REDACTED VERSION
QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2021 SKQB 243**

Date: **2021 09 09**
Docket: DIV 625 of 2012
Judicial Centre: Saskatoon

BETWEEN:

O.M.S.

PETITIONER

- and -

E.J.S.

RESPONDENT

Counsel:

Timothy E. Turple	for the petitioner
Jason R. Brunton	for the respondent

JUDGMENT — MEGAW J.
September 9, 2021

TABLE OF CONTENTS

INTRODUCTION

1. General

[1] The respondent, father, applies for an order authorizing him to proceed to have the parties' 12-year-old daughter vaccinated for Covid-19. The petitioner, mother, opposes the application. This matter began with the father representing himself. Initially he filed very brief materials consisting of the notice of application and his affidavit. The mother responded with considerable materials in opposition including her own affidavit, the affidavits of the paternal grandparents, and affidavits from two medical physicians. The father had by then retained counsel and further materials were filed on his behalf including affidavits from two medical physicians. Further reply materials were filed by the mother, and a reply affidavit was filed by the father. Finally, each side has filed a brief in support of the position they seek to advance.

[2] The application was originally returnable in early June 2021. It was adjourned to permit the parties to complete the evidence they sought to introduce. At the various return dates, direction was provided by the Court to assist in having the

matter proceed on to a hearing. In the course of those directions, an issue of whether the father ought to have sought to vary the existing judgment was dealt with by Turcotte J. That issue has not been raised further and it appears the mother accepts the notice of application is the correct procedure to employ in these circumstances.

[3] When the matter was in chambers in July 2021, I directed that I be seized with the argument of the matter. This step was taken in the interests of getting this matter on for argument in light of the relatively voluminous materials which had been filed and already read. The mother subsequently filed a notice of application to vary the existing parenting plan returnable before me. I advised counsel I was not seized with any matters beyond the present application and any other applications would need to be dealt with in the regular course through chambers.

[4] Argument was held on August 31, 2021. At that time, all matters were reserved for decision. This included not only the decision on the substantive issue but also decisions with respect to the various notices of objection to affidavit evidence, an application to prohibit publication, and the applications to introduce additional materials. The issue of objections to affidavit evidence and the requested publication ban have been dealt with by way of separate judgments rendered. This decision now will resolve the substantive issue and that of granting leave to file additional materials.

[5] I have determined the best interests of this child operate in favour of an order directing that the father shall be entitled to have the child vaccinated for the Covid-19 virus. However, this is to be done in consultation with the child's family physician, Dr. Yatsina and the child's endocrinologist, Dr. Nour, and the parties shall act in accordance with the advice and directions received from these physicians. In the event the parties have difficulty implementing this order, they have leave to return the matter before me upon providing three days' notice.

2. Material Before the Court

[6] As indicated, there is a considerable volume of material filed before the court. The father has filed the following: affidavits of himself sworn May 20, 2021, August 13, 2021, and August 26, 2021; affidavit of Dr. Wong sworn August 13, 2021; affidavit of Dr. Kindrachuk sworn August 13, 2021; and, affidavit of Dr. Yatsina sworn July 8, 2021.

[7] The mother has filed the following: affidavits of herself sworn July 15, 2021, August 6, 2021, and August 24, 2021; affidavits of Dr. Code sworn July 8, 2021 and August 25, 2021; affidavits of Dr. Malthouse sworn July 13, 2021 and August 26, 2021; affidavit of Dr. Keren (Karen) Epstein-Gilboa sworn July 15, 2021; affidavit of H.S. sworn July 15, 2021; and, affidavit of J.S. sworn July 16, 2021.

3. The Supplementary Affidavits of the Parties

[8] The parties sought leave to file additional supplementary affidavits. The petitioner sought leave to file the supplementary affidavits of each of Dr. Malthouse and Dr. Code. She also sought to file her supplementary affidavit sworn August 24, 2021. The respondent sought leave to file his supplementary affidavit sworn August 26, 2021.

[9] Both of the party's additional affidavits seek to place before the Court additional information concerning the spread, or lack thereof, of Covid-19. The parties have each gathered what they describe as statistical information, completed and placed those before the Court in the form of their affidavits. The petitioner has done her own mathematical calculations. The respondent's affidavit also includes some additional

material on the Ministry of Social Services investigation and the three experts retained by the petitioner.

[10] The determination of whether to allow supplementary affidavit material to be filed is discretionary. Generally, the Court's discretion is exercised in the interests of fairness and completeness: fairness with respect to a parties' ability to respond to new matters raised and completeness to ensure the evidentiary record is as complete as possible.

[11] With respect to the affidavits of each of Dr. Code and Dr. Malthouse, I determine to exercise my discretion to allow both of these supplementary affidavits to be filed. Their affidavits can be seen, to some extent, to be a response to issues raised by Dr. Wong in his affidavit. It may be said that Dr. Malthouse's reply goes well beyond such a response. Regardless, in the interest of both fairness and completeness, I determine to permit these affidavits to be filed in this proceeding.

[12] I decline to grant leave with respect to either supplementary affidavit of the parties. I deal firstly with the affidavit of the respondent. Counsel for the Ministry of Social Services had forwarded a letter to the Local Registrar advising the Ministry's file regarding the respondent had been closed. Accordingly, that material is on the court file. The remaining material is of no additional assistance to the Court in view of the issues being faced.

[13] I deal next with the affidavit of the petitioner. The material regarding the tweets by Dr. Wong and Dr. Kindrachuk are of no assistance to the Court in resolving the matters in issue before it. If they are produced to attempt to denigrate these individuals, they are improperly placed in the evidence. The material regarding ongoing

Covid-19 information, and the petitioner's personal calculations, are of no additional assistance to the Court in view of the issues being faced.

BACKGROUND

[14] The parties are the parents of two children but this application deals only with their eldest. She is 12, soon to be 13 and she is their daughter, D. They also have a younger son, but his situation is not the subject of the present application.

[15] A trial was held before Laing J. in 2014 and it was determined the children would reside with the mother and the father would have regular specified parenting time. The mother was to have final decision-making authority with respect to education and medical matters involving the children.

[16] The parties continue to be in conflict regarding the parenting of their children. An incident in 2021 between the father and the daughter raised concerns over the daughter's mental health. It appears the father continues to have a relationship with D. He deposes that matters have largely resolved between he and the daughter. The evidence is such that it appears the parties' relationship with their daughter has regularized and she is seeing both of them pursuant to the parenting arrangements which have been in place.

[17] The mother recounts much information concerning the father's behavior and her concern over his ability, or willingness, to properly monitor the daughter's diabetic condition. She also relays much information regarding the father's personality and anger. The father denies he is behaving inappropriately in any regard with respect to the children.

[18] The mother has commenced an application to alter the parenting plan between the parties. That application will be heard on a later date and is not part of the material now before this Court. That matter will be heard in the usual course once it has been properly served and filed with the Court. Assuming that application proceeds, many, if not all, of the matters the mother has raised in opposition to the father will be considered by the Court in deciding whether the present parenting arrangement ought to be varied. Accordingly, those issues are not before me for decision at this time.

[19] In support of his application to have the child vaccinated, in addition to his own affidavits the father has filed the following affidavits: Dr. Wong, Dr. Kindrachuk, and Dr. Yatsina. It can be concisely stated that Dr. Wong and Dr. Kindrachuk are intimately involved in the Covid-19 pandemic and are strong advocates for all people eligible being vaccinated for this virus. They have filed their *curriculum vitaes* outlining their education, experience, and current work. Dr. Yatsina, as the child's physician, may also be said to favour vaccination.

[20] The mother filed in addition to her own evidence the following affidavits: Dr. Code, Dr. Malthouse, Dr. Epstein-Gilboa, H.S., and J.S. Virtually all of the depositions of H.S. and J.S. have been struck as a result of the notice of objection to affidavit evidence ruling. Dr. Code has made a diagnosis of vaccine toxicity with respect to the child. Dr. Malthouse disputes the safety of the Pfizer vaccine. Dr. Epstein-Gilboa opines the child's views should be adhered to and she should not be compelled to be vaccinated.

[21] The father seeks to have the child vaccinated due to his concerns regarding the Covid-19 virus and its effect on this child. Originally, it appears the father was of the view that due to the child's type 1 diabetic condition she was more at risk should she contract Covid-19. That does not appear to be a correct view in light of the

conclusions of Dr. Nour, the endocrinologist, and Dr. Wong. Regardless, he is concerned about Covid-19 and wants this child vaccinated.

[22] The mother opposes the vaccination of the child, it appears from three fronts. Firstly, she asserts the child has indicated she does not wish to be vaccinated at this time and her voice should be heard. As indicated, the child has been interviewed by Dr. Epstein-Gilboa, a psychotherapist. Dr. Epstein-Gilboa has concluded the child is mature, has endured chronic illness, repeated medical procedures, and repeated fearful incidents. She concludes the child's views should be respected and she should be able to decline to be vaccinated. The deponent also deposes that the risks of the current court case outweigh any benefit to the child to be vaccinated.

[23] Secondly, it appears the mother is asserting, through the evidence of Dr. Code, that the child may have a physical medical condition called vaccine toxicity. While not clear from the material, or the submissions, it appears the mother is taking the position that the child should not be vaccinated due to the conclusion reached by Dr. Code, and she should be eligible for exemption from vaccination as directed by Dr. Code.

[24] Finally, it can reasonably be concluded from the entirety of the material filed, and the submissions advanced that the mother both opposes vaccination generally and questions the accuracy of the various Covid-19 information being disseminated by the health authorities. This can be seen from the affidavit material of Dr. Malthouse together with the materials filed through the mother's brief, the submissions of counsel, and her alliance with the paternal grandparents. The evidence before the Court is that the paternal grandparents are opposed to vaccinations for Covid-19 and have been in contact with and, seemingly working with, the mother in this regard.

[25] Both parties have filed briefs, and through counsel, extensive submissions were made. I will be commenting on specific items raised by the briefs and submissions, together with the evidence filed, in the decision portion of this judgment.

DECISION

1. What the Court Is Not Going to Consider on this Application

[26] Counsel for the mother filed a brief and made oral submissions covering a broad range of issues and information. The submissions appeared to be a mélange of discussion regarding the considerations in the *Divorce Act,* RSC 1985, c 3 (2^{d} Supp) regarding this child, together with argument on the reality of the Covid-19 pandemic, the safety or effectiveness of the Pfizer vaccine, and the ability of the Court to remain unbiased in its consideration of these various issues. While it is not my intention to respond to everything which was raised, it is necessary to respond to some of these matters to both put them in context and dispel any concerns with respect to them.

[27] The mother's brief refers to information from a Dr. Christian, a Robert F. Kennedy, and certain data mined from the internet regarding the Covid-19 situation in the United States. As well, during argument counsel provided two further websites which he sought to have the Court research to discover further Covid-19 information. In the main, it might fairly be observed that all of this information, and much of the other material set forth in that brief and during argument, are put forth to advance argument *contra* Covid-19 as a pandemic, *contra* steps taken by various health authorities to deal with Covid-19, and *contra* both the safety and the efficacy of the Pfizer vaccine.

[28] Perhaps, it could be argued this weight of information is put forth to justify or support the child's decision not to be vaccinated at this time. Of course, she

is just 12 years old and there is no indication any of this myriad of information was either in her mind or voiced by her in support of her position. Rather, it seems apparent this information is placed before the Court to allow a questioning of the entirety of that which is presented through health authorities with respect to Covid-19 to the world. Indeed, the mother's brief contains a reference, stated to be a fact, that the World Health Organization has misled the public with respect to Covid-19 and its effects.

[29] Information, material, statistics, testimonials, and assertions, which are not presented in the form of affidavit material for the Court's consideration are not something which can be considered on this, or any other, chambers application. It may be leave of the Court could be sought to introduce some of these aspects that have not been presented in evidentiary form. No such leave was sought here, and no submissions were received from counsel opposite to allow for a review of the material submitted.

[30] In the judgment which follows, I do not consider any such material which was not set forth in the affidavit material filed, and which has not been determined to be admissible. Accordingly, those matters involving the two named individuals and the internet information/statistics/material, will not be considered by me.

[31] The brief then appears to take a pre-emptive strike at judicial neutrality and absence of bias. It is done under the somewhat difficult moniker of "Elephant in the Courtroom." The reference to Dr. Christian is made in this context. There is also a reference to the comments of Barrington-Foote J.A. in *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112, [2020] 12 WWR 396. It appears both of these references are being made to encourage the Court to have a free discussion on the issue of Covid-19 and vaccinations absent any preconceived beliefs or notions.

[32] The brief goes on to include a section outlining bias in the Court and the applicable test for determining bias. However, this is apparently not being presented in the context of suggesting, much less asserting, there is any reasonable apprehension of bias with the presiding Justice. Indeed, no submissions were raised in any respect in that regard. Rather, it is done apparently in an over-arching attempt to remind the Court it must be impartial and unbiased, and it must permit fulsome discussion of the entirety of Covid-19, its effects, and the safety of the vaccine.

[33] Of course, the Court's function is to determine factual issues based on the evidence that is presented before it. It is then to determine the application of those facts to the legal issues presented in the matter between the parties. The brief appears to be a shot across the bow querying whether courts and judges can ever do that, particularly on this current pandemic issue. To that extent, I regard the comments made to be inappropriate.

[34] In the absence of a suggestion of a reasonable apprehension of bias, it is inappropriate for counsel to admonish the Court on what counsel is concerned the presiding justice may or may not do. Instead, advance the arguments based on the facts and the Court will make a decision accordingly. To query a court's ability to do this ought not be recognized as an argument in the arsenal of counsel.

[35] The brief refers to s. 64 of *The Public Health Act, 1994*, SS 1994, c P-37.1 being the conscientious objection to immunization provision of that legislation. Immunization for Covid-19 is not mandatory pursuant to the Act and accordingly, this provision has no application to the matter before the Court. Why it is included in the materials was not adequately explained. Perhaps it is being suggested the movement of the health authorities to have people vaccinated is equivalent to mandating this be done.

If that is what is being suggested, it is wrong on the plain wording of the legislative provision.

[36] Next, the brief includes a section entitled “International Law.” This is a series of snippets of various items out of Canada which the petitioner apparently seeks to rely upon. The purpose of these various references, in the context of the application before the Court is, at best, opaque. At worst, it is offensive. I explain as follows.

[37] The brief refers to the Nuremberg Code and the Helsinki Declaration, amongst others. In the context of the matter before the Court, I determine none of those extracts have any application. Apparently, they are presented on the premise that the Pfizer vaccine is experimental and therefore cannot be lawfully forced on anyone. While the comments contained in the brief are confusing, I am able to state this is an incorrect statement of both fact and law. I will deal with this in the context of what is before the Court. Suffice it to say at this stage, none of these references are of any application to the matter presently before the Court. The reference to the Nuremberg Code in this context is particularly troubling.

[38] The brief refers to a notice from Transport Canada. During argument counsel resiled from relying on this entry on the basis that the notice referenced had, perhaps coincidentally, subsequently been removed from the Transport Canada website. Putting this suggestion of coincidence aside due to a complete lack of evidence in that regard, what relevance this notice could possibly have to the matters in issue in this litigation was not shown. Regardless of the fact it is apparently no longer on the website, this Court would have given no heed to this reference in the context of this application.

[39] The brief then contains a section regarding pharmaceutical company liability history. The entirety of this section of the brief can be compassionately described as disjointed. Amongst other things, it invites the Court to take judicial notice of the fact Pfizer has a "substantial history of fines and product liability judgments against it."

[40] Quite aside from the logical leap to have a court take judicial notice of seemingly disparate factual events, what is the possible relevance of any of this to the matter before the Court? Is it being suggested Pfizer is in the business of creating dangerous products and this Covid-19 vaccine is one such product? Is it being suggested the Court ought to look askance at anything produced by this manufacturer as a result of this information? None of these conclusions are either logical or tenable and none of this is relevant to that which is before the Court. These items will not be considered further in this decision.

2. What This Application Is Not About

[41] This case is not about whether there is, or has been, a pandemic with respect to the Covid-19 virus. It is also not about whether the numbers with respect to that pandemic are accurate, sufficiently large, or really affect children. It is also not about the safety or the efficacy of the Pfizer vaccine. I will explain these statements in more detail further in this judgment.

[42] This case is also not about governments bullying or forcing citizens to take experimental drugs. It is not about freedom of speech or the lack thereof. And, it is not about the inability of certain individuals to have their points of view heard to their personal satisfaction.

[43] Finally, it is not about either right or left politics. And it is not about society or the Court picking a side in a legitimate ongoing societal debate. In short, it is not about the current health situation and any suggestion it has been politicized. Thus, it is not about the propriety or impropriety of the various levels of government imposing health guidelines, restrictions, masking, or lack of vaccination consequences.

3. What This Application Is About

[44] This application is about only one thing: should this 12-year-old child be ordered to be vaccinated for the Covid-19 virus if she is saying she does not want that to be done and in light of evidence concerning a condition called "vaccine toxicity"? In arriving at the appropriate conclusion on this issue, it will be necessary to make findings of fact based on the evidentiary record that is before the Court. The basis for making these factual determinations is not complicated and will not come as a surprise to those reading these reasons. This despite the fact the petitioner has gone to extreme lengths to attempt to illustrate the entirety of response, and follow up to the Covid-19 pandemic, has been done pursuant to a false narrative and based on false information.

4. Best Interests of the Child

[45] The Court's singular focus on all matters involving children is to do that which is in the child's best interest. Whether that best interest accords with either the mother's or the father's wishes is secondary to this primary goal. While the provisions of the *Divorce Act* have been recently amended to specify the considerations in arriving at this best interests determination, it remains of assistance to review and consider the comments made, for example, in *Prime v Prime*, 2020 SKQB 326:

> **57** In considering those things highlighted by both legislative enactments, it is always of assistance to recall the direction of L'Heureux-Dubé J. in *Young v Young*, [1993] 4 SCR 3 at 84:

> The best interests of the child is not simply the right to be free of demonstrable harm. It is the positive right to the best possible arrangements in the circumstances of the parties. This could not be more clearly indicated than in the report on Family Law, supra, as the Law Reform Commission of Canada begins its recommendations on children and the dissolution of marriage with the following words at p. 63:
>
> > 1. Children should have two fundamental rights when their parents' marriage ends:
> >
> > > (a) the right to social and psychological support by having the most suitable arrangements possible in the circumstances made for their custody, care and upbringing; and
> > >
> > > (b) the right to economic support.

58 In considering the best interests of the children, it is important to remember this is both "fluid and all embracing". In Julien D. Payne & Marilyn A. Payne, *Canadian Family Law*, 8th ed (Toronto: Irwin Law Inc., 2020) the concept is described as follows at 585:

> Pursuant to section 16(1) of the *Divorce Act*, whenever parenting issues arise on or after divorce, whether by way of an original application or an application to vary an existing order, the court must determine the application by reference only to the best interests of the child. And pursuant to section 7.1 of the *Divorce Act*, anyone who has parenting time, decision-making responsibility, or contact must discharge their responsibilities in the best interests of the child. A trial judge is not bound by a prior interim order and has an unfettered discretion to re-examine the facts for the purpose of determining the best interests of the child. The "best interests of a child" criterion does not constitute a denial of a parent's freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*, nor does it contravene equality rights under section 15 of the *Charter*. The "best interests of the child" test has been described as one with an inherent indeterminacy and elasticity. The "best interests of the child" is a fluid and all-embracing concept that encompasses the physical, emotional, intellectual, moral, and social well-being of the child. Section 16(2) of the *Divorce Act* specifically states that in determining the best interests of a child of the marriage in light of the specified factors spelled out in that section, the court shall give primary consideration

> to the child's physical, emotional, and psychological safety, security, and well-being. The court must look not only at the day-today needs of the child but also to the longer-term growth and development of the child. What is in the child's best interests must be examined from the perspective of the child's needs with an assessment of the ability and willingness of each parent to meet those needs. As Baird JA, of the New Brunswick Court of Appeal, has stated: "There are three imperatives that must govern child placement decisions. Those decisions should: safeguard the child's need for continuity of relationships; reflect the child's, not the adult's, sense of time; and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions."
>
> [footnotes omitted]

59 And, I am mindful the determination of the best interests of the children is not based on a picture of perfect parenting by either party. The course of family life is such that specific incidents, which do not actually endanger or adversely affect children, do not impact the final decision. The court must consider the entirety of the situation involving the children. Parents are not expected to be free of mistake or misstep. They are expected to have the best interests of their children in mind. And, they are expected to parent in accordance with these best interests.

60 This case involved some specific instances of complaints regarding parenting and its potential effect on the children. Some, but not all, of those will be discussed in the body of this judgment. However, this is not the type of file where specific instances play a role in determining the best interests of these children. Rather, the best interests will be determined by the totality of the evidence available.

61 I bear in mind the concise comments of the Court of Appeal in *Peterson v Peterson*, 2019 SKCA 76, 30 RFL (8th) 341 [*Peterson*]:

> **35** The wording of s. 16(8) makes it clear that the principal determination to be made in any case involving custody is the best interests of the child: *Van de Perre* [*Perre Van de Perre v Edwards*, 2001 SCC 60, [2001] 2 SCR 1014]. This is reinforced by the governing jurisprudence. "Best interests of the child" is truly the only relevant consideration in making a custody order: *Gordon v Goertz*, [1996] 2 SCR 27 [*Gordon*]; see also *Russell v Russell*, 2018 SKCA 80 at para 15, 16 RFL (8th) 26.

> **36** Determining the best interests of the child requires a child-centered analysis, representing the child's right to the best possible arrangement in the circumstances. While parental interests and claims are entitled to serious consideration, they must be set aside where the welfare of the child demands it: *A.O. v T.E.*, 2016 SKCA 148, 88 RFL (7th) 34.

[46] The *Divorce Act* provides as follows when considering a child's best interests:

> **16** (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
>
> (2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.
>
> (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
>
> (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
>
> (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
>
> (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
>
> (d) the history of care of the child;
>
> (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
>
> (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
>
> (g) any plans for the child's care;

> (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
>
> (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
>
> (j) any family violence and its impact on, among other things,
>
> > (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
> >
> > (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
>
> (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

[47] Again, it is necessary to keep that which is before the Court for resolution in sharp focus: the Court is asked to determine whether there should be an order directing the child be vaccinated. There is much evidence concerning the mother's understanding of the father's historical actions. There is also much evidence given by the mother concerning events in late 2020, when the father was alleged to have kicked the child during an argument, and in July of this year when the child is alleged to have had a depressive episode resulting in possible suicidal ideations and a hospital visit.

[48] The mother has brought a separate application to vary the parenting plan. The determination regarding the father's behaviour, and any effect that ought to have on the parenting of this child, will be determined there. As a result, I determine much of this evidence is of no assistance to the application now before the Court.

[49] The child's professed concern regarding her father will be discussed in these reasons as well the parenting situation over the last several weeks. These assist in determining what is in this child's best interests on this application.

5. Allegations of Family Violence and Recent Incidents Involving This Child

[50] The mother asserts the father has been violent in the past and this should affect what is done on the present application. She also appears to be asserting that in the present Covid-19 context, the father's health measures are "obsessive, excessive and in relation to the children and particularly D., punitive" (paragraph 49 of the petitioner's brief).

[51] I deal firstly with the allegations of historical violence. In the circumstances of this application, I do not view any such allegations or assertions as impacting on the particular decision that is before the Court. Again, those may well have to be considered on any subsequent application looking to change the current parenting arrangement. Except to the extent the actions may impact on D. and her approach to vaccination, I am of the view they should not be considered here.

[52] As indicated the mother alleges the father is being punitive to the child as a result of the protocols he has established during the Covid-19 period. These protocols include limiting non-family members in the house, establishment of a sanitation station, online schooling, testing for Covid-19 if symptoms are shown, and not be in contact with non-vaccinated individuals. I am unable to conclude these measures are either punitive, or for that matter unusual, during the Covid-19 pandemic times. While I will be discussing the Court's ability to take judicial notice of certain facts, the measures to be taken to combat the spread of Covid-19 were well known throughout society and I am unable to conclude any of the father's measures were either unusual or over-bearing.

[53] The petitioner's brief describes the father's measures in this regard as "a severe form of child abuse that is both psychological and emotional" (paragraph 56). Suffice it to say, in light of my conclusion in the preceding paragraph, I reject this rather difficult and over-reaching assertion.

[54] The material relays an incident involving the child and her father in July of this year. That incident resulted in healthcare professional intervention. There was concern because the child was showing signs of wanting to self-harm.

[55] I cannot determine exactly what happened in this incident based on the affidavit material. It is clear the child and father had an argument. He appears to have taken parenting action and the child reacted badly to that.

[56] Since then it appears parenting continues. The incident does not appear to have been repeated. Their relationship appears to continue. Again, this all may warrant further consideration for ongoing parenting. I determine the incident is not such as to affect the single issue before me now.

6. The Child's Needs - Section 16(3)(a)

[57] Under this heading, I look to this specific child's physical needs. I will consider her mental and emotional matters when reviewing her expressed wishes. With respect to physical needs, I must consider her diabetic condition and I must consider those matters raised by Dr. Code in his affidavit material.

[58] With respect to the child's diabetic condition, I cannot conclude that this results in her needing to be treated differently concerning Covid-19 than a non-diabetic child or individual. The father's initial assertion and Dr. Yatsina's deposition to this

effect both appear to be wrong in view of all of the evidence. I observe as well, this aspect was not pursued by counsel for the father in his submissions.

[59] The totality of the evidence appears to allow for the conclusion that the child's type 1 diabetic condition does not place her at any greater risk than any other members of society with respect to the effects of contracting Covid-19. I arrive at this conclusion from a consideration of what has been said by Dr. Nour and what is deposed to by Dr. Wong. As a result, this diabetic condition, in this context, is not something I need consider further.

[60] I next turn to Dr. Code's affidavit and opinion. Dr. Code is an anaesthesiologist and he has previously been a tenured professor at the University of Saskatchewan, College of Medicine. In June of this year, he had a video conference with the child and from that prepared a detailed patient intake. He issued a "vaccine exemption" for this child. He provides the following opinion:

> 11. It is my opinion that [D.] appears to have already suffered from vaccine toxicity issues.

[61] Dr. Wong commented on Dr. Code's opinion and as a result, a reply affidavit was filed. Dr. Code responded with the following:

> 1. In reply to the Affidavit of Alexander Wong sworn August 13, 2021, one of the reasons I identified in my Affidavit that vaccine toxicity is the most likely cause of [D.'s] neurodevelopment delay is my training in integrative medicine with Der. Andrew Wild in 2006 to 2008 and graduation with a fellowship in integrated medicine. The opinion I arrive at was based upon my one-hour interview with [D.] and also, I reviewed the reports from the Saskatoon Kinsmen Children's Centre and was able to identify that the most likely cause of [D.'s] development delays were vaccine induced.
>
> 2. This forms part of the reason that I have prescribed the medical exemption that is Exhibit "C" to my affidavit sworn July 8, 2021.

[62] While I had determined not to strike any of the professional witness' opinions, I did indicate I would decide what weight ought to be ascribed to them. In the case of Dr. Code, for the reasons that follow, I determine to give no weight to the opinions he has expressed and his apparent diagnosis with respect to this child. While I spell out specifically why I determine not to accept this witness' views, I do so with a *proviso* recognition that any concerns in this regard can be dealt with through consultation with the child's family physician and endocrinologist.

[63] Dr. Code deposes to a diagnosis of "possible" vaccine toxicity for this child. He specifically uses the word "possible" thus his thoughts are not definitive, and he has apparently not formed a final conclusion. I am unable to accept his opinion in this matter due to the following.

[64] As a starting point, and rather remarkably, in his first affidavit Dr. Code indicated he obtained the entirety of his information, including medical history, background conditions, and previous treatments, from this child. She is 12 years old. He took what he describes as a detailed patient intake including a comprehensive medical history since birth. All of this during a single one-hour interview. It appears from the affidavit this video interview was conducted solely between Dr. Code and the child.

[65] How a 12-year-old child knows her complete medical history, much less a history from birth, is a mystery calling out for explanation from the professional seeking to rely on this information. There is no explanation provided by Dr. Code. This appears most unusual and without such explanation renders both the information and the opinion suspect.

[66] In addition, it appears Dr. Code spoke to neither this child's mother nor her father regarding the child's medical history. One would have thought that would be essential information gathering for a physician intent on embarking on a possible diagnosis and providing an opinion. At the very least, making these inquiries would ensure the information is complete. Yet it did not occur here. Why that is so is another mystery that could have been explained by a professional witness with the eminent qualifications and experience of Dr. Code.

[67] As well, he did not speak to either the child's family physician or the specialist assisting the child with her diabetic condition. At a minimum, one would have thought the contents of this child's patient files(s) would be required to be reviewed and could provide both important factual and medical information. As well, in the scope of professional services, one would have thought those other medical individuals might be able to provide valuable assistance in ensuring the medical history obtained is both accurate and complete.

[68] To provide but one glaringly obvious concern: is there any possibility Dr. Code's concerns have been previously considered and a diagnosis made? In this context, has the issue of "vaccine toxicity" been considered and either accepted or rejected? The absence of this review leads to a legitimate questioning of the opinion provided.

[69] In his supplementary affidavit, Dr. Code advises he also reviewed reports from the Saskatoon Kinsmen Children's Centre. He did not identify this previously. He does not identify which reports he has reviewed nor what parts of those reports assisted him in arriving at his opinion. As well, he does not append his detailed patient intake form to allow for critical review of what was discussed. I determine that the disclosure

of this paperwork is essential to review and consider that opinion which he proffers properly and intelligently.

[70] Yet further, I note Dr. Code does not identify specifically what he discussed with the child during this one-hour interview. This is, for obvious reasons, of utmost importance in allowing for a critical evaluation of the opinion he has provided.

[71] Finally, I note there is no discussion in the report of any further testing or examination that might be required. It might be nothing is required but that is not stated. The failure to provide this information leads the Court to question the completeness of that which was undertaken by Dr. Code. This is so particularly because the diagnosis is, at best, provisional and based on a possibility. And, it appears the diagnosis was made on incomplete information and in a hasty manner.

[72] For all of these reasons, I decline to accept the opinion of Dr. Code or implement the vaccine exemption he seeks to prescribe. It is difficult to understand how a physician specializing in the area he indicates would conduct an interview with a 12-year-old child and base the entirety of his opinion on such truncated and incomplete information.

[73] And, as indicated at the start of this portion of these reasons, if there is something, anything, to that which is raised by Dr. Code, it can be properly and thoroughly investigated and considered by the child's family physician and specialist. This is the approach suggested by Dr. Wong and it commends itself completely to this situation. Those healthcare professionals who have had direct involvement and treatment of this child, who know her medical history, and have access to her healthcare records, can continue to make the medical judgments they have been making in the best interests of this child.

7. The Child's Views and Preferences - Section 16(3)(e)

[74] This then brings me to a consideration of this child's views and preferences. In this regard, I must consider specifically what the child is alleged to have said, the opinion of Dr. Epstein-Gilboa, and the legal effect of a child's expressed views. I begin with what the child has expressed.

[75] The mother, at paragraph 72 of her July 15, 2021, affidavit states that this child has told her she does not want to receive the Covid-19 vaccine based on information she has received and, apparently, her own research. What information she has received or what research a 12-year-old child could have done is not explained in the affidavit. When these disclosures were made is not spelled out by the mother: are they recent and as a result of the current application?

[76] As a result of the current application, Dr. Keren (Karen) Epstein-Gilboa was retained. She is a registered psychotherapist and registered nurse with post-graduate training in family therapy. Her professional report and opinion are appended to her affidavit.

[77] She was initially consulted by the paternal grandfather and counsel for the mother. The contact with the paternal grandfather consisted of him advising the witness that his son was pressuring the child to be vaccinated against her will. The grandfather indicated he supported his daughter-in-law and the child in opposing the vaccination. The witness than conducted two lengthy interviews with the child and her mother, reviewed "an affidavit" provided by the mother, and a video and a newspaper article featuring the father. She did not interview the father because the child would not consent to that being done. For the majority of the time the child was being interviewed, the mother was present. Dr. Epstein-Gilboa did not obtain the father's consent to engage

in this interview. She does not explain why the lack of consent or any knowledge of the existing order. Neither does she explain anything said by the child regarding the father's involvement.

[78] As a result of her consultation, Dr. Epstein-Gilboa concludes as follows at page 25 of her report:

> …The developmental concepts also seem to suggest that the risks of the current court case is greater than the benefit for this young adolescent. It might be more developmentally appropriate to acknowledge D.S's mature decision making skills and listen to her perspective about and goals for her body. D.S. deserves to be heard, her views respected, her capacities celebrated and her safety guaranteed.

[79] As a result of this background, the mother asserts the child's views are that she does not now wish to be vaccinated and her views must be respected. The father questions whether the child's views are truly her own. Moreover, the father asserts the child's wishes do not simply carry the day on these matters.

[80] In considering the views of a minor when determining that which is in their best interests, I am required to consider what is described as the mature minor doctrine. The parties are agreed that this doctrine is best explained through the words of Abella J. in *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181:

> **75** Priscilla Alderson studied decision making in 8-to 15-year-old London students in order to assess their degree of independence from their parents in light of the *Gillick* decision ("Everyday and medical life choices: decision-making among 8- to 15-year-old school students", in *Children, Medicine and the Law*, p. 445). She found that children were more likely to agree with their parents over having surgery or visiting a doctor than over other decisions, such as what films to watch or friends to spend time with. Alderson also conducted interviews with young people in hospitals. When asked when they

thought they would be entitled to consent to surgery, most simply cited the relevant law:

> Replies on consent to surgery are probably influenced by beliefs about the law, rather than by personal preferences. A frequent reply in the hospital study is, "I'm not allowed to consent to surgery until I'm 16, or 18 or [occasionally] 21". Another response is to equate freedom to make medical decisions with being somehow "grown-up", such as old enough to go out to work or to leave home. "Sixteen" or "18" are therefore common answers, and reveal more about public beliefs than particular youngsters' need or ability. [p. 457]

76 In a separate paper, Alderson argued that social context has a strong influence on children's competency to consent to medical treatment:

> Many factors surround children's consent, and powerfully, often invisibly, influence the child's understanding and decisions. Some of the young patients we met wanted to "be the main decider", others wanted to share in decisions, and others wanted their parents and/or doctors to make decisions for them. Competence is more than a skill, it is a way of relating, and can be understood more clearly when each child's inner qualities are seen within a network of relationships and cultural influences.

("In the genes or in the stars? Children's competence to consent", in *Children, Medicine and the Law*, 549, at p. 553)

77 Moreover, the health or medical status of the adolescent may in itself affect his or her maturity and ability to make maximally autonomous choices, since the ability of an adolescent to provide informed consent may be affected by the chronicity of the illness and by any "discomfort, pain, and malaise" experienced by the young person as a result of his or her condition (Levine, at p. 209).

78 Clearly the factors that may affect an adolescent's ability to exercise *independent*, mature judgment in making maximally autonomous choices are numerous, complex, and difficult to enumerate with any precision. They include "the individual physical, intellectual and psychological maturity of the minor, the minor's lifestyle [and] the nature of the parent-child relationship" (Manitoba Law Reform Commission, *Minors' Consent to Health Care*, p. 32). While it may be relatively easy to test cognitive competence alone, as the social scientific literature shows, it will inevitably be a far more challenging exercise to evaluate the impact of these other types of factors.

> **79** The difficulty and uncertainty involved in assessing maturity has prompted some experts to suggest that children should be entitled to exercise their autonomy only insofar as it does not threaten their life or health. As John Eekelaar remarks:
>
> > We cannot know for certain whether, retrospectively, a person may not regret that some control was not exercised over his immature judgment by persons with greater experience. But could we not say that it is on balance better to subject all persons to this potential inhibition up to a defined age, in case the failure to exercise the restraint unduly prejudices a person's basic or developmental interests?
>
> ("The Emergence of Children's Rights" (1986), 6 *Oxford J. Legal Stud.* 161, at pp. 181-82)
>
> (See also Michael D. A. Freeman, *The Rights and Wrongs of Children* (1983), c. 2; and Fortin, at p. 76.)
>
> *Interpreting Best Interests*
>
> **80** These observations take us back to ss. 25(8) and 25(9) of the *Child and Family Services Act*, and to an interpretive approach to "best interests" that is consistent with international standards, developments in the common law, and the reality of childhood and child protection.
>
> **81** The general purpose of the "best interests" standard is to provide courts with a focus and perspective through which to act on behalf of those who are vulnerable. In contrast, competent adults are assumed to be "the best arbiter[s] of [their] own moral destiny" (Giles R. Scofield, "Is the Medical Ethicist an 'Expert'?" (1994), 3(1) *Bioethics Bulletin* 1, at p. 9), and so are entitled to independently assess and determine their own best interests, regardless of whether others would agree when evaluating the choice from an objective standpoint.
>
> **82** The application of an objective "best interests" standard to infants and very young children is uncontroversial. Mature adolescents, on the other hand, have strong claims to autonomy, but these claims exist in tension with a protective duty on the part of the state that is also justified.

[81] In an earlier decision from this Court, Rothery J. in *Dueck (Re),* [1999] 6 WWR 327 (QL) (Sask QB) set forth the considerations when reviewing whether the child is a mature minor:

> **7** The determination of whether a child is a mature minor must always be made on a case-by-case basis. The relevant factors a court must take into consideration are outlined in *Wilson on Children and the Law* (Toronto: Butterworths, 1994) at para. 5.21:
>
> 1. The child's age and maturity;
>
> 2. The nature and extent of the child's dependency upon her guardians in respect of taking care of herself, making her own decisions, not necessarily requiring living apart and economic self-sufficiency, but those circumstances would likely be sufficient to enable the child to speak independent of her parents so long as the child qua patient like any other patient fully appreciates and understands the consent to specific treatment;
>
> 3. The complexity of the treatment.

[82] All of this leads me to this conclusion: under the doctrine of mature minor, I am required to consider the child's views and assess his or her maturity to form those views against the entire backdrop of the situation. This approach incorporates the requirement under the *Divorce Act* that I consider the child's views commensurate, always, with how those fit into their best interests.

[83] In the case before the Court, there is no reason to conclude D. is anything other than a mature, bright, and capable, young woman. I strongly suspect neither of her parents would disagree with that assessment by the Court. Of course, I have not met her but, regardless, based on the entirety of the information placed before the Court, I am prepared to make this determination.

[84] The background circumstances here raise rather significant concern over the influence others are having over this young person and whether these others are causing her to form her views with respect to the vaccine. I explain this as follows.

[85] It appears the child's paternal grandparents are opposed to the administration of this vaccine. The grandfather made the initial contact with Dr.

Epstein-Gilboa. Why is that so and what influence has he had insofar as the child is concerned? The mother appears similarly to be, at a minimum, skeptical of both Covid-19 and the vaccine. The child lives the majority of the time with the mother. The mother was involved in all of the interviews with this witness in this proceeding. There is a legitimate concern with respect to her influence on the issue of vaccination.

[86] I then turn to the complexity of the issues surrounding Covid-19.

[87] The child refers to what she believes to be an ingredient of the vaccine and that it is experimental. It appears she has been provided with this information. To an extent it echoes that which is said, in part, by Dr. Malthouse.

[88] As indicated, I do not accept this child is speaking independently. That lack of independence calls into question whether the views expressed are truly her own.

[89] This leads me to conclude that in this case, as a result of my conclusions regarding Covid-19 and the vaccination, I cannot simply, in any event, exercising the Court's *parens patriae* jurisdiction, leave the decision in this regard in the hands of a 12 year old. She is, after all, a child. She is 12. She is entitled to expect the ongoing guidance of the adults in her life and she is not entitled on all matters to simply make a decision on her own. This is one of those situations. Her views, as suspect as they may be, do not carry the day here.

[90] In this context I have considered the decision in *Chmiliar v Chmiliar*, 2001 ABQB 525, [2001] 11 WWR 386 [*Chmiliar*]. There, the court directed that a 10-year-old child be vaccinated for meningitis. However, the court determined that the 13-year-old sibling did not have to be vaccinated due to that child's views opposing such a procedure. In the case now before the Court, the mother urges the outcome of this case upon this Court.

[91] In that case, Moen J. made a specific finding as follows:

> **61** I find that the daughter has been so significantly influenced by her mother and has developed such an irrational fear instilled by her mother that she has lost her capacity to make a rational decision in relation to vaccination.
>
> **62** Having found that the daughter has lost the capacity to consent, I must determine what is in the best interests of the daughter at this time for me to order the vaccinations.

[92] Despite this finding, an order was made that the teenager was not compelled to be vaccinated. The basis for the order was as follows:

> **64** Although I do not accept the "evidence" presented by Mrs. Chmiliar, and I am satisfied that there would be no immediate harm to the daughter if she received the vaccines, I am concerned about the fear of vaccinations that Mrs. Chmiliar has inculcated in her daughter.
>
> **65** The vaccinations involved are not required for life or death at this time. Therefore, given that the daughter is so fearful of the consequences of the vaccine, I will not order the vaccinations because on balance, her fear outweighs the benefits at this time. She will be sixteen in three years and has said that she will undertake the rubella vaccine. I am hopeful that she will do so to protect her children. Further, as she matures, I am hopeful that she will come to her own conclusions about her healthcare in a balanced way, not tainted by irrational fear.

[93] I note specifically the finding that the vaccinations were not required for life or death at this time. As a result, the learned judge was prepared to allow non vaccination. I determine that decision ought properly to be confined to its own particular facts. Having found the child to be overly influenced by the mother, it is difficult to reconcile the final decision within the mature minor doctrine. Because it is confined to its own facts, I determine not to follow the result.

[94] In any event, the decision is not binding upon me as it is made by a Superior Court of concurrent jurisdiction in another province. I determine not to follow

it. I hold the view, in today's jurisprudential environment, the *Chmiliar* decision is not correctly decided.

[95] I instead rely upon the insightful comments of Wilkinson J. in *Cates v Kendall*, 2011 SKQB 225, [2011] 12 WWR 185:

> **45** The Abella decision in *A.C. v. Manitoba*, in addressing the law as it relates to children, holds that the general purpose of the "best interests" standard is to provide courts with a focus and perspective through which to act on behalf of those who are vulnerable. The common law has, however, recently abandoned the assumption that all minors lack decision-making capacity, and replaced it with a general recognition that children are entitled to a degree of autonomy reflective of their evolving intelligence and understanding. This is the common law "mature minor" doctrine. The doctrine strives to ensure that young people not be automatically deprived of the right to make decisions affecting their medical treatment. It provides instead that the right to make those decisions varies in accordance with the young person's level of maturity, with the degree to which maturity is scrutinized intensifying in accordance with the severity of the potential consequences of the treatment or of its refusal.
>
> **46** The case canvasses a wide spectrum in terms of cases from within Canada and without. Reference was made to *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All E.R. 402 (H.L.), and Lord Fraser's conclusion that physicians could rely on the instructions of "mature" children. The conclusion rested at least partly on the assumption that there might be circumstances in which a doctor is a better judge than the parents of the medical advice and treatment which would be conducive to a child's welfare (at page 412). The ultimate question was always "what is best in the interests of the [minor] patient. (page 413).
>
> **47** In *Re W (a minor) (medical treatment)*, [1992] 4 All E.R. 627 (C.A.), the English Court of Appeal stressed, however, that while the Court was theoretically empowered to authorize treatment of "*Gillick*-competent" minors under its *parens patriae* jurisdiction, the wishes and objections of a minor would necessarily factor significantly into any assessment of his or her "best interests", with the weight given to such views varying in accordance with the minor's maturity. Accordingly, the proposition is not that a "mature minor" is essentially an adult for medical treatment purposes, but rather that courts must

> give adolescents room to exercise their autonomy to the extent that their maturity allows.
>
> [Emphasis added]

[96] All of this leads me to the conclusion that on the facts of this case, the child's views, while considered, do not decide the issue. There is concern over how much she has been influenced. There is moreover concern over Covid-19 and the need to be vaccinated.

8. Judicial Notice in Covid-19 Cases

[97] The foregoing discussion then brings me to an analysis of the situation in light of the existence of Covid-19 and the vaccine available for immunization from it. The mother has placed evidence before the Court raising skepticism regarding the seriousness of the Covid-19 pandemic, and specifically its seriousness in children. She queries, whether in her own affidavits, the affidavits of Dr. Malthouse, her critiques through counsel of the information of Drs. Wong and Kindrachuk, and of the general tenor of the comments, that the Pfizer vaccine is experimental and dangerous. In other words, either obliquely, or directly, the mother is challenging the prevailing wisdom surrounding all of the health concerns arising from Covid-19.

[98] The father has provided the affidavits of Dr. Wong and Dr. Kindrachuk on the topic of Covid-19 and the vaccination of individuals. Those materials appear in contradistinction to the position being advanced by the mother. These materials exhort the pandemic nature of Covid-19, its health concerns, and the need for all eligible individuals to be vaccinated.

[99] This is not the first vaccination case to come before Canadian courts. It may be one of the first Covid-19 vaccination cases, at least in this jurisdiction, but the

Court has grappled with these very issues before. Indeed, quite recently in Ontario the courts were tasked with certain issues surrounding Covid-19: *B.C.J.B. v E.-R.R.R.*, 2020 ONCJ 438 [*B.C.J.B.*]; *I.S. v J.W.*, 2021 ONSC 1194 [*J.W.*]; *Tarkowski v Lemieux*, 2020 ONCJ 280 [*Lemieux*]. I now move to the consideration of what facts are established before me. Specifically, I will now consider of what I may take judicial notice in these proceeding.

[100] In *B.C.J.B.*, the court confronted head-on the court's need to decide certain factual issues as opposed to being able to take judicial notice of them. I begin with that inquiry in the case before me. The law with respect to the ability to take judicial notice is well known. In this jurisdiction, the most recent leading authority is *R v Cyr*, 2014 SKQB 61, [2014] 6 WWR 566. There, Schwann J. (as she then was) reviews the test as set forth by McLachlin C.J. in *R v Find*, 2001 SCC 32, [2001] 1 SCR 863:

> **48** According to Binnie J., the permissible scope of judicial notice varies according to the nature of the issue under consideration regardless of whether the "fact" involved an adjudicative, legislative or social fact. Particular attention must be paid to the proximity of the fact advanced into evidence to the centre of the controversy. As Binnie J. states:
>
> > 60 ... more stringent proof may be called for of facts that are close to the center of the controversy between the parties (whether social, legislative or adjudicative) as distinguished from background facts at or near the periphery.
> >
> > 61 To put it another way, the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria. ...
>
> **49** While some commentators believe the restrictive "Morgan" criteria set out in Find should be limited to adjudicative facts, Canadian jurisprudence has adopted a more nuanced approach. That is, whatever the type or categorization of fact for which judicial notice is sought, that fact will be given judicial notice only if it meets the criteria set out in Find.

> **50** When dealing with social facts, such as social science research used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case, or legislative facts, the Find criteria remains relevant, but not conclusive (Spence, supra para. 63). At para. 63 of Spence, Binnie J. noted:
>
> > 63 ... Outside the realm of adjudicative fact, the limits of judicial notice are inevitably somewhat elastic. Still, the Morgan criteria will have great weight when the legislative fact or social fact approaches the dispositive issue. ...

[101] In *B.C.J.B.*, Finlayson J. provides explanation of the basis for taking judicial notice of facts:

> **145** According to Sopinka, Lederman and Bryant, "The Law of Evidence in Canada" 5th ed., Toronto: LexisNexis Canada Inc., 2018, at page 1393 (and see also R. v. Williams, [1998] 1 S.C.R. 1128 para 54):
>
> > Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons; or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by a party.
>
> **146** In this case, I have been asked to take judicial notice of both adjudicative facts (namely that vaccines are "safe and beneficial"), to resolve the factual dispute between the parents, and legislative facts to inform the Court's decision-making (namely government policy as reflected in the aforementioned documents and Ontario legislation, surrounding vaccines), as informative to the Court's legal reasoning.
>
> **147** At pages 506-507 of "The Law of Evidence", 7th ed., Toronto: Irwin Law Inc. 2015, Justice Paciocco and Professor Stuesser explain the difference between these kinds of facts:
>
> > It is important to distinguish between taking judicial notice of "adjudicative facts" and "legislative facts". Judicial notice, as outlined, applies to adjudicative facts, which are facts to be determined in the litigation between the parties. Legislative facts are also admitted without the need for proof. However, legislative facts are those that have relevance to legal

> reasoning and the law-making process and involve broad considerations of policy. Legislative facts assist in determining questions of law and are not intended to assist in resolving questions of fact.
>
> **148** Justice Paciocco and Professor Stuesser also discuss a third category, namely "social framework facts" which provide a context for the judge to consider and apply the evidence in a given case. Although some of the cases that counsel supplied me with concern taking judicial notice of this kind of evidence, "social framework facts" are not in issue in this case before me. The facts I am being asked to judicially notice are in the fields of science and medicine, and related government policy.

[102] I adopt and apply the foregoing discussion on judicial notice to the matters before the Court on this application.

[103] In determining whether to take judicial notice of certain matters, the Court must raise this specific issue with counsel to permit submissions to be made and the Court is not to complete its own research in this regard. In *Saskatchewan v Good Spirit School Division No. 204*, 2020 SKCA 34, [2020] 7 WWR 589, the Court stated:

> **107** Contrary to Good Spirit's arguments on this point, a judge is not entitled to take judicial notice of a *fact* unless it is (a) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (b) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: see *R v Find*, 2001 SCC 32 at paras 48-49, [2001] 1 SCR 863. It simply was not open to the trial judge to add to the record without allowing the parties an opportunity to make submissions or to call additional evidence. On this point, see *R v Bornyk*, 2015 BCCA 28 at para 11, 320 CCC (3d) 393, citing *R v Hamilton* (2004), 189 OAC 90 (CA) at paras 67, 68 and 71, in the affirmative.

[104] And in *R v Abramtez*, 2014 SKCA 84, 442 Sask R 86, the Court stated:

> **22** When considering whether a fact is suitable for judicial notice, a judge is not to take his or her personal knowledge into account, or profess to know of the fact, or take steps to acquire knowledge of the fact: see *R v Bland* (1974), 20 CCC (2d) 332 (Ont CA) and *R v Potts* (1982), 134 DLR (3d) 227 (Ont CA).

[105] In the case before the Court, at the hearing of this matter the Court engaged in a discussion with counsel regarding the ability to take judicial notice of certain matters related to Covid-19 and vaccinations. Counsel for the father was prepared to have the Court take such judicial notice while counsel for the mother referred the Court to the comments in the brief that the Court must keep an open mind and consider the evidence tendered. Specifically, the queries posed were whether the Court could consider that there was a Covid-19 pandemic and the taking of a vaccination was protection against acquiring the virus. As well, the Court queried whether judicial notice could be taken that the Pfizer vaccine was safe and effective.

[106] While not dealing with vaccine issues specifically for Covid-19, other courts have considered taking judicial notice of certain Covid-19 issues. In *C.C. v J.B.*, 2021 ONSC 2891, Audet J. was faced with a cross-border child custody dispute and stated:

> **49** I take judicial notice of the fact that Public Health's travel restrictions and quarantine requirements in both Ontario/Canada and Virginia/the U.S. are in a continual state of flux. Presently, the entire province is under a month-long lock-down. As the vaccine roll-out in Ontario and in the United States continues to evolve and the number of confirmed COVID cases vary, it is hoped that these restrictions will slowly abate and we may eventually see a return to some form of normalcy for the summer holidays; however, this is far from certain.

[107] In *R v Morgan*, 2020 ONCA 279, the Covid-19 pandemic was raised with respect to sentencing in the criminal context. The Ontario Court of Appeal stated:

> **8** In our view, it is not necessary to decide whether this court could take judicial notice of the effects of the COVID-19 pandemic to the extent to which the appellant would have us do that. We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.

[108] In *R v S.A.*, 2020 ONSC 2946, the court stated:

> **87** I note that cases like *Jeyakanthan* [*R v Jeyakanthan*, 2020 ONSC 1984] were decided very early on in this pandemic and we know so much more now. The Court of Appeal held in *R v. Morgan*, 2020 ONCA 279, at para. 8, a case involving a sentence appeal, that "it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission". There is as well a decision from the Supreme Court of Canada, *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, where McLachlin C.J. held that a court may "take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (para. 48). In light of these cases I agree with Harris J. in *Rajan* at para. 54 that proof with respect to many COVID-19 factual issues, including the importance of physical distancing, is quintessentially a matter for judicial notice. No evidence need be tendered. Furthermore, now we have in addition the evidence of Dr. Orkin. It is also important to consider the fact that in most if not all of these earlier decisions of this court there were secondary ground concerns which is not the case before me.

[109] The foregoing is not presented as an exhaustive study of cases involving Covid-19 considerations. Rather, it is presented to illustrate the various courts' preparedness to take judicial notice of matters involving this virus and the pandemic the country has been experiencing for the last number of months.

[110] This then brings me to *B.C.J.B.* In considering a vaccine issue, albeit not for Covid-19, following an extensive review of the law, Finlayson J. concluded as follows:

> **186** In summary, I am prepared to take notice of the following adjudicative facts. Ontario's publicly funded vaccines are safe and effective at preventing vaccine preventable diseases. Their widespread use has led to severe reductions or eradication of incidents of these diseases in our society.

187 I take judicial notice of the harm to a child, flowing from contracting a vaccine preventable disease, may even include death.

188 I find these facts to be so notorious as not to be the subject of dispute among reasonable persons. They are also capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.

189 I appreciate that I am taking judicial notice of scientific facts. In so doing, I have had resort to the vaccine cases. I note that the cases have included medical evidence from family doctors, pediatricians, immunologists, and pediatric infectious diseases specialists. But I do not rely on any particular statement made by an expert in any particular case to take judicial notice. Rather the case law, read as a whole, reflects the reality there is no debate in the medical community about the facts about which I am prepared to take judicial notice. So do the documents from the governments of Ontario and Canada that the father supplied to the Court.

190 I find I am unable to take judicial notice that this particular child has no health conditions that contraindicate vaccinations. Based on my review of the case law, what will be required by way of evidence on this point for most children, will normally not be onerous. In some cases, even the failure of the parent opposing the vaccines to place any admissible evidence on this point before the Court, was dispositive. But out of an abundance of caution, in most cases something like a simple letter from a family doctor will normally suffice. In this case before me, there is more than ample medical evidence for the Court to make the specific finding about B.R.M.R. I deal with that below.

191 Regarding legislative facts, I am prepared to take judicial notice of the policy reflected in the "Immunization 2020" document and the documents from the government of Canada. Canada and Ontario have a coordinated immunization strategy in the interest of public safety. These include sophisticated delivery systems, oversight and vaccine safety monitoring and compliance measures. The *Immunization of School Pupils Act* is part of Ontario's public health strategy.

192 These documents reveal that government policy, at all levels, supports the widespread use vaccination to promote individual health and public safety. I note that various vaccine decisions have taken judicial notice of government policy. While these facts are not an "adjudicative facts", they inform how the Court should apply the best interests test in this particular case. Government policy supports an application of the best interests test that encourages good science-based health decision-making for children, when it comes to vaccines.

> **193** Although these facts about which I am prepared to take judicial notice are very informative, none of them are dispositive to the precise issue before the Court. Nevertheless, even on the strictest approach to judicial notice, I believe that the facts are within the purview of the Court to judicially notice. And if I am wrong to take judicial notice of these facts, then I would fall back on the medical evidence before the Court. That too, would lead me to the same order that I intend to make.

[111] The analysis completed by Finlayson J. has been approved of in *J.W.* at paras 182-183, and *A.P. v L.K.*, 2021 ONSC 150. In the later decision, Akbarali J. stated:

> **186** I agree with Finlayson J.'s thorough analysis. The facts of which he determined a court may take judicial notice encompass, and go farther than, those urged by the intervener. I agree with the intervener that both the public documents exception and taking judicial notice of these facts promote access to justice and the primary objective of the *Family Law Rules*. This is so because these evidentiary rules allow a court to deal with questions about vaccinations without putting litigants to the time and expense of proving the safety and efficacy of vaccines in each individual case where the issue may arise, enabling the parties and the court to focus their resources on what must be the heart of the question at issue: whether it is in the best interest of the child who is the focus of the proceeding to be vaccinated.

[112] Applying that background to the matter before the Court, I conclude that I am able to take judicial notice of certain facts in the case before me. Firstly, I am able to conclude, without the necessity of specific proof, that Canada, and Saskatchewan in particular, have been in a Covid-19 pandemic which has resulted in a number of health and other restrictions being imposed to control the spread of the virus. Secondly, I am able to conclude without the necessity of any specific proof that the possibility of contracting the Covid-19 virus poses a serious and significant health risk to people generally, including children and adults.

[113] Finally, and perhaps most directly relevant to the matters before the Court here, I conclude I am able to take judicial notice that the Pfizer Covid-19 vaccination is

safe and effective for use in people, including both adults and children. I form this conclusion by taking judicial notice of the vaccine approval process in Canada and the approval by the health authorities of this particular vaccine. To argue it is experimental as is put forth by the mother and her supporting affidavits is not in accordance with the general knowledge available regarding this approval process and implementation.

[114] I find these facts "to be so notorious as not to be the subject of dispute among reasonable people" (*B.C.J.B.* at para 188). These facts can be established by assessing sources that cannot reasonably be disputed to be accurate. These include health authority information put forth by Health Canada and the Saskatchewan Health Authority, amongst others.

9. What then is in this Child's Best Interests with Respect to the Administration of the Pfizer Vaccine for Covid-19?

[115] With respect to vaccine cases that have come before the court, it has been stated that almost universally, courts have determined to permit the child to be vaccinated. In *B.C.J.B.* Finlayson J. states:

> **160** There are a number of decisions from Ontario and across Canada about vaccines decided in similar contexts as this case before me. The cases are not only helpful to my determination about where B.R.M.R.'s best interests lie, but also to the judicial notice questions before the Court.
>
> **161** Each of the cases review a parent's prior decision-making about vaccinating his or her child(ren), to determine which parent should be empowered with some form of health decision-making going forward. This issue has been determined, both by way of motion and by way of trial, on initial applications, on variation applications, and also in cases where there were custody terms in written agreements in conflict with the orders the courts were asked to make.
>
> **162** Regardless of the process employed to arrive at a decision (motion versus trial), in all but two cases which I have reviewed, courts have

> consistently and overwhelmingly bestowed decision-making authority over health, or sometimes more narrowly over the health decision of whether to vaccinate a child, upon the parent best able to make an informed decision, based on sound medical advice. The courts in some of these cases have taken judicial notice of various facts relating to vaccines. In almost all of the cases, the parent opposed to vaccinating his or her child, relied on inadmissible junk-science material, internet evidence from questionable sources, biased and misleading information from the so-called "anti-vaccination movement", or even opinion evidence from persons with questionable qualifications to give that opinion in the first place.
>
> **163** Regarding the two cases where in the end result, the children remained not vaccinated, one case turned on the fact that the child was 13, had the capacity to consent to medical treatment, and had developed an unreasonable fear of being vaccinated based on parental influence. I note in that even in that case, however, the Court did order that the younger 10 years'-old sibling of the 13 years'-old child, be vaccinated. The other case is a recent decision of an arbitrator. The facts of that case are not yet fully known in any published decision, due to the confidentiality of the arbitration process. An appeal to the Superior Court is pending. I understand the appeal scheduled to be argued on September 29, 2020. See *A.P. v. L.K.*, 2020 ONSC 5551 para 2.

[116] That court then completes a review of a number of authorities in this regard. I adopt and accept that review. Interestingly, and perhaps most topical to that now before the Court is the case of *Lemieux*. There the court specifically authorized the father to determine the application of vaccines, include a future Covid-19 vaccine.

[117] I have commented on the outlier decision of *Chmiliar*. Finlayson J. also refers to *A.P. v L.K.*, 2019 ONSC 7256 and *A.P. v L.K.*, 2020 ONSC 2520. That decision was then under appeal and a decision in that regard is not available. I decline to apply the reasoning there set forth as the facts are not fully developed and the appeal has not been decided.

[118] I have determined there is nothing before me that satisfies me on a balance of probabilities that this child's health will be compromised by the

administration of the Covid-19 vaccine. In any event, with the manner in which the order is being granted, any health concerns may be the subject of consultation with the family physician and the endocrinologist. This will ensure the child's medical issues are properly and thoroughly considered by those that are most familiar with her and her medical file.

[119] In light of the determinations concerning Covid-19, its effects, and the need to be vaccinated to avoid these effects, I determine it is in the child's best interests to have the Pfizer Covid-19 vaccine administered forthwith.

[120] This is so because she must have the ability to avoid contracting the virus. The most efficacious way that is done at this time is through the administration of the vaccine. The adverse and serious health effects of Covid-19 have been noted. This child's best interests dictate she be given the best opportunity to avoid such health risks.

10. What of The Evidence That Has Been Placed Before the Court?

[121] I have taken judicial notice of those facts which allow the Court to make a decision on the specific issue before me. However, in the interest of completeness, I am going to consider the evidence which has been placed before the Court on those matters of which judicial notice was taken and evaluate it accordingly.

[122] The father has placed before the Court affidavits from Dr. Wong, Dr. Kindrachuk, and Dr. Yatsina. The mother, in addition to her own affidavit evidence indicating her views on the statistics regarding Covid-19, has placed before the Court affidavits from Dr. Malthouse and Dr. Code, touching on these issues. I have dealt with Dr. Code's materials. I intend now to deal with the remaining professional's opinions. To reiterate material submitted through counsel's briefs, or submissions, or references

to websites, without verification of their contents, are not something this Court either should or can entertain.

[123] Dr. Wong is an infectious disease physician employed by both the Saskatchewan Health Authority and as an associate professor with the University of Saskatchewan. He is an advocate of vaccinations for Covid-19 and has been an active voice in Saskatchewan with respect to Covid-19 information. He has spoken to the child to provide her with information and answer her questions. He has also reviewed the affidavits filed by Drs. Code and Malthouse.

[124] Dr. Wong provides the following opinion:

> **Should [D.] receive COVID-19 vaccine?**
>
> For all the reasons listed above with supporting evidence attached herein, [D.'s] risk of complications & severe illness with COVID-19 exceeds the risk of any potential complications of receiving the Pfizer-BioNTech COVID-19 vaccine. There is no data to suggest that the COVID-19 vaccine would not be efficacious and safe for [D.] given her diagnosis for T1DM.
>
> It is my recommendation, absent any contraindications to receiving vaccine, that [D.] receive two does of vaccine as per the recommended vaccine schedule as quickly as possible to reduce her risk of acquiring COVID-19 infection and developing any complications therein, especially as the prevalence of community transmission of Delta variant continues to increase across Saskatchewan.

[125] He responds to Dr. Malthouse's statements by saying, that in his view, certain of those statements are simply wrong. With respect to Dr. Code's opinion he states:

> His affidavit describes a video conference meeting with [D.S.] on June 16 for one hour, during which he conducted a patient intake visit. He indicates that [D.] discloses that she did not speak until she was age five and experienced multiple developmental delays requiring assessment. He then concludes that these developmental delays are

> medically concerning for potential vaccine toxicity, and that her neurodevelopmental delay is "most likely" vaccine toxicity.
>
> Dr. Code indicates that he has serious concerns regarding the "potential toxicity of the components of the [Pfizer Covid-19] vaccine" but does not describe them in detail. He indicates the vaccine is experimental.
>
> I am unable to comment on the specifics of Dr. Code's assessment as I did not have any of the specifics of [D.'s] medical history. However, given that [D.] has at least one medical issue requiring the ongoing support of a pediatric specialist (in this case, pediatric endocrinology for her type 1 diabetes), the legitimacy and need for a medical exemption for COVID-19 vaccine likely best falls to the medical professionals responsible for [D.'s] ongoing longitudinal follow-up as they would be most aware of her medical history and needs, including her paediatrician and pediatric specialist teams. A developmental paediatrician could be further enlisted if needed to determine whether a vaccine exemption is indicated.
>
> As an adult infectious disease physician by training, I do not have the requisite expertise to clearly delineate whether pediatric developmental disorders were directly related to childhood vaccination. I am uncertain that the general expertise of an anaesthesiologist would allow for this determination either, as Dr Code otherwise claims.

[126] Dr. Kindrachuk is an assistant professor and Canada Research Chair in emerging viruses in the Department of Medical Microbiology and Infectious Diseases at the University of Manitoba. His report details his experience with infectious diseases and details his opinions on Covid-19. Specifically, with respect to the vaccination of children, he opines as follows:

> In conclusion, data overwhelmingly suggests that SARS-CoV-2 transmission and infections in children are important in regards to their role in virus circulation in communities but also increasing understanding of the healthcare impacts of the virus on this demographic, and in particular those with underlying medical conditions. Primary points of consideration include:
>
> - **Morbidity and mortality:** while much of the pandemic has centered around the increasing fatalities nationally and globally, there has been less discussion regarding the

> effects of Covid-19 associated morbidity. Hospitalization data demonstrates that this disease can have health impacts on individuals across multiple age groups and adds significant stress on national healthcare systems and capacity.
>
> - **SARS-CoV-2 transmission routes:** there is growing appreciation for the role of aerosols in SARS-CoV-2 transmission in addition to respiratory droplets. Aerosols have the potential for broader transmission within enclosed settings in the absence of multiple nonpharmaceutical interventions (including face masks, distancing and ventilation) and data demonstrates that aerosols may be an important factor in presymptomatic transmission of the virus.
>
> - **VOCS and herd immunity:** the recent emergence of SARS-CoV-2 variants of concerns that have increased transmissibility and the immune evasion characteristics supports the need to curb transmission in the global community quickly prior to further variant emergence. VOCS may be able to circulate even in populations that have exceeded the proposed herd immunity threshold with potentially devasting public health consequences. Thus, approaches that combine nonpharmaceutical interventions in addition to expanding vaccination campaigns will have the greatest opportunity to curb community transmission of the virus expediently.

[127] Dr. Yatsina is the child's family physician from birth. She opines on the child's high risk from a Covid-19 infection due to her diabetic condition. She holds the opinion it would be beneficial for the child to be vaccinated for the Covid-19 virus based on information provided to her by the Canadian Pediatric Society. As an aside, counsel for the mother raised in argument that this physician had been bullied by the father into presenting the opinions which she did. I reject this submission outright. There is no such evidence before the Court.

[128] Dr. Malthouse is a family physician from British Columbia. He indicates he has a special interest in vaccinations and has been studying the Canadian public-

health response to the Covid-19 pandemic. He is opposed to vaccinations with the Pfizer vaccine and opines as follows:

> 35. To summarize, it is my opinion, having studied all of the data very carefully, that we have evidence of undisclosed ingredients in the vaccines, inadequate animal and human trials, a significant risk of infertility, potential cross-reactivity from the vaccine-induced spike proteins with many human tissues, evidence of rapid distribution of vaccine material throughout the body, and unsatisfactory long-term studies with respect to the safety of these vaccines. As many of the provinces are lifting their emergency status, I do not recommend vaccination of individuals under age 20.
>
> 36. It is my opinion, based upon the minimal benefit demonstrated by the Pfizer-BioNTech Covid-19 vaccine in this trial of the 12-15 year old demographic, that already has an infection survival rate of 99.997% and the significant demonstrated and potential risks associated with receiving the vaccine, vaccinating individuals age 12-15 years old poses a greater risk to the health of this age group than is presented by not receiving this vaccine.

[129] Dr. Wong had raised that Dr. Malthouse has been disciplined by his professional regulatory body as a result of his statements regarding Covid-19 and that Dr. Malthouse was taking steps legally against this body. Dr. Malthouse responds to those comments by a supplementary affidavit. He confirms, in the main, actions taken against him by the College and his response to those actions. He does not affirm if he remains registered to practice medicine. He goes on to reiterate his belief the administration of this vaccine is not recommended.

[130] Were I required to make a factual determination regarding whether children should be vaccinated for the Covid-19 virus, based on the evidence before the Court, I would accept the opinions in this regard provided by Dr. Wong and Dr. Kindrachuk. Were I required to determine whether the Pfizer vaccine was safe and effective based on the evidence presently before the Court, I would accept the opinion of Dr. Wong. I make these findings for the following reasons.

[131] Drs. Wong and Kindrachuk are eminently qualified in the specific area of infectious diseases and, in particular the Covid-19 virus. Their professional lives are devoted to the study and research of viruses, and this virus in particular. I find their reports to be well researched, balanced, and persuasive.

[132] With respect to Dr. Malthouse, I note he has no particular qualifications for engaging in the research role he has personally undertaken. There is nothing in his *curriculum vitae* which indicates he has acquired any expertise in the specific area of infectious diseases much less Covid-19. Furthermore, there is nothing in his *curriculum vitae* which provides for any measure of expertise, study, research, or understanding, of vaccines generally, or the Pfizer vaccine in particular. While I mean no disrespect to his professional integrity, it might fairly be observed his criticism of the Pfizer vaccine is somewhat of an interesting hobby for him and not a professional vocation.

[133] He is a family physician. I have no doubt from a review of his *curriculum vitae* that he has practiced his profession diligently and effectively for the 43 years as indicated. Despite that achievement, that does not qualify him to opine in the area he has sought to opine. He then makes certain statements regarding the effects of Covid-19 on children and alternative treatments available. However, his statements are devoid of either supporting material or independent study in this regard. In short, his inquiring mind does little more than any other lay person’s questioning personality. These traits do not warrant considering his opinions in this regard, much less accepting them in a best interests of the child analysis.

[134] This then means that as a result of the evidence of Drs. Wong and Kindrachuk, I determine Covid-19 has resulted in a pandemic situation and the virus poses serious and significant health risks to all people including children. Finally I

conclude, from these opinions, the Pfizer vaccine is safe and effective and provides protection against acquiring Covid-19.

11. Section 7 of the *Divorce Act*

[135] The final issue I deal with involves the newly amended s. 7 of the *Divorce Act*. The mother asserts the father failed to comply with these new provisions and accordingly this application must be struck.

[136] The amendments to the *Divorce Act* introduced March 1, 2021, included the following:

> **7** The jurisdiction conferred on a court by this Act to grant a divorce shall be exercised only by a judge of the court without a jury.
>
> **Duties**
>
> **Parties to a Proceeding**
>
> **Best interests of child**
>
> **7.1** A person to whom parenting time or decision-making responsibility has been allocated in respect of a child of the marriage or who has contact with that child under a contact order shall exercise that time, responsibility or contact in a manner that is consistent with the best interests of the child.
>
> **Protection of children from conflict**
>
> **7.2** A party to a proceeding under this Act shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding.
>
> **Family dispute resolution process**
>
> **7.3** To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

> **Complete, accurate and up-to-date information**
>
> **7.4** A party to a proceeding under this Act or a person who is subject to an order made under this Act shall provide complete, accurate and up-to-date information if required to do so under this Act.
>
> **Duty to comply with orders**
>
> **7.5** For greater certainty, a person who is subject to an order made under this Act shall comply with the order until it is no longer in effect.
>
> **Certification**
>
> **7.6** Every document that formally commences a proceeding under this Act, or that responds to such a document, that is filed with a court by a party to a proceeding shall contain a statement by the party certifying that they are aware of their duties under sections 7.1 to 7.5.

[137] The mother submits the father has failed to follow the provisions of s. 7 in their entirety, and in particular he has failed to certify pursuant to s. 7.6 that he is aware of his duties under this provision. She then argues that this failure to certify and this failure to comply is fatal to the application. The argument concludes that the Court must therefore dismiss the application.

[138] The provisions of s. 7 are notices to parents of their obligations when involved in a divorce proceeding. They are reminders to parents to ensure they are firstly putting the children's interests first and secondly are acting in good faith with any proceeding taken. In the case of s. 7.3 there is an encouragement to engage alternatives to court to attempt to resolve any disputes which arise.

[139] I do not determine a failure to certify compliance pursuant to s. 7.6 must necessarily result in a dismissal of the application. While the Court may exercise that power in an appropriate case, it is not automatically available in every case. A failure to so certify may result in inquiry by the Court or, in appropriate circumstances, it may

not be the subject of any comment. An absence of such a certificate is therefore not fatal to an application.

[140] With respect to s. 7.3, the evidence is conflictual on whether or not the father attempted to discuss the vaccination issue with the mother. He says he did, and she says he did not. I am not in a position to resolve that evidentiary conflict on the basis of the affidavits filed. But, regardless, what is clear is that resolution short of court decision was not going to happen in this case. The volume of material filed both in support of, and in opposition to, the requested relief quite obviously indicates the parties have polar opposite views. Moreover, the positions advanced through the briefs and in oral argument illustrate the necessity to seek court intervention for a final resolution.

[141] In the result, I dismiss the suggestion the father's failure (assuming such to be the case) results in the application being struck.

CONCLUSION

[142] On the basis of all of the foregoing, I determine it is in this child's best interest to be vaccinated as protection against the Covid-19 virus. I further determine her father shall be authorized to arrange for, and have completed, that vaccination. He shall be entitled to do this without the consent of the mother. The vaccination shall only be completed following receipt of such further advice as Drs. Yatsina and Nour are prepared to give. In the event the parties have difficulty implementing this order, they have leave to have this matter return to me for further directions, upon providing three days' notice.

[143] The parties sought costs in the event they were successful on this application. The father has been wholly successful and as a result I determine to exercise my discretion in favour of him receiving an award of costs. This matter was

considerably more involved, urgent, and complicated than what other family law applications are seen to be. As a result, I determine this matter warrants an increase in the usual amount of costs. I determine the father shall have costs in the amount of $2,000 payable forthwith.

J.
M.T. MEGAW