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The Next Chapter in the Role of Alberta's Chief Medical Officer of Health

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Legislation and Cases Commented on: *Public Health Act*, RSA 2000, c P-37; *CM v Alberta*, 2022 ABKB 716 (CanLII); *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 (CanLII)

At the start of the COVID-19 pandemic, provincial public health officials were thrust into the spotlight as trusted figures who would guide the public through the unknowns of a novel virus. However, as the pandemic raged on and tensions emerged regarding the appropriate restrictiveness of public health measures, cracks formed in the relationships between the public, politicians, and public health officials. At times, Alberta's then Premier Jason Kenney and then Minister of Health Tyler Shandro seemed content to take credit for effectively balancing "lives and livelihoods". However, when things were not going well, they would credit then Chief Medical Officer of Health (CMOH) Deena Hinshaw. For example, when the government's disastrous "Open for Summer" plan contributed to severe hospital capacity problems and prompted discussions of sending people out of province for care and rationing essential health services, Shandro was quick to note that the plan "came from Dr. Hinshaw" and that he was "deferential to [her] independence."

Despite a lack of clarity on who was actually making decisions in Alberta, as I argued with Shaun Fluker here, the law is very clear on who has the legal authority to make public health orders. Per section 29(1) of the *Public Health Act*, RSA 2000, c P-37, a medical officer of health, including the CMOH, can "take whatever steps are necessary" to address the spread of a communicable disease. Indeed, the various COVID-19 public health orders bore the CMOH's signature and referred to her legal authority under the *Act*. The Court of King's Bench confirmed this interpretation of the legislation in *CM v Alberta*, 2022 ABKB 716 (CanLII), which was a challenge to a CMOH order rescinding masking requirements in schools (discussed in an earlier blog post). In this case, Justice Grant S. Dunlop found that "while the Order was issued by the Chief Medical Officer of Health, that order merely implemented a decision of a committee of cabinet, rather than being the Chief Medical Officer's own decision," in contravention of the *Act* (at para 6).

In the remainder of this blog post, I comment on 1) recent developments in cases challenging COVID-19 public health orders, and 2) comments made by Premier Danielle Smith on September 14 regarding forthcoming amendments to the *Public Health Act* that would address the powers of the CMOH.

Recent Cases Addressing COVID-19 Public Health Orders

In late July, the Court of King's Bench revisited the issue of the CMOH's legal authority in *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 (CanLII). In contrast to *CM*, in

which litigants argued that public health measures were insufficiently robust, litigants in *Ingram* claimed that these measures unduly restricted their rights. They argued that CMOH orders pertaining to gatherings, masking, isolation and quarantine, and business and school closures interfered with a host of *Charter*-protected rights and freedoms, including expression, religion, peaceful assembly, association, liberty, and security of the person.

Justice Barbara E. Romaine unsurprisingly concluded that the impugned public health orders were *ultra vires*, given that "[t]he *Public Health Act* requires that decisions with respect to public health orders must be made by the CMOH, or her statutorily-authorized delegate" and not Cabinet (at para 3). The government prevailed on the *Charter* question, with the Court finding that limitations on individual rights were justified in light of the "extraordinary threat" posed by COVID-19 (at para 449).

On August 28 and 30, public health restrictions were again before the courts. Pastor James Coates of GraceLife Church had flagrantly violated COVID-19 public health orders during the winter of 2020/2021, which ingratiated him to those opposed to public health restrictions and led to charges under the *Public Health Act*. He spent 35 days in jail for refusing to agree to a bail condition requiring him to comply with the legislation. Charges were also laid against the owner of the Whistle Stop Cafe, who vocally criticized restrictions and operated his restaurant in contravention of public health orders. These and other similar cases have now been dismissed or dropped due to *CM* and *Ingram*, which found that the contents of public health orders were determined by Cabinet and not the CMOH as required by the *Public Health Act*. In response, in a September 19 press conference, one of the lawyers involved in challenging public health restrictions announced a forthcoming legal action against the government to seek damages on behalf of businesses that were closed pursuant to the *ultra vires* public health orders.

Critics of public health restrictions are touting the dismissal of charges as a victory for individual rights and a vindication of their view that the government behaved tyrannically during the pandemic. Although this is a mischaracterization of *Ingram*, given the loss on the *Charter* issue, this case seems to have emboldened the anti-public health movement at an inopportune time, with the imminent rollout of influenza and COVID-19 booster shots and a looming respiratory virus season. Of course, all of this could have been avoided had the government merely adhered to the CMOH's decision-making authority as clearly set out in the *Public Health Act* rather than Cabinet dictating the contents of her orders. Alternatively, if Cabinet wanted to make public health decisions, they could have simply redrafted the provisions describing the CMOH's authority when they made other amendments to the *Act* during COVID-19. As I discuss elsewhere with Shaun Fluker, there are other provincial models that allocate greater responsibility for public health decision-making to Cabinet that the Alberta government could have drawn on.

Forthcoming Changes to the *Public Health Act*

Although the notion of pandemic preparedness typically conjures up things like surveillance programs and personal protective equipment stockpiles, SARS and now COVID-19 have demonstrated that legislative preparedness is also crucial to an effective public health emergency response. In order to properly prepare for the next emergency, it is clear that governments ought

to revisit their public health legislation, including the question of the role of the CMOH. Specifically, governments should consider two interrelated issues.

First, should the office of the CMOH be independent from government? For example, should the CMOH report to the Legislative Assembly rather than the Minister of Health? And should the CMOH be permitted or required to speak directly to the public on health-related matters, including disclosing the advice they give to government? At least one inquiry has argued for this type of independence. According to Ontario's Long-Term Care COVID-19 Commission, "[i]n a health emergency, the public has the right to know the advice given on such an important matter, directly from their chief medical officer" and "the CMOH should be required to report directly to the public where he or she believes it would be in the public interest to do so" (at 230-231). The results of a recent survey of Albertans conducted by the Public Health Emergencies Governance Review Panel indicate divisiveness on this issue, but the most popular response was support for a greater role for experts in a public health emergency, including a more independent CMOH.

Second, and relatedly, how should legal authority to make public health decisions be allocated between the CMOH and Cabinet? An appearance by Premier Smith on the West of Centre podcast on September 14 clarifies how Alberta plans to answer this question. Smith made it clear during her campaign that she did not approve of Alberta's approach to COVID-19 and, upon being elected, she dismissed the CMOH and others involved in the pandemic response. Now, she plans to assert further control over public health by shifting more decision-making authority to Cabinet. She stated on the podcast that the CMOH should have the power to respond to more narrow public health issues, such as those confined to one site like the recent *E. coli* outbreak, without having to "wait for Cabinet to convene and approve their decisions". However, her view is that Cabinet ought to have authority to make decisions when the issue is one that "impacts the broader society" and requires "policy decisions and economic decisions" (at 10m:07s).

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