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For the Record: Who Makes COVID-19 Public Health Orders in Alberta?

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Decisions commented on: *CM v Alberta*, 2022 ABQB 462 (CanLII); *CM v Alberta*, 2022 ABQB 357 (CanLII)

In an effort to be a frontrunner in the race to remove COVID-19 public health measures during the early months of 2022, the Alberta government made several notable moves, including decisions on masking. On February 8, 2022, the Premier announced that children would no longer be required to wear masks in school as of February 14 and that children under 12 would not be required to mask anywhere. On the same day, the Minister of Education took the opportunity to issue her own written direction that "[A]s of February 14, 2022 school boards will not be empowered by provincial health order or recommendations from the CMOH to require ECS - grade 12 students to be masked to attend school in person or to ride a school bus." This direction by the Minister was a notable departure from her earlier position that schools were explicitly permitted to implement public health measures to respond to their own local context.

The Chief Medical Officer of Health, Dr. Deena Hinshaw, (CMOH) subsequently issued her CMOH Order 08-2022 dated February 10 rescinding the requirement for masking in schools effective on February 14, 2022. The direction to school authorities by the Minister of Education and CMOH Order 08-2022 are now subject to a judicial review application filed by 5 children and the Alberta Federation of Labour in the Court of Queen's Bench on numerous grounds, including a claim for *Charter* relief. In May and June, the Honourable Mr. Justice G. S. Dunlop heard arguments on interlocutory motions concerning a refusal by the Respondent CMOH and the Crown to produce a full Record of Decision. Justice Dunlop issued two decisions in *CM v Alberta*, 2022 ABQB 462 (CanLII) and *CM v Alberta*, 2022 ABQB 357 (CanLII) which rejected claims of Cabinet privilege and ordered the CMOH to produce a better Record of Decision in accordance with the *Alberta Rules of Court*, Alta Reg 124/2010, including full disclosure of PowerPoint slides presented to Cabinet on February 8, 2022 and minutes of that Cabinet meeting which preceded the announcements by the Premier and Minister of Education.

Rules of Court and Production of the Record for Decision

No matter what the substantive result is on the merits of this judicial review application on CMOH Order 08-2022 and the numerous other judicial review applications concerning CMOH orders, the judicial process will thankfully impose some procedural order and rules on the Executive – something which has been sorely lacking in Alberta (and elsewhere) with respect to COVID-19 public health orders. Specific to this context, the rules applicable to disclosure in an application for judicial review of an executive decision have imposed some transparency into the decision-making process and forced clarity onto who exactly is the decision-maker in these matters.

Upon filing an application for judicial review, an applicant must serve the impugned decision-maker with both the application and a notice to produce the record of decision. Section 3.18 of the *Rules of Court* provides as follows:

> 3.18(1) An originating applicant for judicial review who seeks an order to set aside a decision or act must include with the originating application a notice in Form 8, addressed to the person or body who made or possesses the record of proceedings on which the decision or act sought to be set aside is based, to send the record of proceedings to the court clerk named in the notice.
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> (2) The notice must require the following to be sent or an explanation to be provided of why an item cannot be sent:
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> (a) the written record, if any, of the decision or act that is the subject of the originating application for judicial review,
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> (b) the reasons given for the decision or act, if any,
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> (c) the document which started the proceeding,
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> (d) the evidence and exhibits filed with the person or body, if any, and
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> (e) anything else relevant to the decision or act in the possession of the person or body.
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> (3) The Court may add to, dispense with or vary anything required to be sent to the court clerk under this rule.

In response, section 3.19 requires the decision-maker to comply with the request to produce the record or explain why compliance cannot be met:

> 3.19(1) On receipt of an originating application for judicial review and a notice in accordance with rule 3.18, the person or body named in the notice must, as soon as practicable,
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> (a) comply with the notice and send to the court clerk a certified record of proceedings in Form 9, or
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> (b) provide in Form 9 a written explanation why the notice cannot be complied with or fully complied with.
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> (2) The certified record of proceedings sent to the court clerk under this rule constitutes part of the court file of the originating application.
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> (3) If the Court is not satisfied with the explanation for not sending all or part of the record of proceedings, the Court may order any or all of the following:
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> (a) the person or body to provide a better explanation;
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> (b) the person or body to send a certified copy of a record to the court clerk;
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> (c) the person or body to take any other action the Court considers appropriate.

In response to the initial request from the Applicants to produce the Record of Decision in this case, the CMOH produced a number of documents. She also provided a certificate dated April 12, 2022 and signed by Minister of Justice pursuant to section 34 of the *Alberta Evidence Act*, RSA 2000, c A-19, which asserted Cabinet privilege (public interest immunity) over a PowerPoint presentation prepared by the CMOH for Cabinet and the minutes for the meeting in which Cabinet

deliberated on the policy options contained in the presentation (more on this below). The PowerPoint slides addressed a variety of public health measures including the restriction exemption program, capacity limits, and masking in schools. The *Alberta Evidence Act* certificate was provided to explain why the CMOH did not fully produce the Record of Decision, as required by section 3.19 of the Rules of Court.

Incomplete or sparse records of decision are not an uncommon point of contention in a judicial review, particularly where transparency is in dispute. For instance, this was one of the issues noted in Public Interest Standing and Wild Horses in Alberta published on ABlawg in November 2019. However, the lack of transparency in relation to CMOH orders under the *Public Health Act*, RSA 2000, c P-37, which carry significant socio-economic implications, is worthy of more particular and exceptional attention.

Perhaps the most significant aspect of Justice Dunlop's interlocutory rulings here is that they bring to the surface one of the most disappointing practices of the CMOH–Cabinet relationship during the pandemic: the flip-flopping and finger pointing over who exactly is the Alberta decision-maker in these public health orders:

> [I]n this case the relationship between Cabinet decisions and Chief Medical Officer of Health decisions is a central issue. The Applicants allege improper delegation by the Chief Medical Officer of Health to the Cabinet whereas the Crown argues that Cabinet makes policy decisions and the Chief Medical Officer of Health implements those policy decisions through her orders. (*CM v Alberta*, 2022 ABQB 462 at para 12)

The role of the CMOH and her responsibilities vis-à-vis Cabinet have been the subject of ongoing debate in Alberta throughout the pandemic. While some argue that decisions respecting public health measures ought to be made by the CMOH, who has medical expertise and is insulated from political pressure, others argue that these decisions ought to be made by elected officials given that they not only raise epidemiological considerations but also have important social and economic implications. Generally, the Alberta government has characterized the CMOH as a mere advisor to Cabinet, with elected officials weighing her advice within their framework of protecting "lives and livelihoods". However, at other times, members of Cabinet have attributed public health decisions to the CMOH, characterizing her as more than a mere advisor. This most notably occurred after the decision to lift restrictions in the summer of 2021, which preceded skyrocketing case numbers and severe hospital capacity problems. The Premier and Minister of Health, who were widely criticized during this time, stated that the lifting of restrictions and shift to treating COVID-19 as endemic originated with the CMOH and that they accepted her proposal "without modification."

This debate over who the decision-maker is has continually struck us as odd. As Justice Dunlop observes, there is no question that under section 29 of the *Public Health Act* the decision-maker for public health orders is and has always been the CMOH, as we have previously argued (see e.g. here). She is not merely an advisor to Cabinet on public health orders. According to Justice Dunlop:

> The references to Cabinet documents in Dr. Hinshaw's Certified Record of Proceedings is perplexing. The Decision, on its face, purports to be a decision of Dr. Hinshaw made pursuant to s. 29 of the Public Health Act, RSA 2000 c P-37. That section empowers the Chief Medical Officer of Health to do a wide range of

> things. The Public Health Act permits the Chief Medical Officer to delegate her powers in writing to the Deputy Chief Medical Officer (s. 13(3)) or to an employee of the Department of Health (s. 57). The Public Health Act does not explicitly permit delegation to anyone else, nor does it describe any role for Cabinet in decisions under s. 29. (*CM v Alberta*, 2022 ABQB 357 at para 27)

CMOH Order 08-2022, which rescinded masking in schools, is no exception to this confusion over the division of responsibilities between the CMOH and Cabinet. As Dr. Hinshaw has done in all her orders, she states that she has "the authority to take whatever steps are, in my opinion, necessary in order to lessen the impact of the public health emergency" (as per section 29 of the *Public Health Act*). Despite this statement of legal authority, the documents disclosed as part of the Record for Decision in accordance with the ruling in *CM v Alberta*, 2022 ABQB 357, seem to indicate that the CMOH occupied an advisory role in the decision to lift masking within schools. According to the *Alberta Evidence Act* certificate signed by the Minister of Justice, Dr. Hinshaw prepared the PowerPoint document that presented Cabinet with policy options for loosening public health measures. Following the presentation of these options, meeting minutes indicate that the Priorities Implementation Cabinet Committee directed the Minister of Health to implement Option 2 to ease public health measures using a phased approach. Justice Dunlop astutely points out that the relation between these documents produced by the CMOH and her decision is "…opaque, when it should be very clear" (*CM v Alberta*, 2022 ABQB 357 at para 25).

The state of confusion within the documentation is part of what led Justice Dunlop to the conclusion that the Record of Decision produced by the CMOH in response to the application for judicial review was incomplete:

> Apart from Minister Shandro's certificate, the sole document included in the Certified Record of Proceedings is the Decision itself. It begins with these words:
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> > Whereas I, Dr. Deena Hinshaw, Chief Medical Officer of Health (CMOH) have initiated an investigation into the existence of COVID-19 within the Province of Alberta
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> That opening paragraph and those that immediately follow it, each of which starts with the word "Whereas", can be read as setting out Dr. Hinshaw's reasons for the Decision, which is one of the things a respondent is required to include in a Certified Record of Proceedings. Those opening paragraphs also suggest that there would be a large volume of material in Dr. Hinshaw's possession beyond a Power-Point presentation and Cabinet minutes that would be evidence and exhibits, or relevant to the Decision. Perhaps that material is too voluminous or cumbersome to produce, but the Certified Record of Proceedings does not say so. Instead, Dr. Hinshaw has certified she has only three documents relevant to her Decision. With respect, that is hard to believe. (*CM v Alberta*, 2022 ABQB 357 at paras 28, 29)

Accordingly, Justice Dunlop ordered the CMOH to produce a more fulsome record of decision (*CM v Alberta*, 2022 ABQB 357 at para 67).

Cabinet Privilege

Justice Dunlop's production order led to the next stage of interlocutory proceedings: the assertion of Cabinet privilege by the Crown over the PowerPoint presentation and meeting minutes. In *CM v Alberta*, 2022 ABQB 462, Justice Dunlop rejected this assertion and ordered the full, unredacted disclosure of these documents (at para 4).

This is not the first instance of Cabinet privilege arising over COVID-19 deliberations. The matter first surfaced in Alberta back in November 2020 in connection with the declaration of the second public health emergency under the *Public Health Act*, and the refusal by the CMOH and Minister of Health to disclose CMOH recommendations to Cabinet on the basis of an assertion of privilege. This earlier instance was the topic of discussion in COVID-19 and Cabinet Secrets which made the point that Cabinet confidence (or privilege) is a parliamentary convention intended to protect Cabinet discussions from disclosure to ensure full and frank deliberations over important policy choices, however, it does not provide absolute immunity to disclosure when the subject in question ends up in litigation. Once the matter is before the courts, disclosure of Cabinet deliberations becomes a legal question, and a judge will apply a range of factors to determine whether or not disclosure is necessary to adhere to the open court principle. (See also here for a discussion of Cabinet privilege in the context of COVID-19 public health orders and a recent interlocutory decision by the Honourable Madam Justice B. E. Romaine in *Ingram v Alberta (Chief Medical Officer of Health)*, 2022 ABQB 311 (CanLII).)

In this case, Justice Dunlop's decision to reject Cabinet privilege and order disclosure of the PowerPoint slides and meeting minutes hinged on his finding that the documents did not contain any ". . . statements by or discussions or deliberations among Cabinet members" (*CM v Alberta*, 2022 ABQB 462 at para 8). Instead, the documents consisted of information about COVID-19 in the province and abroad and presented options for easing public health measures. Justice Dunlop rejected the Minister's assertion in his certificate that the disclosure of these materials ". . . could impede the free flow of future Cabinet discussions, or the preparation of materials for Cabinet consideration, thereby negatively impacting the democratic governance of the Province of Alberta" (*CM v Alberta*, 2022 ABQB 462 at para 7). Instead, Justice Dunlop found that given Dr. Hinshaw's "statutory powers and duties under the *Public Health Act* and her professional obligations as a physician" he "would expect her to be candid and complete, regardless of any potential future public disclosure" (*CM v Alberta*, 2022 ABQB 462 at para 10).

Conclusion

Transparency and accountability have been sorely lacking on the making of public health orders – and this isn't just an Alberta problem. We examined this in detail in a recent paper ("Executive Lawmaking and COVID-19 Public Health Orders in Canada" (2020-2021) 25:2 Rev Const Stud 145 – available here as a prepublication version of this paper on SSRN). The outcome on the merits in *CM v Alberta* promises to bring clarity to who made COVID-19 public health orders in Alberta, notwithstanding that the need for this clarification has been fabricated by the nonsense of finger-pointing between the CMOH and Cabinet throughout the pandemic. Making matters worse, the Alberta government actually reviewed the *Public Health Act* in 2021 and, as we previously discussed, not only failed to address this issue but instead affirmed the CMOH's role as a law-maker in the Act, but in practice continued to treat her as an advisor (except where circumstances

were politically favourable to treat her as the decision-maker). The interlocutory orders in *CM v Alberta* also further reinforce the likelihood that Cabinet privilege will not preclude full disclosure of rationales for decisions made, however again recognizing that it should not require a court order for public officials to account to the electorate for such important actions (or non-actions).

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