COURT OF APPEAL FOR ONTARIO

CITATION: J.N. v. C.G., 2023 ONCA 77
DATE: 20230203
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Tulloch, Thorburn and George JJ.A.

BETWEEN

J.N.

Applicant (Respondent)

and

C.G.

Respondent (Appellant)

J.N., acting in person

Erin Pleet, Jonathan Richardson and Jesse Herman, for the appellant

Heard: November 18, 2022

On appeal from the order of Justice Alex Pazaratz of Superior Court of Justice, dated February 22, 2022.

George J.A.:

Overview

[1] The appellant father and respondent mother were married for almost seven years, but are now separated. They have three children. The oldest child lives with the appellant. The two youngest children (ages 10 and 12 at the time of the decision below) live with the respondent. Most of the issues in this litigation,

including parenting time, were resolved by way of minutes of settlement. The only issue the parties could not agree on was who would have decision-making authority in respect of the COVID-19 vaccine for the two youngest children.

[2] The appellant brought a motion which asked the court to grant him that decision-making authority. The appellant relied on the fact that the vaccine was recommended for children ages 5 and older and that all reputable health authorities had found it to be safe and effective. In his view, there was no medical reason for the children not to be vaccinated and, in any event, the children are not old enough to decide this complicated issue for themselves. The respondent argued that sufficient doubt had been cast on the vaccine's safety and efficacy. Until more is known about it, she had determined that the children should not be vaccinated. She also argued that each child had voiced an independent wish not to receive the vaccine.

[3] Each party attached to their affidavit information that they say supported their respective positions. The appellant relied primarily on information from Health Canada and the Canadian Paediatric Society, which speak to the vaccine's safety, effectiveness, and the importance of children being vaccinated. He also filed posts from the respondent's social media accounts which suggested an opposition to vaccination. The respondent relied on information obtained from the Internet, primarily from those who cast doubt on the importance and safety of the vaccine. She attached to her affidavit Pfizer's Fact Sheet (which set out potential side

effects) and various medical articles from online sources. Both parties consented to the motion judge receiving this unsworn material.

[4] The motion judge also asked the Office of the Children's Lawyer ("OCL") to prepare a 'Voice of the Child Report' (A Voice of the Child Report is a short report written by an OCL Clinician for the Court to summarize a child's statement about a particular issue, done for children over the age of seven). According to the social worker who prepared the report, neither child wanted to be vaccinated against COVID-19.

Decision Below

[5] The appellant's motion was dismissed. The motion judge determined that it would not be in the children's best interests for the appellant to have decision-making authority over their COVID-19 vaccinations. The motion judge found the appellant to be "dogmatic, intolerant and paternalistic" and characterized his attack upon the respondent's position as "misguided and mean-spirited". The motion judge refused to take judicial notice of the safety and efficacy of the vaccine because, in his view, the available information about it was a "moving target" and because there was "no consensus or consistency" as to its safety and effectiveness. The motion judge reasoned that because of Canada's history of forced sterilization of Inuit women, residential schools, Japanese internment camps during World War II, Motherisk, and the Thalidomide tragedy, courts should

be reluctant to "take judicial notice that the government is always right". He was especially critical of the appellant's characterization of the respondent's evidence, disagreeing that her sources had been "debunked". Then, the motion judge took the opportunity to weigh in on the discord over COVID-19, vaccinations to protect against it, and the resultant fissures in our society, by writing that "it would be helpful if, once and for all, the competing positions and science could be properly explored and tested in a public trial".

[6] By contrast, the motion judge found that the respondent had "gone to extraordinary lengths to inform herself" and was satisfied that her sources were "qualified and reputable". He found that the respondent had "demonstrated a clear understanding of the science" and that she raised "legitimate questions and concerns" about the vaccine. The motion judge described the respondent's position as "reasonable and helpful".

[7] Lastly, the motion judge found support for the respondent's position in the Voice of the Child Report. The motion judge began his analysis by indicating that the children were not mature enough to decide this complicated issue for themselves, but then went on to write that "significant weight should be given to [their] stated views and requests" as this was a "deeply personal and invasive issue". In his view, "children may not have wisdom, but they have *Charter* rights and undeniable emotions". He held that the children's views were "strong[ly] held

and independently formulated" and that the respondent had not inappropriately influenced them.

Grounds of Appeal

[8] The appellant submits that the motion judge erred by: 1) accepting and relying on the respondent's online resources as "expert" evidence and as credible sources of information; 2) finding that the appellant's evidence (from public health authorities and other well-known sources) was credibly disputed; 3) giving significant weight to the Voice of the Child Report and finding that the children's views were independently held; and 4) placing the onus on the appellant to show that the children should be vaccinated. The appellant asks that he be granted decision-making authority with respect to the children's vaccination. In the alternative, he asks that the matter be remitted for a new hearing before a different judge.

Analysis

Standard of Review

[9] On questions of law, the standard of review is correctness. Findings of fact (and factual inferences) are reviewable only when the judge below committed a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8-10, 25. The standard of appellate review in family law proceedings – where parenting time and decision-making authority are at issue –

is narrow: *Sferruzzi v. Allan*, 2013 ONCA 496, 33 R.F.L. (7th) 1, at para. 43. As decisions in these matters “are inherently exercises in discretion”, they must attract a high degree of deference: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 13.

[10] This court’s task is not to impose the decision we would have made after engaging in a fresh analysis or by balancing the various competing factors differently. We can only intervene if the motion judge erred in law or made a material error in the appreciation of the facts: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12; *N.S. v. R.M.*, 2019 ONCA 685, at paras. 4-5.

<u>Did the motion judge err by accepting and relying on the respondent’s online resources as expert evidence and by finding that they raised legitimate concerns about the safety, efficacy and need for the COVID-19 vaccine?</u>

[11] While the parties consented to the motion judge receiving their unsworn online materials, he was not bound to admit or give it any weight. In his reasons, the motion judge writes that “at the very least, [this evidence] informs me as to the type and quality of research each parent conducted in formulating their respective positions”. In the end, he gave little weight to the materials presented by the appellant noting that “I have not been able to find any indication – in the father’s evidence or in the body of COVID vaccine case law – that allegedly debunked theories have ever been properly considered or tested. In any court. Anywhere.” He further asked, “How can you take judicial notice of a moving target?” However, he gave considerable weight to the respondent’s appended materials which he

treated as “expert” evidence in support of the respondent’s position that there were too many unanswered questions about the vaccine.

[12] The appellant’s chief complaint is that the motion judge did not properly scrutinize the respondent’s evidence and did not consider whether any of it satisfied the threshold criteria governing the admission of expert evidence – including whether the experts were qualified, independent and unbiased: *R. v. Abbey*, 2017 ONCA 640, 140 O.R. (3d) 40, at para. 48. The motion judge did cite and rely on two cases: *ITV Technologies Inc. v. WIC Television Ltd.*, 2003 FC 1056, 29 C.P.R. (4th) 182, and *Sutton v. Sutton*, 2017 ONSC 3181, which apply a common law test for the admission of online materials. They stand for the proposition that information obtained from the Internet can be admissible if it is accompanied by indicia of reliability, including, but not limited to:

a) whether the information comes from an official website from a well-known organization;

b) whether the information is capable of being verified; and

c) whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

[13] This guidance, however, is not a substitute test for the admissibility of expert evidence, and the motion judge did not refer to any of the leading cases on the topic, including *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. Few of the materials presented by the

respondent even meet the criteria set out in the internet reliability cases cited by the motion judge. Indeed, the Federal Court in *ITV Technologies* stressed, at para. 18, that “little or no weight should be given” to information found online without “careful assessment of its sources, independent corroboration … and assessment of the objectivity of the person placing the information on-line”. The motion judge did not adequately heed this warning.

[14] For example, among the documents filed by the respondent were articles from ‘Total Health’ and ‘Contagion Live’, both of which purport to be medical journals. One document is titled, “Are people getting full facts on COVID vaccine risks” which quotes one Dr. Robert Malone, who claims to have invented the mRNA vaccine. Dr. Malone is, in fact, quoted several times; the motion judge concluding that “[w]ith [Dr. Malone’s] credentials, he can hardly be dismissed as a crackpot or fringe author”. Other people cited in this article are described by the motion judge as “well known leaders in their fields” and as “qualified and reputable sources”. The difficulty is, it is not entirely clear how anyone could conclude, from what the respondent filed, that Dr. Malone actually invented the mRNA vaccine or that any of those cited in the article are “well known leaders” in their respective fields. There was no basis to draw either of these conclusions.

[15] As the appellant points out, one author in particular, Dr. Tess Lawrie, simply penned an open letter posted on a website called ‘The Evidence-Based Medicine Consultancy Ltd.’, which appears to be a self-publication. The motion judge’s

description of Dr. Malone, Dr. Lawrie and the other authors cited by the respondent – as leaders in their fields – seems to be based on nothing more than their ability to either create a website or be quoted in one. There is no apparent or verifiable expertise.

[16] While the motion judge did not expressly conclude that these people are experts, his reasons make it clear that he relied on them as such. For example, while ultimately concluding that there is no clear expert opinion on the benefits of vaccination, he proceeded to refer to Dr. Malone as an “equally competent and credible medical professional”. In fact, he went one step further by writing, at para. 79, that the “professional materials filed by the mother [are] actually more informative and more thought-provoking than the somewhat repetitive and narrow government materials filed by the father”.

[17] In my view, the motion judge fell into error by not assessing whether each document presented by the respondent was reliable, independent, unbiased and authorized by someone with expertise in the area. Instead of engaging in an analysis of the evidence presented, he embarked on a lengthy discussion about whose materials were more thought-provoking, which has no bearing at all on whether the respondent’s materials were admissible and should be given any weight.

[18] The motion judge also ignored the fact that, notwithstanding the well-known side effects (which are detailed in the Pfizer Fact Sheet filed by the respondent), the vaccine has been approved for children ages 5 and older by all regulatory health agencies, including Health Canada and the Center for Disease Control and Prevention. The motion judge seemed to find justification for the respondent's position that the children should not be vaccinated (either because the vaccine is unsafe, or because not enough is known about it) because of Pfizer's knowledge about potential side effects, which it is required to disclose by law. By doing so the motion judge treated the respondent as an expert in assessing pharmaceutical disclosure, while essentially dismissing those who are best positioned to interpret this information, public health authorities, who know how to factor the possibility of side effects into the approval process.

[19] The information relied upon by the respondent was nothing but something someone wrote and published on the Internet, without any independent indicia of reliability or expertise, which, even if admissible, should have been afforded no weight at all. This was a palpable and overriding error and I would, therefore, give effect to this ground of appeal.

Did the motion judge err by finding that the appellant's evidence (from public health authorities and other well-known sources) was credibly disputed?

[20] I turn now to the motion judge's treatment of the appellant's evidence. The appellant filed, among other things, Government of Canada materials which speak

to the importance of paediatric vaccination against COVID-19, possible side effects, and the testing and development of COVID-19 vaccines. While taking judicial notice of a fact is highly discretionary, I note that several courts have already taken notice of the safety, efficacy and importance of paediatric COVID-19 vaccines: *I.S. v. J.W.*, 2021 ONSC 1194; *A.B.S. v. S.S.*, 2022 ONSC 1368; *Warren v. Charlton*, 2022 ONSC 1088; *Campbell v. Heffern*, 2021 ONSC 5870. Some have even taken judicial notice of the fact that being vaccinated against COVID-19 is in the best interests of a child, unless there is a compelling reason not to: *Dyquiangco Jr. v. Tipay*, 2022 ONSC 1441; *Rashid v. Ayanesov*, 2022 ONSC 3401; *Davies v. Todd*, 2022 ONCJ 178.

[21] In this case, the motion judge declined to do so, taking the position that the safety and effectiveness of the vaccine is not a notorious, well-known fact, and is the subject of debate among reasonable people. I need not decide whether judicial notice should be taken of the public health and government information adduced by the appellant, as the motion judge fell into error in other respects, including by treating government approval of the vaccine as irrelevant.

[22] As Hackland J. wrote in *A.M. v. C.D.*, 2022 ONSC 1516, at para. 27:

> If we exclude Health Canada advisories from the assessment of whether vaccines are safe, the court will be left in most cases with whatever random information the parties are able to download from the internet. The court often lacks the expertise or the resources to assess this information. In *JN*, the court was reassured that the

> mother's downloads included qualified and reputable sources. Dr. Robert Malone was the primary example referred to. A Google search will, however, disclose that Dr. Malone was barred by Twitter for violating the platform's coronavirus misinformation policy and includes a recent Washington Post article stating that Dr. Malone's "claims and suggestions have been discredited and denounced by medical professionals as not only wrong, but also dangerous". The point being that internet downloads are simply not reliable in many instances, particularly when contrasted with public health advisories.

[23] Instead of conducting a meaningful analysis of the appellant's material, the motion judge simply cited historical events – such as residential schools and internment camps, as well as the fact that courts across the country routinely find that the government (i.e., police) violates people's *Charter* rights – as a reason to not place reliance on government sources generally. He wrote, at para. 67 of his reasons:

> Why should we be so reluctant to take judicial notice that the government is always right?
>
> a) Did the Motherisk inquiry teach us nothing about blind deference to "experts"? Thousands of child protection cases were tainted – and lives potentially ruined – because year after year courts routinely accepted and acted upon substance abuse testing which turned out to be incompetent.
>
> b) What about the Residential School system? For decades the government assured us that taking Indigenous children away – and being wilfully blind to their abuse – was the right thing to do. We're still finding children's bodies.

c) How about sterilizing [Inuit] women? The same thing. The government knew best.

d) Japanese and Chinese internment camps during World War Two? The government told us it was an emergency and had to be done. Emergencies can be used by governments to justify a lot of things that later turn out to be wrong.

e) Few people remember Thalidomide. It was an experimental drug approved by Canada and countries throughout the world in the late 1950's. It was supposed to treat cancer and some skin conditions. Instead, it caused thousands of birth defects and dead bodies before it was withdrawn from the market. But for a period of time government experts said it was perfectly safe.

f) On social issues the government has fared no better. For more than a century, courts took judicial notice of that fact that it was ridiculous to think two people of the same sex could get married. At any given moment, how many active complaints are before the courts across the Country, alleging government breaches of *Charter* Rights? These are vitally important debates which need to be fully canvassed.

g) The list of grievous government mistakes and miscalculations is both endless and notorious. Catching and correcting those mistakes is one of the most important functions of an independent judiciary.

h) And throughout history, the people who held government to account have always been regarded as heroes – not subversives.

i) When our government serially pays out billions of dollars to apologize for unthinkable historic violations of human rights and security – how can we possibly presume that today's government "experts" are infallible?

j) Nobody is infallible.

> k) And nobody who controls other people's lives – *children's lives* – should be beyond scrutiny, or impervious to review.

[24] The motion judge then reinforced these inapt comparisons by characterizing the appellant's evidence as "somewhat narrow and repetitive" and by indicating that the appellant's attack upon the respondent's position was "misguided and inaccurate". Moreover, the motion judge failed to consider whether the appellant's information was admissible under either Ontario's *Evidence Act*, R.S.O. 1990, c. E.23, or as a public document exception to the hearsay rule, nor did he apply the test for internet reliability, which he cited authority for when addressing the respondent's materials.

[25] Section 25 of the *Evidence Act* provides that:

> Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be published by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession with the Queen's dominions, shall be admitted in evidence to prove the contents thereof.

[26] Under the public document exception to the hearsay rule, reports of public officials are admissible for the truth of their contents: *R. v. P.(A.)* (1996), 109 C.C.C. (3d) 385 (Ont. C.A.); *A.C. v. L.L.*, 2021 ONSC 6530. While this speaks only to admissibility, and not to what weight a judge must ultimately assign to it, it is

important to understand why s. 25 exists and why there is a common-law exception, which speaks not only to the inherent reliability and trustworthiness of records and reports generated by public officials, but also to avoid the inconvenience of public officials having to be present in court to prove them. Consider this passage from *P.(A.)*, where Laskin J.A. wrote, at pp. 389-390, that:

> At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly": Sopinka *et al.* The Law of Evidence in Canada (1992), p. 231.

[27] Rand J. explained the rationale in *Finestone v. The Queen* (1953), 107 C.C.C. 93 (S.C.C.), at p. 95:

> The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy [Emphasis added].

[28] Again, this does not compel a judge to give the evidence any weight, but given the purpose behind s. 25 and the public document exception, there is at least an obligation to explain why materials like those filed by the appellant are not trustworthy, which the motion judge's reference to some of Canada's historical misdeeds – all false equivalencies – fails to achieve.

[29] I would also note that there is no question that: 1) there is a COVID-19 pandemic; 2) this disease kills people, including children; and 3) the vaccines available to Canadians, including children ages 5 and older, have received regulatory approval. The problem, apart from the question of judicial notice, is that it is simply unrealistic to expect parties to relitigate the science of vaccination, and legitimacy of public health recommendations, every time there is a disagreement over vaccination.

[30] Further, the materials from the Canadian Paediatric Society – attached to the appellant's affidavit, and which state that the vaccine is safe and effective for children (and that its benefits outweigh its rare side effects) – clearly meet the criteria set out in the case law cited by the motion judge. That is to say, pursuant to *ITV* and *Sutton*, this is a well-known organization (whose objectivity and sources can be readily and easily assessed), and the information contained in its documents is capable of verification. Moreover, as the Canadian Paediatric Society is not a government agency, the motion judge should have been comforted knowing that its opinion is not formulated by a government official, or reliant only on government procured information. Unfortunately, it is unknown what role this information played in the motion judge's analysis, because he made no mention of it. In the circumstances of this case, given the motion judge's open skepticism of government sources, it was essential that he address it.

[31] The motion judge erred in failing to conduct any meaningful review of the appellant's authorities, or the laws of evidence, in favour of the respondent's questionable and unreliable internet printouts with no independent indicia of reliability or expertise. This was a palpable and overriding error.

Did the motion judge err by giving significant weight to the Voice of the Child Report and in finding that the children's views were independently held?

[32] It is well settled that when determining how much weight to give a child's wishes, a court is to consider: 1) whether the parents are able to provide adequate care; 2) how clear and unambivalent the wishes are; 3) how informed the expression is; 4) the age of the child; 5) the child's maturity level; 6) the strength of the wish; 7) how long they have expressed their preference; 8) the practicalities of the situation; 9) parental influence; 10) overall context; and 11) the circumstances of the preference from the child's point of view: *Decaen v. Decaen*, 2013 ONCA 218, 303 O.A.C. 261, at para. 42.

[33] While the motion judge found that the children's views were "strongly held and independently formulated" – and while he noted the children's ages, the fact they lived with the respondent, and that both parties were good parents – he ignores some rather salient aspects of the report, such as the 12-year-old child indicating to the social worker that her "mother had advised that the [vaccine] is experimental" and had provided her with "research from scientists", and that the 10-year-old said to the social worker that "in every case the vaccine had been

tested on animals the animals had died", that the vaccine "was just the test one and he did not want the test one", and that his mother had told him he could not be vaccinated without her permission. In other words, the motion judge failed to consider how informed the expression was and, notwithstanding a conclusory finding that the children's views were "strongly held and independently formulated", he failed to even acknowledge, let alone factor into his analysis, the respondent's obvious influence.

[34] Guidance on how to properly treat a child's views and preferences can be found in *K.K. v. M.M.*, 2021 ONSC 3975. In that case, the court held, at paras. 748-749, that, while the OCL indicated that the 11-year-old child had not been "coached", they were simply repeating what a parent had told them, meaning their views were not independently formed. Accordingly, the child's views were given no weight.

[35] The motion judge appears to have made no effort to understand the children's concerns about the vaccine. In the circumstances of this case, it was incumbent on him to explore this further and to ensure that the children had good and complete information about the vaccine, before drawing a conclusion about their independence.

[36] In the end, the motion judge's finding that the children reached their own conclusions – free from the respondent's influence – was not supported by any

evidence. In fact, the opposite is true. As such, his decision to give the children's views any weight was an error.

Did the motion judge err by placing the onus on the appellant to show that the children should be vaccinated?

[37] For the reasons that follow, I would give effect to this ground of appeal.

[38] As mentioned, most family court decisions related to the pandemic, at least to this point, have deferred to the government recommendation that people, including children, get vaccinated against COVID-19. These decisions have been made in relation to decision-making, parenting time, travel, and education. In *Chase v. Chase*, 2020 ONSC 5083, 151 O.R. (3d) 422, *Zinati v. Spence*, 2020 ONSC 5231 and *A.C. v. L.L.*, 2021 ONSC 6530 – all decided at a time when the Ontario government deemed in-person classes safe – the court held that the parent who did not want a child to attend was required to explain why, and to offer evidence in support. In a travel context – when the federal government recommended against unnecessary travel – courts have consistently held that the party seeking to travel with the child had the onus to establish that it was necessary: *Yohannes v. Boni*, 2020 ONSC 4756; *Gillespie v. Jones*, 2020 ONSC 2558.

[39] Courts have also found that parents must, as a condition to exercising parenting time, abide by government guidelines designed to slow the spread of

COVID-19, and that the failure to do so will have consequences: *A.T. v. V.S.*, 2020 ONSC 4198.

[40] In *Dyquiango*, the court held that vaccination itself was in the child's best interests (absent compelling reasons to the contrary), which placed the burden squarely on the objecting parent and not the one defending a public health measure.

[41] While the motion judge acknowledges many of these decisions, he clearly viewed them as neither binding nor persuasive. While he was not obliged to adopt the reasoning in a court of coordinate jurisdiction, it was important for the motion judge to cogently explain why he was departing from decisions that had already addressed health-related parenting decisions in this same context.

[42] Instead of the cases listed above, the motion judge relied on the case of *R.S.P. v. H.L.C.*, 2021 ONSC 8362. The court in that case, in a passage relied on by the motion judge, noted, at para. 58, that "[j]udicial notice cannot be taken of expert opinion evidence", citing *R. v. Find*, 2001 S.C.C. 32, [2001] 1 S.C.R. 863, at para. 49.

[43] In my view, this statement, while generally accurate, is inapposite in this case, where the "expert opinion" in question is the approval of medical treatment by Health Canada, the national body tasked with determining that treatment's

safety and effectiveness. In *O.M.S v. E.J.S., 2023 SKCA 8*, the Saskatchewan Court of Appeal, at para. 48, writes that:

> [I]n a family dispute, it is both unnecessary and, in most cases, unhelpful, for the parties and court to look for more than the approval of a drug, such as the Pfizer vaccine, together with any medical advice that may reasonably be required as to the risks and benefits to the child at issue, as the basis to conclude that it is in the child's best interests to administer the drug. It is unnecessary because a parent is not obliged to prove, and a court is not obliged to consider or decide, that an approved drug is safe or efficacious when used in accordance with and to the extent specified in the approval – just as they need not consider whether medical advice from the family doctor meets that mark. In most cases at least, additional evidence is unhelpful because, absent sufficient evidence to the contrary, parents and courts are entitled to decide that a child should be treated with approved medications in accordance with the approval, subject, of course, to any child-specific medical concerns that may be in play, or other relevant factors.

[44] Recall the two primary rationales for the public documents exception to the hearsay rule: the impracticality of traditional modes of proof, and the expectation that public servants perform their duties with a degree of diligence and care. It is not the subject of dispute among reasonable people that Health Canada has, in the area of safety and efficacy of medical treatment, "special knowledge … going beyond that of the trier of fact": *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 243. Requiring that opinion to be tendered *viva voce* in every case via live, human experts would be – especially in family court – unnecessarily burdensome.

[45] Stated otherwise, judicial notice should be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness. That being the case, where one party seeks to have a child treated by a Health Canada-approved medication, the onus is on the objecting party to show why the child should not receive that medication. The motion judge erred by reversing that onus.

[46] The respondent, as the parent seeking not to have the children vaccinated, had the onus to establish that, despite Health Canada's opinion as to the vaccine's safety and effectiveness, they should not be. That onus was not satisfied.

Remedy

[47] Having concluded that the motion judge committed several errors, should we remit this back to the Superior Court for further consideration, or does the existing record permit us to decide?

[48] At the hearing of this appeal, counsel advised that the appellant's objective is not to force vaccination upon the children, but simply to grant him decision-making authority regarding COVID-19 vaccines for the two younger children of the marriage. I have no doubt that the appellant is alive to the complications that would arise from giving him sole decision-making authority with respect to the children's vaccination, given their ages, and the fact that the respondent has decision-making authority in all other respects. There is no reason to doubt the appellant's

motivation and stated desire to approach this very sensitive issue in a measured way and with a view to the children's best interests.

[49] With that, and bearing in mind that the only admissible evidence before the motion judge that was deserving of significant weight tended to suggest that vaccination was in the children's best interests, I see no value in remitting this matter back to the Superior Court.

Conclusion

[50] For these reasons, I would allow the appeal, set aside the motion judge's order of February 22, 2022, and grant to the appellant sole decision-making authority with respect to the children's vaccination against COVID-19.

[51] The appellant advised that, if successful, he would not seek costs. No costs are ordered.

Released: February 3, 2023 "M.T."

"J. George J.A."
"I agree. M. Tulloch J.A."
"I agree. Thorburn J.A."