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

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA
and THE CHIEF MEDICAL OFFICER OF HEALTH

Defendants

H E A R I N G
(Excerpt)

Calgary, Alberta
April 7, 2022

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

TABLE OF CONTENTS

Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

---

April 7, 2022	Morning Session
The Honourable Justice Romaine	Court of Queen's Bench of Alberta
J.R.W. Rath (remote appearance)	For R. Ingram
L.B.U. Grey, QC (remote appearance)	Heights Baptist Church, Northside Baptist Church, E. Blacklaws and T. Tanner
N. Parker (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health
B.M. LeClair (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health
N. Trofimuk (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health
M. Palmer	Court Clerk

THE COURT: Good morning everyone. I apologize for the delay but I was a little late in reviewing the cases that were sent to me. But, anyway, I am ready to proceed now. Mr. Trofimuk, Mr. Parker, are you making any additional submissions or should we turn to Mr. Rath at this point?

MR. TROFIMUK: I was going to make some additional submissions just on the question you raised at the end of the day.

THE COURT: Okay.

MR. TROFIMUK: But I'm fine to hear from Mr. Rath first and deal with it all as one -- all at once if -- whatever you prefer.

THE COURT: Okay. Sure, then let's do that. Mr. Rath, we will start with you.

MR. RATH: My Lady, given that it's my friend that has a right of reply and I don't necessarily have a right of surreply, I'd prefer to hear my friends' submissions in their entirety and then (INDISCERNIBLE) my argument

(INDISCERNIBLE).

THE COURT: Okay. Fair enough.

Okay. Mr. Trofimuk, please.

MR. TROFIMUK: Yeah. That makes sense. Thank you.

THE COURT: Yes.

Submissions by Mr. Trofimuk

MR. TROFIMUK: So I think at the end of the day you raised the point that I made a lot of submissions about Cabinet privilege generally, the importance that views of individual minister's consideration specifics not be disclosed, but the question here that we objected to I think, if I have it right, was did Cabinet ever reject any of your recommendations? And so that's sort of a broad question. And the answer to it wouldn't reveal a specific view and so I think that was the issue that you wanted a bit more --

THE COURT: Right.

MR. TROFIMUK: -- on; is that right? Yeah. Okay. Perfect.

So I guess the first point would be, just to cover it off, whether this falls within the certificate and at paragraph 5 where the Minister certified that any information Dr. Hinshaw has on what was said by or to Cabinet members in relation to the COVID-19 pandemic and Alberta's actual or potential responses to it. So we would submit this question does cover that because it would reveal information about what was said to Cabinet, which is that a recommendation was made, as well as information of what was said by Cabinet which is that they rejected it or never rejected it. So we would say it does fall within that paragraph 5.

As far as the purpose goes, so I read the paragraph 18 of *Babcock* which talks about a lot of the considerations that are important. The one part I didn't read which is I suppose directly on point to this specific question is the bottom of paragraph 18 where it says:

> In addition to ensuring candour in Cabinet discussions, the Court in *Carey* recognized another important reason for protecting Cabinet documents, namely, to avoid creating or fanning ill-informed or captious public or political criticism.

And so I have the *Carey* case as well here which is paragraph 49 --

THE COURT: Okay.

MR. TROFIMUK: -- where they mention this. Let me just pull this up here. So at paragraph 49 they're referring to the *Conway* decision and Lord Reid's explanation and what they say is:

> The best explanation is that of Lord Reid. For him it was not candour but the political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only.

And then it quotes from the case -- quotes from Lord Reid. What he says is:

> To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind.

And then the Supreme Court of Canada notes that some -- well they note that:

> I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable.

And so in this case the question is just did Cabinet ever reject any of your recommendations, I think the obvious next question, let's say the answer was yes, and I don't know if it's yes or no, but if the answer was yes the obvious next question would be well which -- which recommendations, why did they reject them. I assume that's the information Mr. Rath would want to get at and that's get squarely into the details of the views of Cabinet, the considerations put before them, and would certainly I think, that would be my submission, be protected by Cabinet privilege.

The issue with just this one question is that in and of itself the answer isn't very helpful and this concern raised about fanning captious public criticism, if the answer is yes, they were rejected without any context, you know, you can get all sorts of speculation about well why

did they reject it, what would it be, and a lot of criticism because it's ill-informed, because you don't know the context. And of course you can't get into the context because that would be privileged. And there is some commentary that perhaps privilege is the wrong word and I think it's paragraph 32 of *Babcock* that points out that it's not privilege in the traditional sense where you can waive it, it's really perhaps Cabinet immunity or Cabinet confidentiality is a better way to put it. But what paragraph 32 of *Babcock* says is that this can't be waived. So even if the Government wanted to say, oh, I better give some context now that we've sort of go into an issue of what happened in an internal Cabinet discussion, we want to explain it, it actually can't be waived and they still wouldn't be able to give that context.

So, even though this isn't the most probing question, it causes the same problems. And perhaps more importantly, there's no real benefit to it to this case. Like there is very limited relevance of the answer to this question to the issues that are pled, which is whether the orders breached *Charter* rights. If, without any context, without anything further, all you have is the answer to the question, yes, Cabinet rejected one of my recommendations or, no, they never rejected any of my recommendations, how does that assist at all in determining whether any *Charter* rights were breached or what a section 1 justification might be?

So, and that kind of goes to factor 5 of the six-factor test which is the importance of this information to the ultimate determination of the case. This isn't -- the answer to this question isn't something that bears on the key issue in this case or is evidence that can't be got elsewhere.

Lastly -- yes?

THE COURT: Yes. I would just like to follow-up with a question on that, Mr. Trofimuk. You say there is no real benefit to the case and you raised factor 5, and those two things are definitely on my mind when I read the cases and have been considering this. The plaintiff's submission is that these restrictions were too severe and could not be justified under section 1 because they were not reasonable. So I may in fact agree that the question we are looking at is whether or not it was ever rejected may not be too helpful, but the issue of whether Cabinet ever issued more restrictive conditions than had been recommended may well go to that. And I have not decided, I am just asking you the question. If Cabinet insisted that Dr. Hinshaw issue more restrictive orders than she had recommended, that may well go to the Crown's obligation to show that under section 1 that the orders were reasonable.

MR. TROFIMUK: And certainly there would be more relevance to a question like that. That, however, I think the public interest in confidentiality would --

like that's exactly the sort of thing that we want to protect is those behind the scenes discussions.

And the other point on that with respect to the question of whether restrictions were too severe is the questions is really whether the -- whether the restrictions are too severe and this isn't information that cannot be got elsewhere. And so Dr. Hinshaw's on the stand, she has -- she can explain why these restrictions are not too severe and all sorts of things relevant to that issue without a necessity to get into internal Cabinet discussions in order to decide that. So that was really the issue of factor 5, is this -- does the absence of this information prevent the Court from adjudicating on the merits the decision? And so the exclusion of this, we would say it does not prevent the Court from adjudicating on the merits.

THE COURT: Okay. Thank you.

MR. TROFIMUK: One last point just because my friend raised it was with respect to the assertion that they pled that this was ultra vires and therefore there's sufficient coverage in the pleadings to ground an argument that, I'm not sure the exact words, but something like Dr. Hinshaw abdicated her decision-making responsibility. So, with respect to that argument, this is very similar to the issue that arose in February in this hearing where Mr. Rath argued that a very broad wording in the originating application covered the restriction exemption program. You issued the decision 2020 ABQB 164, at paragraph 21 noted there was nothing in the originating application to support that. We would say this is very similar, there is nothing in the originating application pleading material facts which is what is necessary about an abdication of decision-making. And, if anything, the arguments made are the opposite, that this was, you know, taking too much control in their factum I believe is the gist of the argument.

So there are two parts in their originating application. Paragraph 9 mentions ultra vires the *Public Health Act,* but in the context of that paragraph they're talking about a violation of the *Bill of Rights* for failing to use the notwithstanding clause. And later on at paragraph 14, they mention it's ultra vires the purpose of the *Public Health Act.* And as I understand that argument, it's because these are orders of general application and they're saying that the purpose only lets you quarantine an individual, or something like that. I may be -- Mr. Rath can explain that better.

So, but there's nothing in the pleadings with facts about her abdicating any decision-making responsibility to support that being a relevant issue.

THE COURT: Okay.

MR. TROFIMUK: So those are all my submissions. Thank you.

THE COURT: Thank you. Thank you, Mr. Trofimuk.

Okay. Mr. Rath?

Submissions by Mr. Rath

MR. RATH: It's (INDISCERNIBLE) this morning that we're living in interesting times and I think that's the most polite thing that can be said about the timeliness of this application and the nature of the application itself is that it's interesting. I don't -- the submissions that were made and the (INDISCERNIBLE) that's been referred to by my friend actually covers the situation that we're dealing with here. We're not dealing with (INDISCERNIBLE) in its normal (INDISCERNIBLE) and that's why we relied on --

THE COURT: Sorry, Mr. Rath, I am sorry, I am going to have to ask the clerk to -- you are drifting in and out so I will mute my side.

MR. RATH: Thank you. We're not dealing with Cabinet decision-making in the normal sense. What we are dealing with here are decisions by the Chief Medical Officer of Health under section 29 of the *Public Health Act.* Section 29 of the *Public Health Act,* as this Court is well aware, states expressly at paragraph 29(2.1)(b) that when an investigation confirms the existence of a public health emergency, the medical officer of health may take whatever other steps are, in the medical officer of health's opinion, necessary in order to lessen the impact of the public health emergency. So in the context of all of the orders that we're dealing with, we are dealing with orders, not of Cabinet, not a Minister of Cabinet, not properly within the statutory framework relating to proper decisions of Cabinet, but decisions of the Chief Medical Officer of Health who, by law and by operation in Alberta, is a medical professional with purported expertise in the area of public health law -- or of public health medicine, sorry, who's actually making medical decisions on behalf of the population of Alberta that she's used as her "patients" or as that individual views as their patients.

The statute does not contemplate ministerial decision-making, it doesn't take -- doesn't contemplate decision-making by the executive council, it doesn't contain language to say that the medical officer of health shall in an advisory capacity consult with the executive council and take the executive council's direction as to what orders are going to be promulgated without any limitation to -- for the purposes of evading the pandemic. That language is contained within section 19 of the *Emergencies Act.* So, our submission in that regard is if the Government of Alberta wished to do as my friend is suggesting that the

Government wished to do, there was a very easy mechanism for the Government to attach Cabinet privilege to what in that context of the *Emergencies Act* would be political and policy decisions as opposed to medical decisions made by a medical doctor tasked with making medical decisions on behalf of the Province of Alberta. With specific reference, My Lady, to the *Emergencies Act,* I would refer you to, you know, section 19 in that regard.

The other thing that we would note is that we do reference at paragraph -- it's on page 4, paragraph J1, a declaration that all provisions of the CMOH orders currently enforced are ultra vires the purpose of the *Public Health Act.* My friends never sought particularization of that paragraph and are now only raising it at this late time as a means of blocking these questions being asked. One of the purposes we would submit of the *Public Health Act* granting these decision-making powers to the Chief Medical Officer of Health is so that decisions could be made by trained medical doctors with regard to the medical health of citizens of the Province of Alberta in the context of medical decisions being made, not political or policy decisions being made as suggested by my friends. Nowhere within the statutory scheme or framework is there scope for political decision-making.

We would further note at page 5 of our pleadings the paragraph N1 which states:

> A declaration that the CMOH orders issued since March 2020 regarding business restrictions imposed due to COVID-19 are ultra vires section 29 of the *Public Health Act* and are of no force and effect.

And, of course, our submissions in that regard is that to the extent that the restrictions are not the opinion or in the medical officer of health's opinion necessary but are -- the restrictions are coming directly from Cabinet. That falls outside the scheme of the *Public Health Act* and nowhere in the *Public Health Act* are provisions contained that allow the Chief Medical Officer of Health to in effect serve as the medium through which Cabinet communicates political or policy decisions under the guise of medical decisions to the Province of Alberta.

I can certainly understand why a government would want to be able to couch some of these very difficult decisions as medical decisions as opposed to political or policy decisions so that they can say at the end of the day we're sorry, we're not the ones that contributed to your business bankruptcy, we're sorry, we're not, you know, responsible for contributing to, you know, the mental health deterioration of your child who's now in hospital with an eating disorder, or responsible for your child's -- potentially partially responsible for your child's attempted suicide. These were all medical decisions made by proper medical professionals and Cabinet has nothing to do with those. They didn't do that. They, in essence, set up a process whereby they would have deniability at the end of the day by hiding behind the Chief Medical Officer of Health and, in essence, claiming that these were

medical decisions as opposed to political decisions and we say that is clearly outside the scope and framework of the *Public Health Act* which grants these powers to the Chief Medical Officer of Health in her medical capacity.

The other issue that we're concerned with and it's not even so much that the orders be less restrictive, it goes to the issue of whether or not the orders could've been more restrictive in certain ways. So as an example -- and we should be entitled to know, you know, what the initial forms of orders were that were being proposed or at least questioned on them because we understand that this is not a discovery and that we're not seeking to subpoena documents or otherwise, but we should be entitled to ask the questions, you know, including did you ever seek to promulgate an order quarantining only those people most likely to end up in hospital. So all of this talk with regard to hospital capacity and how hospitals -- and I think the evidence is incontrovertible in this case that the bulk of the hospitalizations, ICU admissions and deaths in this case are persons over the age of 70, so the whole issue of whether or not this was a recommendation or a proposed order of Dr. Hinshaw or something that she considered but was then overruled by Cabinet is clearly germane to the issues before this Court both from a section 1 analysis and from the standpoint of the fact that the orders themselves to the extent that Cabinet was providing the opinion and directing Dr. Hinshaw as to what orders to issue again goes to the issue of whether or not these are even in fact orders under section 29 of the *Public Health Act.* Or, really, orders under the *Emergencies Act* section 19 that they dressed up for political reasons as being orders under the *Public Health Act.*

The other thing that we would like to raise, My Lady, is, and I'll be continuing on that point with regard to some of the caselaw shortly, but the other point that we want to raise is both the timeliness and the manner in which the certificate of Sonya Savage has been tendered in these proceedings. Clearly, when you look at the structure of Dr. Hinshaw's affidavit where she swears that she's been providing advice to Cabinet and then when you look at her very carefully crafted answers where she just provides these broad general statements as to generally providing advice to Cabinet and then generally being directed by Cabinet, you know, to issue orders pursuant not the input of Cabinet, it's clear that this entire case has been structured by my friends and structured by the Government to utilize this concept of Cabinet privilege as a means of shielding itself from inquiries of the Chief Medical Officer of Health as to what degree of political interference was imparted into her decision-making under the *Public Health Act.* And in that regard, I think the certificate of Sonya Savage itself and the timing of it is something that this Court needs to take into account in the context of the procedural orders that have been issued in this case. From the structure of Dr. Hinshaw's affidavit in the nature of her answers and on top of it the fact that the certificate has been sitting, you know, I'm sure it didn't -- wasn't a one-day process to get this signed on the 17th of February but has been in the words for sometime, and then my friend, Mr. Trofimuk, was able to produce a very well-written and well-reasoned brief of

argument complete with a small phonebook-sized pile of caselaw at 6:00 yesterday afternoon, indicates that this was something that was within the contemplation of the Government of Alberta for sometime in these proceedings.

This was never raise in case management, it was not contemplated within the procedural order of Justice Kirker, and on that basis alone from the lack of disclosure, the lack of candour with the Court, the lack of candour with opposing counsel and the 11th hour provision of the certificate, we would ask this Court to consider as to whether you even need to rule on this matter at all and whether this Court should simply direct that at this late stage in the proceeding that the certificate not be permitted to be filed because at this stage they do need the consent of the Court to file the certificate. I note that it's unfiled, it's not properly before the Court, and I don't think that the Court need to consider this matter any further than that.

In the event that the Court decides that it does, you know, wish to consider the matter, but I say it can be disposed of on that preliminary ground, the nature of the certificate itself needs to be considered because the certificate itself, because it was written pre-emptively with a view towards questions that have not yet been asked, speaks -- is drafted in very, very, very general terms. Paragraph 1: (as read)

> In the course of her employment as Chief Medical Officer of Health for Alberta, Dr. Deena Hinshaw has engaged in confidential high-level discussions with members of the executive council also known as Cabinet regarding the COVID-19 pandemic.

Well I would like you to note that nowhere in that paragraph does I speak to any CMOH orders contemplated under section 29 of the Act. And, in fact, nowhere in the entire certificate is there any reference to Dr. Hinshaw acting as a decision-maker with regard to -- with regard to CMOH orders promulgated under the *Public Health Act.* And in that regard, what we would say is that that lies at the heart of the problem with the legal submissions that my friends are making. I think it is very cleat that, you know, as the province's top medical professional and as the Chief Medical Officer of Health, Dr. Deena Hinshaw has a dual role. And what I mean by dual role is that she has an advisory role to Cabinet with regard to the health of the citizens of Alberta generally, and she has a separate role separate and apart from her advisory role to Cabinet which is her role in promulgating orders section 29 of the *Public Health Act* which, in her best medical opinion, are required for the abatement of a medical emergency.

Now, obviously we're not asking her questions about what advice she's giving Cabinet generally with regard to medical decision -- or medical matters within the general realm of Government policy relating to health in the province where she would be working more in

an advisory capacity or in accordance with the title my father used to hold, you know, a senior consultant for health to the Government of Canada. She wasn't acting in a consulting capacity to the Government providing the Cabinet senior level advice or consultation with regard to health matters generally. Clearly, those discussions we would agree could potentially fall within the rubric of Cabinet privilege. And we're not asking questions about what advice she generally gave to Cabinet with regard to health matters generally that Cabinet could then consider or disregard within the framework of decisions that Cabinet was statutorily empowered to make.

So, as an example, if an emergency were declared under the *Emergencies Act,* section 19 as Colonel David Redman suggested should've occurred, and the Minister were issuing emergency orders of whatever nature were required to evade the emergency, and Dr. Hinshaw was at Cabinet providing medical advice with regard to the implications of those emergency orders under the *Emergencies Act* with regard to the health of citizens of Alberta, then in that circumstance our submission would be that those -- that advice may in fact be the subject of Cabinet privilege. But in this case, and I think it's spoken of in *Carey* and certainly I have it flipped open in the *Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia v. The Judges of the Provincial Court,* in that case the very first point at paragraph 62 of the common-law test to determine whether in that case it was a document that was in the public interest, that a document was confidential, the first question was the level of the decision-making process. So what we're talking about here are now Cabinet-level decisions. These are Dr. Hinshaw's decisions, she is the one responsible for them, she is the one making them in the basis of her best medical opinion, these are not Cabinet-level decisions.

So certainly to the extent that she's purporting to make medical decisions and she's being overruled by politicians at a policy level for any reason, like oh no, we can't quarantine people over the age of 65 because a good part of the parties donation based or people over the age of 65, we can't rile up the seniors, no, we're not going to do that. We're, instead, going to place the burden on school children, we're going to place the burden on businesses, we're going to place the burden on active Albertans who are sometimes referred to as the working well for political reasons. Well, those are the types of things that we should be entitled to ask questions about because what they are doing is they're interfering in her decision-making framework and, in essence, and my friends are basically admitting it because they're characterizing these as policy or political decisions that should be shielded from the Court's review, they're saying that she is making policy or political decisions with regard to the health of the people in Alberta and we say pursuant to our pleadings that this is ultra vires the statutory scheme of the *Public Health Act* under section 29.

And, again, referring to the Judges' referenced case again, I'll just (INDISCERNIBLE) test, the second issue - the nature of the policy concerned. Well, again, these aren't policies.

These are medical orders. She's making a medical decision based on the broad framework of what she says is her expertise in public health law to make determinations with regard to socioeconomic impacts, with regard to broader impacts on the public health, with regard to equity, social justice, all kinds of things within the framework of the practice of public health medicine. She's not making policy decisions, she is making medical decisions with regard to specific orders that, in her opinion, might abate the public health emergency.

And then point 3 deals more with documents but the particular contents of the document. Well, again, we don't intend, and if you look at *Babcock* and if you look at the old House of Lord's decisions on the reason for Cabinet privilege, the Supreme Court of Canada makes it really clear that the reason that we have Cabinet privilege is to protect candour within Cabinet with regard to decisions of Cabinet. So, with a specific view towards not identifying any individual member of Cabinet with regard to their individual views such that at the end of the day if the Government makes a ministerial decision or a Cabinet decision that goes contrary to any member's individual views that member of Cabinet, bound by Cabinet confidence as well, will not be held to public ridicule or shame for having advocated against the position that may have been politically popular, that may have been politically unpopular, or whatever. We have no intention whatsoever of asking Dr. Hinshaw which members of Canada overruled, or if this even happened. We're even trying to get to the basis of whether or not any of her recommendations were overruled by members of Cabinet. But we're not going to ask her, you know, whether it was Jason Kenney that overruled her, whether it was the Minister of Health that overruled her, whether it was any other member of Cabinet that said no, we can't do that for political reasons, our base will eat us alive so no, no, no. We demand that you make another medical decision. Those aren't the questions that we're asking. We're asking her specifically, you know, were any of the orders that you issued as a medical doctor, in your medical opinion necessary, interfered with politically or in any way overridden or countermanded by Cabinet.

And, again, a perfect example, and this goes to the issue of competence of Dr. Hinshaw as a medical professional and the standard of medical ethics that she brings to the practice. We're not in any way suggesting that she's acted unethically or that she's acted incompetently. We're not. But we're certainly allowed to test that question by asking her - did you provide your best medical advice, and notwithstanding having your best medical advice overridden by politicians or overridden by Government policy unrelated to medicine, did you promulgate those decisions as medical decisions on behalf of your patients within the population of Alberta?

And certainly, you know, one of the ones that comes instantly to mind in that regard that we do intend to question on is, you know, the announcement of the best summer ever policy and the open -- the so-called opening up of Alberta from March of 2021 through the

Calgary Stampede into the fourth Delta wave, whether or not those decisions were based on Dr. Hinshaw's best medical advice or whether those decisions were based on political interference or political directives of the Government of Alberta because, again, that goes to the vires of the orders under section 29. Those types of decisions being of a political nature would be completely shielded from review had they been made under the *Emergencies Act* but those types of decisions may have been directed or may have been imposed upon Dr. Hinshaw under section 29 of the -- of the *Public Health Act,* in our view, strictly speaking, would render all those decisions ultra vires and being subject to being stuck down by this Court as not having been decisions promulgated under section 29 as claimed but decisions that were, in effect, promulgated under section 19 of the *Emergencies Act.*

Now, the other things that are noted in the *Nova Scotia Judges'* reference, one they note as the fourth point the timing of the disclosure. Well, in this case we're at trial, you know, we're almost at the end of the trial and now we're being told that we can't question on matters pertaining to decisions that are made by the Chief -- by the Chief Medical Officer of Health ostensibly under section 29. And we say in that regard, with regard to point 5, clearly the answers to these questions are extremely important in the context of producing the information for the interest of administration of justice because we say that this Court actually can't adjudicate or determine these matters without these questions being answered.

It was interesting that my friends raised the *Nixon* case and were saying, oh, there's no allegation of unconscionable behaviour on the part of the Government. Well, in this case, to a certain degree I wouldn't say it's unconscionable behaviour but we're certainly alleging unlawful behaviour. We're alleging violations of the constitution, we're alleging that orders are being promulgated unlawfully under the *Public Health Act* that should've been promulgated under the *Emergencies Act,* and in that regard we would submit that the Court should also take that into account and not let the Government utilize this application to shield itself from review of questions within a procedure that the Government itself elected to follow. None of us told the Government to use section 29 of the *Public Health Act* to have these orders promulgated. They're the ones that chose not to operate under section 19 of the *Emergencies Act.* So this is the process that they chose and in that regard we would submit that they're stuck with the procedure and they're stuck with the limitations of what it is that they chose to do for their own -- for their own reasons.

The other point that we'd like to make, My Lady, and I make this argument in all seriousness, is that if this Court grants my friend's application to shield all of this information from the Court then the only proper thing to do with regard to the administration of justice and the disposition of this case is to order a directed verdict that all of the orders in issue in this case be struck. And the reason we say that is, that if the

Government is right and that Deena Hinshaw and Cabinet sort of as part of their on-the-job training with regard to the COVID pandemic decided to create an entirely new statutory framework for dealing with CMOH orders and, in fact, aren't issuing CMOH orders they're issuing orders that are policy decisions or issuing orders that are political decisions under the *Public Health Act,* we would say that the Government's very application saying that these decisions and orders are protected under that statute have to fall as being ultra vires because the Government itself is saying that these aren't medical decisions, the Government itself is saying that these are policy or political decisions that are shielded from review of this Court, and on that basis I don't think there's anything further for us to do given that the Government has conceded our entire case that these orders are completely unlawful and should not have been issued in the way that they were issued. This isn't a case where the Provincial Court Judges are trying to get documents that help them in litigation with regard to their salaries. In our view, Dr. Hinshaw is clearly a statutory decision-maker in issuing orders under section 29 of the *Public Health Act* as opposed to her advisory role to Cabinet. She is acting as a quasi-judicial decision-maker.

So, by creating this new system where she goes to -- she tells Cabinet what she's recommending, she provides -- whether she provides drafts of the orders or not, we're not sure yet because we haven't been able to ask the questions, and then Cabinet goes through with redlines and tells her what she can or can't order within her best medical judgment for political reasons. If that's the process that's being followed, we're entitled to know because then we're not talking about a case where Cabinet deliberations are being shielded from a third party engaged in litigation, this case then becomes much more like a Cabinet Minister or the Premier picking up the phone in the middle of a judicial proceeding or a quasi-judicial proceeding or an administrative proceeding and telling the administrative decision-maker how to decide the matter and what he or she can and can't decide in the context of the rights of third parties or the rights of people in this province being infringed or potentially interfered with in the context of that administrative decision-making process.

So, in our view, and on the strongest of grounds, my friends' objections need to be -- or objection to the questions asked needs to be overruled on all of the bases that we've argued and in that regard those are our respectful submissions. Thank you for your time and thank you for listening this morning.

THE COURT: Thank you, Mr. Rath.

Okay. Mr. Parker, Mr. Trofimuk, would either one of you like to respond?

MR. TROFIMUK: Yeah, I'd like to respond.

THE COURT: Okay. Go ahead, Mr. Trofimuk.

Submissions by Mr. Trofimuk (Reply)

MR. TROFIMUK: So, okay, there were a few points raised there. I'll just go to some of the first ones. One of the first ones was my friend raised paragraph -- page 4J, declaration sought that it's ultra vires in their originating application, and so that is a remedy sought, that wasn't pled as grounds, as facts justifying anything. That was just a remedy sought. Just wanted to cover that off.

At the beginning, Mr. Rath mentioned that we aren't dealing with Cabinet decision-making in a normal sense, we're dealing with something different. I just wanted to point out that public interest immunity is a very broad objection and so Cabinet privilege has been subsumed in it, but it doesn't only apply. The first part of the test shows this of course, but it doesn't only apply to Cabinet decision-making. One of the cases referenced *Conway v. Rimmer,* that was a former police constable suing for malicious prosecution leading to his termination. One of the reasons that case -- confidentiality wasn't upheld is because this wasn't a Cabinet decision, it was a -- I think it was his supervisor, his police supervisor that he was suing, so that was a lower level of decision-making but of course public interest immunity applies to any decision-making.

The argument that aren't dealing with decisions of Cabinet, all we're dealing with is CMOH orders, well that would certainly I think weigh against the importance of these decisions of Cabinet to the issue if that's their position. They have a lot of arguments about the -- how this should be under the *Emergencies Act* and something along -- a lot of stuff about the *Emergencies Act* and that making it ultra vires. Again, that's nowhere in the pleadings, not a part of this case.

There are questions about political interference, a number of other things, and the point -- all we would make as a point on that is that this isn't a public inquiry where there's grounds to look into all sorts of stuff, this is really about whether these orders are unconstitutional or not. So, those would not be relevant considerations.

With respect to the timeliness, the manner this was tendered, there's sort of an allegation that we, I didn't take good notes on this, but the allegation was that we laid in the weeds, something like that. So we, during the February hearing, realized these sort of border on Cabinet conversations were involved. It could be an issue, that's why we did the research just in case it came up. We of course aren't going to raise the issue before any question is asked. As we saw, Mr. Grey went through three days of cross, it never came up, so it's entirely reasonable to suppose that opposing counsel can go through without ever asking questions that intrude on the Cabinet immunity issue, and so that of course is why we haven't made a deal, wasted Court time on something before it's even an issue. So that's the

explanation on that.

The issue that this isn't -- when going through the test, the first part, that this isn't at the level of Cabinet decision-making, it's of that level that Cabinet is considering what responses to have to the COVID-19 pandemic and we would certainly say how everyone would technically categorize it, it's certainly that level of decision-making, what policy do we have in response to COVID-19. That goes as well to the assertion that these aren't policy decisions. We would say these are certainly policy decisions. This -- policy means what approach are we going to take to address this problem which is different from let's say the implementation of something. This is really which way are we going to go, how many restrictions do we have, what are we going to restrict? And that's what -- that's the essence of policy. So we would say -- we would reject the assertion that these aren't policy decisions.

Mr. Rath mentioned the cases that talk about how the importance of Cabinet privilege is not identifying individual Cabinet members and their views and, of course, that is one of the purposes of Cabinet privilege but it's not the only one. And we went through some of the others and I mentioned this morning of course the one of not fanning ill-informed captious criticism as another one.

The order about opening up for summer, of course that is not -- there's no particulars on that, that's not part of this action so anything in relation to the order opening up for summer is not relevant.

The timing. So Mr. Rath mentioned the timing, we're at the end of trial, the timing issue in the context of this test is not about where -- where the timing of the litigation is, it has to do with the timing of the recentness of that issue, the information that's sought to be protected. And so if that was the hot topic 12 years ago like in *Carey,* well then that shows that a lot of time has passed, it may no longer be an issue. That's what that timing issue means. And the timing issue in this case of course is we're dealing with this pandemic at the time, it's an ongoing -- ongoing issue so timing would weigh of favour of confidentiality. And I would just point to paragraph 31 of the *Keg River* case where it noted that the litigation was actually a major factor in keeping the immediacy and sensitivity factors respecting the policy ongoing. So you can keep this issue alive by having a public litigation, that again weighs in favour of confidentiality.

One other thing to point out, Mr. Rath mentioned they're not suggesting that Dr. Hinshaw acted unethically or incompetently. We think that's really relevant to the sixth part of the test which something along those lines would be needed for that factor to be met. I think it's clear that factor's not met in this case so I don't think I need to say anymore on that.

MR. RATH: Just two brief points in reply, Madam Justice?

THE COURT: Mr. Trofimuk has not finished yet, I do not believe.

MR. RATH: Oh, sorry, I thought he was done. My apologies.

THE COURT: Okay.

MR. TROFIMUK: Sorry, I think Nick might just jump in -- Mr. Parker might jump in, sorry, if that's okay.

THE COURT: Okay.

Submissions by Mr. Parker (Reply)

MR. PARKER: Thank you. And sorry to split our submissions, Justice Romaine, but this was just related more to the point I was going to handle yesterday in fettering. My friend, Mr. Rath, spoke about directing, that is Cabinet directing, the delegated decision-maker. And the materials I sent you last night, I hope they got to you from John Marquis' text on executive legislation. Again, I sent you the portion dealing with fettering legislative discretion. And if you look on page 276, there was a quote from a decision of Justice Strayer and I will just point out the end of that quote. It says this: (as read)

> Similarly, it is irrelevant that the respondents issued the impugned orders because they were directed to do so by those having broader responsibilities or more expertise in respect of health hazards.

And so to -- to sum up what the allegation is here based on the evidence of Dr. Hinshaw and the evidence of Dr. Hinshaw has been consistent from her affidavit through her cross-examination, she said it repeatedly, that she makes recommendations to Cabinet committee, that's one of her overarching duties and roles under section 14 of the *Public Health Act.* They, Cabinet, makes the policy decisions and that the Chief Medical Officer of Health orders implement the decisions and those decisions are her decisions under the *Public Health Act.* But my point is that she is making her orders within and consistent with the broader Government policy and that broader Government policy is something you've heard about in the cross-examination of Dr. Hinshaw. That is, where does information come from dealing with things like that the economy and other areas that are outside of Dr. Hinshaw's expertise, and she's advised, well, Cabinet committee consults with and obtains information from other ministries and that is the -- that is the point here. Cabinet

committees obtain information from other ministries, consider that, develop broader Government policy in terms of the responding to the pandemic, and then Dr. Hinshaw, again who serves at the pleasure of the Minister of Health, makes her *Public Health Act* orders, her Chief Medical Officer of Health orders within and consistent with the broader Government policy. That was all I wanted to add to Mr. Trofimuk's decisions, subject to any questions you have, Justice Romaine. Thank you.

THE COURT: Okay. Thank you.

Okay. Mr. Rath, you had indicated --

MR. RATH: I did, My Lady. I just wanted quickly to respond to my friend, Mr. Parker. These aren't -- she's not acting in an advisory capacity under section 14 here. She's issuing isolation and quarantine orders under section 29.

THE COURT: Okay. Mr. Rath, I think we are getting far from the issue that I have in front of me this morning. You may well make those arguments when the time comes in your arguments.

MR. RATH: Well this goes to the issue of us being able to ask these questions, My Lady. And then the only other point that I had with regard to Mr. Trofimuk's assertion that the opening for summer orders are not before the Court and they're not subsumed in this matter. They certainly are. They're spoken of -- the opening of Alberta is spoken to in Deena Hinshaw's affidavit. The CMOH orders on the downward slide of those graphs in her affidavit that we were looking at the other day clearly, you know, go to those issues. Certainly those issues are before the Court. So to suggest otherwise is simply false.

And then further to my friend's suggestion that he's happy to hear that we're not suggesting that Dr. Hinshaw is neither incompetent or unethical, that's the reason we're asking those questions. To the extent that her best medical advice and best medical opinion has been overridden by political considerations, any professional acting ethically or competently when faced with that situation would resign. We're entitled to ask those questions to get to whether or not these orders have been issued in her best medical opinion or whether she's issuing these orders under the guise of medical orders on the basis of political interference or political direction. Those are our submissions. Thank you.

THE COURT: Thank you.

MR. TROFIMUK: Could I just respond to the open for summer order part?

THE COURT: Yes. Yes, go ahead.

MR. TROFIMUK: So my only point that I was trying to make there was that that order is not being challenged as it has not been identified in the pleadings. So it's not a key issue, you know, going to factor 5. It's not a key issue. I do appreciate that it was mentioned as part of the path that happened in the third wave, that was the end of it, but the point was just that this order wasn't being challenged. Anything behind this order wasn't being challenged in the pleadings specifically.

THE COURT: Okay. Thank you.

Ruling

THE COURT: I want to start out by indicating that as I have said previously in my interim orders on this, this is not a public inquiry into the behaviour of Government during the pandemic. The questions in front of me are narrower. They are whether or not the orders that have been made discriminate against certain groups and whether, if they in fact do, whether they are justified under section 1 of the *Charter.* I just want to make sure that underlies what we have to do here.

I have reviewed the cases, I have reviewed *Babcock, BC Judges',* and *Carey,* and I note that the cases indicate that the procedure to be followed with documents, the same principles set out in those cases should apply to witnesses. So, obviously we are in a situation where we are not dealing with documents, we are dealing with a witness, so as to require some adaption of the principles set out in those cases.

It is important for me to be able to review the answers to certain questions so as to enable me to make a decision on whether those answers fall within the categories set out in the *Carey* guidelines. I have thought about it and I have decided that the appropriate procedure would be that I would in-camera ask Dr. Hinshaw three questions. The answers to those questions would help me to determine the issue in front of me, whether or not the kind of questions that Mr. Rath wants to ask fall within the rubric of Cabinet immunity or not. I am going to read out these three questions to all of the counsel and I will hear your submissions on the questions and also your submissions on the procedure that I intend to take.

Depending on the answers to these questions, and if I decide that Cabinet immunity does not apply to the information disclosed by Dr. Hinshaw to the questions, I may then put the questions and answers on the record. If I decide otherwise, then they will remain confidential to me.

Okay. The questions are, the first question, did the Premier and Cabinet, including the PICC and the EMCC, and I am going to refer to those loosely as the Cabinet, ever direct you, Dr. Hinshaw, to impose more severe restrictions in your CMOH orders than you had recommended to them?

The second question would be, did Cabinet ever direct you to impose more severe restrictions on particular groups such as churches, gyms, schools, and small businesses than you had recommended to them?

The third question is, did you ever recommend to Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet?

I imagine you might want to think about those questions for a few minutes so I will give you an adjournment. Do you want me to repeat them at all? Yes, Mr. Trofimuk wants me to. Okay. I will read them out a little bit more slowly.

MR. PARKER: Thank you.

THE COURT: Did the Premier and Cabinet including the PICC and the EMCC, which I will loosely refer to as Cabinet, ever direct you to impose more severe restrictions in your CMOH orders than you had recommended to them? That is the first question. Has everybody got that one? Okay.

The second question, did Cabinet ever direct you to impose more severe restrictions on particular groups such as churches, gyms, schools, and small businesses than you had recommended to them? Did you get all that? Okay.

Thirdly, did you ever recommend to Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet?

So, the decision before me is whether, first of all, whether the orders discriminate; and, secondly, if they do, whether they are justified under section 1. I believe these are the appropriate questions, the answers to which will allow me to make my decision. But I will give you some time. What would you like to do? If we adjourn for 20 minutes, half an hour? I know that makes --

MR. PARKER: I would --

THE COURT: Go ahead.

MR. PARKER: I'm sorry to interrupt, Justice Romaine. I would need an adjournment to discuss and get some instructions on this given your ruling and I also did have a question about the questions, I did get them down. But, yes, I would need an adjournment and a half-hour would be a good start to see where I can get on getting instructions on this.

THE COURT: Sure. Mr. Rath? Let me say this --

MR. RATH: My Lady, I think half an hour is sensible. We may propose an additional question at the end of the break, so thank you.

THE COURT: Okay. I want to make, you know, this is an interim step. What I hope to do is be able to finish Dr. Hinshaw's testimony today including with these questions so that we do not have to call her back, depending on the decision I make. So, I know she was concerned about a press conference, I think we can still continue with cross-examination questions, Mr. Rath, apart from this kind of question and if we do not have enough time for me to ask Dr. Hinshaw these questions today I am sure I can make some arrangement with her to do so later next week or sometime next week, or Friday.

MR. RATH: My Lady, I have a little bit of a timing concern with regard to what we're doing today. I appreciate the importance of Dr. Hinshaw being able to communicate through press conferences but, you know, when I was thinking about cross-examination today, you know, we were of the view that we have the whole day today, not until 3:00. I'm concerned that if we're going to adjourn at 3, that we're going to be very constrained. I think finishing today by 5 would be within the realm of possibility but I think we're going to be obviously very constrained if we're adjourning at 3 today.

THE COURT: Mr. Rath, Dr. Hinshaw's been on the stand since Monday, this will be the third day of cross-examination --

MR. PARKER: Fourth.

THE COURT: Fourth day. Thank you.

MR. PARKER: Fourth day.

THE COURT: I am losing sight here. I would be -- we will have to see how it goes but I would be surprised that you would have so much more that it would take the full day. But let's see how it goes.

MR. PARKER: Can I just -- sorry.

MR. RATH: Subject to all of Mr. Parker's ongoing objections. So, I mean, it's very hard for us to determine how much time is going to be required because we can't anticipate what we're dealing with. In any event, we're in your hands, My Lady. Thank you for that. I'll take that on board. Thank you.

THE COURT: Okay. Thank you.

MR. PARKER: Justice Romaine?

THE COURT: Yes?

MR. PARKER: Sorry. My apologies. I did have a request and it sounds like you're already looking at this, was to secure Dr. Hinshaw so she could be done by 3 PM to make the 3:30 media briefing, we specifically have been asked to respectfully request from you that we could stop at 3:00 today for that purpose. That they want her at the media briefing at 3:30.

THE COURT: I am quite aware of it and --

MR. PARKER: Thank you.

THE COURT: I think maybe if it comes to that -- well, let's just see. I do not want to say that we will adjourn today and try to find another hour or so to finish the cross-examination and the re-examination, Mr. Parker, but if worse comes to worse Dr. Hinshaw should know that she should be able to do the press briefing.

MR. PARKER: The media briefing.

THE COURT: Yes.

MR. PARKER: Thank you.

THE COURT: Thank you.

MR. PARKER: A half-hour?

THE COURT: Half-hour, yes. Thanks.

(ADJOURNMENT)

THE COURT: Okay. Thank you. Are we ready to proceed? Mr. Trofimuk, I see you, and Mr. Rath.

MR. TROFIMUK: So we're in the process of getting instructions. Oh, here's Mr. Parker back now. He can speak to it.

THE COURT: Okay.

MR. PARKER: My apologies, Justice Romaine. Just still in the process of getting instructions. We need another 15 minutes to do so. We apologize.

THE COURT: Okay. Is this something that, and I should ask Mr. Rath, is this something where we could have Mr. Rath use the time to continue his cross-examination and then we can deal with this, without this subject, and deal with this when you get instructions or do you want to wait until you receive instructions?

MR. PARKER: Mr. Rath can probably answer part of that. For me, we're in the middle of speaking right now --

THE COURT: Oh, okay.

MR. PARKER: -- getting instructions so --

THE COURT: So you have to be involved.

MR. PARKER: -- we need a bit more time.

THE COURT: Sure.

MR. PARKER: But while I've got you, if it is appropriate, I did have some questions that might help on that about the process that you had set out - the three questions. Just two questions really which were you used the phrase "ever" and "anytime" in the questions. It would be related to the impugned orders.

THE COURT: Yes.

MR. PARKER: Thank you. And then the second question was in-camera and the presence of counsel, what was intended by you in that regard, Justice Romaine?

THE COURT: I did not intend counsel to be in attendance, it would only be in-camera with me and the clerk and the court reporter. That would be consistent with, you know, the type of document review by a Justice that was recommended in *Babcock* and the *BC Judges'* case. So no counsel at this point.

MR. RATH: That's what we understood in any event, My Lady. The only thing that I'd ask while we have all counsel online, and it may be something else that they want to get instructions on in advance, speaking with Mr. Grey at the break and what we were discussing was perhaps there be a fourth question and that would be - were you ever directed by Cabinet to impose less severe restrictions against any particular group to the detriment of any other group? Because that's part of our concern as well, I mean, the question that we have -- maybe we can ask it without getting -- we can lead up to (INDISCERNIBLE) Cabinet privilege, but why weren't focused protection orders put in place to protect, you know, people over the age of 65 or protect people who are chronically obese, or any of those people that have a greater tendency to end up in hospital, why weren't the orders simply directed at them and allow the rest of society to function as normal?

MR. PARKER: (INDISCERNIBLE) ask those questions of Dr. Hinshaw.

MR. RATH: What's that?

MR. PARKER: Those could be questions to Dr. Hinshaw, Mr. Rath.

THE COURT: Right.

MR. RATH: Well I'm glad to hear in advance you won't be objecting to them, Mr. Parker. But the question specifically with regard to Cabinet directing her in that regard falls in line of the (INDISCERNIBLE) with regard to the degree in which Cabinet's interfering in Dr. Hinshaw's decision-making.

MS. LECLAIR: Sorry to interrupt. Mr. Rath, can you repeat that question for me just so I can write it down to seek instructions?

MR. RATH: Were you ever directed, you know, by the Premier and the Cabinet -- or the Cabinet to impose less severe restrictions against any particular group to the detriment of any other group?

THE COURT: The last part of that question seems a little difficult. To the detriment of any other group? Are you saying --

MR. RATH: (INDISCERNIBLE) in not locking down people over the age of 65 and imposing a burden on children by shutting down schools, you know, is the example that comes to mind.

THE COURT: And of course that would be inconsistent with her advice.

MR. PARKER: Inconsistent with her evidence. But to the extent they wanted to ask it, they could ask Dr. Hinshaw why did --

THE COURT: Yes.

MR. PARKER: -- did you consider doing these things?

THE COURT: Yes.

MR. PARKER: Why not?

THE COURT: Yes. Okay. Well, we have got that question. You need another 15 minutes? Half an hour?

MR. RATH: We can't hear you, Mr. Parker. Or I can't.

THE COURT: I cannot either.

MR. PARKER: I'm sorry. Ms. LeClair, how long do we need for instructions? Do we need another 15 minutes? Can you advise the Court?

MS. LECLAIR: I think 15 minutes should suffice and then we can come back. Thank you.

THE COURT: Okay.

MR. PARKER: 11:48?

THE COURT: 11:48. Okay. Thank you.

MR. PARKER: Thank you, Justice Romaine.

(ADJOURNMENT)

Discussion

THE COURT: Okay, thank you. Mr. Parker, have you been able to get instructions?

MR. PARKER: I most certainly have, Justice Romaine, thank you very much for your patience. Our instructions are to well I guess agree with the process on the three questions that you've raised, sorry to word it like that way, I don't mean to be disrespectful, Justice Romaine --

THE COURT: No, I understand.

MR. PARKER: -- the -- the process. We had an additional instructions that are important and that is should you find after the three questions have been asked of Dr. Hinshaw that public interest immunity does not apply and therefore will be intending to put evidence on the record then we will be needing and adjournment to seek further instructions on that issue because of the precedent setting nature of -- of that decision and we may be seeking a stay pending an urgent appeal in those circumstances. Thank you very much.

THE COURT: I understand. Okay, Mr. Rath.

MR. RATH: My apologies, My Lady, we're fine to proceed. I didn't hear anything from my friend with regard to the fourth question that we proposed.

THE COURT: Right, we still have that. Mr. Parker, do you have any thoughts on it?

MR. PARKER: Well, I gave my thoughts which were those were -- seems to be questions that should be appropriately directed to Dr. Hinshaw. So, I didn't understand that you were going to be asking that question, Justice Romaine. But are you doing that?

THE COURT: I have not made a decision, I thought I might hear from you. I took a look at it and what I thought what I would ask if it was agreeable would be was Dr. Hinshaw ever directed by Cabinet to impose less severe restrictions than she had recommended on a particular group to the detriment of any other group.

And so, I mean she may have some problems answering that question but that is what I had decided would be the appropriate wording of the question if in fact it was to be asked. And I guess the question is if you do not object to Mr. Rath asking her basically that question then the issue goes away but if are you --

MR. PARKER: Well --

THE COURT: Yes.

MR. PARKER: -- I wasn't talking about the directed because as I say we --

THE COURT: Yes.

MR. PARKER: -- it wasn't phrased that way; I'm saying that you can ask questions to elicit the evidence you're seeking without having to get into questions of being directed -- these things. There is questions that can be asked, haven't been asked of Dr. Hinshaw it would appear to me that go to this very point that don't get into potentially issues of Cabinet or privileged Cabinet immunity -- information covered by Cabinet immunity, excuse me.

THE COURT: Yes, so --

MR. RATH: And My Lady --

THE COURT: Go ahead, Mr. Rath.

MR. RATH: And I was going to say it -- it may well be just open the door to that, that the question could simply be were you ever directed by Cabinet to impose less severe restrictions against your medical advice? We just want to make sure the issue of being directed to impose less severe --

THE COURT: Well, no --

MR. RATH: -- is also in --

THE COURT: No, I think my concern about that is that the question that I am going to have to answer in this litigation has to do with your clients are alleging that the restrictions were too severe and so that is why I framed the questions as I have. It is up to the Crown to establish that they were not too severe in the circumstances. It is not an issue here whether they were less severe than necessary.

MR. RATH: Well, to be -- to -- but again to the extent that restrictions were made -- were made less severe against some groups to the prejudice of the groups that both Mr. Grey and I are representing. That is a real question --

THE COURT: Okay --

MR. RATH: -- in the context of --

THE COURT: Okay, well I am inclined to think that Mr. Parker is right that you could ask questions such as you impose restrictions on this group and not on that group, why did you do that? Okay?

MR. RATH: Fair enough and then -- yeah and then we may have to come back to this. We may have to come back to the issue of whether -- whether she was directed by Cabinet or not, so that's fine.

THE COURT: Okay, then that is good, I will make arrangements with Dr. Hinshaw to do this. We are opening another Webex address and we can do it whenever is convenient, but it is now noon, so should we break for half an hour for lunch and then do as much as we can or start now and do you need a lunch break?

MR. RATH: What -- what -- what -- what I was going to suggest, Madam Justice is perhaps that if you have a Webex that have (INDISCERNIBLE) that we simply ask the questions of Dr. Hinshaw and get this over with and then we can just move on.

THE COURT: Well --

MR. RATH: And then we all know --

THE COURT: Well, I am afraid you know I am not prepared to give the answer right immediately after I asked the questions.

MR. RATH: I see, okay.

THE COURT: Okay.

MR. RATH: Yeah.

THE COURT: Okay, so again I ask the question what do you

want to do? Do you want to resume your cross-examination, Mr. Rath?

MR. RATH: Yeah, we -- we might just as well, Madam Justice. Thank you.

THE COURT: Okay and then we may have to break for half an hour or something at 1:00.

MR. RATH: And I'm just going to -- sorry, find where Dr. Hinshaw is because we had originally told her probably 10:00 she would --

THE COURT: Yes.

MR. RATH: -- and Ms. LeClair do you -- have you been in communication -- she has as I expected, thank you so much.

THE COURT: Okay.

MR. RATH: Will she be coming in shortly then? She will, thank you, I'll setup then.

MS. LECLAIR: I just asked Dr. Hinshaw to log in, so she should be here shortly.

THE COURT: Okay.

MS. LECLAIR: She's indicated she's read my email and she will be here shortly.

THE COURT: Okay. Thank you, Ms. LeClair.

MS. LECLAIR: Madam clerk, I see Dr. Hinshaw is in the list of attendees now if you can promote her to panelist, please?

THE COURT CLERK: Okay. Sorry, I made Dr. Hinshaw a panelist now, she should be there.

THE COURT: I do not see her on the line yet.

DR. HINSHAW: Morning, I don’t know if you can hear me. I have started my video.

THE COURT: Okay, great we see you now. Thank you. Sorry for the delay, Dr. Hinshaw, but we are ready to proceed now, okay.

DEENA HINSHAW, Previously Sworn, Cross-examined by Mr. Rath

Q Good afternoon, Dr. Hinshaw.
A Good afternoon.

Q By -- by 6 minutes I think, so paragraph 53 of your affidavit please, Dr. Hinshaw.
A Yes.

Q Yeah, you state that: (as read)

> COVID-19 disproportionately causes adverse health outcomes including death and people of two segment so the population, those with pre-existing medical conditions and those over the age of 65. People with these characteristics are more likely to have been hospitalised and more likely to have been admitted to ICUs with COVID-19.

Why is it that with regard to all of the orders that you issued that you simply didn't focus your orders on those groups of people?

A The way that an infectious behaves is it transmits from one person to another irrespective of who has the risks for serious outcomes. And so, while there were certain orders that focused on high-risk settings such as long-term cares to put additional requirements in place in those settings where there were large groups of people at very high-risk living close together.

The other orders that were put in place were really put in place when the transmission in the community was happening at a rate and increasing at a rate that was putting the entire population at risk. And so, the individuals who have chronic conditions, individuals over 65 years of age interact on a regular basis with those who are younger, with those who may not have chronic conditions.

And so, the intent of the nonpharmaceutical interventions was to reduce the spread of COVID-19 in the community and to reduce therefore the -- the burden on hospitals for two reasons. One is that even though these individuals are at the highest risk, even otherwise health individuals and I think I was speaking to Mr. Grey pointing out in tab L the proportion of those who needed hospital care who did not have a known pre-existing condition.

So again, the first reason for the need to utilise nonpharmaceutical interventions across the population is that those at higher risk are deeply connected to those who maybe don't have individual high-risk and the second reason being that if enough people are infected even in groups where the individual risk is lower at a population level, the total impact on the healthcare system becomes significant.

So, if you look at figure 17 on page 221, you can look at the ICU and non-ICU proportion in green that did not have any known comorbidities, again approximately one in a five are a little bit greater if you look at the non-ICU burden. So, ultimately those are the two reasons that it was necessary to use nonpharmaceutical interventions across the population at the point in time where voluntarily measures were not sufficient to control the spread.

Q Right but given we're talking about nonvoluntarily measures, why not simply order people over the age of 65 to stay in their homes or order people over the age of 65 not to go to restaurants or not to go out in public? You're -- instead of imposing these restrictions across the entire -- across the entire society?

A Again, first of all because those individuals are connected to others and so individuals over the age of 65, some of whom are part of essential infrastructure in Exhibit X where I respond to the Great Barrington Declaration, I point out the fact that a large proportion of medical professionals such as physicians are of older groups. So, universally requiring older people to stay home, first of all it would be difficult to therefore ensure that they have the necessary supports for life.

So, in terms of infrastructure to support individuals to stay home. Second, that that would have impact on essential infrastructure and finally the fact that if enough people are infected even those who are young and otherwise healthy at a population level the volumes of those needing acute care would be significant enough to put strain on the acute care system.

So, it really is not effective to target interventions at a smaller subgroup. It's also important to note that the presence of chronic conditions in the population is -- is quite high. And so, even if you look at under -- younger age groups the prevalence of chronic conditions in -- of -- of the types that could potentially increase the risk of severe outcomes of COVID-19 is approximately one third in those age 30 to 39 and increases with every decade over that.

So again, we're not talking about a small number of people if we were to say anyone with a chronic condition that increases their risk of a severe outcome and anyone over 65. To make all of those people stay home would paralyse the functioning of our

society.

Q But I guess the concern is you certainly issued orders that applied to the entirety of society with regard to limitations on how many people could be in a home at any particular time within the impugned orders. Why wouldn't you as an example be able to simply say that people over the age of 80 should not attend in -- in public spaces or public places as an example? Are there -- are -- so answer that question and I'll carry on with my other ones.

A I'm not sure that I have anything more to say, I -- I believe I've answered that. It -- I don't believe it would be possible without -- again you simply can't order people to stay home for months at a time without considering the infrastructure to support them and the necessity of live. And second, even if that had been done the volume of infection in the general population was such that the burden on the acute care system would still have been substantial and led us to that risk of overwhelming the healthcare system.

Q But certainly with regard to the cohort of people over the age of 80, they were -- they certainly seemed to form the bulk of the hospital admissions -- hospital and ICU admissions. Why not focus protection on that group?

MR. PARKER: I'm going to object, the question's been answered a number of times and answered consistently this morning.

Q MR. RATH: Well, let me -- let me ask you another question, how many practicing physicians are over the age of 80 but now you seem to indicate that that was a problem.

A I don't know the answer to that question.

Q Did you ever consider that in the context of what you have just stated was your reason for not doing that?

A I believe I stated my answer for not mandating people over the age 80 to stay home, would be that it would be difficult to supply the necessities of life and that the transmission in the general population would still be enough to put hospitals under significant strain. My answer about physicians was related to the 65-age cut-off.

Q Well, you would agree though that you closed down schools without considering the necessities of life of schoolchildren who were getting school lunches, correct?

A I'm afraid I don't quite understand the connection.

Q Well, you are aware that when the initial school closure orders came down that there were -- there were -- that there were severe concerns with regard to children going hungry in the province because of their involvement in school lunch programs which

was the only place that they were getting adequate nutrition. Are you aware of that?

MR. PARKER: Sorry, I'm going to object. There's no evidence in this matter of what Mr. Rath is speaking about.

MR. RATH: I just asked her if she's aware of it, she can say she's not Your Honour -- or My Lady, sorry.

THE COURT: No, I agree with Mr. Parker. You are purporting to give evidence and there is no evidence in this proceeding. So, I will uphold the objection.

Q MR. RATH: All right and with regard to when you say that you can't lock -- you can't imply lockdown orders against people in particular age cohorts, with regard to your powers under the *Public Health Act* that allow you to do whatever is considered necessary. Could that not have been taken into consideration and specific measures had been implemented complimentary to those lockdown orders that would allow those people to obtain the necessities of life while in isolation or quarantine?

MR. PARKER: I'm going to object, and this is the same line of questioning that's been asked and answered this morning. To the extent he's -- just that Mr. Rath is asking about the section 29 of the *Public Health Act*, perhaps he's also asking for a legal interpretation is the objection.

THE COURT: Mr. Rath?

MR. RATH: I think it's a proper question, Your Honour, if -- My Lady, if you want to rule against it go ahead and I'll ask another question.

THE COURT: Okay, I have to say I believe it has been asked and answered if the distinction between that question was to ask for a legal opinion on section 29 it would be an improper question, okay.

MR. RATH: No, that's -- that's -- that fine, My Lady. The distinction in that question was to do with additional measures to support people over the age of 80 who were ordered to isolate or stay home under section 29 of the *Public Health Act* (INDISCERNIBLE) quarantine.

Q MR. RATH: Dr. Hinshaw, is it your evidence that when you order people into isolation or a quarantine that when those orders are issued those people are incapable of obtaining the necessities of life?

A The quarantine and isolation orders are for shorter time periods, so those time periods are 10 and 14 days and (INDISCERNIBLE) 14 for quarantine. And the shorter duration of those particular requirements would be different than if I were to order a certain segment of the population to stay home for several months.

Q But again, even with a 14-day order of quarantine there would have to be some provision made to ensure that that person staying home had access to the necessities of life under one those orders, wouldn't they?

A The ability to obtain the necessities of life are important no matter how long someone is staying home and so their -- again I would have to go back and check what was put in place for people to obtain assistance if they didn't have sufficient family and friends' support to obtain the necessities of life in that shorter timeframe. I -- I'm afraid I can't recall the specifics of what else was put in place to support people for that shorter period of time.

Q Okay and practically speaking, there is no reason that people over the age of 65 or over the age of 80 couldn't be prohibited by CMOH orders from attending at public venues like hockey games, recreational facilities, casinos, nightclubs, restaurants, and other places where you considered there'd be a high-risk of transmission, is there?

MR. PARKER: Well, objection this is again a question that's been answered by Dr. Hinshaw.

MR. RATH: I don't believe that question has been answered, My Lady.

THE COURT: I am sorry, Mr. Rath, I agree. I think it has been asked and answered.

Q MR. RATH: Dr. Hinshaw, you have passed orders that allow restaurants to ascertain whether people are vaccinated or unvaccinated, why couldn't orders be issued to simply advise restaurants not to allow people over the age of 65 to attend at a restaurant if the concern is that restaurants are -- create an environment that has such a high-risk of transmission?

MR. PARKER: I'm going to object again; this is the same line of questioning that we -- Mr. Rath has been pursuing since we started up.

THE COURT: Mr. Rath?

MR. RATH: My Lady, I haven't asked this question. I think

it's an appropriate question for Dr. Hinshaw to answer because it goes to the issue of why she didn't consider what would've been a very important focused protection measure in the context of any section 1 arguments that we're going to be making later.

THE COURT: You know I must admit I think that this is very similar to the questions that have been asked and answered but I will allow Dr. Hinshaw to answer this one.

A So, I think it might be useful because as you'll recall in answers to earlier questions I specified that there were multiple reasons for not considering this particular approach. So, if you turn to page 376 which is at the appendix X, and you look at the impact of widespread transmission of COVID-19 on the general population.

And so, this uses Alberta data to calculate what the potential impact would be in our acute care system if we were somehow able to successfully sequester all those over the age of 60 with absolutely no interactions with those under 60, which again I believe is unlikely to practically be possible. But assuming that that could happen, you'll see the paragraph under, Assume in increased hospitalisations.

So again, this doesn't address the fact that there would be an increased number of deaths in that younger population that would result from widespread transmission while individual risk is low, risk at a population level of widespread transmission would be significant.

But if we simply look at the impact on the acute care system and we look at our own Alberta age specific data, if we assumed that we did not mitigate the spread of COVID-19 in those under the age of 60 and we assumed within a 3 month time period that approximately half of that population became infected through widespread transmission, we would expect if we just used our Alberta specific date for there to be greater than 39000 hospitalisations to achieve that infection rate of 50 percent in that particular younger population.

If we adjust that, acknowledging as I have said before, that the PCR diagnosed cases are only a proportion of the total cases in the population and therefore our PCR rates that -- that we are able to talk about would only be subset. So, if we adjust that and say that if we estimate actual infections are about 4.6 times higher, we use that to adjust the proportions that would end up in hospital, we would still see about 8,600 hospitalisations as a consequence of that 50 percent infection rate in those under the age of 60.

So, I want to be very clear that it's not simply practical implications of pursuing that

particular approach, there's actually significant mortality and morbidity and impacts on the acute care system even if we were able to successfully sequester those over age 60 for many months at a time. And if we attempted to do so, again I don't believe that it would be possible to completely sever any connection from those younger than 60 and those older than 60 for that prolonged period of time. So, I hope that makes clear the reasons why that approach would not be successful or practical.

Q Isn't that same -- that same form of reasoning applicable to the measures that you put in place, Dr. Hinshaw? Because the measures that are in place can't work perfectly either and I -- and we understood that the purpose of these measures that you put in place was to simply "limit the spread" because it's impossible to stop the spread. Is that fair?

A The measures that we utilised to limit the spread were successful in achieving the desired impact, which was protecting the hospital system, limiting severe outcomes, and preventing deaths.

Q Dr. Hinshaw, can you name one person whose death you prevented through any of these measures? This is all -- this is all -- this is all pure hypothesis, is it not?

MR. PARKER: I'm going to object on relevance.

MR. RATH: Well, it goes to the heart of what the witness is saying.

Q MR. RATH: Do you have any evidence whatsoever other than those graphs that you showed us the other day that demonstrates that these measures had any appreciable effect on hospitalisations or COVID outcomes?

THE COURT: It is not an appropriate question, Mr. Rath. You are asking the witness to prove a negative. It is not a fair question; I am not allowing it.

MR. RATH: That's the entire -- that's the entire point, My Lady, everything that this witness has been saying in this regard is on the basis that -- that no one can prove a negative. We can't prove that she's wrong, she can't prove that she's right --

THE COURT: Well --

MR. RATH: -- and I'm -- and I'm glad that -- I'm glad that you picked up on that, My Lady, because I think that's an extremely important point.

THE COURT: I am not sure that I took that from that, Mr. Rath, but let us proceed.

Q MR. RATH: Now, Dr. Hinshaw, with regard to all of the public appearances that you've made with regard to COVID, did -- why were you of the opinion that simply telling people over the age of 65 and people with chronic morbidities that if they didn't voluntarily self-isolate and stay home and restrict their access to -- to society as a whole and other people as a whole within society, that they would be far more likely to die? Do you remember -- do you recall ever doing that?

A I'm sorry, I think the question was why -- why my opinion was a particular opinion but I -- I'm not sure that I can --

Q Well, I --

A -- verify that what you said was (INDISCERNIBLE)

Q I'll withdraw the question, I'll re-ask it. Within the context of the press conferences and the public statements that you've -- you've been making, did you ever make it clear to people over the -- the age of 65 and people with multiple comorbidities that if they didn't self-isolate and stay away from others in society that they would be far more likely to die from COVID-19?

A Yes, I attempted to convey that message. We put up on our website a risk calculator that individuals could use to input their particular characteristics that would help them to assess whether they were in a -- a high, medium, or low-risk category and then had recommendations for those individuals to take additional precautions if they were in a higher-risk category. So, it was certainly something that I attempted to convey as well as providing tools to help people understand how individual factors contributed to individual risk.

Q And why in your view was this not sufficient?

A I'm sorry, do you mean why in my view was it not sufficient to control the spread of COVID-19?

Q Well, is this sufficient to provide those people ample warning and direction with regard to their behaviour such that they wouldn't end up getting sick and dying from COVID-19?

A I'm not sure I -- I understand the question about sufficient. In what context?

Q Well, in the context of either stopping or -- stopping or limiting the spread, which seems to be your focus.

A So, I concluded it was not sufficient because the transmission in the community was rising sharply at different points in time during the COVID waves that we experienced

and the burdens on acute care were subsequently rising precipitously. And so, the conclusion that that provision of advice was not sufficient was based on the conditions and situations that unfolded in the province.

Q Okay. Now, Dr. Hinshaw, with regard to -- I'm referring to paragraph 77 where you're saying: (as read)

> There was less known about the virus and disease during the first wave of the pandemic in March and April of 2020 then during the second wave in November and December of 2020 [and then] more was known about the underlying science during the third wave than either of the two waves before.

Given what you learned during the first wave of COVID and given what -- why were you not concerned with doing everything you could to increase hospital capacity in the Province of Alberta?

A I'm not sure that -- that I would agree with that statement.

Q Well, from March of 2020 to December of 2020 how many new hospital beds and how many new ICU beds were created in the Province of Alberta?

A So, I believe I've provided evidence previously that the work to expand acute care capacity or to be able to care for additional was an important area of work that was undertaken but it is not something that I would be able to provide detailed evidence on as it's not something that again was directly under my management.

Q Right, so as Chief Medical Officer of Health is it your evidence that you were not taking steps at every turn to attempt to bring about an increase in hospital capacity in this province?

MR. PARKER: Objection, she's just told you that that's not part of what she does --

THE COURT: Yes.

MR. PARKER: -- is my understanding.

THE COURT: Mr. Rath?

MR. RATH: That's -- that's fine, we'll accept that answer, My Lady. I withdraw that question.

Q MR. RATH: Now, I'd like to move onto paragraph 80, Dr. Hinshaw, and revisit some issues with regard to the scientific advisory group that you say was advising you.

MR. PARKER: Revisit -- revisit?

MR. RATH: Mr. Parker, you're --

MR. PARKER: Sorry.

MR. RATH: -- (INDISCERNIBLE) interruptions are not required. If you have an objection prior to my asking my question go ahead and make it.

MR. PARKER: My apologies, I was intended to be muted. My apologies.

Q MR. RATH: Dr. Hinshaw, with regard to the scientific advisory group, were any members of that group active medical practitioners?

A Yes, so the terms of reference for the scientific advisory group can be found at tab Q -- or sorry, appendix Q, page 253 and so there's a list of the membership there that includes several active medical practitioners.

Q Okay and were any of those medical practitioners involved in treating patients with COVID-19?

A Some would have been.

Q Okay and were any of them involved in treating patients for COVID-19 with therapies including hydroxychloroquine, Ivermectin, fluvoxamine or otherwise.

A I wouldn’t be able to specify whether these individuals were part of the randomised controlled trial that was operating in Alberta early in the pandemic to evaluate the efficacy of hydroxychloroquine, but it is possible that some of them may have been involved in that clinical trial.

Aside from -- from that, I think I've stated the nature of the evidence on therapies that are used to treat COVID-19 and the importance of looking to Health Canada for the licensing of medications as well as then the College of Physicians and Surgeons with respect to the standards of utilising medication off-label. But I wouldn’t be to speak specifically to which therapies these individual physicians used in the course of their treatments.

Q Did you ever talk to the scientific advisory group with regard to coming up with an out-

patient treatment program for COVID-19?

A So, I asked the scientific advisory group to provide advice on the state of the evidence with respect to treatments for COVID-19 and that was something that -- that they did. That evidence again, there were unfortunately no therapies for the -- the first part of the pandemic that were licensed and approved for use in patients prior to those who needed hospital care.

And so again, we were following the published evidence and outside of clinical trials the -- the therapies that had been suggested for use in patients with COVID-19 did not have the quality evidence to indicate that they were effective and so the -- again what I had asked for them to do was to provide the state of the -- the evidence on therapies for COVID-19 and that's what they did.

Q Do you know if any of them contacted the East Virginia School of Medicine to look into their -- either their -- their MATH+ protocols or the I-MASK protocol?

A I -- I wouldn't be able to comment on that.

Q Are you aware of those protocols?

A Again, those protocols are not ones that I'm familiar with as I've really relied on the advice of our scientific advisory group around what protocols are informed by best available evidence and reliable evidence.

Q Right and are you aware that in the Indian state of Uttar Pradesh they developed an out-patient protocols for use with regard to COVID-19?

MR. PARKER: I am going to object to Mr. -- Mr. Rath giving evidence on -- as he's just done.

MR. RATH: My -- My Lady, this form of objection, I am not giving evidence. I am simply asking a question; the witness is able to say yes or no. If she says yes I can then ask her a follow-up. If she says no there's no point to a follow-up question and I would simply move on.

THE COURT: Despite the fact that I think there is little relevance to the question I am going to allow Dr. Hinshaw to answer it.

A No, I am not familiar with the Indian state that you mentioned in that context.

Q MR. RATH: Thank you. Did you look at any other -- as the Chief Medical Officer of Health of Alberta, did you look at any other jurisdictions that were providing out-patient treatment to patients suffering from COVID-19?

A To -- to be really clear, the use of therapeutics in -- in treating patients with COVID-19 is something that's overseen by Health Canada in terms of their licensing of medications for use for specific indications. As well as the College of Physicians and Surgeons of Alberta, which has the standards by which physicians would need to -- the standards which physicians would need to follow if they were utilising medication that's off-label, so not approved for a particular use.

And so, it's -- again in my role as a single individual I am reliant on partnerships with other organisations and the work that they do in -- in their areas of expertise. And so, in my role as Chief Medical Office of Health I relied on those organisations as well as the scientific advisory group to continue to monitor the state of evidence and to keep apprised if there were any therapies that had shown to effective when used early treatment. There certainly are therapies currently available that are effective when used in early treatment and those are in use in the province.

Q Right and with regard to some of these therapies, when did monoclonal antibodies first become available, Doctor? They -- it was during the period of time that these orders were being issued, correct?

A I'm afraid I would have to go back and look at the details, I -- I wouldn't be able to tell you right now what date monoclonal antibodies first became available.

Q All right and what about vitamin D, Dr. Hinshaw, have you looked at any documentation that would indicate that vitamin D and zinc would be beneficial with regard to patients -- out-patients suffering from COVID-19?

A I have looked at some of those studies and that is another topic that I asked the scientific advisory group to -- to look at in terms of an evidence summary, which they did. And again, unfortunately there is no good evidence that those therapies are effective at early treatment or prevention from high-quality scientific evidence.

Q And are you -- are you aware of studies, Doctor, that indicated that -- like you didn't -- sorry, I'll strike that, I'll re-ask the question. You indicated earlier in your testimony that you're aware that Aboriginal Canadians could have an incidence of COVID infection twice that of the normal population. Are you aware of studies that indicate that those infection rates amongst Indigenous persons and persons of darker skin colour could benefit from vitamin D as a COVID prevention measure?

A I'm sorry, I -- I don't recall providing evidence specifically that Indigenous Canadians were twice as likely to contract COVID-19. If you could just refer me back to that specific part of the testimony.

Q It was with regard to comments that you were providing with regard to social justice and social -- and equity, you'd indicated that you were aware that Aboriginal Canadians

had a COVID rate approaching double that of the Canadian population as a whole.

A My recollection was that I indicated it was higher, I don't recall giving a specific number. I'm sorry if I'm not remembering that accurately.

Q All right and maybe I'm not remembering it accurately, but in any event are you aware of studies pertaining specifically to vitamin D and the benefits of vitamin D to populations with darker skin colour -- colouring?

A I'm not aware of any high-quality scientific studies that indicated that the use of vitamin D in -- in any specific population was effective for prevention or treatment of COVID-19.

Q All right and what about -- what about acetylsalicylic acid or Aspirin?

A Again I've --

Q Go ahead.

A Sorry?

Q No, go ahead.

A I have seen some studies that again those particular studies indicated that there was a question of benefit of the use of Aspirin, however there were methodological issues with the studies that I saw and I have not seen any -- any high-quality scientific evidence that there is some substantial benefit to the use of Aspirin in COVID-19.

Q And so, you're not aware of the University of Maryland study that indicated that COVID mortality could be reduced as much 43 percent through the use of daily does -- daily Aspirin or ASA?

A I'm not sure which study I looked at whether or not it was the one that you're referencing. The study I looked at was observational in nature and -- and not one that again would be considered to be a high-quality piece of evidence that -- that could show causation but rather showed correlation which is -- again a single study is -- is important to cross reference with other studies.

And so, it's really important for me to be able to call on the assistance of experts such as those in the scientific advisory group who can spend the time reviewing all of the literature and coming to conclusions about what all of the literature shows the evidence to be on any particular therapy.

Q What about contacting other practitioners or physicians that are actually utilising these treatments and therapies in the context of COVID-19 treatment? Do you know if anyone from the scientific advisory group reached out to the University of Maryland or the East Virginia Medical School or any of the other medical groups in the United States that

were publishing papers and documents claiming to be applying these therapies to great success?

A I'm not able to speak on behalf of the scientific advisory group in terms of -- of the activities that they undertook. What I know is that the review of -- of evidence that's available and -- and evidence for therapies requires rigorous assessment and then just as an example, hydroxychloroquine as I believe I've mentioned earlier, is a therapy that early in the pandemic had some promising reports of utility.

There were as a result many larger scale randomised control trials that were implemented and unfortunately the results from those high-quality studies indicated that the risk of harm was greater than any benefit that hydroxychloroquine provided and in fact it was not effective in early treatment of patients with COVID-19. So, it's extremely important that we evaluate therapies and ensure that high-quality evidence is used to guide the decisions again that are made by other bodies with respect to licensing of the use of therapies for particular indications.

Q Right and the same type of randomised control trial was never conducted in Alberta with regard to Ivermectin?

A I wouldn't be able to say with certainty, I'm not aware of one. However, I -- I'm not sure -- I wouldn't be able to say with certainty whether one was or wasn't conducted.

Q And you -- you certainly didn't direct one, is that correct?

A The majority of the evidence on the effectiveness of Ivermectin when looking at high-quality studies was not promising and so again, it's important for me to rely on other bodies that -- that do that kind of work as a part of the partnership that is required in the response to a pandemic of the nature of COVID-19.

Q And what about fluvoxamine?

A I'm aware of one study relatively recently, so outside the time period in question that came of multisite trial that showed some promise for the use of fluvoxamine. That's something that I've been aware that the clinical advisory committees are evaluating but again, it's not a -- a role that I have to dictate what is or isn't use for treatment for COVID-19. And so again, that's something -- treatment decisions are decisions taken by other bodies as is appropriate to their roles.

Q But as Chief Medical Officer of Health, would you agree that the availability of out-patient treatment and therapeutics are things that you should be taking into account in the context of orders that you're issuing?

A Of course, that's exactly why again throughout the pandemic as out-patient treatments that have high-quality evidence behind them have become available, there have been connections with my office as planning is -- is rolled out for use of those therapies such

as Sotrovimab and Paxlovid. So, that is something that has been taken into account, unfortunately those therapies -- again I can't recall exactly when Sotrovimab first became available but for much of the early part of the pandemic we simply had no out-patient treatments with high-quality evidence that indicated they were effective.

Q And you're aware that the Ontario Science Table has approved fluvoxamine for use in Ontario?

A Just to be clear, my understanding is that the Ontario Science Table has recommended the use of fluvoxamine, I don't believe it's the role of the Science Table to approve a medication. They're a licensing --

Q All right.

A -- they -- they wouldn't be the regulator of -- of medications. So, I am aware that the Ontario Science Table has made that recommendation. Again --

Q Well, I guess --

A Sorry?

Q Nothing, go ahead.

A I was just going to --

Q I don't want to --

A I was just going to say that I have been relying on the expert advisory bodies in Alberta to review the evidence and to come up with the recommendations about appropriate clinical therapies in this province.

Q Right but you'd agree that the Ontario Science Table advises one of the largest health regions in Canada, correct?

A I'm not sure I would use -- I guess it depends how you use the term health region. Obviously, one of the populations with the -- one of the provinces with the greatest population, but ultimately the point I'm making is that advice around clinical therapies and the evidence base of which therapies are to be used, that is in the hands of clinicians and clinician academics and so I rely on their advice with respect to what's utilised in Alberta.

And again, it's -- it's my recollection, certainly could be wrong, that the evidence with respect to fluvoxamine was generated after the time period that we're discussing here, and I just want to be clear about roles and responsibilities of the -- the different groups who work on evidence summaries.

Q The -- the at the benefits of fluvoxamine have been made public and discussed from

very early on in the pandemic, correct?

A No. I'm -- I'm aware again of a -- what I've seen is one good quality trial that showed some promising impacts. The -- that is what I'm aware of and again, just want to be clear that decisions around therapeutics are made by other bodies.

Q I -- I understand that Dr. Hinshaw, but has fluvoxamine been recommended for use in Alberta?

MR. PARKER: I'm going to the object to the -- the witness' evidence is very clear that what she knows of this study is outside of the relevant time period, so it's not relevant.

THE COURT: Mr. Rath?

MR. RATH: Well, in that regard, My Lady our submission would be that it is relevant when we consider that the drug in question has been approved in another jurisdiction and my understand is has not been recommended for use in Alberta. So, you know my question is, why does it take so long for Alberta to approve things that may save people's lives while we're locking people down in their homes. So, I think -- I think that that question is relevant.

THE COURT: Well, I think that is a question for the people who do approve therapies and Dr. Hinshaw has said that that is not her.

MR. RATH: Well, I -- and I suppose to the degree to which she has the power to -- to do these things under section 29 is a matter of argument, so we'll leave it there. My Lady, I have 10 to 1 on my watch, I think this might be an appropriate place for a lunch break if you wouldn't mind?

THE COURT: Okay, how much more, Mr. Rath, do you think you have?

MR. RATH: I actually think that I will be done prior to 3:00 today, My Lady, so --

THE COURT: Okay.

MR. RATH: -- if we could have 45 -- if we could have 45 minutes for lunch, if you wouldn’t mind?

THE COURT: Well, as well as you of course, we have got Mr.

Parker and any responding questions he wants to ask Dr. Hinshaw. So, I am going to adjourn for lunch for half an hour. Sorry, that is a bit tight, but we want to be able to get Dr. Hinshaw out of here for press conference. Okay --

MR. RATH: All right --

THE COURT: -- half an hour?

MR. RATH: -- thank you.

MR. PARKER: Thank you.

THE COURT: Okay.

(WITNESS STANDS DOWN)

PROCEEDINGS ADJOURNED

Certificate of Record

I, Michelle Palmer, certify that the recording herein is the record of oral evidence of proceedings held in the Court of Queen's Bench, held in courtroom 1702, at Calgary, Alberta on the 7th day of April, 2022 and I was the court official in charge of the sound recording machine during these proceedings.

Certificate of Transcript

I, Nicole Carpendale, 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 not included orally on the record.

TEZZ TRANSCRIPTION, Transcriber
Order Number: TDS-1004904
Dated: April 29, 2022

Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

---

April 7, 2022	Afternoon Session
The Honourable Justice Romaine	Court of Queen's Bench of Alberta
J.R.W. Rath (remote appearance)	For R. Ingram
L.B.U. Grey, QC (remote appearance)	Heights Baptist Church, Northside Baptist Church, E. Blacklaws and T. Tanner
N. Parker (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health
B.M. LeClair (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health
N. Trofimuk (remote appearance)	For Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health
M. Palmer	Court Clerk

THE COURT: Are we ready to proceed? Mr. Rath? Is Mr. Rath not online?

MR. RATH: My Lady, my computer was just slow in coming on so …

THE COURT: Okay. Go ahead, Mr. Rath.

MR. RATH: Thanks.

DEENA HINSHAW, Previously Sworn, Cross-examined by Mr. Rath

Q I'd like to turn to paragraph 233 please, Dr. Hinshaw.
A Yes.

Q You're referring to strength of immunity continues to be reviewed; are you referring to natural immunity in that paragraph?
A I'm referring to the combination of post-vaccine and post-infection immunity.

Q Right. So as regards to post-infection immunity, you (INDISCERNIBLE) --
A That's often a term that's utilised but -- sorry can you not hear me?

Q No, I didn't hear an answer, sorry that's -- I can hear you now.
A Okay. Sorry, I was answering but perhaps you didn't hear me. I was just saying that -- that is a term that's utilised which I believe to be misleading to post-infection immunity is precise terminology that's my preference to refer to immune response that happens after someone's infected.

Q All right. Thank you. And in that regard, is it then your evidence that the length of time that post-infection immunity exists is presently unknown?

MR. PARKER: I'm going to object given the timing of the question presently and we're talking about matters in the second and third waves realm.

Q MR. RATH: At the time this affidavit was sworn then, Dr. Hinshaw, is it your evidence is it your evidence that you were of the view that the length of time that post-infection immunity existed was unknown?
A It was not known at that time with any certainty how long that post infection immunity would last.

Q Right and at the time this affidavit was sworn was the length of time that the immunity from any (INDISCERNIBLE) --

THE COURT: Mr. -- sorry Mr. Rath, I cannot hear many of your questions, you keep going in and out. So I have been on mute, I will go back on mute, but if you could -- has anybody else had this problem or is it just me?

MR. PARKER: Yeah, no we've had it as well, Justice Romaine.

THE COURT: Okay, well I will go back on mute in any event.

MR. RATH: I don't know what happened over the lunch break but I'll try to get closer to my microphone. Is that better, My Lady?

Q MR. RATH: Okay. So, Dr. Hinshaw, would you say the statement, however the length of time an individual remains immune is still unknown, that that statement was true when this affidavit was sworn with regard to vaccines, as well?
A Yes.

Q Okay. So, in other words, when this affidavit was sworn, it was unknown as to what period of time the vaccines would confer immunity and what period of time post-infection immunity would -- or yeah -- post-infection immunity would last, is that fair enough?
A Yes, that's accurate.

Q Okay. And then you also say based on December results of the Alberta residual Sera study, only 2 and-a-half percent of Alberta's population had detectible antibodies to the virus that causes COVID-19. Did that study also look at T-cell immunity or only sera immunity?
A It only looked at serology not T-cells.

Q Right, but you agree there is such a thing as T-cell immunity?
A Yes.

Q Okay and now this deals with PCR testing, you also agree that with regard to PCR testing that PCR tests detect either people that are actively infected or infectious with COVID-19 and also detect people that have recovered from COVID-19 and have been previously infected, correct?
A So PCR tests will detect the presence of virus in the body but do not differentiate between someone who is infectious at that moment time and someone who may be shredding virus that is no longer viable. The length of time that an individual would shed the non-viable virus following their recovery from the acute infection would be variable and would increase over time, but as I stated to Mr. Grey, we changed our policy with respect to requiring isolation for someone who tested positive via PCR to not requiring individuals who tests positive to reisolate if it has been less than 90 days since the prior infection, to account for the fact that that PCR test could potentially be reflective of simply for long shedding and not a new infection. So again, it does not detect virus for a prolonged period of time. Again, the vast majority people would not shed beyond 90 days.

Q Right, but again within that 90 day period the PCR test could also be detecting not just people that are infected and infectious, but people that have recovered from an active COVID-19 infection and, in fact, had post-infection immunity; is that correct?
A It's possible, again for the majority of the pandemic our testing protocol has focussed primarily on those who are actively symptomatic or those who are close contact to the confirmed infectious case. So, the likelihood that the majority of cases that were detected were individuals who had recovered and were not actively infectious would be mitigated by those particular testing eligibility protocols.

Q Well, other than with regard to individuals who are the "close contact" of someone who

tested positive, that close contact in that small circumstance could in fact have been patient zero, you now, they could've been the person that infected that period, but there were, in fact, now recovered and immune from COVID pursuant to post-infection immunity, correct?

A Well, it's possible that a close contact could've been the source, that is -- that is possible. Again, those individuals -- the other thing to note with respect to the immune response following infection, is that it is variable depending on the individual, their immune characteristics and the severity of the initial infection.

And so each individual would have a different likelihood of having an immune response that would be protected against further exposures, depending on all of those characteristics. So, again, it's likely that within the week or two following an infection, it's likely that most people would not have been susceptible in that very short time period, however, it would be not accurate to conclude that every individual would have the same duration of immune response and immune protection following infection.

Q Right, but that same statement is also true of people who've been vaccinated because of individual physiology being different, correct? That you can't say with certainty that any one given individual has the same immune response to being vaccinated, correct?

A That's accurate as far as physiological component goes. Again, the one variable that would be unique to infection is that the severity of the initial infection does seem to have some impact on the immune response and then the subsequent duration of the measurable antibodies in the system.

Q Right and would the same thing be true with regard to people who mix and match -- mix and match vaccines. So as an example, where we have circumstances where somebody had the AstraZeneca vaccine, followed by the Pfizer vaccine, followed by the Moderna vaccine; which has been encouraged in this province, would that also affect the immunological response from vaccines?

MR. PARKER: Objection on relevance.

MR. RATH: I'm just trying to establish that everything that she's saying about post-infection immunity is equally true of vaccinated immunity, My Lady. It goes to putting in evidence with regard to immunity and I'm simply testing the evidence. Mr. Parker, (INDISCERNIBLE) evidence relevant by putting it in her affidavit. I presume that Mr. Parker didn't intentionally include irrelevant information in this affidavit.

THE COURT: I am simply having problems, Mr. Rath, connecting this line of questioning with the issues in front of me and it has all been very

interesting, but I am not going to allow further questions on it.

MR. RATH: So then for the record, My Lady, within this proceeding the applicants are being denied the ability to cross-examine on evidence that's contained in Dr. Hinshaw's affidavit because evidence in her affidavit is not relevant to the matters before the proceedings, is that -- is that (INDISCERNIBLE) ruling?

THE COURT: That is not what I said and that is not what I mean.

MR. RATH: Well, we have your ruling in any event. Thank you, My Lady.

Q MR. RATH: Now, Dr. Hinshaw, I'd like to move onto death rates. With regard to the period covered in this affidavit, do you have any evidence that the overall death rate in Alberta increased during the period that's the subject of this application?

A So you're referring to the all cause mortality rate?

Q Yes,

A I don't have that at hand and I would be reluctant to speak to details that I don't have at my fingertips. It's my recollection that there was an increase in all cause mortality for the year 2020 and also for the year 2021, but I wouldn't be able to speak to that in any greater detail without being able to refer to specific evidence.

Q That's fine, Dr. Hinshaw. Thank you. Now, a lot of your evidence touched on and concerned trying to -- bringing in these measures to alleviate stress on the hospital system. With regard to the period that this affidavit covers, was COVID the only factor at play in causing stress on our acute care system?

A There, of course, were other patients who had other care needs that continued to present for both routine and urgent and emergent care, so COVID-19 was at that particular point in time, the largest contributor to acute care strain, however, of course, there were other health issues that were resulting in a need for acute care treatment.

Q And could you list some of those -- could you list some of those other factors, Doctor? Would that include physicians leaving the province?

A I believe that I spoke to that question earlier by saying I don't have specific information about physician supply or the change in how many physicians were in the province. So that particular factor, I would not be able to speak to, I simply don't have the information.

Q All right. And then you'd indicated in your earlier testimony that your understanding was that the position being put forward by Dr. Bhattachrya and the people that signed the Barrington Declaration was a minority position; is that -- is that a fair summary of your evidence?

A Yes, that's accurate and that's the reason that I had submitted the appendix Y to my affidavit which is the John Snow Declaration which is, in my opinion, indicative of the majority position of those who have expertise in epidemiology and public health.

Q Right and you're aware that over 69,000 people have signed the Barrington Declaration but only 6900 have signed the John Snow Declaration.

MR. PARKER: Object, on relevance.

MR. RATH: Well, it's minority versus majority positions, that's her evidence. I'm just asking her if she's aware that approximately 10 times more people subscribe to the Great Barrington Declaration that subscribe to the John Snow Memorandum.

MR. PARKER: I'm going to object on relevance.

THE COURT: I understand your objection on relevance, Mr. Parker, but I am going to allow Dr. Hinshaw to answer the question.

A I'm not aware of, whether or not, there was a requirement for an individual to be an expert in the field in order to be able to sign onto the Great Barrington Declaration. So I wouldn't, again without knowing the credentials of all those who signed that particular document, I wouldn't be able to conclude, whether or not, those numbers are reflective of the opinion of experts in the field.

Q MR. RATH: So, in other words, with regard to your previous evidence in this regard, majority positions versus minority positions, the real answer is that you don't know?

A What I know is that all of the colleagues with whom I confer, the academics working in this field and the again majority of people who have expertise in this area that I know, are all of the position that it would not have been possible to manage the demand on our acute care systems and the burden of severe illness without the use of non-pharmaceutical interventions that were unfortunately more broadly applicable than is outlined as a hypothesis in the Great Barrington Declaration. And again, I don't believe that the -- without knowing any requirements for credentials, I don't believe that the numbers that have been shared would be indicative of the majority of experts in this field.

So it is my belief, based on all of the information that I have, that the majority of experts in this field would conclude that within the context of a place like Alberta, with the acute care capacity that we have and with an interest in again preventing the most severe outcomes like death and preventing acute care utilization that would exceed our capacity, that the utilization of non-pharmaceutical interventions was necessary.

Q Okay. Well, thank you for that extremely lengthy qualification of your previous answer.

MR. RATH: Madam Justice, I believe those are all my questions for this witness. Thank you.

THE COURT: Okay. Thank you Mr. Rath. Mr. Parker, do you have any or Mr. -- I am assuming it is going to be you, Mr. Parker, do you have anything arising?

MR. PARKER: Thank you. That's the correct assumption. I have no questions arising Justice Romaine.

THE COURT: Okay. Thank you. It is now 1:30, Dr. Hinshaw, as a result of discussions this morning, we have agreed that on the issue of cabinet privilege that I will be asking you three questions in-camera with just you and I and the court reporter and the clerk. Do you have time to answer those questions now or do you want us to make different arrangements for that?

A That's fine, I'm happy to stay on now.

THE COURT: Well, actually, what we are going to ask is the clerk is going to send you, through Mr. Parker, a new website address so that we can ensure confidentiality. Okay.

A Okay. Excellent. Thank you very much.

(WITNESS STANDS DOWN)

THE COURT: So with respect to what is happening now, I am assuming you will not be starting your arguments tomorrow, I am assuming you are going to wait for me to make my decision on that cabinet confidentiality issue and then is the plan for you to go straight to your written arguments?

MR. RATH: Well, depending on what the answers are to those

questions, we may have some limited cross-examination to follow-up, I think in fairness, Madam Justice, but that would be, you know, our only caveat.

THE COURT: Well, okay, well you know we will deal with it when you get my decision, but do you want to talk about timing of the written decisions today?

MR. RATH: Yes, please.

THE COURT: So let's assume -- and I am going to do my best to get my decision out by the end of next week. So, once you have received that decision, there will be -- why do we not say that early in the following week, if necessary, Mr. Parker you said you reserved the right to ask for a stay if -- depending on what my decision is. And Mr. Rath you may make some other submissions about follow-up, whether you are entitled to any follow-up questions. So, should we -- unfortunately I did not bring my book down, I think that is Easter weekend, is it not?

MR. PARKER: Not this weekend, but the week after is the Easter weekend.

THE COURT: Right.

MR. PARKER: So a week tomorrow is Good Friday.

THE COURT: Right, okay. So, I have commercial duty during that week, it is a pretty full week, maybe what I have to do is get back to you with respect to a day during that week where we can canvass the implications of my decision. Okay.

And then at that time we can set parameters for written argument, does that make sense?

MR. PARKER: It does, thank you very much, Justice Romaine.

MR. RATH: Certainly, My Lady. Thank you.

THE COURT: Okay. Thank you. We will speak later. Thank you.

MR. PARKER: Thank you Justice Romaine.

(IN-CAMERA - PUBLIC EXCLUDED)

PROCEEDINGS ADJOURNED

Certificate of Record

I, Michelle Palmer, certify that the recording herein is the record of oral evidence of proceedings held in the Court of Queen's Bench, held in courtroom 1702, at Calgary, Alberta on the 7th day of April, 2022 and I was the court official in charge of the sound recording machine during these proceedings.

Certificate of Transcript

I, Nicole Carpendale, 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 not included orally on the record.

TEZZ TRANSCRIPTION, Transcriber
Order Number: TDS-1004904
Dated: April 29, 2022