A different timeframe and a different directive or order, that is not one of the orders that we're concerned with in this *Ingram* matter. It's --

MS. JOHNSON: You're correct, My Lady. We're not --

THE COURT: Yeah.

MS. JOHNSON: We are not challenging CMOH order 08-2022. That's not the issue. The issue is the information that in -- that the record of decision of Dr. Hinshaw to rescind the masking mandate and to implement CMOH order 08-2022 relied on information that was available to the scientific advisory group at the time of the impugned orders in this case.

THE COURT: Hm.

MS. JOHNSON: Yes. The affidavit evidence we filed is replete -- in fact, the affidavit on August 24th has almost 100 studies that were prior to July 12th, 2021, and those are hyperlinked in the documents of the AACRP that they used in February

to rescind the masking mandate.

THE COURT: Okay.

MS. JOHNSON: Getting back to -- yeah. Getting back to the -- so it is our submission the scientific advisory group was not reliable. In the respondent's argument in this application, they state there are 6,000 new papers a month being produced. To suggest that there's scientific evidence and information that's so voluminous that Dr. Hinshaw could not possibly have discovered one single study on the harms of masking to rely upon is an unacceptable excuse.

There's no reason why Dr. Hinshaw could not find time to review scientific evidence. That's her job. At the very least, the scientific advisory group should be providing her with abstracts or summaries of scientific information, especially when it's admitted that they are breaching the *Charter* rights and freedoms of Albertans.

I would also hope that Dr. Hinshaw would consider looking at other studies on her own with respect to masking. So the assertion by Alberta about the 6,000 studies published a month being too onerous on them to discharge that obligation to review, it contradicts Dr. Hinshaw's own evidence that the scientific advisory group reviewed all studies available at that time and that -- she could have qualified her answer if that's the case, Alberta's argument now is there's too many studies.

She could have qualified her answer and said, There's simply too much information for me to possibly review it all, but I tried. Or she could have had the memo that she had already been provided in -- in February -- had the memo in mind when she provided her testimony her with the numerous hyperlinks to studies that were relevant to the time of these impugned orders, and she could have testified that due to new evidence that she discovered in February 2022, she has questions about the degree to which the issues of masking harms and efficacy were properly canvassed by the scientific advisory group.

It's our submission that when it was politically expedient for Alberta to rescind masking restrictions for Albertans, they were able to find the justification to support their decision very quickly while utilizing data that predates the CMOH orders in this case. To further demonstrate the conflict Alberta is in right now and the decisions at issue in this case, in *C.M.,* they're arguing the exact opposite position as they are here.

With respect to the section 1 issues, before ruling in favour of section 1 in this case, My Lady, it is our submission we need to know Dr. Hinshaw's recommendations to Cabinet, every recommendation she made and presented to Cabinet regarding every CMOH order she enacted, because central to the PowerPoint and the PICC minutes is the fact --

unequivocal fact -- Alberta did not choose the least restrictive means. They were provided with three options. They choose -- they were provided releasing restrictions fast or going a moderate and they chose to do it moderately.

THE COURT: So, Ms. Johnson?

MS. JOHNSON: And we know --

THE COURT: Ms. Johnson, with respect --

MS. JOHNSON: Yes.

THE COURT: -- to one matter that occurred months after the orders that your clients are impugning, months later, the health officer proposed three options to Cabinet. However, with respect to the impugned orders that are before this Court, she answered that at no time had the government imposed options that were more serious than what she had recommended.

That's the issue before this Court in terms of the constitutional challenge, the breach of constitutional rights and whether or not they are saved by the reasonable clause. So you're saying because she did it once months afterwards, she must have been lying about whether or not she did it before. That's your position?

MS. JOHNSON: No. That's not my position, My Lady. I'm not -- I'm not saying that. What I am saying is there is doubt at this point because we do not have a record of the recommendations she provided to Cabinet. We do not know what she told Cabinet. I -- I would submit that Dr. Hinshaw -- I mean, I understand what your -- your concern is, but I -- I'm not saying that Dr. Hinshaw is lying. All I'm saying is we do not know.

All of those questions were objected to based on public interest immunity, and the fact of the matter is Dr. Hinshaw's not a politician. She is not a member of Cabinet. Her recommendations to Cabinet do not reveal Cabinet deliberations and in this case, the balance -- when you balance that out, the -- it -- it weighs in favour of releasing that information. It doesn't even come under Cabinet interest immunity. So we need to know.

What's revealing in the documents in the Dunlop case is now we do know at least once the Alberta government did choose a -- they did not choose the least restrictive means. They were provided that opinion by the Chief Medical Officer of Health and she -- and then she implemented the order that they told her to do. And that's a central issue to this case as well, is who's making these orders? How are they made? There's a lot of lack of

transparency for the applicants in this case to actually determine -- I mean, if -- if that is the evidence of Dr. Hinshaw that she never -- that they never chose a least restrictive, then it should not be an issue that they could provide those recommendations.

We don't have a complete record and that's the -- that's the heart of this problem. We don't have a complete record. And when we think of the intention of the rules of court, My Lady, under rule 1.2, you need to have a full, complete factual record of this proceeding so that the real issues can be decided in a -- in a cost-effective manner.

The other problem with Dr. Hinshaw's questions is her -- her in-camera questioning is it makes it sounds like invariably every single time that she ever provided information to Cabinet it was a single recommendation, one single recommendation, and invariably Cabinet always followed that recommendation. Well, now we have evidence that didn't happen in this case, in the *C.M.* case. And when Cabinet chose the middle option in *C.M.,* they are not choosing the least restrictive means.

So we submit we need to afforded the -- the opportunity to cross-examine Dr. Hinshaw on her recommendations for every CMOH order in this case and see if she presented them in a different format than she did with the PowerPoint and the PICC -- the PICC minutes. Further, as a medical professional, Dr. Hinshaw would not have or should not have presented any recommendations to Cabinet she disagreed with. Therefore, to the extent to which Cabinet did not select the least restrictive means every single time in an impugned order in this case goes straight to the heart of the section 1 analysis that needs to be conducted.

Dr. Hinshaw's testimony, we've covered this, at that time, when she says at that time she was not aware of the numerous studies that were published that the government relied on in February. And the context, as we've said, of those scientific studies is important because Alberta submits that the memo is not reliable. Yet, it's the memo that the government used in February to rescind restrictions that limited the rights and freedoms of Albertans.

Also, when Dr. Hinshaw testified in this case that there was no evidence of harms, the Alberta government itself was able to come up with the harms in that memo to Premier Kenney. So there is -- we submit there is incontrovertible evidence that the scientific advisory group was not performing in the manner in which Dr. Hinshaw assumed they were performing.

Further, to the extent to which the PICC itself had to perform its own masking research demonstrates the degree to which Dr. Hinshaw and the scientific advisory group have failed Albertans. And all of this calls into question the evidence that's been submitted and we submit it behooves the Court to let Dr. Hinshaw come back in -- in all fairness to her to

answer questions of the issues that have arisen out of the AACRP and the Dunlop case. And those are my submissions, My Lady.

THE COURT: Thank you. Mr. Rath?

Submissions by Mr. Rath

MR. RATH: Madam justice, on behalf -- on behalf of Ms. Ingram, we adopt all of the submissions that have been made by my learned and very capable friend Ms. Johnson. I just have couple very quick points to add to her submissions that will respond to some of the questions that you're asking, My Lady.

And specifically, what I'd like to refer to is the context of this case and the context of Dr. Hinshaw's testimony to this Court. Surprisingly to us at least, when Dr. -- Dr. Hinshaw testified that she was not the actual decision maker in this case, that Cabinet was the actual decision maker and that she was merely providing the recommendations -- so the real issue here and what's been brought to light by the disclosure in the Dunlop case is the fact that we do not know whether this information that Dr. Hinshaw was testifying to at -- you know, that may or may not have been looked at by the scientific advisory group ever made its way to Cabinet.

So we now have a situation as a result of the *C.M.* disclosures and Dr. Hinshaw's testimony in this case where apparently Dr. Hinshaw abdicated -- not -- not fettered or delegated -- abdicated her statutory responsibility under section 29 to Cabinet without the applicants having access to a complete record to know whether or not in conjunction of that abdication there was a responsibility. There was also an abdication of the responsibility to pass on whatever information the scientific advisory group or Dr. Hinshaw had in their possession prior to the orders made in this case with regard to the harms of masking on children and adults in this province.

And quite frankly, from what we're seeing in the *C.M.* case and from the testimony in this case, from our perspective, the record indicates that it is not the least bit clear that Cabinet obtained any information from the scientific advisory group or Dr. Hinshaw with regard to the harms of masking or any other MPI because the government of Alberta has not provided a complete record in this case as it was obligated to do under the rules of court. So those are my submissions, subject to -- to any reply that I'll have to my friend. So I just wanted to provide that context to the Court. Thank you.

THE COURT: Thank you. Okay. Thank you. Mr. Parker, do you want to take a short break before you start or are you okay?

MR. PARKER: I'm good to go, Justice Romaine, unless you would like to break.

THE COURT: No. No. Let's go then. Okay.

Submissions by Mr. Parker

MR. PARKER: Thank you. Justice Romaine, this application makes very serious allegations based on one piece of the transcript, seven lines from the transcript that my friend has reviewed a couple of times this morning. It deals with a collateral issue that's set out at paragraph 26 of our brief in this matter and that evidence is taken out of context, as we've argued in our brief.

For example, here are some of the very serious allegations that my friends' clients have made. Paragraph 80 of their brief: "Alberta is hiding documents." Paragraph 91: (as read)

> Dr. Hinshaw intentionally tried to psychologically manipulate Albertans.

Paragraph 104: (as read)

> Dr. Hinshaw was not candid with the Court and was evasive and manipulating the information she provided.

Paragraph 105: (as read)

> Dr. Hinshaw's recommendations were not for a bona fides medical purpose.

Paragraph 113: (as read)

> Dr. Hinshaw's answers to the three questions of this Court were completely lacking in candour and demonstrably false.

Paragraph 124: "Dr. Hinshaw's answers were not truthful." Correspond that, just as an aside, with Ms. Johnson's response to a question of yours today that she's not saying -- they're not saying Dr. Hinshaw was lying. Paragraph 125: (as read)

> Dr. Hinshaw's responses in camera raise a concern on a prima facie basis that she has committed perjury.

The respondents Her Majesty the Queen in Right of Alberta and the Chief Medical Officer of Health ask you to reject these baseless and inflammatory allegations and deny this application in total.

I'm going to go to some context now. This is important. First of all, as this Court has said more than once, including in its decision on public interest immunity at paragraph 28 -- that's 2022 ABQB 311 -- this is not a public inquiry. As argued in our closing argument, what it is is an application brought by an originating application that was amended. It was brought by five applicants, none of whom are children.

The five applicants are two churches, Northside Baptist Church, I'll refer to as NBC, and Heights Baptist Church, I'll refer to as HBC. These are separate legal entities incorporated under the *Societies Act* as religious societies. The other three applicants are individuals. Torry Tanner, who alleges amongst other things that her 2(a) rights, freedom of religion and conscience, were violated because she was prohibited from having her children and extended family over to her house to celebrate over Christmas. Erin Blacklaws, who alleges amongst other things that her section 2(c) and (d), association and assembly rights, were infringed because she was prevented from seeing her father while he was in the hospital with COVID. And Rebecca Ingram, a gym owner, who alleges amongst other things that her section 2(a), freedom of religion rights, were violated because she had to cease regular attendance at her church. Those are all set out in detail in our pretrial factum.

Further context, the matters in issue. As we say in paragraph 8 of our closing argument after trial, the matters in issue are defined by the pleadings, the amended originating application and the particulars mandated under section 24(3) of the *Judicature Act*. Masking of children in schools is not an issue in this matter. There are no applicant children. There is no evidence on masking in children other than in paragraph 7 of Ms. Ingram's first affidavit, but Ms. Ingram does not challenge masking in schools. Again, see the amended originating application and the particulars. What she attempts to challenge, and what we've argued throughout she has no standing to do, is assert that the school closures were discriminatory and violations of three of her children's *Charter* rights.

The issue raised here, the key impugned evidence -- and we've heard it several times today and we set it out at paragraph 28 of our brief in this matter. That's the evidence from the transcript of April 5th at page 88, lines 31 to 38. And again, that evidence, the question related to harm -- potential psychological harm to elementary school children that were being forced to wear masks. It's not an issue in this matter. This is the very definition of a collateral fact.

Further context and in response to paragraphs 35 to 38 of the applicants' reply brief that we received at the end of the day Wednesday, the only supplementary particulars with

respect to masking as a violation of HBC and NBC is at paragraph 13 and 16 of the supplementary particulars. The applicants argue at paragraphs 35 to 38 of their reply brief that masking is relevant to the applicants' case. They say that the applicants HBC and NBC are a congregation of Christians who comprise Albertans of all ages, including school aged children.

They say it is the uncontested evidence of the applicants HBC and NBC that masking violates their section 2(a) *Charter* rights and then they say that -- at paragraph 38, that the respondents have conceded that mandatory masking orders are a breach of their congregants' *Charter* rights. That is incorrect. That is not the concession that is being made. Again, HBC and NBC are separate legal entities. They are societies registered under the *Societies Act*.

What Alberta has conceded is that the societies, HBC and NBC, had standing to assert that their religious 2(a) rights were violated. This was mentioned throughout the respondents' pretrial factum. For example, I will go to paragraph 13 and 14 of the respondents' pretrial factum. Paragraph 13: (as read)

> The applicants Torry Tanner, Erin Blacklaws and Rebecca Ingram all assert an infringement of their section 2(a) religious freedom rights. The applicants Heights Baptist Church and North Baptist Church, collectively the applicant churches, also assert infringements of their section 2(a) *Charter* rights.

Paragraph 14: (as read)

> Although no jurisprudence exists expressly recognizing the rights of corporations or non-natural persons to hold section 2(a) *Charter* rights, Alberta has not challenged the standing of the applicant churches to assert infringement of section 2(a) *Charter*. For the purposes of this action, Alberta has conceded that the applicant churches may assert section 2(a) *Charter* infringements.

Similarly, paragraphs 22 to 24 of the pretrial factum refer to the churches' 2(a) *Charter* rights. Also see paragraph 58 in respect to section 2(c) and 2(d) rights and HBC not having standing to assert infringements on behalf of its congregants. Similarly, see paragraphs 139 and 140 of the pretrial factum.

This position in Alberta's pretrial factum filed almost a year ago now would have come or should have come as no surprise to the applicants as the respondents had previously stated in its brief on standing filed May 7th, 2021, at paragraph 10: "For the purpose of this" --

excuse me: (as read)

> For the purposes of this action, Alberta is not contesting the standing of the applicant churches to assert section 2(a) *Charter* violations.

That's the concession. However, if the applicants had wanted to assert -- assert violations of individual congregant's rights, then they should have named congregants as applicants. And if they wanted to assert violation of children's rights, vis-à-vis masking and freedom of religion, then applicant children or an applicant child should exist, but they do not.

To summarize on this point, the actual issue in the impugned evidence of Dr. Hinshaw is to do with masking harms of children in grade school. Just to be clear, that's grade 4 and up, because Alberta never had masking for kindergarten through grade 3, and again, there are no applicants or claimants making such a claim. There are no particulars in relation to masking of children in schools and there's no evidence on that other than as mentioned in paragraph 7 of Ms. Ingram's first affidavit.

The very recent attempt in the reply brief filed Wednesday of HBC and NBC to suggest that they have -- that this is an issue because there are congregant -- members of their congregation who are asserting these rights is incorrect for the reasons I've just reviewed, and their allegation that Alberta conceded that there was a violation of the congregants' rights is entirely wrong. And this was clearly done to try to get around the collateral fact rule that has direct application to this matter.

Finally on this point, even if you -- you were to accept that the churches can assert their congregants' rights re: masking without the need for any applicant congregants and the sufficient particulars were provided pursuant to the *Judicature Act* 24(3) on this point, this would still require evidence of an alleged infringement. And we raised this last year in the respondents' reply brief in support of the application to strike affidavits that was filed on May 28th, 2021.

This is in footnote 6 of that brief to the well-known Supreme Court decision of *Mackay v. Manitoba*, 1989 2 SCR 357, at pages 361 to 362. The well-known paragraph reads as follows:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A

> respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

The answer is that the wrongly impugned evidence of Dr. Hinshaw is on a collateral issue. This is discussed at paragraph 57 and 58 of the respondents' brief in this application. It is not relevant to any issue. It is solely asked to impeach the credibility. Her answer therefore -- or the answer given is final unless there is a common law or statutory exception to the collateral fact rule, and there is none. And that should be enough to end this application.

However, I want to go on and talk about the time period, an issue that was raised in some of your questions to counsel for the applicants today. The time period in Ingram relates to the orders made, specific orders made, for which particulars were provided in the second and third waves.

Now, I know this was already covered in your -- what I have recalled in the closing argument in this matter, the scope of hearing decision, that is 2022 ABQB 164, when the applicants' attempt to extend the challenge beyond the third wave was rejected. However, in preparing for this matter, I found an email that I couldn't find when we were arguing this issue at trial, and that email was sent to my friends, including Mr. Grey and Mr. Rath and their juniors at that time, Jocelyn Gerke and Martin Rejman. It was dated May 27th, 2021, 4 PM, and it said, in part: (as read)

> Good -- good afternoon, counsel. We will be appearing before Justice Kirker on June 1 to address the remaining disputed affidavit evidence and we believe we should also have time on June 1 to address with Justice Kirker any housekeeping matters the parties wish to raise. Accordingly, the respondents intend to raise the following for Justice Kirker's consideration and direction, one, direction on the time period for which the respondents must justify any alleged breaches. Given the filing deadline of July 12th for rebuttal evidence, the respondents intend to lead evidence justifying any breaches as of May 31, 2021.

I believe, and my apologies because I did not have it at trial, I believe that there is a transcript from the June 1 appearance before Justice Kirker and, as of yesterday, we did request it and I understand it is in the process of being prepared. I thought when we argued this issue at trial that I had all the case management transcripts, but I expect I will receive that Monday and I expect it may shine more light on this issue because it was my recollection that this issue was raised before Justice Kirker. We will see what, if any, my

friends said about the proposed timeline of cutting off at May 31, 2021 and we will see what Justice Kirker said about it. I appreciate that I don't have that to provide you today but, given the ongoing consideration that you are giving from the trial, I would ask that we be able to provide that transcript to you and to counsel should it reveal further information on the time period specifically in question.

The context, of course, is important relevant to the time period because, as we say, whether we cut off the time period in Ingram at the end of May or whether it extended into June and went to the end of June, that's a very different time period and, therefore, a very different context than that which was considered in *C.M.* in February of this year.

And just on that context, I refer you to, I won't take you there but I will give you the references to, Dr. Hinshaw's affidavit filed July 12th, 2021 in this matter, paragraphs 156 to 160. She talks about Alberta's present situation and the plan to open up at the end of June of 2021 and focuses on the steps that had to be overcome, which involve number of vaccinations and whether hospitalizations were decreasing. Also see paragraph 2020 -- sorry, 224 of Dr. Hinshaw's affidavit on that point. Again, the point is a very different context than was being considered in February of this year relative to vaccinations and relative to hospitalizations, among other things.

Further on the context and the time period, I just want to specifically talk about the three questions that you asked Dr. Hinshaw in-camera, and I had clarified on April 7th, at page 22 of the transcript, lines 32 to 37, and I said this, beginning at line 34: (as read)

> Just two questions, really, which were, you used the phrase "ever" and "anytime" in the questions, it would be related to the impugned orders?

You answered "Yes". I believe in the reply argument of the applicants, they are -- they're seemingly suggesting, Well, how did Dr. Hinshaw know that your questions to her were restricted to the time period of the impugned orders? Well, Dr. Hinshaw's a party in this matter, she's the chief medical officer of health, I think it was clear from the evidence that she gave as set out in the transcript that she knew full well the relevant time period in Ingram. There's nothing to suggest that she misled you in her answers, it's baseless and it's offensive to suggest otherwise, and we ask you to say so.

Further context, section 1 and minimal impairment. My friends say repeatedly in their argument, in this application, and again today, Ms. Johnson, that the -- that there needs to be proof that Alberta chose the least restrictive measures, they underlined that in their application materials. They continue to misstate the law on minimal impairment. We reviewed the law on minimal impairment in our pretrial brief at paragraphs 265 through to

271 and, just in brief, paragraph 265: (as read)

> The law is that the limitations must merely fall within a range of reasonable options to achieve the pressing and substantial objective.

Paragraph 266: (as read)

> The Supreme Court has recognized there are certain types of decisions where there may be no obviously correct or obviously wrong solution, but a range of options, each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives. In those cases, governments have a large margin of appreciation within which to make choices. It is not a standard of perfection but, rather, a standard that requires consideration of the context and the available options. In cases involving scientific evidence, that delineation becomes even less clear. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the Court to second guess. That would only be to substitute one estimate for another.

Paragraph 267: (as read)

> The Supreme Court noted, This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's decision. We say, as we've said in our closing argument, there is a sound evidentiary basis for the restrictions that are impugned in this matter.

And, finally, from our pretrial factum, paragraph 268: (as read)

> When the legislature is asked to mediate between claims of competing groups, it necessarily is required to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government, whereas other groups and

> individuals will assert the government should not intrude. And, of course, what is a reasonable range of alternatives may, in fact, change over time. It may change from, for example, the fall of 2020, the spring of 2021, or the late winter of 2022. There's no inconsistency as alleged by applicants between Alberta's position in this matter, Ingram, and in the *C.M.* matter. In both, it has been asserted that voluntary measures were used until no longer sufficient and only at that time were mandatory restrictions imposed.

Finally, on minimal impairment in the law, we also set out the law at paragraphs 345 to 348 of our closing argument and then I also recommend to you the review by Chief Justice Joyal in the *Gateway* decision, 2021 MBQB 218, at paragraph 298 to 317 on minimal impairment.

I'm going to move on to the collateral fact rule and the allegation of failure to disclose. This is covered at paragraphs 51 to 54 of our application in this -- sorry, our brief in this matter under the heading, Not a Statement of Claim. I -- I just wanted to make one correction, however, to paragraph 45 of our brief. We have erroneously referred to, at the beginning of paragraph 45, the August 6th, 2021 oral hearing order, this is under part (g), oral hearing order evidentiary procedures, and we said the oral hearing order set deadlines for the exchange of evidence by the parties in this action. That was incorrect. It was the procedural order dated -- filed March 16th, 2021 that should have been referred to. That was the order that set deadlines for the exchange of evidence in the Ingram matter by the parties.

And that's important because -- or -- or it -- it might be important if this were not resolved completely as we say it is by application of the collateral fact rule, but my friend has -- has raised today throughout hyperlinks in various documents taking -- taking you to studies that predate July of 2021 and, of course, this leads to the response, well, if they thought that these studies were relevant to a matter in issue, then they could have been filed as part of the 2,300 page primary report of Dr. Bhattacharya that was filed in January of 2021. Again, Alberta, pursuant to the procedural order, filed its rebuttal evidence on July 12th, 2021 and again surrebuttal evidence pursuant to this order was filed on July 30th, 2021 by the applicants, including another lengthy report from Dr. Bhattacharya. If the applicants actually thought these studies on masking harms to children in schools was an issue, then one would have expected them to file as part of the primary report, or at least the surrebuttal report, argument -- or evidence, rather, and the studies. They did not and we suggest to you that's because masking harms to children in grade school is not a relevant issue in Ingram.

This, again, as I say, is an important point because, as stated at paragraph 54(a) of the applicants' argument in this matter, in reference to the reasons of Justice Cote in *Alberta v. B.M.*, that's at footnote 54 of my friends' argument, and that's 2009 ABCA 258, in respect to fresh evidence, Justice Cote says:

> 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.

And that answer applies to any studies that the applicants say Alberta should have put in on harms of school masking. It also applies to the SAG reviews that are publicly available online, but have not been put into evidence by the applicants.

I'm going to move on to some other issues now that I say it's not necessary for this Court to address, given the clearly collateral issue that has been raised as to harms of masking of children in grade school.

Sorry, I'm -- I'm just correcting -- I referred to footnote 54 of their brief and it was paragraph 54 that I should have been referring to when I talked about *Alberta v. B.M.*

Again, moving on to some points that I want to some points that I want to cover, as earlier noted, given the very serious allegation made against the respondents and, in particular, against Dr. Hinshaw, I will now review paragraphs 22 to 30 of the respondents' brief and the allegation of -- sorry, and the subject of mischaracterization of Dr. Hinshaw's testimony by the applicants beginning at paragraph 22.

The applicants argue at paragraph 15 that Dr. Hinshaw testified there was no evidence regarding serious health outcomes or adverse outcomes from wearing a mask. That quote misrepresents her testimony. On the transcript, both before and after the section quoted at paragraph 15, Dr. Hinshaw clarified several times that she did not recall specifically what SAG had found.

Paragraph 24 our brief, we set out a portion of the transcript where Mr. Rath had asked Dr. Hinshaw to review materials overnight. I interjected and said that she would not do so unless directed by you, Justice Romaine. You said to Mr. Rath: (as read)

> This is not a questioning, this is a cross-examination. On what basis do you wish me to direct Dr. Hinshaw to go back and look at documents?

Mr. Rath responded, "Well, that's fair enough, My Lady. Withdrawn." And that's from the April 5th transcript, page 89, lines 14 to 29.

Paragraph 25 of our brief, it is clear in the context of this section of questioning on this particular point that, although Dr. Hinshaw did not recall at that time any specific sections on psychological harms, she clarified that, in order to answer these questions, she would have to go back and check the list of evidence reviews. She most certainly did not, as the applicants imply, definitively say that there was no evidence.

As we say at paragraph 26, the key line that the applicants take issue with is from the transcript on April 5th, page 88, lines 31 to 38, and, again, that deals with evidence on potential psychological harms to elementary school children from being forced to wear masks.

As we say at paragraph 27: (as read)

> In addition to the context of Dr. Hinshaw needed to review the evidence to properly answer the questions, it is clear there were two additional qualifiers which the applicants have not acknowledged. First, it was the Scientific Advisory Group who concluded that there was no evidence regarding serious or adverse health outcomes, and, second, it was "at this time."

Summarizing this point at paragraph 28 of our argument, nothing in the documents disclosed in the AACRP and *C.M.* on July 12th suggest any impropriety on the part of Dr. Hinshaw in her testimony in response to the line of questioning, which we summarize as follows: (as read)

> Dr. Hinshaw did not recall the specific evidence reviews done at the time in relation to mental health harms of masking in schools. She would have to go back and check the reviews to answer this question. SAG was asked to review all the evidence with respect to potential harms of masking. SAG concluded at that time there was no evidence regarding serious health outcomes or adverse health outcomes from wearing a mask. SAG was asked to look at all the evidence and would have looked at evidence relating to harm, including mental health, but Dr. Hinshaw would have to go back and read the review again to be able to answer the question of whether there was anything in the reviews on this. Nothing in the AACRP impugns Dr. Hinshaw's credibility and nothing suggests suggesting the documents would be proactively

> conclusive in reversing the outcome of a judgment order that has not yet even been made exists in those materials.

As we say at paragraph 30 of the argument: (as read)

> The premier's staff memo, or the memo, as has been referred to, does not disclose any serious contradiction with Dr. Hinshaw's testimony in this matter.

Again, that memo is from February 2022. It was cc'd to Dr. Hinshaw, the memo is dated February 7th, 2022, and the PICC meeting was the next day, February 8th, 2022: (as read)

> There's nothing rising to serious health outcomes or adverse -- serious adverse health outcomes. There's minor redness, itching, and there's muffled communication issues.

The applicants also seriously mischaracterize the AACRP documents. This is argued at paragraphs 31 to 35 of our brief in this matter. Paragraph 32 states: (as read)

> The applicants state that in the document, Dr. Hinshaw advised Cabinet that masks are harmful and not efficacious.

This statement is not true. Nowhere in the AACRP documents does Dr. Hinshaw advise Cabinet that masks are either harmful or not efficacious. Dr. Hinshaw consistently reiterated throughout her testimony that masks are helpful in reducing the spread of COVID-19 and nowhere in the AACRP documents does she state otherwise.

Paragraph 33: (as read)

> Dr. Hinshaw also consistently stated that CMOH orders employed the least restrictive means necessary and used voluntary measures where possible and only resorted to mandatory measures where voluntary were not sufficient. This is completely consistent with the decision to make school masking voluntary, rather than mandatory, in February 2022. It is not as alleged, the opposite position, but it is, in fact, applying the exact same approach in a different factual context, as discussed earlier.

Paragraph 34 of our brief: (as read)

> The applicants' statement that the documents show that mask

> wearing was not effective in reducing in school transmission is not an accurate summary of the AACRP documents. The (INDISCERNIBLE) email, for example, concludes in its summary that masking in schools can contribute to reducing transmission.

The applicants have also made misrepresentations in their reply received at the end of the day Wednesday. I'm going to go through a few of those now. Paragraph 12 of the applicants' reply says that, "Alberta argues in *C.M.* that masks are not effective as an NPI and masks are harmful." These are not true. As noted at paragraph 42 of the *C.M.* written argument filed August 12th, 2022: (as read)

> Alberta is not disputing that masks can be an effective tool against the spread of COVID-19. Nobody is denying this fact, a fact Alberta has advanced in other court actions arising from COVID-19.

From paragraph 43 of Alberta's argument filed August 12th, 2022 in *C.M.*: (as read)

> This application relates solely and entirely to the removal of mask mandates. There is not one shred of evidence suggesting Alberta discourage the use of masks by school-age children. The order simply removed the requirement of masking in schools for children and, in conjunction with the guidance letter, allowed students guided by their parents to make the decision as to whether or not to wear a mask themselves, returning Alberta to the pre-pandemic status quo on this specific issue, while continuing other protective measures. Nowhere in *C.M.* does Alberta argue that masks are harmful or that masks are ineffective. Paragraph 12 of the applicants' reply in this matter says Alberta relies heavily on the memo to justify rescinding the mask mandate in *C.M.*. However, nowhere in the AACRP or *C.M.* arguments does Alberta rely heavily on the memo. The memo was produced in the AACRP because it is one of the documents that was before Cabinet in relation to this issue, however, there is no evidence that this memo played a significant role in the decision making process or that it was heavily relied upon to justify the decision.

I'm just going to -- before I carry on with these mischaracterizations of what's being argued by Alberta in *C.M.*, I just note a point here that there is no record of proceedings produced in this matter and I understand in *C.M.* it's a live issue still whether the decision in question is an administrative decision or whether, in fact, the orders are executive legislation. The

same issue comes through in the amended originating application in Ingram. The applicants have argued both, that is that it's an administrative decision, alternatively, it is akin to executive legislation. And I think it's fair to say that -- that what has been a settled approach in Ingram is it's being treated by all parties quite correctly as executive legislation for the reasons argued in our closing argument and, indeed, was accepted by Justice Kirker in her decisions on certain pretrial matters as such, and so it's not an administrative decision and there's no record of proceedings.

Moving back to mischaracterization in the applicants' reply, paragraph 13: (as read)

> Alberta suggesting the decision making process applied by PICC in *C.M.* is weak and unreliable.

And paragraph 14: (as read)

> *C.M.* reveals that the memo is how PICC made the decision to rescind the mask mandate. Nothing in the AACRP suggests that the memo is why PICC made the decision to rescind the mask mandate. Tab 14 of the AACRP, the Cabinet minutes, suggest that PICC considered the options in their PowerPoint at tab 13 and shows option 2, page 1 of tab 14. There is no mention in the minutes of the memo at all and no basis in the documents for the applicants to make this statement. Alberta at no point suggest that the decision making process applied by PICC in *C.M.* is weak. It may be that the applicants have incorrectly assumed that, because the memo was from the premier's office staff, that it somehow represents the decision of PICC. This is not correct. It is a memo put together by the premier's office staff and sent to the premier and, as I indicated, cc'd to Dr. Hinshaw the day before the PICC meeting.

Paragraph 15 of the applicants' reply in this matter: (as read)

> When summarizing the scientific evidence from both the email and the memo, Alberta states in the documents that the impact of masking in schools was not supported by the evidence. This is not an accurate summary of the evidence, nor is it something Alberta has stated in the documents. The summary on the first page of the email at tab 8 states, The evidence for protection from masks in schools is less direct and it might be small but, taken together, support the conclusion that face coverings in schools can

> contribute as part of a host of measures to reduce transmission. Tab 12, appendix 1, summarizing context of COVID-19 and evidence relevant to masking in schools at the time of the decision, states in its summary of the evidence at page 2, Analysis of research literature indicated wearing masks can be effective in contributing to reducing the transmission of COVID-19 in public and community settings, however, the impact of masking in schools was less clear, with mixed results from different studies. It was difficult to determine the effect of removing or changing one measure, e.g., masking, as many of the studies examining COVID-19 incidents in schools had layered infection prevention and control measures in place. However, the summary at appendix 1 of tab 12 did also note at page 3 that Alberta data looking at schools that did or didn't have requirements for masks in the fall of 2021, before provincial masking requirements were reinstated, showed more outbreaks in schools without masking requirements than in those with masking requirements. It is also worth noting tab 7, COVID-19: COVID in Schools, which looked at what actually happened in Alberta and found school boards without mask mandates have three times more outbreaks in their schools on average, page 1 of tab 7, although it is true that the summaries note that wearing masks is effective in reducing transmission of COVID-19 in public settings, but the impact of masking in schools was less clear, tab 12, at page 2, or less direct, tab 8, summary, at page 1, or has limitations that make the pool of evidence weak and the benefits of masking unclear, tab 6, page 1. It is not accurate to say, as the applicants do, that Alberta states in the documents that the impact of masking in schools was not supported by the evidence.

Paragraph 16 of the applicants' reply: (as read)

> In further support of this, a hyperlink study published on May 21, 2021 and contained within the memo hyperlinks found that the May 2021 study the applicants reference is actually not contained within the memo hyperlinks. The applicants found this study referenced in a Time Magazine article. They did not find it discussed in or hyperlinked by the memo, see the affidavit of Leslie Doucette (phonetic) at paragraph 11.

And then paragraph 17 of the applicants' reply: (as read)

> Numerous scientific studies pre-dating July 12th, 2021 are cited in the hyperlinks in the memo outlining harms related to self-contamination with upper respiratory tract and skin microorganisms. This statement at paragraph 17 is misleading as well. In the section of the memo titled, Harmful Effects of Mask Wearing on Children, page 3 of tab 6, there is only one hyperlink to a scientific study pre-dating July 2021. Mask education, the benefits and burdens of wearing face masks in school during the current Corona pandemic is the study published August 11th, 2020. Notably, the first sentence of the article reads, Face masks can prevent the spread of the virus SARS-CoV-2 in particular as this spread can occur from people with no symptoms. All other articles are post-June 2021.

Sorry, there's a second scientific article from -- yes: (as read)

> All the other articles are post-June 2021. There is a second scientific article from July 1, 2021.

Paragraph 40 of the applicants' reply: (as read)

> The memo is the very same memo that PICC relied on to rescind masking in 2022. It is also the very same memo that Alberta is defending in *C.M.*. These statements are both false. As discussed previously, there is no evidence in the Cabinet minutes or anywhere that PICC relied on this memo at all to rescind masking, nor is there any evidence that Alberta is defending this memo in *C.M.*. It appears the applicants may misunderstand that this memo was a document put together by the premier's office staff for discussion purposes and perhaps they erroneously believe it is the decision of PICC. It is not.

Paragraph 41 of the applicants' reply refers to the weight PICC put upon those studies and states: (as read)

> PICC reviewed those studies and believed they were persuasive, reliable, and relevant to rescind restrictions. Again, this is an allegation by the applicants that is completely false. Nowhere in the AACRP does it say that PICC reviewed the studies and believed they were persuasive, reliable, and relevant.

Paragraph 45 refers to the memo now revealing that reems of evidence was available to Alberta prior to the imposition of the CMOH orders, and paragraph 46 of the applicants' reply says: (as read)

> All of this evidence was easily obtainable by the Government of Alberta but, apparently, neither Dr. Hinshaw nor SAG had proficient Google skills to uncover it. Alberta, again, agrees that all of these scientific articles could have been discovered with a Google search by the applicants. The applicants chose not to put them in their expert report or to cross-examine Dr. Hinshaw on them.

And, again, per paragraph 12 of the *Alberta v. B.M.* case, the decision of Justice Cote I referred to earlier: (as read)

> This is fatal to an application to introduce fresh evidence and the applicants should not be entitled to try to rely on these studies after the hearing has concluded.

Paragraph 55, finally, of the applicants' reply, they say: (as read)

> It is difficult to believe Dr. Hinshaw could have forgotten the memo. It is evidence that Dr. Hinshaw is engaging in an exercise of hiding information from this Court. The memo was from 2022 and so not relevant. Dr. Hinshaw understood what was relevant to this case when answering questions, including the relevant time period, and would not have brought up a memo from outside the relevant time period. There is no basis for the nefarious motive suggested by the applicants.

Finally, I'm just going to go through the affidavit of Leslie Doucette that I believe we received on Wednesday of this week, it was affirmed August 24th, 2022, and we have some submissions in respect to the exhibits referred to in Ms. Doucette's affidavit.

MR. RATH: This is Mr. Rath. Can we take the morning break right now for health reasons?

THE COURT: I'm sorry, Mr. Rath, did you say something?

MR. RATH: Oh, yes. Madam Justice, I note we've been at this

for 2 hours. If it pleases the Court, would we be able to take the morning break right now for a health break?

MR. PARKER: I'm -- I'm -- this is my last point, I've got 10 minutes. I'm in your hands, Justice Romaine.

THE COURT: Well, okay, I don't want anybody to suffer. Let's take 10 minutes. Okay? Thanks.

MR. RATH: Thank you.

(ADJOURNMENT)

THE COURT: Okay. Thank you.

Okay. Mr. Parker, back to you.

MR. PARKER: Thank you, Justice Romaine. I just wanted to make a clarification, a correction, to submissions I made earlier. Mr. Trofimuk advised me that I indicated that all that was conceded with respect to 2(a) was that the applicant churches have standing and we're not opposing that. It was pointed out to me that we've also, and this is correct, conceded a prima facie infringement of the church's 2(a) rights. And so just to clarify what I said earlier about the concession on that point.

With that, I'm just going to move now to my final submissions in respect to the affidavit of Ms. Doucette affirmed August 24th and some of the exhibits. First of all, Exhibit B is an article from February 5th, 2022, while outside the relevant time period, it is not a scientific article, it is a commentary in Time Magazine. Exhibit C is not cited in any AACRP documents, it is a study mentioned in the Time Magazine article that is in Exhibit B. It was also publicly available in April 2021 and the applicants could have found it if they looked for it.

Exhibit D, not cited in any AACRP documents, it is a study mentioned in the Time Magazine article. It was publicly available in May 2021. My same comments apply that the applicants could have found it and submitted it. Exhibit E, the UK education summary, is from January 2022, outside the relevant time period. Exhibit F, not cited in any AACRP documents, it is a study mentioned in the UK education summary that is Exhibit B. It was publicly available in September 2020.

Exhibit G, not cited in any AACRP documents, it is a study mentioned in Exhibit F, which is a study mentioned in the UK education summary, and Exhibit G was publicly available

in June 2019, and when you hear that date, you will appreciate that it's not even related to COVID-19. Exhibit H, UK health review, was published November 2021, outside the relevant time period, not cited in the memo, it is a study cited in the UK education summary that is Exhibit E. Exhibit I, the Camenettes (phonetic) article, was published January 28, 2022, outside the relevant time period. And Exhibit J, the Fetussi (phonetic) study, was published November 3, 2021, outside the relevant time period, not cited in the memo, it's the study cited in the Camenettes article that is Exhibit I.

With that, Justice Romaine, unless you have any questions for me, those -- those are the submissions of the respondents on this application. Thank you.

THE COURT: Thank you. Thank you.

Ms. Johnson, anything in response?

MR. RATH: Madam Justice, my apology for that, that's Mr. Rath speaking, we were having a little technical difficulty with -- with our mouse but, anyway, we're fine now. We have approximately 15 or 20 minutes in reply, but I think we would be a lot more efficient in providing our reply to the Court if we could take the lunch break right now and provide it after lunch.

THE COURT: No, I'm sorry, let's continue, let's continue. If you've got about 15 minutes, that'll take us to about 12:30, so, yes. Okay. Go ahead.

Submissions by Mr. Rath (Reply)

MR. RATH: All right. Thank you, My Lady. The first thing that I'd like to address is my friend, Mr. Parker, taking such great issue with us pointing out the statements made by Dr. Hinshaw being untruthful. In -- in fairness to us, and -- and then to say it's somehow inconsistent with my friend, Ms. Johnson, saying that we're not asserting that Dr. Hinshaw is a liar, those statements are not inconsistent. Her statement, "There was no evidence of serious health outcomes from wearing masks during the relevant period that these orders were made", is clearly on its face an untruthful statement because there are reems -- there is reems of evidence that we have now seen that was available to Cabinet that showed that there were serious -- there was evidence of serious health outcomes from wearing masks that preexisted the orders in this case. So that statement on its face, My Lady, is untruthful.

There's a big issue, though, and there's a big difference and that's why the paragraph that refers to using the 'P' word, or perjury, that on a prima facie basis, there's an untruthful statement on the record, that's the statement, and in fairness to Dr. Hinshaw, she should be

given the opportunity to come and explain to the Court whether or not -- whether or not she knew that there was evidence of serious health outcomes from wearing masks that was available or that she saw that she did not admit to the Court or provide to Cabinet. That's a very serious issue in this case.

The other thing that I'd like to point out in reply is that one of the things that this -- the application that's before you today isn't just an application for this evidence to be admitted, but it's also an application for the government to provide -- provide the written submissions or whatever written record was provided by Dr. Hinshaw to Cabinet when all of the CMOH orders in this case were made. Mr. Parker is correct, there was not a record filed in this case, an application was not made to provide a form 9 record, but it's not because we were of the view or that applicants' counsel agreed that what was at issue here was executive legislation as opposed to administrative decisions, we were of the view that the onus was on the government under section 1 to provide that evidence and that the government would, in fact, provide that record as part of its obligation to satisfy its section 1 obligations in this case.

And, again, keep in mind, satisfy its section 1 obligations in this case, when we were labouring under the false apprehension that Dr. Hinshaw, and not Cabinet, was the decision maker in this case. We didn't know until Dr. Hinshaw arrived in court and provided her evidence on cross-examination that, in fact, it was Dr. Hinshaw and not PICC that, in fact, was -- it was the party making the decisions that were impugned in this case. So, in that regard, clearly, any of the documents, any of the evidence that was provided by Dr. Hinshaw to PICC needs to be produced in this case for this Court to be comfortable that its decision would provide a fair result.

The other thing that I found quite telling in my friend Mr. Parker's submissions is that he stated that Dr. Hinshaw did not advise Cabinet at any time whether masks were harmful or not. So we have this disconnect between the Scientific Advisory Group, potentially, you know, maybe doing research on whether masks are harmful or not or obtaining evidence on whether masks are harmful or not. Dr. Hinshaw may be -- be aware of whether masks are harmful or not, but we now have the admission from Mr. Parker that whether masks are harmful or not was not something that was ever advised to Cabinet by Dr. Hinshaw, so we have a complete disconnect as to what was going on between the Scientific Advisory Group and Dr. Hinshaw in this case, and I -- and I think that that's something that this Court needs to have in mind in terms of our request that this Court exercise its discretion to order that Dr. Hinshaw provide copies of whatever PowerPoint or whatever forms of memos or documents that she provided to Cabinet throughout with regard to all of the impugned orders in this case so that we can -- you know, we can see exactly where things -- where things lye.

Now, the other thing I would like to point out is that, with regard to the *C.M.* case and my friend's argument that all of this is somehow collateral because *C.M.* only applied to the masking of school children, that statement that he made over and over again in his argument is on its face completely incorrect. So -- and I will demonstrate that to you by taking you to paragraph 1 of the memorandum of decision of Mr. Justice Dunlop, there are two of them, so let me find the date of this one, so it's the first one dated the 19th of May 2022: (as read)

> (INDISCERNIBLE) which alleges numerous defects (INDISCERNIBLE) …

THE COURT: We can't hear you. We can't hear you, Mr. Rath. After numerous defaults …

MR. RATH: Can you hear me now, My Lady?

THE COURT: Yes, I can. Thank you.

MR. RATH: Okay. Thank you. I'm not sure what happened there: (as read)

> Alleges numerous defects in the decision of the Chief Medical Officer of Health to change a requirement that people wear masks in public places, including schools.

So the matter that's before the Court in *C.M.* in terms of the relevance to this proceeding is not limited to school-age children. We can bring up the application -- or the order, sorry, for the record, hang on, we can provide it on a -- in a shared format, but the order makes it clear that the order being sought in that case went far beyond -- it'll be -- we'll share it with you right now, My Lady, goes far beyond masking of school-age children and includes masking requirements generally throughout society. So for Mr. Parker to allege that the matters in *C.M.* were simply limited to school-age children is on its face simply incorrect.

The next thing that we would like to point out is that, in that context, the evidence that we're seeking to have admitted in this case goes to -- and -- and the question of whether or not the applicants should have done a Google search and found this evidence as opposed to the respondents, in our view, wasn't relevant to include this in an affidavit of Dr. Bhattacharya. What is relevant now with regard to that evidence is a matter of context, and that context is that all of this was available to Cabinet, yet, Dr. -- Dr. Hinshaw appears not to have provided it to Cabinet on the basis of her evidence that there was no evidence of harm, and then Mr. Parker's submissions that Dr. Hinshaw never advised Cabinet that

there were any harms arising from wearing masks.

And, again, in that regard, it calls into question all of the decisions that were made by Cabinet to impose the CMOH orders in this case because, ultimately, we do not know what Dr. Hinshaw did or didn't tell them or share with them from the Scientific Advisory Group and what is clear, thanks to Mr. Parker's admission and the evidence that we see from *C.M.*, is that Cabinet, in making these decisions to impose these far reaching orders that restrict the rights of citizens of Alberta, apparently was not provided any evidence of harms arising from at least the masking portion of these orders and we need to know whether they were provided any evidence of any harms with regard to any of the other measures, including the -- including locking people up in their homes as a form of NPI, because if they weren't provided any evidence of harms all the way through by Dr. Hinshaw with regard to masking or anything else, how can they have made a balanced decision that -- that satisfies their obligations under the *Oakes* test and under section 1? And I think that that's a very, very crucial consideration for this Court to have in mind with regard to this application that we see both the form of advice that was provided by Dr. Hinshaw to Cabinet and the actual recommendations that were made in the form that they were provided.

Now, Mr. Parker tends to rely on case law that says, Oh, when we're dealing with scientific articles and whatever and there's a range of options that are available, you know, the Court shouldn't worry their -- you know -- you know, worry themselves over this and shouldn't interfere in this and this all, you know -- you know, this is all outside the realm of anything (INDISCERNIBLE), in any event, but the problem is we don't know what Cabinet was considering and whether or not any of this information was even scientific. So, you know, the advice of Dr. Hinshaw simply could have been, and we suggest this in our brief and we didn't do it lightly, either, but, in essence, she is providing them a menu where they were being asked a la carte to pick from options that she was provided. That's what we see in -- in the -- you know, in the *C.M.* case.

So we don't know in the context of that a la carte menu being provided whether there was any scientific evidence accompanying that a la carte menu or whether or not there was -- with regard to any of the NPIs that were being suggested, whether Cabinet was provided any evidence of any harms arising from those NPIs being imposed. And we saw that in all of the evidence-in-chief from Dr. Bhattacharya, we obviously cross-examined all of the Crown's evidence on -- you know, witnesses on potential harms arising from NPIs, et cetera, et cetera, but all of this took place in a very artificial circumstance where all of the questions that were being asked by the -- of the Crown's witnesses and all of the evidence that we provided through out expert witness was under the false assumption, or false belief, that Dr. Hinshaw was actually the decision maker. So we did not find out until she came in to this court and shockingly told us that she was not the decision maker, that she was merely a recommender, and -- and, quite frankly, from the *C.M.* case, again, what we see,

the provider of an a la carte menu, that provided Cabinet with choices that they could make.

So this entire case was based on the fact that she was an administrative decision maker that would make those decisions within normal administrative norms, within the context of the *Charter of Rights and Freedoms*, and her obligations as a professional physician, and we now find out that that was not the case, that, at the end of the day, Cabinet was the decision maker and that Dr. Hinshaw, apparently in *C.M.*, was simply providing them a menu without any advice whatsoever as to whether any of the menu items were harmful or not, and, quite frankly, it's on that basis that we are seeking the order that the written advice that was provided to Cabinet be provided and that Dr. Hinshaw be required to re-attend for cross-examination so that we can determine whether or not, you know, the answers that she provided during the -- during the hearing phase of this matter were correct.

And -- and, again, my friend makes a point that, you know, we suggested that her answers to your questions were lacking in candor and, you know, the Court is -- you know, the Court seems to be signaling, and my friend seems to be suggesting, that Dr. Hinshaw knew when she was answering those questions that those questions were limited temporally or limited in time to the time that the orders were, in fact, issued in this case.

But if you look at the third question you asked her, My Lady, you say quite clearly, Did you ever at any time issue an order that Cabinet -- where Cabinet imposed greater restrictions than were recommended? And she answers with a one word answer, No. Had she been answering that question with the candor that one would expect, she should have answered that questions, No, not within the period of time that these orders were issued, however, you do need to know that, you know, later on, I was providing -- I was providing advice to Cabinet on the basis of multiple menu options and Cabinet would often pick a menu option that imposed greater restrictions than the least restrictive of the menu options that I provided them. Instead, she provided evidence that led us to believe and had the appearance of suggesting to the Court that she only ever provided one recommendation and that Cabinet invariably followed her recommendation. That's a very different factual matrix than what we now see as a result of the documents that are -- that have been released in the *C.M.* case.

And, again, we're not -- you know, we are not suggesting at this time on the evidential record before this Court that Dr. Hinshaw has committed perjury or has lied to this Court, however, facially, on the face, some of her answers do, in fact, appear to be untruthful, not true, or not factually correct, however you wish to characterize it, and, in fairness to her, she should be given the opportunity to provide this Court the menus or recommendations that she made in writing in Cabinet with regard to each of the impugned CMOH orders in this case and then be given the opportunity to explain any inconsistencies between those recommendations or menus and her evidence in this case.

So those are our submissions in this regard and we would like to thank the Court for its time and attention.

THE COURT: Okay. Thank you.

MR. RATH: Those are my submissions.

THE COURT: Thank you. I will, of course, be very cognizant of the allegations that have been made that Dr. Hinshaw gave untruthful, or inaccurate, information. I'm going to be looking at the transcripts and her answers in whole on all of these issues. They are serious allegations that have been made and everyone should have no doubt that I will be looking at the record very carefully.

Okay. I hope to get an endorsement out on this issue some time next week or early the following week. Thank you for your submissions.

MR. RATH: And -- and, Madam Justice, just quickly with -- with regard to our -- our submissions in this regard. Also, please keep in mind that those submissions were made in the face of a -- of a justice of this court finding the certificate filed by Dr. Hinshaw in the *C.M.* case to be unbelievable that there is only three documents and then, after the fact and after an order being made on that justice's own motion, that literally, you know, dozens of other documents were found to exist following Dr. Hinshaw filing an affidavit that wasn't believable by this court. So please keep our submissions in regard to all of this in -- in light of -- as through the lens of the findings of Justice Dunlop, so, thank you.

THE COURT: Thank you. But I'm afraid I can't agree with how you've characterized the findings of Justice Dunlop, but I will address that as well. Thank you.

MR. PARKER: Thank you, Justice Romaine.

PROCEEDINGS ADJOURNED

Certificate of Record

I, Elena Kay, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench, held in courtroom 1502, at Calgary, Alberta, on the 26th day of August, 2022, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Carla Novello, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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