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Confirmed in Law: The Decision-Maker for COVID-19 Public Health Orders in Alberta is the Chief Medical Officer of Health

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Decision commented on: *CM v Alberta*, 2022 ABKB 716 (See here for the decision, which was not on CanLII as of the date of writing)

In the winter of 2022, the Alberta government repealed the bulk of its COVID-19 public health measures in an effort to be among the first provinces to re-open. On February 8, 2022, the Premier announced that children would no longer be required to mask in school and, on that same day, the Minister of Education (Adriana LaGrange) issued a written statement that "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."

The decision to lift masking requirements in schools was implemented by the Chief Medical Officer of Health (Dr. Deena Hinshaw - CMOH) in CMOH Order 08-2022, which was subsequently challenged in a judicial review application filed by children who claimed they were at heightened risk of severe outcomes if they contracted COVID-19 and the Alberta Federation of Labour. The Applicants argued that CMOH Order 08-2022 was *ultra vires*, made for improper purposes, and unreasonable. They also argued that both the Order and Minister LaGrange's February 2022 statement violated section 7 and section 15 of the *Charter*. In this post, we address Justice Grant Dunlop's October 27, 2022 ruling that CMOH Order 08-2022 was unreasonable and his declaration that Minister LaGrange's statement did not prohibit schools from requiring masks. We do not address the *Charter* claims, which Justice Dunlop dismissed due to a lack of evidence demonstrating the impact of Order 08-2022 and Minister LaGrange's statement on the Applicants or other children with disabilities.

Who Made the Decision to Issue CMOH Order 08-2022?

Justice Dunlop has (hopefully) ended the possibility of any more flip-flopping and finger pointing between the CMOH and Cabinet over who exactly is the decision-maker for COVID-19 (and other) public health orders made under the *Public Health Act*, RSA 2000, c P-37. The problem, as we described in For the Record: Who Makes COVID-19 Public Health Orders in Alberta?, has been manufactured and exacerbated by the conduct of the CMOH and various Cabinet ministers over the course of the pandemic:

> 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 confusion has persisted despite clear statutory language in the *Public Health Act* and the preamble in all (or nearly all) COVID-19 orders, including CMOH Order 08-2022, in which the CMOH asserted 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." This case brought the matter to a head, as the CMOH submitted a Record of Decision for CMOH Order 08-2022 which suggested that the CMOH occupied merely an advisory role to Cabinet in the decision to lift masking requirements within schools.

Justice Dunlop conducts his review of CMOH Order 08-2022 as a determination of the *vires* (i.e. validity) of the order. Administrative law nerds will want to give attention to paragraphs 45 to 56 of the decision, where Justice Dunlop explains that the standard of review is reasonableness (at para 49), but of a more deferential sort than that set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII). Justice Dunlop rules that judicial review of delegated legislation is limited to either a constitutional or *vires* ground (at paras 51 – 53), and accordingly a reasonableness review of delegated legislation is not a review on the merits of the enactment (at para 54). These paragraphs illustrate some unfinished business post-*Vavilov* and, in particular, the need for the Supreme Court of Canada to revisit and clarify how to apply the standard of reasonableness in cases which concern a review of delegated legislation. Canadian courts are presently giving mixed signals on this issue, with two dominant strands in the jurisprudence: one which provides for a very deferential review in which there is a presumption of validity (e.g. *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII)) and another which provides for what we might call the 'normal' approach to applying reasonableness with the refinements set out by *Vavilov* (e.g. *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (CanLII)). For those interested in more discussion, our colleague Professor Olszynski (along with co-author Mark Mancini) tackled this question here.

The *vires* review focuses attention on sections 29(2) and (2.1) of the *Public Health Act*, which, as we have observed on several other occasions (see e.g. here), very clearly authorizes the CMOH to issue public health orders of general application (at paras 59 – 61). The legislation does not authorize Cabinet or any individual Minister to issue those orders, and the legislation does not provide that the CMOH is merely an advisor to Cabinet on these public health orders. The legislation authorizes the CMOH to delegate these powers, but only to others in her office (at para 63).

Justice Dunlop observes that the structure of authority for issuing public health orders varies across provinces. Manitoba, for example, requires Ministerial approval of public health orders. We also examined this variation across provinces in detail in a recent paper ("Executive Lawmaking and COVID-19 Public Health Orders in Canada" (2020-2021) 25:2 Rev Const Stud 145 – see here for a prepublication version of this paper on SSRN). The primary point to be made here is that if the Legislature had intended the CMOH to merely be an advisor to Cabinet or the Minister of Health on public health orders, the *Public Health Act* would reflect this intention. It does not.

Having confirmed that the only possible (and reasonable) interpretation of relevant sections of the *Public Health Act* is a reading that confirms the CMOH was the only official with statutory power to issue CMOH Order 08-2022, Justice Dunlop turns to the evidence in the case to establish who actually made the decision reflected in the Order. Readers may recall that the CMOH and the Crown initially refused to provide this evidence (a.k.a. the full Record of Decision) to the Applicants, which led to interlocutory motions and two earlier decisions by Justice Dunlop ordering full disclosure (*CM v Alberta*, 2022 ABQB 357 (CanLII) and *CM v Alberta*, 2022 ABQB 462 (CanLII)), both of which were the subject of our comments in For the Record: Who Makes COVID-19 Public Health Orders in Alberta?.

It is clear from Justice Dunlop's latest decision why the CMOH and the Crown were reluctant to satisfy their disclosure obligation: the evidence confirms that the substance of CMOH Order 08-2022 was a Cabinet decision. Justice Dunlop reviews the Record of Decision (at paras 68 – 81), and on the basis of this review he concludes that Cabinet made the decision to remove the school mask mandate and issue CMOH Order 08-2022:

> Finally, there is no evidence that Dr. Hinshaw made the decision, other than the fact that she signed the Order. (at para 80)

Amongst other observations that led him to conclude as such, Justice Dunlop notes specifically that the CMOH changed her position on school masking over the course of just one month, and did so with no explanation (references to 'PICC' in this and subsequent quotes are to the committee of Cabinet which actually made the decision to rescind the school mask mandate):

> Fourth, at a press conference on January 5, 2022, Dr. Hinshaw said:
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> > The use of rapid testing and medical masks, in addition to the measures already in place, will help to protect students and staff as they return to the classroom. Given the current situation, I also want to note that I strongly recommend that students in all grades wear masks, including in kindergarten to grade 3.
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> At the press conference on February 10, 2022, when asked what had changed in the last month or so to make masking for children no longer necessary, Dr. Hinshaw answered: "I would defer to Minister Copping to answer that question." The fact that Dr. Hinshaw declined to explain why she was removing the school mask mandate when a month earlier she recommended that students in all grades wear masks, and the fact that she referred questions to the Minister of Health, who is a member of PICC, supports the conclusion that the decision to remove the school mask mandate was PICC's decision, not Dr. Hinshaw's. (at paras 75, 76)

Justice Dunlop rules that CMOH Order 08-2022 was the result of an unreasonable – and thus unlawful – interpretation of the *Public Health Act*:

> [I]t is simply not reasonable to read s. 29 of the *Public Health Act*, with its repeated references to what the medical officer of health "considers necessary" or "determines", to permit the Chief Medical Officer to make orders at the direction of PICC or any other person or body.
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> Dr. Hinshaw's interpretation of the Public Health Act as leaving final decision-making authority for public health orders with elected officials is contrary to the Public Health Act and consequently is unreasonable. The Order was based on that unreasonable interpretation. Because the Order slavishly implemented PICC's decision, I conclude the Order was unreasonable. (at paras 84, 85)

The usual remedy that flows from a ruling of unreasonableness upon judicial review of an administrative decision is a quashing of the impugned unlawful decision. However, in cases such as this one, where the impugned decision has already been rescinded, it would be moot to quash the Order. Accordingly, Justice Dunlop issues a declaration that CMOH Order 08-2022 was unreasonable (at para 132).

While the language of 'reasonableness' is how a reviewing court must usually explain its findings in a judicial review proceeding, the excerpts from the Record of Decision here suggest a complete failure on the part of this Cabinet committee, the Minister of Health, and the CMOH, to either understand the law or comply with the law related to public health decisions. It is difficult to overstate the gravity of this failure.

What was the Effect of Minister LaGrange's February 2022 Statement?

At an August 13, 2021 press conference, Minister LaGrange stated that, "[t]hroughout the pandemic, we have trusted local school authorities to make decisions that work for their schools and their school communities," including "physical distancing, cohorting and masking requirements that may exceed provincial guidance" (at para 94). This messaging was not restricted to schools, with government similarly encouraging private businesses and individuals to assess their own needs and to adopt appropriate COVID-19 precautions. Instead of being forced to acknowledge the fallout from their 'Open for Summer' strategy by reinstating public health measures, the government perhaps wanted to minimize accountability by encouraging others to adopt precautions instead of doing so themselves.

After the summer 2021 false start, which led to severe hospital capacity issues and renewed restrictions throughout the fall of 2021 and early 2022, the government again decided to repeal public health measures in February 2022, including mask mandates in schools. However, this time, the government actively discouraged other entities from adopting their own public health precautions. For example, the Minister of Advanced Education sent a letter to post-secondary institutions on February 9, 2022 telling them that he expected their COVID-19 policies to "align" with the government's rules respecting issues such as distancing, proof of vaccination, and masking. Similarly, Minister LaGrange issued a statement that "school boards will not be empowered" to require masking and "school authorities cannot deny their students access to in

person education" due to their personal masking choices (at para 93). This statement stood in stark contrast to Minister LaGrange's earlier position that schools had such authority.

During the hearing of this matter, Justice Dunlop questioned counsel for the Crown on this issue, who acknowledged that section 33 of the *Education Act*, SA 2012, c E-0.3, vested school boards with the responsibility to ensure a "safe learning environment" (at para 95). In his decision, Justice Dunlop concludes that section 51(2) of the *Education Act* requires the Minister to enact a regulation if she intends to restrict the power of a school board, and he rules that Minister LaGrange's February 2022 statement is not a regulation (at paras 96 – 98). As Justice Dunlop summarizes in the beginning of his judgement:

> I also find that, while Minister LaGrange's Statement on its face appears to prohibit school boards from imposing mask mandates, it does not do so, because the Minister can only do that through a regulation, and the statement was not a regulation. (at para 7)

Throughout the pandemic, there have been similar debates across the country about the legal authority of various entities to implement public health precautions such as masking and proof of vaccine requirements (see e.g. here for an example from the post-secondary context in BC). These debates are surprising, given that many entities, ranging from schools to employers to private businesses, have a responsibility to ensure the safety of their populations. Public health is so broad and multi-faceted that it cannot be the exclusive jurisdiction of provincial governments. Justice Dunlop's decision provides important support for the argument that subject to explicit legal limits (e.g. regulations in this case), public health decisions are not limited to what is contained in CMOH orders.

Conclusion

The decision in *CM v Alberta* brings legal clarity and transparency to the making of COVID-19 public health orders in Alberta, and it provides much needed confirmation on the respective roles of the CMOH and Cabinet. Prior to this decision, there was a misalignment between legislation, which explicitly empowered the CMOH to make orders with respect to public health restrictions, and practice in Alberta, which was for Cabinet to dictate decisions to the CMOH. We now have clarity on who is responsible, and thus accountable, for which public health decisions.

Justice Dunlop's decision also addresses the misconception that entities like schools cannot implement public health measures beyond those contained in CMOH orders. Although schools have the explicit legal authority to adopt policies to ensure a safe learning environment, Justice Dunlop's clarification was much needed, given the government's mixed messaging on this point.

This decision also clarifies that if individual Ministers would like to exert authority over public health measures in Alberta, they cannot accomplish this by simply issuing letters to schools or fettering the discretion of the CMOH. Instead, they must follow legal (and democratic) process and legislate by making regulations or amending the *Public Health Act*.

While the declaration of unreasonableness imposes some measure of legal accountability, this decision falls short of holding responsible officials fully accountable for their failure to adhere to

the very basis of their legal authority to govern on a matter of utmost public health importance. That measure of accountability lies elsewhere, at the ballot box.

Although COVID-19 is not yet behind us, policy-makers are beginning to have conversations about lessons learned and future pandemic preparedness. One aspect of this review process is to evaluate public health legislation, including a determination of the appropriate role of the CMOH. First, governments must decide whether the CMOH ought to be merely an advisor to government or an independent decision-maker. Although Alberta's CMOH is an independent decision-maker, other provinces have adopted a variety of approaches to allocating power between the CMOH and Cabinet that may be considered. Second, there is too much uncertainty over whether legislatures really intend a CMOH (or similarly appointed official in public health legislation) to enact laws of general application, and to do so without the oversight of a Minister or Cabinet as a whole. Public health legislation is generally clear on the point that a CMOH can issue public health orders in situations that affect specified individuals or groups of individuals, such as shutting down a restaurant due to a food borne pathogen or ordering a landlord to disinfect an apartment building. However, a purposive reading of this legislation leads to questions about whether the legislature even contemplated scenarios where public health officials could issue orders to mandate masking in all public places or close down entire segments of the economy without government approval. In our view, it is imperative that this authority be clarified by the legislature.

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