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OCLA Report 2022-2 | 23 September 2022

Canadian court decisions on the constitutionality of Covid measures are invalid due to jurisdictional errors of law

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"In very fundamental respects our freedoms are not afforded by enforceable rights but rather by the curtailment of the exercise of power to interfere with them."
—Justice Colvin (Australia), 2021

Plan

Introduction

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.[1]

This means that a court commits a fundamental error of law, invalidating its judgement, if it exceeds or denies its jurisdiction to decide the issues before it. For example, if it makes decisions on questions beyond its power to consider, or if it explicitly or in-effect refuses to make material decisions on questions within its purview.

The purpose of this article is to show that Canadian courts have denied their jurisdiction by deferring evaluations of key scientific questions to medical experts in constitutional cases about Covid mandates.

I write the present Report:

- to encourage scientists to research and understand the legal context in which they are asked to contribute as experts
- to encourage applicants of constitutional challenges and their lawyers to be more demanding of judges *vis-à-vis* protecting the institution of justice, and to pursue appeals on this basis
- to illustrate using analyses of Covid cases how wrong a scientific position adopted by the court can be
- to argue that several seminal rulings of provincial superior courts on the constitutionality of Covid measures imposed by provincial governments are invalid pursuant to jurisdictional errors of law

The said rulings critiqued in this regard are:

> *Taylor v. Newfoundland and Labrador* (2020 NLSC 125)
> *Gateway Bible Baptist Church et al. v. Manitoba et al.* (2021 MBQB 219)
> *Ontario v. Trinity Bible Chapel et al.* (2022 ONSC 1344)

[1] *Anthony David Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163

Obligation of judges to be gatekeepers against prejudice caused by admitting expert testimony

The limited role of expert witnesses in Canadian courts, and admissibility of their evidence, has been delimited by the Supreme Court of Canada.

The current case of reference is *White v Abbott* (2015 SCC 23) ("*White*"),[2] in which the Supreme Court relied on past rulings to delineate the present analytic framework for admitting and using expert evidence and opinion. It is worth copying the entire relevant section of *White* (paragraphs 11 through 24) as follows [emphasis added]:

> B. *Expert Witness Independence and Impartiality*
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> [11] There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358, at p. 374.
>
> [12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right Honourable Lord

[2] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 SCR 182, <https://canlii.ca/t/ghd4f>

Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

[13] To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. *The Legal Framework*

(1) The Exclusionary Rule for Opinion Evidence

[14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, 1982 CanLII 33 (SCC), [1982] 2 S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

[15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore

allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, 1982 CanLII 25 (SCC), [1982] 2 S.C.R. 24, at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

[16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[17] We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.)

[18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are

not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

[20] *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

[21] So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists "to ensure that the dangers associated

with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis and concerns such as those about reliability fit into the overall analysis.

[22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

In *R. v. Bingley* (2017), the Supreme Court reiterated the analytic framework this way [emphasis added]: [3]

B. *Is the Evidence Admissible Expert Opinion?*

> [13] The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras. 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.
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> [14] The expert evidence analysis is divided into two stages. First, the evidence must meet the four *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White Burgess*, at para. 24.
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> [15] If at the first stage, the evidence does not meet the threshold *Mohan* requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 82; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 47. It must be necessary "to enable the trier of fact to appreciate the matters in issue" by providing information outside of the experience and knowledge of the trier of fact: *Mohan*, at p. 23; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 57. Opinion evidence that otherwise meets the *Mohan* requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25. The opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25. In the case of an opinion that is based on a novel scientific theory or technique, a basic threshold of reliability of the underlying science must also be established: *White Burgess*, at para. 23; *Mohan*, at p. 25.
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> [16] At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial

[3] *R. v. Bingley*, 2017 SCC 12 (CanLII), [2017] 1 SCR 170, <https://canlii.ca/t/gxn04>

> judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *Mohan*, at p. 21; *White Burgess*, at paras. 19 and 24.
>
> [17] The expert opinion admissibility analysis cannot be "conducted in a vacuum": *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized: see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.

The Supreme Court again made relevant determinations in *Bent v. Platnick* (2020) [emphasis added]: [4]

> [224] At the time Ms. Bent sent her email, there had already been significant public controversy over the neutrality of experts retained by insurance companies. Although all experts have a duty to act independently and impartially (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 S.C.R. 182, at para. 10), concerns have been raised for many years about experts and assessors who produce selective or misleading reports that "may be the determining factor" in resolving a claim for insurance benefits (*MacDonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669 (Ont. S.C.J.), at para. 100; see also paras. 101-3; *Burwash v. Williams*, 2014 ONSC 6828, at paras. 25-29 (CanLII); *Daggitt v. Campbell*, 2016 ONSC 2742, 131 O.R. (3d) 423, at paras. 27-30).
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> [225] Cunningham A.C.J. summarized the problem as follows in the Ministry of Finance's *Ontario Automobile Insurance Dispute Resolution System Review: Final Report* (2014):
>
> > The problem is obvious. An expert retained by an insurer who supports claimants is unlikely to be retained again. [p. 23]

[4] *Bent v. Platnick*, 2020 SCC 23 (CanLII), <https://canlii.ca/t/j9kjw>

And in *B.J.T. v. J.D.* (2022) [emphasis added]: [5]

> [83] The hearing judge was obliged to consider the objectivity and impartiality of the expert opinion evidence to ascertain both its threshold admissibility and the weight that should ultimately be ascribed to it (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 32; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106). That the expert psychologist was engaged first by the father as a private professional to provide assistance about how to parent and then retained by the Director as a purportedly neutral observer to assist in evaluating the father's abilities to parent, creates the very type of *prima facie* conflict of interest or fear of allied interests that would entitle the hearing judge to assess the impact, if any, this dual relationship had on the admissibility and weight of the expert evidence presented (see N. Bala and J. Thomson, *Expert Evidence and Assessments in Child Welfare Cases* (2015), at pp. 25-26).
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> [84] As the "gatekeeper" of evidence, it was well within the hearing judge's purview to determine the weight to be given to this part of the expert's opinion (*The Queen v. Lupien*, 1969 CanLII 55 (SCC), [1970] S.C.R. 263, at p. 280, see also *White Burgess*, at para. 20). The hearing judge was not required to adopt an "all-or-nothing" approach to the evidence (see *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 266). She observed that the expert was not impartial on this issue and that she was not in a position to offer an informed opinion about the relative merits of each parent's claims because although she had first-hand knowledge of the father's abilities, her appreciation for the grandmother's ability was only second-hand and sourced from the Director. Hence, she was not in a position to undertake a fair and reliable comparative analysis of W.D.'s best interests as between these two parents, and in turn, advance an opinion on his placement. The hearing judge was within her authority to conclude that while the expert's evidence was probative insofar as it spoke to the father's parenting abilities, her evidence merited less weight when she opined on W.D.'s ultimate placement. There is no material error that would allow appellate intervention on this finding and her determination deserved deference.

One notes the significant potential for expert evidence and opinion to cause a miscarriages of justice; the judge's associated obligation to consider admissibility of the expert evidence

[5] *B.J.T. v. J.D.*, 2022 SCC 24 (CanLII), <https://canlii.ca/t/jpkkn>

following the above described two-part test (relevance-necessity and potential deleterious effect); the important role that perceived conflict of interest can play; and the judge's overriding duty not to defer to the expert's opinion rather than carefully evaluate it and its factual basis.

The said overriding duty is succinctly expressed in *White* (at para. 18): "The trier of fact must be able to use its 'informed judgment', not simply decide on the basis of an 'act of faith' in the expert's opinion".

Heightened judicial gatekeeper vigilance is required in constitutional cases about Covid measures

The said significant potential for expert evidence and opinion to cause a miscarriage of justice is exacerbated in constitutional cases about Covid measures because:

i. The violations of fundamental rights go as far as to include structural coercion to receive bodily injections and other medical measures (masking, isolation), and as to limit basic human interactions (gatherings).
ii. The Government side has disproportionate resources and access to proffer experts.
iii. The Government experts are often directly employees or grantees of the Government.
iv. The Government experts are often integral parts of the (local, national and global) permanent multi-institutional "pandemic response" structure, a hammer looking for a nail.
v. There is a large potential for bias arising from the Pharmaceutical profit motive and Pharmaceutical capture of public and private institutions, at every jurisdictional level.
vi. There is an ambient challenge to objectivity, affecting all professional circles, arising from the pandemic-response conditions installed by the Government party, promoted by mass media, and which penetrate the courtroom itself.
vii. There is an ambient challenge to government accountability arising from the concern, fear and panic instilled in the general population by the said pandemic-response conditions.[6]
viii. Much of the underlying basic science is both new and controversial, including: mRNA lipid-capsule vaccines, mechanisms of transmission, testing technology, treatment protocols for intensive care, contact tracing procedures, and comorbidity factors.

[6] In this regard, several studies report increased popularity of governments associated with strong pandemic responses. For example: Merkley, E., Bridgman, A., Loewen, P., Owen, T., Ruths, D., & Zhilin, O. (2020). A Rare Moment of Cross-Partisan Consensus: Elite and Public Response to the COVID-19 Pandemic in Canada. *Canadian Journal of Political Science, 53*(2), 311-318. doi:10.1017/S0008423920000311. https://doi.org/10.1017/S0008423920000311

In particular, the influence of the Pharmaceutical industry is no small challenge to a fair evaluation of the constitutional cases about Covid.

In the words of Harvard Medical School's John Abramson and co-author Barbara Starfield:[7]

> Financial ties between the experts who formulate guidelines and drug companies whose drugs are being considered are not unusual. A study published in *JAMA* shows that 59% of the experts participating in guideline creation have such financial ties.**26** There were no such conflicts of interest disclosed in the July 2004 update of the National Cholesterol Education Program's (NCEP) recommendations for lowering cholesterol with statins published in *Circulation*.**27** Just 1 week after the recommendations were published as conflicts started to appear in the press, the National Institutes of Health (NIH) put the complete list on its website: 8 of the 9 authors had financial ties to statin makers.**28** In December of 2004, Pulitzer Prize winning journalist, David Willman reported in the Los Angeles Times that one of the authors of the NCEP update, a full-time employee of the National Heart, Lung, and Blood Institute (NHLBI) overseeing the formulation of the cholesterol guidelines, received $114,000 in consulting fees from statin makers between 2001 and 2003 in addition to his full-time salary.**29** Willman's article contributed to NIH's adoption of a policy that precludes conflicts of interest among its scientists, but it did not lead to a re-evaluation of the NCEP recommendations.
>
> So what are dedicated clinicians to do? The first step is to give up the illusion that the primary purpose of modern medical research is to improve Americans' health most effectively and efficiently. In our opinion, the primary purpose of commercially funded clinical research is to maximize financial return on investment, not health.

That was in 2005, and not in circumstances of being in the midst of a declared pandemic.

In fact, there is a large current body of research on the undeniable, systemic and demonstrably harmful conflicts of interests in the medical industry and medical establishment.[8] See most recent studies.[9] [10] [11] [12] [13] [14]

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[7] John Abramson, Barbara Starfield. "The Effect of Conflict of Interest on Biomedical Research and Clinical Practice Guidelines: Can We Trust the Evidence in Evidence-Based Medicine?" *The Journal of the American Board of Family Practice* Sep 2005, 18 (5) 414-418; DOI: 10.3122/jabfm.18.5.414; https://www.jabfm.org/content/18/5/414

[8] Nejstgaard CH, Bero L, Hróbjartsson A, Jørgensen AW, Jørgensen KJ, Le M, Lundh A. "Conflicts of interest in clinical guidelines, advisory committee reports, opinion pieces, and narrative reviews: associations with

Likewise, the fact that Government experts "are often integral parts of the (local, national and global) permanent multi-institutional 'pandemic response' structure, a hammer looking for a nail" is a structural source of bias that cannot easily be overestimated.[15] [16]

In addition, the quantitative study of measurable bias of special-knowledge experts testifying in court is now itself an active area of scientific research. This research has shown that — even in cases with no apparent financial or career-advancement conflicts of interest — there is widespread "allegiance bias", "confirmation bias" and "prior-belief bias", including in circumstances in which the expert is merely reporting results from the application of quantitative measures such as codified psychological tests and forensic laboratory results.[17] [18] [19] [20] [21] [22]

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[9] Shai Mulinari, Luc Martinon, Pierre-Alain Jachiet, Piotr Ozieranski. "Pharmaceutical industry self-regulation and non-transparency: country and company level analysis of payments to healthcare professionals in seven European countries". Health Policy, Volume 125, Issue 7, 2021, Pages 915-922, ISSN 0168-8510, https://doi.org/10.1016/j.healthpol.2021.04.015 .

[10] Al Sulais E, Alsahafi M, AlAmeel T. "Undisclosed payments by pharmaceutical manufacturers to authors of inflammatory bowel disease guidelines in the United States". *Saudi J Gastroenterol*. 2021 Nov-Dec;27(6):342-347. doi: 10.4103/sjg.sjg_426_21. PMID: 34755712; PMCID: PMC8656332. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8656332/

[11] Faggion, CM Jr. "Watching the Watchers: A report on the disclosure of potential conflicts of interest by editors and editorial board members of dental journals". *Eur J Oral Sci*. 2021; 129:e12823. https://doi.org/10.1111/eos.12823.

[12] Borysowski, J, Lewis, ACF, Górski, A. "Conflicts of interest in oncology expanded access studies". *Int. J. Cancer*. 2021; 149(10): 1809- 1816. https://doi.org/10.1002/ijc.33733

[13] Zhang, N., Yan, P., Zhao, H., Feng, L., Chu, X., Li, J., Chen, N., Yang, K., Liu, X. "The Impact of Drug Trials With Financial Conflict of Interests on the Meta-analyses: A Meta-epidemiological Study". *International Journal of Health Policy and Management*, 2021; (): -. doi: 10.34172/ijhpm.2021.162. https://dx.doi.org/10.34172/ijhpm.2021.162

[14] Michael P. Hengartner. "Evidence-biased Antidepressant Prescription: Overmedicalisation, Flawed Research, and Conficts of Interest". Palgrave Macmillan, 2022, 354 pages, ISBN 978-3-030-82586-7. https://doi.org/10.1007/978-3-030-82587-4

[15] Torsten Engelbrecht, Claus Köhnlein (2020, 2nd English Edition) "Virus Mania: Corona/COVID-19, Measles, Swine Flu, Cervical Cancer, Avian Flu, SARS, BSE, Hepatitis C, AIDS, Polio, Spanish Flu. How the Medical Industry Continually Invents Epidemics, Making Billion-Dollar Profits At Our Expense". ISBN: 978-3-7519-4253-9. (577 pages, 1,432 footnote references)

[16] Robert F. Kennedy Jr. (2021) "The Real Anthony Fauci: Bill Gates, Big Pharma, and the Global War on Democracy and Public Health". Children's Health Defense. ISBN: 978-1-5107-6680-8. (449 pages, 1,846 footnote references)

[17] Daniel C. Murrie, Marcus T. Boccaccini, Lucy A. Guarnera, Katrina A. Rufino. "Are Forensic Experts Biased by the Side That Retained Them?". *Psychological Science*, 22 August 2013, Volume 24, Issue 10, pages 1889-1897. https://doi.org/10.1177/0956797613481812

[18] Itiel E. Dror (2013) "Practical Solutions to Cognitive and Human Factor Challenges in Forensic Science". *Forensic Science Policy & Management: An International Journal*, 4:3-4, 105-113, DOI: 10.1080/19409044.2014.901437 https://doi.org/10.1080/19409044.2014.901437

While legal circles acknowledge a problem and occasionally discuss tentative methods to mitigate the harm, they generally limit themselves to solely recognizing "allegiance bias" (i.e., allegiance to the party who retains the expert); [23] and they do not approach the overarching structural conflicts of interest that occur in entire fields of activity, such as with the omnipresence of Pharmaceutical influences at every stratum of the medical and public health establishment.

This is the institutional, financial and societal context in which judges receive expert testimony, while not having any formal training in the above-described research on the kinds, extent and impacts of bias with specialized-knowledge experts in different fields.

Nonetheless, given the above-reviewed Supreme Court of Canada directives, trial and application judges carry a heavy burden to ensure that justice is not corrupted by expert testimony tainted by apparent bias and structural conflict of interest.

In circumstances in which technical evidence is determinative of the legal issues, judges must dig deep into understanding both the limits of scientific methods and the sources of bias and of conflict of interest in the given field. They cannot accept expert opinion without appreciating the merit of the purported "facts" on which the opinion is based and the logical reliability of the inferences being advanced by the expert. And they should not admit unbalanced or uncontradicted expert opinion on evolving and unsettled science, in circumstances of likely structural conflict of interest.

In this paper, I find that provincial superior court decisions about breaches of fundamental rights caused by Covid pandemic measures represent miscarriages of justice; and that the vector has been received expert opinion.

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[23] Loïc Welch-Mongeau (2020) "Adversarial Tensions & Alternative Approaches to Expert Testimony", 2020 2-1, *Canadian Journal of Law and Justice*, pages 55-90, 2020 CanLIIDocs 1991, https://canlii.ca/t/sw72

Case analysis: *Taylor v. Newfoundland and Labrador* (2020 NLSC 125)

The first provincial superior court to hear a constitutional challenge about Covid measures in Canada was in Newfoundland and Labrador: *Taylor v. Newfoundland and Labrador* (2020 NLSC 125) ("*Taylor*").[24]

Taylor was influential, and was used and cited in constitutional Covid cases in British Columbia, Manitoba and Ontario, which I review below.

In *Taylor*, the applicant's *Charter* right of movement was found to be violated by the province's travel ban, and the applicant was thus prevented from attending to her mother's funeral. The Canadian Civil Liberties Association intervened for the applicant. The judge found the travel ban to be constitutionally reasonable and justified.

The judge's opening words in the decision are (at para. 1):

> "It is difficult to overstate the global impact of the SARS-CoV-2 virus, known more commonly by the infectious and potentially fatal disease it causes, COVID-19."

This sets the tone for the entire decision, and the similar court decisions that followed.

It is unlikely that the judge had any personal experience about COVID-19. Expressly, he relied exclusively on four (4) unopposed Government experts, such as when he cites expert Wilson as (at para. 62):

> "The first is that this is a <u>novel</u> virus: never before encountered in the world, therefore its biology unclear, no possibility of immunity in any country's population, no vaccine, and no treatments confirmed to be effective. The second is that this has produced a much more severe, complicated, and protracted clinical condition than seen in influenza, <u>with an approximately ten times higher death rate</u>." [emphasis in original and added]

The court dates of hearing were in August 2020, whereas on 17 March 2020 arguably the most renown epidemiologist (cited >450K times),[25] Stanford University's Professor of Medicine John Ioannidis, had already published his first estimate about the virulence of the virus. He reported

[24] *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 (CanLII), <https://canlii.ca/t/j9p6v>
[25] Google Scholar authenticated profile of John P.A. Ioannidis: https://scholar.google.com/citations?user=JiiMY_wAAAAJ&hl

that the case fatality ratio (the "death rate") was possibly lower than that of seasonal influenza, since it could be as low as 0.05%.[26]

Then, on 14 July 2020, Professor Ioannidis published a detailed meta-analysis (based on 36 studies) in which he placed the median infection fatality ratio at 0.24%, and at 0.04% among people <70 years old. These findings were augmented to 61 studies and published in the *Bulletin of the World Health Organization* on 1 October 2020.[27]

But the judge (in *Taylor*) did not have the benefit of a counter expertise and apparently was not told about the research findings of Professor Ioannidis. The said findings would have provided a context in which COVID-19 was quite reasonably comparable in virulence to seasonal influenza.

The Government's expert Janice Fitzgerald is the Chief Medical Officer of Health (CMOH) for Newfoundland and Labrador (paras. 90-91): the judge states that "In addition to her own expertise" "she relies on expertise from outside the office" from several sources. However, the court's decision does not specify what "her own expertise" might be. In fact, according to the public records of the College of Physicians and Surgeons of Newfoundland and Labrador,[28] Dr. Janice Fitzgerald (Licence Number F 05114) is an MD solely certified in "family medicine" and does not have education or specialty certification in the medical field of public health. She is not registered as having the "Public Health and Preventive Medicine" specialization regulated by the Royal College of Physicians and Surgeons of Canada,[29] normally held by public health officers.

As far as this author can see, Dr. Fitzgerald does not have relevant educational, research or certification expertise. She relayed hearsay evidence about the opinions of unspecified external experts that were not proffered before the court. Yet, the judge relies heavily and critically on the said hearsay provided by Dr. Fitzgerald (paras. 434-435, 478-479, 480-482, 486).

In *Taylor*, the judge described the harm that the travel ban sought to prevent as follows (para. 410):

> [410] The nature of the harm caused by COVID-19 is unfortunately all too real. It is a severe acute respiratory illness that has killed close to a million persons globally and almost 10,000 in Canada alone, and the number continues to rise.[101]=[Fitzgerald Affidavit] Dr. Wilson

[26] John P.A. Ioannidis. (17 march 2020) "A fiasco in the making? As the coronavirus pandemic takes hold, we are making decisions without reliable data". *STAT*. https://www.statnews.com/2020/03/17/a-fiasco-in-the-making-as-the-coronavirus-pandemic-takes-hold-we-are-making-decisions-without-reliable-data/

[27] John P.A. Ioannidis. (14 July 2020) "The infection fatality rate of COVID-19 inferred from seroprevalence data". *medRxiv* 2020.05.13.20101253; doi: https://doi.org/10.1101/2020.05.13.20101253 . Now published in *Bulletin of the World Health Organization* doi: 10.2471/BLT.20.265892 (using 61 studies).

[28] https://cpsnl.ca/physician-search/ (accessed on 20 September 2022).

[29] https://www.royalcollege.ca/rcsite/documents/credential-exams/per-application-form-public-health-preventive-medicine-e.pdf (accessed on 20 September 2022).

> explained, as did Dr. Fitzgerald, that there are characteristics which increase the complexity of public health decision making in the case of COVID-19. It is a novel virus with no known cure, effective treatment or vaccine, and the illness caused by it is far more severe than seen in influenza. Infected, but asymptomatic persons, may unwittingly infect others. [emphasis added]

With respect, if the harm caused by a severe illness during a pandemic were "all too real", meriting the draconian response described in the decision (para. 470), then the court would not need experts to gauge said harm, and any expert evidence would be definitive rather than contradicted by arguably the world's top epidemiologist (Ioannidis); among other problems too numerous to outline. Here is said para. 470:

> [470] By the end of April 2020 the travel restriction was one of a number of special measures implemented by the CMOH in an effort to arrest the spread of COVID-19. The province was, at that time, in a virtual state of lockdown with the closure of institutions, and non-essential business. With few exceptions individuals entering the province were required to self-isolate for 14 days. Enhanced testing for COVID-19 was available to those with symptoms of the disease. Social distancing of six feet was, and remains the rule. Public health officials employed contact tracing as a means of tracking the infection in the population.

Even if said harm were admitted, was the court presented any logically reliable evidence that a travel ban would save lives or prevent illness? The answer is no.

The Government's own evidence is that:

> [104] Due to the sudden onset of COVID-19 there is currently a sparsity of peer-reviewed scientific literature and medical publications which specifically address the effectiveness of travel restrictions in curtailing this disease[68]=[Fitzgerald Affidavit, at para. 82. The work of Dr. Rahman and the predictive analytics team stands as an exception in this jurisdiction.]. There are several studies which suggest that the exportation of the disease from China was curtailed by travel restrictions, giving health systems time to prepare and respond. A study out of Europe showed a faster spread across Europe with unconstrained travel.[69]=[Fitzgerald Affidavit, at para. 83.]

In fact, at the time of the court hearing both declared respiratory disease pandemics and frequent airplane travel had been around for a long time, and there has never been an empirical demonstration that banning cross border travel prevented deaths.

With respect, the court's comment that "The work of Dr. Rahman and the predictive analytics team stands as an exception in this jurisdiction" is a misconception. The work of the Government's expert Rahman, described at length in the court decision (paras. 77-89), is a theoretical modelling exercise, without any independent validation.

All such models had already been shown to be grossly unreliable at the time of the court hearing. In the words of Professor Ioannidis and co-authors:[30]

> "Epidemic forecasting has a dubious track-record, and its failures became more prominent with COVID-19. Poor data input, wrong modeling assumptions, high sensitivity of estimates, lack of incorporation of epidemiological features, poor past evidence on effects of available interventions, lack of transparency, errors, lack of determinacy, consideration of only one or a few dimensions of the problem at hand, lack of expertise in crucial disciplines, groupthink and bandwagon effects, and selective reporting are some of the causes of these failures. Nevertheless, epidemic forecasting is unlikely to be abandoned. …"

In *Taylor*, the judge did not have the benefit of any counter expertise, and apparently did not probe or care to appreciate the theoretical nature of the exercises undertaken by Dr. Rahman.

The judge went on to rely on the as-received opinions of Dr. Rahman at critical junctures in his decision: paras. 431-432, 442-451. The judge assimilated the model results to empirical evidence (para. 442).

One paragraph deserves special attention:

> [448] While the Respondents bear the onus, no evidence has been adduced to counter this conclusion, nor to impugn the methodology of Dr. Rahman and the predicative analytics group. The Applicants simply point to the number of exemptions in support of the argument that there is no rational connection between the travel restriction and spread of COVID-19. This argument is speculative and contrary to the modelling evidence.

This is a remarkable judicial twist. The judge, having explained at length that the models of Dr. Rahman "predict" that even very few introduced infectious individuals can lead to significant negative consequences (paras. 431-432, 443-447), goes on to state that "The Applicants simply

[30] Ioannidis JPA, Cripps S, Tanner MA. "Forecasting for COVID-19 has failed". *Int J Forecast.* 2022 Apr-Jun;38(2):423-438. doi: 10.1016/j.ijforecast.2020.08.004. Epub 2020 Aug 25. PMID: 32863495; PMCID: PMC7447267. https://doi.org/10.1016/j.ijforecast.2020.08.004

point to the number of exemptions in support of the argument that there is no rational connection between the travel restriction and spread of COVID-19." Further, the judge takes the known number of travel-ban exceptions to be "speculative" while the theoretical modeling results are "evidence": "This argument is speculative and contrary to the modelling evidence."

This author has the definite impression that the topics of "uncertainty" and "error estimation" never came up in discussing the theoretical modelling results. Even in the absence of any counter expertise, these questions are a matter of logical evaluation, and are central to any evaluation of "inference" from starting assumptions, irrespective of questioning said starting assumptions (input parameters).

Finally, the judge concludes:

> [451] Based on the evidentiary record, and the uncontradicted evidence of Dr. Rahman, in particular, it is beyond argument that travel restriction is an effective means for reducing the spread of COVID-19 in Newfoundland and Labrador. The travel restriction is rationally connected to its objective.

In addition to the palpable structural bias of the unopposed Government's experts, we have the court's endorsement and application of a so-called and ill-defined "precautionary principle" (paras. 60, 67, 411, 467, 468). Specifically [emphasis added]:

> [467] I am reminded at this juncture of the evidence of Dr. Wilson and the precautionary principle in public health decision making. In the context of the COVID-19 pandemic, with the prospect of serious illness or death, the margin for error is small. In such a circumstance, the public health response is to err on the side of caution until further confirmatory evidence becomes available; the precautionary principle. Applying public health measures across the population is often a more effective means than trying to target smaller at risk sub groups. "Public health goals are rarely achieved through single actions or simple tools. A range of mechanism may be employed, depending on the health problem and context."[117]
>
> [468] Dr. Wilson concluded her report:
>
> Intervening at a population level to address an important public health problem is rarely a simple prospect, usually requires multiple approaches, and may simultaneously be perceived as too much or too little by different sections of society. However, the more serious the consequences of under-reaction, the more that decision-making is likely to be driven by the precautionary principle: in the absence of clear evidence, use best judgement to prevent potential harm.[118]

Contrary to statements in *Taylor*, such insistence on a "precautionary principle" is an overriding admission that the evidentiary basis for the intervention is less than certain.

The particular "precautionary principle" that is advanced by the expert and accepted by the court (para. 468) appears to be one where "the more serious the postulated or apprehended presumably impending negative consequences, irrespective of how little you actually know, the less you need to know to justify your intended or 'best judgement' measures".

With this "precautionary principle", one need only be "very concerned" to justify acting in ignorance. With this "precautionary principle", no lack of knowledge about efficacy of the intended measures is an impediment to imposing said measures.

Another troublesome characteristic of the particular "precautionary principle" is that there is no mention of consideration of the uncertain medical harm that could arise from imposing the measures. This "precautionary principle", as it is described in *Taylor*, is a one-way justification for action. Uncertain harm from inaction is weighted 100, whereas harm from action is not on the radar.

Such a "precautionary principle" constitutes irresponsible risk management because many public health measures have a known potential to cause significant medical harm, including death. This was vividly evident in the isolation of the elderly and disabled, and in the over-treatment (mechanical ventilators) of patients in intensive care, during Covid.

On the contrary, the "precautionary principle" that is generally accepted is a two-sided risk management strategy, not a blanket justification for action in an evidence-poor context: see the highly cited study by Kriebel et al.[31]

In fact, at its root, and in much of the world, the precautionary principle stands for an onus on governments to obtain evidence of minimal harm from the intended measures, and inaction until this evidentiary burden is satisfied. Here is the European Union definition of the precautionary principle:[32]

> The precautionary principle is an approach to risk management, where, if it is possible that a given policy or action might cause harm to the public or the environment and if there is still no scientific agreement on the issue, the policy or action in question should not be carried out. However, the policy or action may be reviewed when more scientific

[31] D Kriebel, J Tickner, P Epstein, J Lemons, R Levins, E L Loechler, M Quinn, R Rudel, T Schettler, and M Stoto. (2001) "The precautionary principle in environmental science". *Environmental Health Perspectives* 109:9 CID: https://doi.org/10.1289/ehp.01109871

[32] "Precautionary principle". *EUR-Lex*. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:precautionary_principle

> information becomes available. The principle is set out in Article 191 of the Treaty on the Functioning of the European Union (TFEU).
>
> The concept of the precautionary principle was first set out in a European Commission communication adopted in February 2000, which defined the concept and envisaged how it would be applied.
>
> The precautionary principle may only be invoked if there is a potential risk and may not be used to justify arbitrary decisions.

In medicine, this has historically been called "First do no harm".

In *Taylor*, the judge relies on *Harper v. Canada* to justify making a ruling (about s. 1 of the *Charter*) in an absence of evidence about the postulated harm to be avoided:

> [405] In *Harper v. Canada (Attorney General),* 2004 SCC 33 Justice Bastarache observed that the "legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case" (*Harper*, at para. 77). In the absence of determinative scientific evidence the Court is entitled to rely on logic, reason and the application of common sense to what is known (*Harper*, at para. 78).

The problem in *Taylor*, however, is that the judge did not apply judicial circumspection to first question "what is known", but instead took the as-received unopposed opinions of four (4) Government's experts to be "what is known" about the declared pandemic.

Regarding "the type of proof that a court will require of the legislature to justify its measures under s. 1" (para. 407), the judge again took the as-received unopposed opinions of the four (4) Government's experts to constitute said proof.

The judge expresses that "the means chosen must impair as little as possible the right or freedom in question" (para. 423), yet in the ruling the judge fails to mention, consider or acknowledge that, given the many existing regulatory exemptions to the cross-border travel ban (para. 483), it would have been easy to add "attending the death or funeral of a parent, grandparent or child". Here is said para. 483:

> [483] In continuing the least drastic means analysis I observe that the travel restriction did not impose a blanket ban on all travel, but admitted of exemptions. These included residents of Newfoundland and Labrador, certain asymptomatic workers, those requiring the support of family or to care for family members, those permanently

relocating to the province, completing a contract or education, and complying with custody, access or adoption, for example.[125]

In this author's view, another worrisome aspect of *Taylor* is the judge's express deference to the Government's experts and to the Government's position (paras. 456-464) [emphasis added]:

> [458] To this I would add that the courts do not have the specialized expertise to second guess the decisions of public health officials.
>
> [459] In the context of the COVID-19 pandemic Chief Justice Roberts of the Supreme Court of the United States, for the majority, had the following to say regarding deference and the role of the judiciary (*South Bay United Pentecostal Church et al v. Gavin Newsom, Governor of California, et al.,* No. 19A1044 (USSC) at p. 2):
>
> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those official "undertake [ ] to act in area fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).
>
> …
> [463] I accept the Applicant's argument that the pandemic is not a magic wand which can be waved to make constitutional rights disappear and that the decision of the CMOH is not immunized from review.
>
> [464] However, it is not an abdication of the court's responsibility to afford the CMOH an appropriate measure of deference in recognition of (1) the expertise of her office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that the CMOH, and those in support of that office, face a formidable challenge under difficult circumstances.

This amounts to the absurd propositions in which authoritative expertise trumps judicial circumspection of facts or absence of facts; in which government-declared ignorance is a free pass for "broad latitude"; and in which a government-declared "formidable challenge" justifies any response that will be sufficiently tolerated by the public.

Following this prescription, it is difficult to see how the courts can play a significant role in protecting the public's fundamental rights against government abuse of power when the government, with a near-monopoly on authoritative expertise, decides to scream "Fire!"

In summary, in this author's view, *Taylor* is invalid, among other reasons, because of jurisdictional errors of law:

i. The judge denied his jurisdiction by not applying the *White* directive for admissibility of expert testimony, in which the deleterious effects of admitting said testimony are analysed (*White*, para. 24, above). There is not one iota of an indication in the decision that the judge made any consideration of said directive.
ii. The judge denied his jurisdiction by deferring to the experts' opinions rather than carefully evaluate them (*White*, para. 17, above), and did not maintain the ability to critically assess the evidence (*Bingley*, para. 13, above). The judge did not use his "informed judgment", but simply decided on the basis of an "act of faith" in the Government's experts' opinions (*White*, para. 18, above).

Case analysis: *Gateway Bible Baptist Church et al. v. Manitoba et al.* (2021 MBQB 219)

An early favourable citation of *Taylor* was made in the superior court in Manitoba, which was a constitutional case about Covid measures: *Gateway Bible Baptist Church et al. v. Manitoba et al.* (2021 MBQB 219) ("*Gateway*").[33]

In *Gateway*, Covid rules about private and public gatherings limited the *Charter* freedoms of religion, expression and peaceful assembly.

The significance of *Gateway* is expressed at its para. 48:

> [48] The adjudication on this application (taking place as it does in the midst of a pandemic) represents one of the first cases in Canada where the constitutional challenge to the public health restrictions is accompanied by full and corresponding evidence challenging and attacking the science upon which the government in question (in this case Manitoba) relies. As such, it behooves this Court to ensure that

[33] *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219 (CanLII), <https://canlii.ca/t/jk2rp>

> while obviously summarized, as complete an account as possible of the evidence and the related positions of the parties is outlined. In this way, while my related and relevant legal determinations will be seen to dispose of the constitutional issues before me, they will also be seen as a purposeful consideration but ultimately, a clear rejection of much of what the applicants submit as their foundational challenge to the science upon which Manitoba has relied and acted. [emphasis added]

The judge in *Gateway* explains his approach to conflicting scientific positions in para. 50, while not referring to any case law in support of his novel approach:

> [50] Having observed, listened to and re-examined the totality of the evidence (and the submissions of the parties in respect of that evidence) it is my view that this is not a case where stark, zero-sum determinative findings of credibility need or will be made to rationalize divergent positions based on differing views and interpretations of what some say is the evolving scientific information. In other words, where, for example, the applicants' experts' evidence challenges Manitoba's experts on their interpretation of the science, absent a clear determination that the science that Manitoba's experts rely upon is wrong (a determination which I most definitely do not make), the determinative and salient question is not which experts do I completely accept or reject based on credibility or otherwise. Rather, to the extent differences in the expert evidence exists, the real question in the context of the issues that have been pled — particularly in relation to Manitoba's s. 1 defence — is whether there is nonetheless, a sufficiently sound and credible evidentiary basis (even in light of any opposing evidence) for Manitoba's claim that the limitations and restrictions placed on certain fundamental freedoms represent valid policy approaches which are reasonably justified and constitutionally defensible in Canada's free and democratic society. Put differently, after a review of any contrary scientific evidence and challenge, does there nonetheless remain a credible evidentiary record that supports Manitoba's position that any restrictions on the identified fundamental freedoms are rationally connected, minimally impairing and reasonable and proportionate public health policy choices vis-à-vis what are acknowledged and conceded to be, Manitoba's pressing and substantial public health objectives? [emphasis added]

The present author does not know how to interpret this judicial construct (para. 50) except as follows:

i. "There are diametrically opposite positions about the underlying science used to justify the impugned Covid measures.

ii. I will not resolve these contradictions by differentiating the credibilities and qualifications of the opposing experts, or otherwise.
iii. Instead, I will look at whether the opinions of the Government's experts make sense to me, where it does not appear to me that said opinions are clearly wrong.
iv. If I find that the opinions of the Government's experts make sense to me, then that will be enough to justify the Covid measures."

In this approach, critique at the heart of the underlying science advanced to justify infringing or denying fundamental rights is irrelevant, as long as the Government's experts tell a good story.

In my view, para. 50 of *Gateway* means that the judge is denying his jurisdiction both: (1) to decide difficult questions of admissibility (including deleterious effects of admitting the expert evidence), and (2) to decide which determinative opposing expert evidence or opinion is objectively more likely to be correct, irrespective of the side bringing it.

The judge expressly builds-in strong judicial bias to accept the scientific opinions proffered by the Government, irrespective of opposite expert opinion.

The scientific positions are clearly opposite, and clearly at the heart of the question of justification for the enacted measures: see *Gateway* paras. 85-87, 284-285.

The problem is that in science opposite or incompatible interpretations of the same phenomenon cannot both be correct. At least one must be objectively wrong. It's not like law where opposing sides can both make different but valid arguments that both have some merit.

The judge's approach summarized in para. 50 of *Gateway* is reaffirmed and detailed further as follows (paras. 197-200) [emphasis added]:

> [197] Given my findings and determinations clearly set out in the analysis section of this judgment (commencing at paragraph 203), in presenting the above highlights of the cross-examinations, I have commented upon the witnesses' evidence and the challenge to their evidence selectively and only where obviously necessary to understand and support the basis for my findings and determinations made in the context of my legal analysis. <u>As has already been noted and will be further explained later in my analysis, in most instances, where differences in the expert evidence exists, those differences and the evidence underlying those differences do not sufficiently persuade me that the supporting evidence that Manitoba invokes for its position is, in the final analysis, lacking in reliability, credibility or cogency</u> such so as to compromise its s. 1 defence. Indeed, on an "all things considered" assessment of the evidence, I have no difficulty concluding that even where Manitoba's response to the various waves of the pandemic could be properly criticized in hindsight as too slow and not sufficiently broad,

the restrictions that were eventually imposed represent public health policy choices rooted in a comparatively well-accepted public health consensus. As Dr. Roussin noted, the impugned restrictions were generally consistent with measures seen across most of Canada and the rest of the world.

[198] I appreciate that specific aspects of Manitoba's evidentiary foundation can be parsed and challenged based on what in some cases may be alternative readings or interpretations of the evolving science. That said, in the face of Manitoba's otherwise reliable and credible expert witnesses (an assessment which the cross-examinations did not change), absent a more persuasive and conclusive evidentiary challenge to Manitoba's witnesses and their evidence, the evidence of the applicants and their challenge on cross-examination represent at best, a contrary if not contrarian scientific point of view. While that view and challenge may be deserving of rigorous consideration in the ongoing scientific conversation, as it was presented in this case in the affidavits and on cross-examination, it did not demonstrate or satisfy me that Manitoba has failed to discharge its onus in the context of the s. 1 justificatory framework. Manitoba's position and its supporting expert evidence represent an appropriately "all things considered" reasonable basis for the decisions that it took respecting the restrictions that were ultimately imposed — decisions which I find on the evidence, were made on the basis of credible science.

[199] In different ways, depending upon their role, position or expertise, all of Manitoba's experts have persuasively conveyed and supported the essence of Manitoba's position in this case. It is a position that acknowledges that pandemics are indeed extremely difficult on a population. It is a position that also convincingly contends that COVID-19 has caused serious illness and death, particularly in older adults, but also, in vulnerable populations of all ages. Based on s. 67 of ***The Public Health Act***, the CPHO has been delegated the onerous and formidable task of implementing measures (with the approval of the minister) to prevent or lessen the danger to public health posed by COVID-19. By necessity, these measures will include that which will prevent exponential growth of the virus from overwhelming our limited health care resources, while trying to minimize the hardship and disruption that these restrictions impose on our day-to-day lives. As all the relevant witnesses have acknowledged, it is an awesome challenge to find the requisite balance. Despite some of the contrary evidence and cross-examination, the search for and calibration of that balance is not necessarily amenable to a sterile quantitative metric.

> [200] When I consider the cross-examination of Manitoba's experts as conducted by the applicants, I certainly note and accept those points where valid and reasonable disagreement can be stipulated as it relates to what might still be some of the evolving science. That said, in the absence of convincing evidence of any obvious or definitively faulty science being applied by Manitoba (and in this case, I have seen none), Manitoba's own evidence convinces me that it is on solid ground in its s. 1 defence of measures and restrictions, which I repeat, represent the public health consensus and approach followed across most of Canada and the world.

With respect, in reality there is logically no such thing as "credible science" (para. 198). With incompatible scientific positions there is only demonstrably "incorrect science". Science is practiced by disproving often strongly held positions. In such conflicts, at least one position is objectively incorrect.

In this author's view, if such a said conflict is brought into the courtroom (as is the case) and if its outcome is determinative of the legal challenge (as is the case), then the court must accept its jurisdiction to duly attempt to decide which position is most likely to be most incorrect or baseless. The said jurisdiction to decide does not equate to applying "a sterile quantitative metric" (para. 199). Rather, it is at the heart of the court's duty. Otherwise, the legal exercise is reduced to evaluating relative "status" of the parties in deciding who to believe. The Government is allowed to interfere with fundamental rights without demonstrating valid justification, and the constitution itself is circumvented.

Para. 200 of *Gateway* stands for: "This judge will not analyse and decide the scientific contradictions because he does not see the Government science as being obviously and definitively wrong."

The extensive contradictions do not even lead the judge to question whether the Government has met its onus of justification. Instead, the judge asks only whether the Government position is self-consistent and has an appearance of being reasonable, when viewed in isolation from the challenge and without the nuisance of expert claims that it is wrong.

The judge's novel approach in *Gateway* is to place an arbitrarily high and ill-defined threshold for challenging scientific opinions proffered by the Government, thereby denying his jurisdiction to decide between incompatible scientific positions, despite extensive testimony by a large number of experts. This author has found no precedent for the said approach, nor does the judge cite any similar case law.

Like T*aylor*, and citing *Taylor*, *Gateway* emphasizes "not second guessing public health officials" and broad margins given the "deadly and unprecedented pandemic" (paras. 281, 283, 292):

> [292] In the context of this deadly and unprecedented pandemic, I have determined that this is most certainly a case where a margin of appreciation can be afforded to those making decisions quickly and in real time for the benefit of the public good and safety. I say that while recognizing and underscoring that fundamental freedoms do not and ought not to be seen to suddenly disappear in a pandemic and that courts have a specific responsibility to affirm that most obvious of propositions. But just as I recognize that special responsibility of the courts, given the evidence adduced by Manitoba (which I accept as credible and sound), so too must I recognize that the factual underpinnings for managing a pandemic are rooted in mostly scientific and medical matters. Those are matters that fall outside the expertise of courts. Although courts are frequently asked to adjudicate disputes involving aspects of medicine and science, humility and the reliance on credible experts are in such cases, usually required. In other words, where a sufficient evidentiary foundation has been provided in a case like the present, the determination of whether any limits on rights are constitutionally defensible is a determination that should be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence. [emphasis added]

With respect, excusing errors of public health officials based on circumstances is a different question from the rigours of judging a constitutional case in court. A pandemic should not be used as a backdrop to deviate from established legal procedures and standards. There cannot be a larger "margin of appreciation" in determining whether a Government infringement was constitutional, on the basis that a pandemic raged. The infringement was constitutional or it was not, pursuant to the established legal principles.

In summary, in this author's view, *Gateway* is invalid because of jurisdictional and fundamental errors of law:

i. The judge denied his jurisdiction by not applying the *White* directive for admissibility of expert testimony, in which the deleterious effects of admitting said testimony are analysed (*White*, para. 24, above). There is not one iota of an indication in the decision that the judge made any consideration of said directive. Allowing opposing experts is not a remedy.
ii. The judge denied his jurisdiction by deferring to the Government's experts' opinions rather than carefully evaluate them (*White*, para. 17, above), thus did not maintain the ability to critically assess the evidence (*Bingley*, para. 13, above), and by refusing

to judge the relative merits of key opposing and incompatible scientific testimony at the heart of the constitutional challenge. The judge did not use his "informed judgment", but simply decided on the basis of an "act of faith" in the Government's experts' opinions (*White*, para. 18, above).

iii. The judge denied the applicants their natural justice rights by not judging their expert evidence, and by building-in judicial bias against their experts.

Case analysis: *Ontario v. Trinity Bible Chapel et al.* (2022 ONSC 1344)

A recent case in Ontario, which adopted the novel approach used in *Gateway* of not deciding between incompatible scientific positions key to the legal issue is: *Ontario v. Trinity Bible Chapel et al.* (2022 ONSC 1344) ("*Trinity*").[34]

The approach in *Trinity* of denying jurisdiction to discern pivotal opposite scientific evidence is a carbon copy of what was done in *Gateway*. Here are relevant passages from *Trinity* (paras. 6.1, 39-40, 142-143) [emphasis added]:

> [6] At the outset, I offer the following observations:
> 1. **Scientific Debate:** Various affidavits were filed on this hearing, including evidence from medical experts. <u>These experts disagree on several points, including the extent to which Covid-19 posed an unprecedented threat to public health, the extent to which the virus can be transmitted outdoors</u>, and the extent to which religious gatherings pose a greater risk of transmission than retail settings. <u>My role is not that of an armchair epidemiologist. I am neither equipped nor inclined to resolve scientific debates and controversy surrounding Covid-19. The question before me is not whether certain experts are right or wrong. The question is whether it was open to Ontario to act as it did, and whether there was scientific support for the precautionary measures that were taken</u>. [bold type in original]
> […]
>
> [39] <u>Various experts offered opinions on Covid-19 in affidavits and in cross-examination. There are differences of opinion on core issues.</u> Ontario relies primarily on the evidence of Dr. McKeown, Associate Chief Medical Officer of Health, who advised Ontario on its prevention strategy during the pandemic, and Dr. Hodge, a physician who practices public health and preventative medicine. Ontario also tendered an affidavit from Dr. Chagla. The moving parties rely on the evidence of Dr. Warren, an infectious diseases consultant and medical

[34] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 (CanLII), <https://canlii.ca/t/jmp9d>

> microbiologist, and the evidence of Dr. Schabas, a doctor specializing in internal medicine and in public health. The moving parties also rely on evidence given by Dr. Chagla in his cross-examination.
>
> [40] I will summarize the key points made by the experts, beginning with Ontario's evidence and then turning to that of the moving parties. As noted earlier, it is not my role to choose between dueling experts on the science of Covid-19. The question is whether it was reasonable for Ontario to do what it did, on the basis of the evidence available to it at the relevant time. The views expressed by Dr. McKeown and Dr. Hodge best reflect what was known and understood by Ontario when it made its decisions. Therefore, I have set out their evidence in some detail.
>
> [142] The moving parties argue that there is no scientific basis for the measure employed to curb the impact of the pandemic. It is said that Covid-19 is largely comparable to influenza, which also claims many lives each year. The moving parties argue, in essence, that Ontario overreacted to the pandemic, imposing measures that were far more restrictive than was dictated by science. As noted above, the moving parties' medical experts saw Covid-19 rather differently than did Ontario's experts.
>
> [143] How does that bear on the constitutional analysis? I have already observed that it is not my task to mediate or resolve conflicting views about Covid-19. Nor is the court to play "Monday morning quarterback" when assessing the science behind Ontario's decisions. I agree with Ontario that "government decisions taken on the basis of imperfect information should not be undermined later with the benefit of hindsight".

In the present author's opinion, such a position is an outright denial of jurisdiction. The purpose of expert evidence is to provide needed technical information and to propose and explain inferences. There must be judicial circumspection and differentiation of opposite, contrary or incompatible scientific positions pivotal to the legal issue; not complete deference to one side, using the pretexts of "complicated" and "pandemic".

If the court cannot decide and concludes irreconcilable uncertainty in the pivotal scientific basis, then I would argue that the Government cannot have met its s. 1 onus of justification. Expressed good intentions should never be a sufficient justification to violate fundamental rights.

It is noteworthy that none of the above decisions (*Taylor*, *Gateway*, *Trinity*) discuss or reference the law of admitting expert evidence, and none of the judges consider or apply the *White* directives to limit deleterious effects of admitting expert evidence.

Conclusion

It is exactly when some are screaming "Fire!" that calm and known procedures must prevail.

In the prominent examples reviewed above, the court lost its bearings and did not adhere to proven safeguards against miscarriages of justice.

The court accepted notions of ●"pandemic virulence", ●"reported rapidly evolving science and circumstances", ●"apparently unintelligible specialized information", and a ●"precautionary principle" that requires government action that may provide medical help or may cause medical harm — in virtually an absence of science about whether the said action helps or harms — as contextual justifications for unprecedented Government measures.

And the court refused the challenge of examining and discerning pivotal opposite, contrary or incompatible specialized evidence, even though it had access to experts having a duty to serve the court.

In each case, the judge did not use his "informed judgment", but simply decided on the basis of an "act of faith" in the Government's experts' opinions.

Complexity is difficult, but it seems to this author that if a judge is unavoidably baffled by contradictory scientific evidence at the heart of the constitutional issue, then he cannot conclude that the Government has met its onus to justify its measures.

In the present author's view, the decisions studied and many like them represent a failure of the justice system in Canada to protect fundamental rights, during what can be considered as the test of Covid (no pun intended).

It is difficult to see how this failure and its negative consequences will be addressed, in time for the next declared global or national emergency. Consequently, many are abandoning hope in the justice system regarding such government campaigns.