

COURT FILE NUMBER: 2001-14300

COURT: COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE: CALGARY

APPLICANTS: REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER

RESPONDENTS: HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

ENTERED



JS

SUBMISSIONS OF THE RESPONDENTS, HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH WITH RESPECT TO THE RELEVANCE OR SIGNIFICANCE OF *CM V. ALBERTA*

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1. These are Alberta's submissions on the relevance or significance, if any, of *CM v Alberta*, 2022 ABKB 716 (*CM*). This Court has not yet determined whether improper subdelegation has been pled.¹ If improper subdelegation is not pled then *CM* is not relevant. If pled, then for the reasons below, this Court should come to a different conclusion on whether Dr. Hinshaw improperly subdelegated her authority. *CM* is either incorrectly decided or is distinguishable as being on a different decision for different CMOH Orders and with different evidence before the Court than in Ingram.
2. If not pled, then the Applicants would have to amend the Amended Originating Application to plead that Dr. Hinshaw improperly subdelegated her authority to Cabinet to make decisions under s. 29(2.1) of the *PHA*.² The Court should not allow an amendment after all evidence has been heard unless it is satisfied that all evidence possible on the new issue has been submitted and that Alberta would not be prejudiced by the new pleading.³
3. If improper subdelegation is pled, the evidence before this Court is clear there has been no improper subdelegation of authority in respect to the impugned Orders.⁴ Alberta has the following further submissions on the significance of *CM*.
4. Alberta agrees⁵ with Justice Dunlop's finding that the *PHA* requires that CMOH Orders "be based on" the CMOH's "judgment."⁶ Alberta further submits that decisive involvement is the appropriate test for whether there has been improper subdelegation.⁷ On the evidence before him, Justice Dunlop determined the CMOH had not retained decisive involvement with respect

¹ See Alberta Final Written Argument filed July 13, 2022 (Alberta Final Written Argument) at footnote 30. Alberta has argued that improper subdelegation is not pled, see Alberta Final Written Argument at paras 29-47.

² Alberta Rules of Court, r 3.65(4) (amendments at trial) and r. 1.2(2)(a) (identifying real issues in dispute).

³ See cases discussed in AA Fradsham, *Alberta Rules of Court Annotated 2021*, (Toronto: Thomson Reuters Canada Limited) at pp 261 and 262.

⁴ Impugned Orders refers to the CMOH Orders outlined in Alberta's Pre-Trial Factum filed September 14, 2021 at para 6.

⁵ See Alberta Final Written Argument at para 80.

⁶ *CM* at paras 61 and 67.

⁷ Alberta's Final Written Argument at paras 82 and 84. Justice Dunlop assumed without deciding that the test for improper subdelegation is whether the delegate retained decisive involvement in the delegated decision, *CM* at paras 85 and 86 citing JM Keyes, *Executive Legislation* 2d ed (Markham: LexisNexis Canada Inc, 2010) at 276.

to CMOH Order 08-2022 that eliminated the requirement for school masking because he said “the decision” to do so was made by PICC.⁸

5. While Alberta notes that Dr. Hinshaw’s affidavit⁹ evidence before this Court is very similar to the evidence on the “decision making process” in Appendix 1 considered in *CM*¹⁰, based on the totality of the evidence before it, this Court should conclude that the public health decisions in respect to the impugned Orders were those of the CMOH.¹¹ *CM* was a judicial review, which necessarily involves limited evidence,¹² and the Court did not have the benefit of direct testimony about the process followed. By contrast, in *Ingram* Dr. Hinshaw gave direct evidence and was cross-examined extensively about her role in making public health recommendations and issuing the impugned Orders.¹³ In summary, and as noted by this Court, Dr. Hinshaw’s evidence was not, as argued by the Applicants, that Cabinet made the public health decisions for the impugned Orders, but that Dr. Hinshaw “provided recommendations to Cabinet and then she issued orders”¹⁴ informed by Cabinet’s policy decisions.¹⁵
6. Dr. Hinshaw’s evidence on the decision making process must also be understood in the context of all of her statutory powers and obligations. She does not make the CMOH Orders in a vacuum.¹⁶ She has recognized the reality that she serves at the pleasure of the Minister of Health.¹⁷ She has also explained that one of her overarching statutory roles was to provide advice and recommendations to him on protecting the health of Albertans.¹⁸ In this context it makes sense for her to describe her role as making recommendations while leaving the final policy decision on moving forward with public health measures to elected officials. Further, since the CMOH Orders are executive legislation, “even if the Premier had directed [Dr. Hinshaw] to enact the [CMOH Orders], it represents no justiciable error for [her] to comply.”¹⁹

⁸ *CM* at para 81.

⁹ Affidavit of Dr. Hinshaw, filed July 12, 2021 at para 29.

¹⁰ *CM* at para 68.

¹¹ *CM* at paras 68-81.

¹² See eg *Friends of the Athabasca Environmental Association v Lack*, 1992 ABCA 179 at para 19.

¹³ See Trial Transcripts April 4, p8/11-17 and 25-26; April 5, p95/14-24; April 6, p83/25-p84/5, p98/16-p99/11, and p117/6-24.

¹⁴ Trial Transcript, April 5, p97/5-6.

¹⁵ Trial Transcript, April 6, p85/24-26.

¹⁶ Alberta Final Written Argument at paras 62 and 63.

¹⁷ Alberta Final Written Argument at paras 67.

¹⁸ Affidavit of Dr. Hinshaw, filed July 12, 2021 at paras 14 and 15.

¹⁹ *Ontario Federation of Anglers & Hunters v Ontario (Ministry of Natural Resources)*, 211 DLR (4th) 741, 2002 CanLII 41606 at para 42 (CA). See also paras 36-42 generally.

7. The evidence before this Court is that in providing continuous recommendations to government on Alberta's COVID-19 response, Dr. Hinshaw would often outline a range of policy alternatives, which all had strengths and weaknesses. All of the recommendations Dr. Hinshaw made were acceptable to her, and thus reflected her judgment on matters of public health. Elected officials then debated her recommendations and decided on the policy direction to move forward with, which was then implemented through the CMOH Orders.²⁰ The CMOH Orders Dr. Hinshaw signed thus reflected her recommendations and her judgment on the necessary public health restrictions.
8. Further, there is no evidence before this Court that Dr. Hinshaw's interpretation of her s. 29 powers influenced her to sign and issue any of the impugned Orders contrary to her judgment, or that the impugned Orders contained measures contrary to her recommendations. In any event, Dr. Hinshaw's understanding of the decision-making process under the *PHA* was not material to her decisions to implement the impugned Orders.
9. This is confirmed by Dr. Hinshaw's answers to this Court's questions about whether Cabinet directed her to impose more severe restrictions than she had recommended. It is clear from her answers that Dr. Hinshaw did not sign Orders implementing more severe restrictions than she judged necessary and recommended to Cabinet. There is simply no evidence in this case that the impugned Orders "slavishly implemented" Cabinet's decisions²¹ or that Dr. Hinshaw failed to retain decisive involvement because the impugned Orders were not based on her judgment.²²

²⁰ Exhibit 12, Press Releases by Dr. Hinshaw From February 14, 2020 to July 28, 2021 at pages 095 (454) and 096 (455); Trial Transcript, April 6, p82/22.

²¹ *CM* at para 85.

²² Dr. Hinshaw's trial testimony provided numerous examples of how she exercised her judgment in various contexts in recommending mandatory public health measures to respond to the COVID-19 pandemic. See for example, Trial Transcripts, April 4, p39/30-34 and p40/15-21 (outdoor transmission); April 4, p 73/20-36 (protecting vulnerable populations); April 4, p79/17-p80/4 and p86/10-24 (moving from voluntary to mandatory restrictions); April 5, p95/14/17-24 (acute care capacity); April 6, p120/14-18 and 25-36 and p122/31-38 (restrictions on physical activity venues); and April 7, p36/38-p37/3 (community transmission and acute care capacity).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November 2022.

**HIS MAJESTY THE KING IN RIGHT OF THE
PROVINCE OF ALBERTA and THE CHIEF
MEDICAL OFFICER OF HEALTH**

Per: _____

for

Nicholas Parker

Alberta Justice, Constitutional and Aboriginal Law

TABLE OF AUTHORITIES

TAB

1. *Friends of the Athabasca Environmental Association v Lack*, 1992 ABCA 179.
2. *Ontario Federation of Anglers & Hunters v Ontario (Ministry of Natural Resources)*, 211 DLR (4th) 741, 2002 CanLII 41606 (CA).