Court of Queen's Bench of Alberta

Citation: C.M. v Alberta, 2022 ABQB 357

Date: 20220519
Docket: 2203 04046
Registry: Edmonton

Between:

C.M., Litigation Guardian for A.B., S.A., Litigation Guardian for F.S., C.H., Litigation Guardian for G.H., A.B., Litigation Guardian for J.K., R.L., Litigation Guardian for L.M. and Alberta Federation of Labour

Applicants

- and -

Her Majesty the Queen in Right of Alberta

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice G.S. Dunlop

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1. Introduction

[1] This action was started by an Originating Application which alleges numerous defects in a decision of the Chief Medical Officer of Health to change a requirement that people wear masks in public places, including schools. The Originating Application also alleges defects in a declaration by the Minister of Education prohibiting school boards from requiring masks in schools. In these reasons I will refer to the Chief Medical Officer of Health's decision as the

"Decision" and the Minister's declaration as the "Prohibition". The hearing of the Originating Application is scheduled for mid-August 2022.

[2] The applicants are five children and the Alberta Federation of Labour. In these reasons I will refer to the five children as the "Children" and the Alberta Federation of Labour as the "AFL". Each of the Children is represented in this action by a parent. I will refer to the Children's parents as the "Parents". I will refer to the applicants collectively as the "Applicants".

[3] The respondent is Her Majesty the Queen in Right of Alberta. In these reasons I will refer to the respondent as the "Crown". I will refer to the Chief Medical Officer of Health, who is Dr. Deena Hinshaw, as "Dr. Hinshaw" and the Minister of Education as the "Minister".

[4] On May 17, 2022 I heard oral submissions on an interlocutory application in this matter. I also received written submissions from the Applicants on May 9, 2022 and from the Crown on May 13, 2022. On this interlocutory application, the Applicants apply for an order:

- permitting the Applicants to rely on their affidavits already filed, in support of the judicial review aspect of this Action;
- permitting the Applicants to file additional affidavits, in support of the *Charter* challenge aspect of this Action, with the admissibility of those additional affidavits to be determined at the hearing in August;
- permitting the Applicants to rely on an affidavit sworn by Dr. Hinshaw on July 12, 2021 and filed in another action, in support of this Action;
- granting the AFL public interest standing in this Action.

[5] In these reasons I will refer to the matters before me today as the "Application" or "this Application" and the matters scheduled for hearing in August as the "Action" or "this Action".

[6] The Crown takes no position regarding the AFL's standing in this Action, but invites me to consider the test and exercise my discretion on this point. The Crown and the Applicants agree on the test for public interest standing. The Applicants submit as follows in paragraph 61 of their written submission:

> The test is met here. First, there is a *prima facie* serious justiciable issue to be determined in these proceedings. Second, AFL has a demonstrably genuine interest in access to public education including for all students, including those accommodated and ensure access with the assistance of EAs, in addition to AFL's long standing interest in workplace safety in Alberta, including in schools. In addition, if circumstances arose under which the individual Applicants were no longer able or willing to take part in this litigation, AFL is committed to continuing the proceeding to its conclusion. Finally, this proceeding and the AFL's involvement is an effective and reasonable way to bring the issues at play in the judicial review and the *Charter* challenge before this Court.

[7] I accept the Applicants' submissions on this point. Given the absence of any opposition by the Crown, I grant the AFL public interest standing.

[8] The issues on this Application are:

- First, what is scope of the Action?
- Second, is the record of the Decision filed with the Court complete?
- Third, if the record is not complete, what is the best way to complete it?
- Fourth, should the Applicants be permitted to rely on affidavits with respect to the Prohibition?
- Fifth, should the Applicants be permitted to rely on affidavits in support of their *Charter* claims?
- Sixth, should hearsay and expert evidence be admitted?
- Seventh, should the Applicants be permitted to rely on Dr. Hinshaw's affidavit filed in another action?
- Lastly, given my findings on the first seven issues, should any of the Applicants' affidavits filed to date be excluded, in whole or in part?

2. Scope of the Action

[9] The Crown submits that this Action is limited to judicial review of the Decision, because the Originating Application is in the form of an originating application for judicial review and because the prayer for relief (paragraph 103 of the Originating Application) does not specifically include anything about the Prohibition. I disagree for these reasons.

[10] First, r 3.15, which requires an Originating Application seeking judicial review to be in a certain form, does not prohibit applicants for judicial review from also including other claims and relief in the same pleading.

[11] Second, the Originating Application specifically pleads more than judicial review of the Decision. *Charter* relief is pled in paragraphs 7, 86, 92 to 100 and 103 and defects in the Prohibition, including *Charter* breaches, are pled in paragraphs 6, 7, 79, 80, and 81. Anyone reading the Originating Application would know this Action is more than a narrow judicial review of the Decision. I reject the Crown's submission (in paragraph 9 of its written brief) that it did not have notice that the Applicants are seeking *Charter* relief and relief with respect to the Prohibition.

[12] Third, the Originating Application includes in the prayer for relief at para 103(h), "such further and other relief as this Honourable Court deems just".

[13] Fourth, the Court may grant a remedy even if it is not formally claimed or sought: r. 1.3(2).

[14] Fifth, if the Crown were truly uncertain regarding the scope of this Action, it could have sought particulars: r. 3.61.

[15] Sixth, the modern view is that the *Rules* are tools to obtain remedies, not foreclose them: ***Trang v Alberta (Director, Edmonton Remand Centre)*** 2001 ABQB 884 at para. 14.

[16] The Crown also submits (paragraph 9 and 14 of its written submission) that the Originating Application does not plead a cause of action with respect to the Prohibition. I disagree. The allegations in paragraphs 77 – 81 of the Originating Application that there was no statutory authority for the Prohibition, that the Prohibition breached the Applicants' *Charter* and other rights, and that the Prohibition interfered with certain school board duties, are sufficient basis for a cause of action seeking a declaration.

[17] The scope of this action includes alleged defects in the Prohibition and *Charter* relief, in addition to judicial review of the Decision.

3. Is the Record of the Decision Complete?

[18] The Applicants submit that the Dr. Hinshaw's Certified Record of Proceedings is deficient and that that justifies supplementing the record with affidavit evidence.

[19] The Applicants served a Notice to Produce Record on the Dr. Hinshaw. They did not serve one on the Minister. Dr. Hinshaw provided a Certified Record of Proceedings. Both documents are prescribed forms under the *Rules*, Forms 8 and 9, respectively. The Applicants followed the prescribed form and added to it. Dr. Hinshaw followed the prescribed form but subtracted from it.

[20] The Applicants added to Form 8 as follows:

- at the end of paragraph (a) they added:

  > February 10, 2022 – Record of Decision CMOH-Order 08-2022 COVID-19 response ("Decision")

- at the end of paragraph (b) they added:

  > including but not limited to any recommendations and advice given by the Decision-maker, Dr. Hinshaw

- at the end of paragraph (e) they added:

  > including but not limited to all minutes of meetings regarding the Decision; all evidence, reports, records and/or briefing notes relied on in coming to the Decision; and all stakeholder input relevant to or relied upon for the Decision.

[21] Dr. Hinshaw deleted from Form 9 paragraphs 1(b), (c), (d) and (e), which read:

> (b) the reasons given for the decision or act,
>
> (c) the document starting the proceeding,
>
> (d) the evidence and exhibits filed with us, and
>
> (e) anything else in our possession relevant to the decision or act, namely

[22] Nothing in the *Rules* authorizes parties to unilaterally modify Forms 8 or 9. Furthermore, regardless of any modifications to Form 9, the respondent remains obligated by r. 3.18 and r. 3.19 to send to the Clerk items (b) through (e) quoted above, or an explanation of why any of those things cannot be sent. Similarly, regardless of anything an applicant adds to Form 8, those additions do not add to what the respondent is required to include in its Record of Proceedings.

[23] The *Rules* permit the Court to modify what is required: r. 3.18(3).

[24] The body of Dr. Hinshaw's Certified Record of Proceedings reads as follows:

> 1. Please find attached:
>
> (a) The Record of Decision – CMOH Order 08-2022
>
> 2. The following are parts of the notice to obtain record of proceedings that cannot be fully complied with and the reasons why:
>
> (a) Documents covered by Public Interest Immunity – See attached certificate filed concurrently pursuant to 34(4) of the *Alberta Evidence Act*, RSA 2000, c A-18, in relation to:
>
> (i) A Power-Point presentation with information regarding the ongoing COVID-19 Pandemic;
>
> (ii) The Official Record of Decision consisting of Cabinet meeting minutes arising from the February 8, 2022 meeting where ongoing public health orders were discussed and considered.
>
> 3. **I certify that I have attached all records as required by Rule 3.19(1).**
>
> **(emphasis added)**

[25] The relationship between the documents listed in 2(a) and the documents which Dr. Hinshaw is required to produce is opaque, when it should be clear. Is Dr. Hinshaw saying that the Power-Point presentation was part of her reasons, the document that started the proceeding, evidence and exhibits filed with her, or something else relevant to her decision? If the Power-Point presentation is none of those things, then it ought not to be mentioned at all. The same applies to the Cabinet meeting minutes.

[26] The Certificate of Tyler Shandro, QC, attached to Dr. Hinshaw's Certified Record of Proceedings includes the following statements:

> 1. In the course of her employment as Chief Medical Officer of Health ("CMOH") for Alberta, Dr. Deena Hinshaw has engaged in confidential high-level discussions and prepared documents and records for members of the Executive Council, also known as Cabinet, regarding the COVID-19 pandemic.

2. Prior to the implementation of CMOH Order 08-2022 (the "Decision"), Dr. Hinshaw prepared a power-point presentation (the "Power-Point") with information regarding the ongoing COVID-19 Pandemic to facilitate discussions as to what course of action to carry out. This Power-Point was prepared and presented on February 8, 2022, with the sole intended recipient as being Cabinet, given the sensitive nature of deliberations and considerations that go into the production of public health orders.
3. Furthermore, Cabinet prepared an Official Record of Decision ("ORD") consisting of meeting minutes arising from the February 8, 2022 meeting. The ORD arises from confidential discussions and deliberations which occurred within Cabinet, including Dr. Hinshaw.

…

6. The Power-Point was prepared for Cabinet's considerations in making decisions in conjunction with Dr. Hinshaw on how to respond to the COVID-19 pandemic, which involve ongoing important and significant public policy issues.

[27] 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.

[28] 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:

> 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

[29] 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.

[30] Minister Shandro has certified that disclosure of the Power-Point presentation and the Cabinet minutes would be not in the public interest and would be prejudicial to those not involved in this litigation. The Applicants have not challenged that, and I make no finding about

those documents. My finding is that there must be more that would be responsive to the Notice to Obtain Record of Proceedings than the three documents Dr. Hinshaw has disclosed.

[31] In ***Beaudoin v British Columbia*** 2021 BCSC 512, the applicants sought judicial review and *Charter* remedies with respect to public health restrictions imposed by the Public Health Officer. The parties disagreed regarding what constituted the record. The Court held as follows at paragraph 85:

> It is my view that in the case of a non-adjudicative tribunal such as this, the record of proceedings must of necessity be reconstructed. It is not necessarily "static", but still consists either of general, or uncontroversial background information that will assist me in understanding the issues or information that was before Dr. Henry.

[32] In ***Beaudoin*** the respondents provided an affidavit setting out the information the Public Health Officer had before her when she made her order: ***Beaudoin*** at para 90. The record filed with the court in ***Beaudoin*** was extensive, as it provided a basis for the Court to make this finding at para 234:

> On the record in this case, I find that Dr. Henry turned her mind to the impact of her orders on religious practices and governed herself by the principle of proportionality. She consulted widely with faith leaders and individually asked for the input of the leaders of two of the churches making up the religious petitioners, while affirming the need for respect for the rule of law and public health.

[33] In contrast to the extensive record filed in ***Beaudoin***, in the case before me Dr. Hinshaw and the Crown have provided nothing other than the Decision and the Minister of Justice's certificate regarding the Power-Point presentation and the Cabinet minutes.

[34] For the reasons set out above, I agree with the Applicants that the record is incomplete.

4. How Best to Complete the Record

[35] The Applicants submit that a deficient record opens the door to affidavit evidence to fill in the gap, relying on r. 3.22(d), ***Swan River First Nation v Alberta (Agriculture and Forestry)*** 2022 ABQB 194, ***Alberta's Free Roaming Horses Society v Alberta*** 2019 ABQB 714 and other cases. The Crown has not provided argument on this point, beyond its assertion that the record is complete and that nothing other than the record should be considered on a judicial review

[36] I agree that affidavit evidence could complete the incomplete record, and that, subject to other Crown objections which I will address later in these reasons, that could be in the form of Mr. McGowan's affidavit and the Parents' affidavits. The danger of that approach is that those affidavits may be inaccurate, and are likely to be incomplete, with respect to what was before Dr. Hinshaw when she made the Decision.

[37] In my view, the best remedy for a deficient record is a compliant record, which specifies in detail and attaches what the *Rules* require:

(a) Dr. Hinshaw's Decision;

(b) her reasons;

(c) the document starting the proceeding;

(d) the evidence and exhibits filed with her; and

(e) anything else in her possession relevant to her Decision

[38] I order Dr. Hinshaw to provide a Certified Record of Proceedings in Form 9 that provides that information and those documents. If she cannot comply with any part of that, she may state which things she cannot provide and why in paragraph 2 of the Certified Record of Proceedings.

[39] I note that the Applicants served a Notice to Obtain Record of Proceedings on Crown counsel on February 19, 2022, that the non-compliant record was provided nearly two months later, on April 14, 2022, and that the hearing of this Action is scheduled for mid-August 2022. In that context I order Dr. Hinshaw to provide a compliant Certified Record of Proceedings to the Applicants' counsel and submit it to the Court for filing, no later than May 27, 2022. That deadline may be varied by agreement of the parties, or by me on application supported by evidence.

[40] For the time being, the parts of the Applicants' affidavits that provide general background information and information Dr. Hinshaw likely had when she made the Decision are admissible. I may reconsider the admissibility of those parts of the Applicants' affidavits at the hearing of the Action in August, in light of a more complete record filed by Dr. Hinshaw.

5. Evidence On the Prohibition Issues

[41] The Crown submits that no evidence regarding the Prohibition should be permitted because the Applicants seek no relief and have not pled a cause of action relating to the Prohibition. I have already considered and rejected that argument earlier in these reasons. The Crown has not provided an alternative argument as to why evidence regarding the Prohibition should not be permitted.

[42] The Applicants do not seek judicial review of the Prohibition. Consequently, they did not file and serve a Form 8 and no Form 9 was filed with respect to the Prohibition. Obviously, the Court requires some evidence on which to base its findings. The Applicants have provided affidavits that include evidence regarding the Prohibition. I see no reason for a blanket exclusion of that evidence.

6. Evidence On *Charter* Issues

[43] The Crown submits (at paragraph 22 of its written brief) that the Applicants have not challenged the constitutionality of the Decision. I disagree. Paragraphs 92 – 100 of the Originating Application clearly do that, and paragraph 103 (b) and (c) seek a declaration and s. 24 relief. Paragraph 80 alleges that the Prohibition breaches s. 15 of the *Charter*.

[44] The Crown submits that evidence going to the alleged breaches of *Charter* rights and whether those breaches are justified under s. 1 of the *Charter*, should not be permitted on judicial

review because only the evidence before Dr. Hinshaw when she made her decision should be considered. I disagree for two reasons. First, so far Dr. Hinshaw has failed to disclose what evidence she considered. Second, there is more to this Action than a judicial review. The Applicants are seeking *Charter* relief. They are entitled to adduce evidence to prove their case.

7. Hearsay and Expert Evidence

[45] The Crown objects to the admission into evidence of some of the exhibits attached to Mr. McGowan's affidavit on the basis that they are hearsay and, in some cases, expert evidence. The same objection applies to the body of Mr. McGowan's affidavit where he quotes those exhibits and to the Parents' affidavits where they refer to the same documents.

[46] Some of the exhibits are statements by Dr. Hinshaw or representatives of the Alberta government. Those are admissible, at least for the fact that they were made, if not for the truth of their contents, as part of the general background to the Decision: ***Beaudoin*** at para 34 – 60, 85.

[47] Furthermore, statements by public officials in the exercise of their duty are admissible hearsay, provided four preconditions are met:

> (1) The subject matter of the statement must be of a public nature.
>
> (2) The statement must have been prepared with a view to being retained and kept as a public record.
>
> (3) It must have been made for a public purpose and available to the public for inspection at all times.
>
> (4) It must have been prepared by a public officer in pursuance of his or her duty.
>
> Sidney N Lederman, Alan W Bryant and Michelle K Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 5th ed (Toronto, Ont: LexisNexis Canada, 2018) at para 6.308

[48] Some of the statements of representatives of the Alberta government and Dr. Hinshaw attached to and quoted in Mr. McGowan's affidavit arguably meet those four preconditions. The same may be true of statements by the Government of Canada and Dr. Teresa Tam, the Chief Public Health Officer of Canada. The argument is weaker with respect to foreign bodies, such as the Centers for Disease Control in the United States and non-government bodies, such as the Canadian Paediatric Society and the American Academy of Pediatrics.

[49] Having made those general comments, I decline to rule on admissibility of particular items of alleged hearsay or expert evidence at this stage because it will be more efficient to do so at the hearing of the Action in August. At that time, I may follow the same approach as Graesser, J did in ***Schulte v Alberta (Appeals Commission)*** 2015 ABQB 17 at para 32 – 33:

> Some of the information in the affidavit relates to Mr. Schulte's claims of bias, procedural unfairness and breaches of natural justice. Additional evidence is admissible with respect to those issues. Some information relates to his Charter arguments and factual assertions in connection with those arguments. These are

> admissible with respect to Charter challenges. Much of the affidavit is Mr. Schulte's explanation as to why various decisions since 1987 are wrong and unfair to him. His opinions and his arguments are not admissible by way of affidavit evidence.
>
> I will not rule the affidavit inadmissible, but will make limited use of it. It provides details of Mr. Schulte's constitutional claims, as well as his bias, procedural fairness and natural justice claims. Some parts assist in understanding Mr. Schulte's position. Other parts are irrelevant and unhelpful to any of the issues. In the end, I will make use of the information in the affidavit when it is admissible and helpful on an issue, and I will ignore it as evidence of any facts to supplement those used by the Appeals Commission.

[50] The Court of Appeal followed the same approach in upholding that decision: ***Schulte v Alberta (Workers' Compensation Appeals Commission)*** 2016 ABCA 304 at para. 4.

8. Dr. Hinshaw's July 12, 2021 Affidavit

[51] Dr. Hinshaw swore an affidavit on July 12, 2021, which was filed in another action. I will refer to that other action as the "Ingram Action" and that affidavit as the "Hinshaw affidavit". The Applicants seek to admit the Hinshaw affidavit into evidence in this Action pursuant to r. 6.11(1)(f). The Crown opposes that.

[52] The body of the Hinshaw affidavit is 70 pages. The exhibits add another 323 pages. The body is divided into 6 sections with the following titles:

A. Chief Medical Officer of Health and the Speciality of Public Health and Preventive Medicine

B. The Ministry of Health and The Regional Health Authority (Alberta Health Services)

C. SARS-CoV-2 is a New and Infectious Virus that Has Caused a Global pandemic

D. Alberta's Approach to Responding to the COVID-19 Pandemic

E. Alberta's Voluntary and Mandatory Public Health Measures: March 2020 to June 2021

F. "Focussed Protection" – Herd Immunity and the Great Barrington Declaration

[53] The Hinshaw affidavit:

- addresses issues in another action which may overlap but are not the same as the issues in this Action;
- responds to or refers to other affidavits filed in the Ingram Action which are not before me and which neither the Applicants nor the Crown have sought to have entered into evidence in this Action;

- may include some things that are relevant to the Decision, but which would be incomplete and might be misleading, given the passage of time and changes in the COVID-19 pandemic between July 2021 and February 2022;
- includes a large volume of completely irrelevant material; and
- might open the door to questioning of Dr. Hinshaw with the potential to prolong, distract, and frustrate this Action.

[54] For those reasons I find that it is not appropriate to admit the Hinshaw affidavit into evidence in this Action.

9. Affidavits Filed to Date

9.1 McGowan Affidavit

[55] Gil McGowan is the President of the AFL. The Crown concedes that paragraphs 2 – 4 of his affidavit are admissible, as they go to the AFL's standing in this Action.

[56] The balance of Mr. McGowan's affidavit consists of:

- the Decision and the Minister of Justice's certificate and when and how Mr. McGowan and the Applicant's counsel learned about and received them (para. 5 – 9 and exhibits 1 and 2).
- the Hinshaw affidavit (para. 10 – 12 and exhibit 3)
- statements by Dr. Hinshaw and the Minister in August 2021 and January 2022 (para. 13 – 15, 25 – 27, 24 and exhibits 4 and 14)
- Edmonton Public School Board documents, a back to school plan dated August 16, 2021, a letter dated January 6, 2022, and board minutes dated February 15, 2022 (para 16, 25, 23 – 34 and exhibits 5, 15 and 19)
- orders by Dr. Hinshaw dated September 3 and 24, 2021 (para 17 and exhibit 6)
- a government press release and other publications dated July 2021, September 15, 2021 and February 1, 2022 (para 18 and exhibit 7)
- an originating application in another action seeking judicial review of earlier decisions by Dr. Hinshaw (para 19 and exhibit 8)
- statements about COVID-19 by people who are not parties to this Action, such as the Chief Public Health Officer of Canada and the Centre for Disease Control in the United States (para 20 – 24, 35 – 37 and exhibits 9 – 13, 20 and 21)
- statements by the Premier of Alberta, the Health Minister and Dr. Hinshaw at press conferences in February 202 (para. 26 – 31 and exhibits 16 – 17)
- statements by Dr. Hinshaw at a press conference on April 13, 2022 (para 38 – 41 and exhibit 22)

- tweets about the AFL and this Action dated February 14, 2022 and attributed to the Premier of Alberta (para 28 – 29 and exhibits 23 and 24)
- a protest of public health mandates at the Coutts Boarder crossing (para 30).

[57] I have already addressed the Hinshaw affidavit, the body of which is an exhibit to Mr. McGowan's affidavit. The Hinshaw affidavit is inadmissible.

[58] The parts of Mr. McGowan's affidavit that contain information about COVID-19 available to Dr. Hinshaw before she made the Decision, including her own statements and statements by the Alberta and Canadian governments and the Center for Disease Control in the United States, are relevant to the judicial review application because that information may be part of what Dr. Hinshaw considered in reaching the Decision. Given the failure of Dr. Hinshaw and the Crown to provide a complete record, the Applicants are entitled to supplement the inadequate record as best they can. If Dr. Hinshaw provides a complete record, as I have ordered, I may reconsider the admissibility of this material during the hearing of the Action in August.

[59] Mr. McGowan's evidence regarding the Prohibition, including the actions and documents of the Edmonton Public School Board is relevant to that part of the Action.

[60] The Originating Application in another action, which is referred in paragraph 19 and attached as exhibit 8 to Mr. McGowan's affidavit is not relevant to this Action.

[61] I conclude that Mr. McGowan's affidavit is substantially admissible. Some parts of it are harmlessly redundant, such as the inclusion of the Decision and the Minister of Justice's certificate. Some parts may be irrelevant or otherwise inadmissible, in which case I will ignore those portions in my reasons following the hearing of the Action in August.

9.2 Parents' Affidavits

[62] Each of the Children is represented in this Action by a Parent. Three of those Parents have sworn affidavits filed in this Action. Each of the Parents who provided an affidavit describes their child and their child's medical conditions, their family, their experience with schooling up to and after the Decision and the Prohibition, and their personal experience learning of, attempting to understand, and reacting to the Decision and the Prohibition. That evidence is relevant to the *Charter* issues and is therefore admissible.

[63] The Parents' affidavits also contain conclusions and argument, for example the affidavit of CH, parent of GH, includes the following:

> 8 On February 8, 2022, I learned of the Chief Medical Officer of Health's intention to lift the mask mandate in all schools.
>
> 9. At this announcement, I did observe the Premier say something to the effect of: "COVID and the restrictions associated with it have robbed thousands of children of the simple joys of just being a kid." …
>
> 10. My child cannot safely attend school without COVID "restrictions" in place.

> 11. From this statement, I was informed and do believe that the government of Alberta does not believe kids with disabilities should also have the right to just 'be kids'. This is because my child, G.H., has relied on others to protect them from contracting covid- 19 so that they can engage in some normal activities, including accessing public education like their peers.

[64] Conclusions and arguments in the parents' affidavits are not admissible as evidence.

[65] Rather than parse the parents' affidavits paragraph by paragraph at this interlocutory stage, I find that they are substantially admissible. At the hearing of the Action and in my decision following that hearing, I will ignore inadmissible portions of those affidavits.

10. Disposition

[66] I grant the Application in part and dismiss it in part. Specifically:

- The parties may rely on the McGowan affidavit and the Parents' affidavits, subject to the limitations set out above.
- The Hinshaw affidavit is not admitted into evidence in this Action.
- The parties may file additional affidavit evidence in relation to the *Charter* issues, subject to submissions and ruling on admissibility at the hearing of the Action.
- The AFL is granted public interest standing.

[67] In addition, on my own motion, I order Dr. Hinshaw to provide a better Certified Record of Proceedings, as set out above, by May 27, 2022, or such other date as the parties agree, or I order.

[68] Deadlines for additional *Charter* evidence, if not agreed, may be spoken to at the case conference, tentatively scheduled for June 2, 2022.

[69] Costs of this Application, if not agreed, may be spoken to at the hearing of the Action.

Heard on the 17th day of May, 2022.
Dated at the City of Edmonton, Alberta this 19th day of May, 2022.

G.S. Dunlop
J.C.Q.B.A.

Appearances:

Sharon Roberts and Orlagh O'Kelly
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for the Applicants

Gary Zimmermann
Steven Dollansky
Joel Franz
McLennan Ross LLP
for the Respondent