In the Matter of a Discipline Hearing
under s. 38 of the *Health Professions Act*, R.S.B.C. 1996, c. 183

BETWEEN:

COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA

(the “College”)

AND:

DR. CHARLES HOFFE

(the “Respondent”)

Reasons for Decision - Judicial Notice Application

Overview

1. This Discipline Committee Panel (the “Panel”) of the College of Physicians and Surgeons of British Columbia (the “College”) has been appointed to conduct a hearing to inquire into the conduct of Dr. Charles Hoffe as set out in a second further amended citation to appear, dated April 23, 2024 (the “Citation”).

2. The Citation alleges that Dr. Hoffe engaged in unprofessional conduct and contravened various professional standards by publishing statements about vaccinations, treatment and public measures relating to COVID-19 that the College says were misleading, incorrect or inflammatory.

3. In his defense, Dr. Hoffe intends to rely on eight expert reports addressing the efficacy of COVID-19 vaccines, their development and approval process, the risks of COVID-19 vaccines relative to the risks of contracting COVID-19, and the efficacy and safety of Ivermectin as a treatment for COVID-19.

4. In response to receipt of Dr. Hoffe’s expert reports, the College applied to have the Panel take judicial notice of the following facts:

    (1) The Covid virus kills or causes other serious effects;

    (2) The virus does not discriminate;

    (3) Vaccines work;

    (4) Vaccines are generally safe and have a low risk of harmful effects, especially in children;

    (5) Infection and transmission of the COVID-19 virus is less likely to occur among fully vaccinated individuals than for those who are unvaccinated;

vaccines do not prevent infection, reinfection or transmission, but they reduce the severity of symptoms and the risk of bad outcomes;

(6) Health Canada has approved COVID vaccines, and regulatory approval is a strong indicator of safety and effectiveness;

(7) Health Canada has not approved Ivermectin to treat COVID-19; and

(8) Health Canada advises that Canadians should not consume the veterinary version of Ivermectin.

(the "Notice Facts")

5. The College submits that none of these issues are the subject of reasonable dispute among members of the medical community in British Columbia. It submits that judicial notice of the Notice Facts "will resolve all of the scientific disputes relating to COVID-19 and vaccines which are relevant to the Citation"[1]. This will make it unnecessary for the College to obtain numerous rebuttal expert reports on these issues. Resolving these issues via judicial notice, the College says, will be faster and more cost-effective than an ordinary fact-finding process by the assessment of expert evidence and will focus the matters at issue at the hearing.

6. The College submits that judicial notice of the Notice Facts will also create a more efficient process and avoid the possibility that the Panel will end up making factual findings that are contrary to facts known to be beyond reasonable dispute among members of the medical community in British Columbia.

7. In response, Dr. Hoffe submits that the College is seeking "to have a trier of fact accept their version of the facts without having to prove them and without allowing the opposing party an opportunity to challenge them"[2]. He submits that his expert reports demonstrate that the Notice Facts are reasonably disputed. He submits that he would be denied the significant degree of procedural fairness to which he is entitled in this proceeding if the Panel were to resolve the scientific issues underlying the Citation's allegations via judicial notice rather than through ordinary fact-finding procedures.

8. For the reasons set out below, the Panel takes judicial notice that:

- COVID-19 can kill or cause other serious effects (Notice Fact 1);
- Health Canada has approved COVID-19 vaccines (Notice Fact 6, in part);
- Health Canada has not approved Ivermectin to treat COVID-19 (Notice Fact 7); and,

[1] Notice of Application of the College dated February 16, 2024 at para. 29(1).

[2] Application Response of Dr. Hoffe dated March 22, 2024 at para. 31.

- Health Canada advises that Canadians should not consume the veterinary version of Ivermectin (Notice Fact 8).

9. The Panel declines to take judicial notice of the balance of the Notice Facts.

Factual Background

10. The Citation alleges that, in or about April 2021, the Respondent engaged in unprofessional conduct and/or contravened standards imposed under the *Health Professions Act,* including but not limited to the Canadian Medical Association's Code of Ethics and Professionalism by, *inter alia*, publishing statements on social media and other digital platforms, including electronic mail, that were misleading, incorrect, or inflammatory about vaccinations, treatment, and public measures relating to COVID-19 including:

    a) publicly expressing that Ivermectin is an advisable treatment for COVID-19 and recommending that the public obtain Ivermectin from animal feed stores;

    b) publicly expressing that the COVID-19 vaccinations cause microscopic blood clots that cause serious neurological harm, female infertility, and a high number of deaths, which is not recognized by public health;

    c) publicly expressing that vaccinated persons can cause harm to unvaccinated persons; and

    d) publishing to colleagues or to the public, on or about April 2021, containing statements that were misleading, incorrect, or inflammatory about, inter alia, vaccinations, treatments, and/or public measures relating to COVID-19.

11. Further particulars of Dr. Hoffe's alleged misleading, incorrect, or inflammatory statements (the "Particulars") are set out in a letter from the College dated July 28, 2022. The Impugned Statements include, *inter alia*, representations that:

    (1) COVID-19 vaccines are "experimental";

    (2) COVID-19 vaccines generate COVID spike proteins, which in women concentrate particularly in the ovaries and cause damage to the ovaries;

    (3) The fertility consequences of COVID-19 vaccines are unknown;

    (4) COVID-19 vaccines cause myocarditis, which causes permanent damage to heart muscles, including in children;

(5) Ivermectin is a safe and effective treatment for COVID-19;

(6) COVID-19 vaccines cause miscarriages, and erratic and heavy periods;

(7) COVID-19 vaccines cause blood clots; and

(8) COVID-19 vaccines are more dangerous for children than contracting COVID-19.

12. The present application was brought by the College approximately two weeks prior to the then-scheduled start of the hearing, which was set to take place from March 1-14, 2024. The hearing, which had already been adjourned twice, was adjourned again as a result (see previous Reasons for Decision to Adjourn the Hearing). The hearing was opened on May 31, 20,24 and is now scheduled to continue on October 1-11, 2024 and November 18-22, 2024.

13. Only the Citation, Affidavit of Service and Particulars have been entered into evidence at this point in time.

14. Proposed expert witnesses have not yet been qualified or cross-examined, nor have their reports been accepted into evidence. However, the parties' materials on the judicial notice application speak to the expert evidence that they intend to tender, as well as further expert evidence that may be necessary. In particular, the College intends to tender an expert report from Dr. Trevor Corneil, a Public Health and Preventative Medicine specialist, in support of the facts alleged in the Citation. Dr. Hoffe intends to tender eight expert reports supporting the veracity of the various statements set out in the Particulars.

The Parties' Positions

<u>The College's Submissions</u>

15. The College submits that the Notice Facts are notorious, generally accepted and/or readily demonstrable. It submits that Canadian courts and tribunals have consistently treated the safety of COVID-19 vaccines and the quality of public health advice on vaccination as beyond reasonable dispute, resolving these questions on the basis of judicial notice, rather than delving into contested evidence.

16. The College relies on the benefits of judicial notice in terms of promoting efficiency. The College submits that taking judicial notice of all the Notice Facts would "resolve all of the scientific disputes relating to COVID-19 and vaccines which are relevant to the Citation"[3]. It argues that judicial notice of the Notice Facts will foreclose the presentation of evidence by Dr. Hoffe that would turn this proceeding into "a general inquiry into the nature of the COVID-19 pandemic, the validity of public health

[3] Notice of Application of the College dated February 16, 2024 at para. 29(1).

measures in response to it, and the technical make-up of vaccines approved for us in Canada".

17. Without judicial notice, the College says that it will be required to obtain rebuttal expert reports addressing the scientific issues raised by Dr. Hoffe's expert reports, increasing the number of witnesses and prolonging the time required for the hearing. The College notes that Dr. Hoffe's expert reports are collectively about 1,000 pages long, with hundreds of citations. Its rebuttal witnesses will likely include a cellular biologist, a virologist, a cardiologist, a hematologist and a gynecologist.

18. The College submits that fact-finding based on contested expert evidence will result in a hearing focused on the science of COVID-19 vaccines and related issues, rather than the issue at the heart of this case: "does a physician licensed to practice in BC who makes unqualified statements at odds with the generally accepted views of the profession about COVID-19, public health measures including vaccines, and COVID-19 treatments, commit professional misconduct?"[4]. The College notes that judicial notice will not resolve this central issue and that the College will continue to bear the burden of proving that Dr. Hoffe made statements that contravened professional standards. Dr. Hoffe, the College says, will continue to have the opportunity to dispute that he contravened professional standards.

19. Refusing to take judicial notice of the Notice Facts, in the College's submission, also raises the possibility that the Panel will make findings of fact that are contrary to statements from Health Canada or facts found by the BC Supreme Court and other adjudicators, which would cause a loss of public confidence in the administration of justice. The College submits that Dr. Hoffe's expert reports contain direct challenges to generally accepted facts about COVID-19 and COVID-19 vaccines.

20. The College submits that the impugned statements set out in the Particulars are misleading, incorrect or inflammatory because they contradict facts notorious within British Columbia or Canada, or which are readily and authoritatively demonstrable by resort to government sources. The College submits that these notorious and demonstrable facts "can be broken down into" the Notice Facts.

21. The College points to previous cases in which courts have taken judicial notice of the Notice Facts or have found them based on evidence and submits that this is evidence of the notorious nature of these facts. The College also points to publicly available information from public health bodies and specialized professional societies as evidencing that the Notice Facts are readily and authoritatively demonstrable.

22. For each of the eight Notice Facts, the College lists the grounds on which the fact is (1) notorious, based on courts or tribunals having taken judicial notice of the fact or found the fact based on evidence, or (2) readily and authoritatively demonstrable, based on information from public health bodies.

[4] Notice of Application of the College dated February 16, 2024 at para. 12.

Dr. Hoffe's Submissions

23. Dr. Hoffe takes issue with the reliability of the statements from government sources and public health bodies relied upon by the College on the basis that they are not proven, often constitute hearsay, and contradict other credible sources of information. Dr. Hoffe points out that evidence pertaining to the Notice Facts has evolved and changed since the beginning of 2020. Further, Dr. Hoffe submits, the Notice Facts are overly broad, vague, and in at least one instance contradictory, making it inappropriate to take judicial notice of them.

24. Dr. Hoffe submits that none of the decisions relied upon by the College involve a decisionmaker preferring to rely on judicial notice over admissible and relevant expert evidence. Dr. Hoffe's expert evidence, he submits, contradicts the Notice Facts. The fact that the Notice Facts are the subject of expert evidence (both from Dr. Hoffe and the College) indicates that they are not notorious or immediately demonstrable, and that it is not necessary or reasonable to find these facts via judicial notice rather than through the usual testing of evidence.

25. Dr. Hoffe submits that the College's submission that it will require additional expert witnesses and more much hearing time to respond to Dr. Hoffe's expert evidence demonstrates that the Notice Facts are not notorious, nor capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

26. Dr. Hoffe submits that the convenience of having a more efficient, shorter hearing cannot outweigh the interests in having a fair hearing where the College is required to prove its allegations against Dr. Hoffe based on evidence, and Dr. Hoffe has an opportunity to tender evidence in his defense. Precluding Dr. Hoffe from presenting evidence or cross-examining the College's experts on factual issues would prevent him from being able to defend himself, and breach procedural fairness. Procedural fairness requires an opportunity for evidence and cross-examination. Dr. Hoffe submits that a professional disciplinary hearing requires a high degree of procedural fairness.

27. Dr. Hoffe is prepared to agree, based on the evidence presented, to the following portions of the Notice Facts: "The [COVID-19] vaccines do not prevent infection, reinfection or transmission" and "Health Canada has approved COVID vaccines".

28. Dr. Hoffe's submissions describe the expert evidence he intends to tender to contradict the Notice Facts or their implications, or to support the veracity of the impugned statements set out in the Particulars.

College’s Reply Submissions

29. The College’s reply submissions run over 100 pages. Although the College replies on many issues, the focus of the submission is on the relevance and reliability of Dr. Hoffe’s expert reports. The College argues that Dr. Hoffe’s expert reports are either consistent with the Notice Facts or are so unreliable that they do not demonstrate any reasonable dispute about the Notice Facts.

30. The College does not raise any objections to the admissibility of Dr. Hoffe’s expert reports at this stage in the proceedings (with one exception). Rather, its submissions address the weight to be given to the expert reports for the purposes of assessing whether they demonstrate a reasonable dispute about the notoriety or demonstrability of the Notice Facts.

31. The College submits that the reliability of expert evidence based on novel scientific theory must be assessed on the basis of the factors set out in *Daubert v. Merril Dow Pharms., Inc.*, 509 U.S. 579. The College argues that each expert statement is either consistent with or supportive of the Notice Fact, or unreliable because it contains errors, is contradicted by other data, or is not supported by the source referenced by the expert.

Determinations

Law of Judicial Notice

32. Judicial notice is the only exception to the general rule that cases must be decided on the evidence presented by the parties in open court. Judicial notice involves the acceptance of a fact or state of affairs without proof: *R. v. J.M.,* 2021 ONCA 150 at para. 31.

33. Taking judicial notice of a fact is highly discretionary: *R. v. Zundel* (1987), 57 O.R. (2d) 129 (Ont. C.A.), leave to the SCC refused (61 O.R. (2d) 588) (“*R. v. Zundel*”); *J.N. v. C.G.,* 2023 ONCA 77 at para. 20 (“*J.N. v. C.G.*”).

34. Because judicial notice dispenses with the need for proof of a fact, the threshold for judicial notice is strict. Judicial notice may be applied to only two kinds of facts:

    (1) Facts that are “so notorious or generally accepted as not to be the subject of debate among reasonable persons”; and

    (2) Facts that are “capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy”.

    Find at para. 48.

35. A fact is “notorious” if it is widely known. Notorious facts may be ones that anyone can personally ascertain, or ones that have been repeatedly confirmed by trusted sources of information: *Khodeir v. Canada,* 2022 FC 44 (“*Khodeir*”) at paras. 22-23.

36. Matters that are the proper subject of expert evidence are not capable of being judicially noticed as these are, by definition, “neither notorious nor capable of immediate and accurate demonstration”: *Find* at para. 49. Nonetheless, scientific facts may be notorious if they are well known among the general public. Decision-makers are mindful that there is disagreement about some aspects of scientific knowledge and are careful not to take judicial notice of matters on which science has not reached consensus or which are laden with value judgments: *Khodeir* at para. 26.

37. The purposes of judicial notice are described in *Khodeir* at para. 20 as follows:

> It fosters efficiency, by ensuring that the bringing of evidence of obvious facts does not bog down the judicial process. It also promotes public confidence in the administration of justice. Courts would not be trusted if they required litigants to go to the expense of proving notorious facts or if they reached conclusions that are contrary to what is considered beyond reasonable dispute.

38. In *R. v. R.M.*, 2023 BCCA 455 at para. 98 (“*R. v. R.M.*”), the B.C. Court of Appeal wrote that judicial notice “expedites the process of the courts, creates uniformity in decision-making and keeps the courts receptive to societal change”.

39. The test for judicial notice is more strictly applied where the facts in relation to which judicial noticed is sought are more central to the issues of controversy in a proceeding.

40. Facts fall “on a spectrum that runs from those that are central to or dispositive of an issue, at one end, to those that merely paint the background to a specific issue”: *R v. Spence*, 2005 SCC 71 at para. 61 (“*Spence*”). As the fact becomes more central to the case, the test for judicial notice becomes stricter – meaning the fact should be more notorious, or more immediately demonstrable, if it is properly to be the subject of judicial notice: *Spence* at para. 61. This is because “the need for reliability and trustworthiness increases directly with the centrality of the ‘fact’ to the disposition of the controversy”: *Spence* at para. 65.

41. The strict application of the test for judicial notice of dispositive facts also arises from concerns about procedural fairness. In *R. v. R.M.*, the Court of Appeal wrote at paras. 102-104:

> It is clear from these cases that judicial notice is not extraordinary, and that it can play an accepted and important role in the litigation process. However, judicial notice operates in the context of an adversarial system.

> Of critical importance to that system is the long-settled "principle that the opposing party must have the opportunity to challenge all facts that are not self-evidently beyond dispute". Consequently, a court's authority to take judicial notice is limited to "ensure that a fact accepted as true without further proof actually arises from a common understanding or within a common frame of reference".
>
> When a court takes judicial notice of an extrinsic fact, it dispenses with the need to prove the fact and accepts it as having been established. The party that seeks to rely on the fact will not bear the burden of proving it. Once this occurs, there is no room to rebut the fact or to test it through cross-examination.
>
> Accordingly, to preserve trial fairness, the law holds that the closer an extrinsic fact lies "to the dispositive end of the spectrum", the more stringent the requirements for taking judicial notice.
>
> [Citations omitted.]

42. In *R. v. Zundel,* the Ontario Court of Appeal held that the trial judge had exercised his discretion judicially in refusing judicial notice because of the impact on the defendant's ability to make full answer and defence. The proceeding was a criminal case alleging that the defendant was guilty of the offense of publishing false news based on a pamphlet he had published denying the Holocaust. The Court of Appeal summarized the trial judge's reasoning:

> At the end of the Crown's case, Crown counsel requested that the judge take judicial notice of the Holocaust. The judge in his ruling rejecting the Crown's application stated that the Crown had requested the court to take judicial notice of two things. Firstly, that millions of Jews were annihilated in Europe during the years 1933 to 1945 because of a "premeditated policy of the hierarchy of Nazi Germany". Secondly, the means of annihilation included mass shootings of Jews, their deliberate starvation, privation and death by gassing. <u>The judge, after careful consideration of lengthy submissions by both Crown counsel and defence counsel, said that, however tempted he might be to grant the Crown's application, it would have the effect, in the eyes of the public, as well as perhaps in the eyes of the jury and the accused, of not providing the accused with an opportunity to make full answer and defence. To grant the motion would have the effect of "substantially eliminating a portion of the duty incumbent on the Crown in so far as the guilt of the accused is concerned".</u>
>
> The application to the court to take judicial notice of the Holocaust was renewed after the conclusion of the defence evidence on the basis that the bulk of the defence evidence had related to the appellant's belief in

> the truth of the pamphlet and that there was no evidence called "to cast a doubt" on the two matters that the court had earlier been requested to notice. <u>The court in rejecting the second application stated that the Crown alleged that the accused had published something that was inherently false and the Crown had the burden of proving that allegation.</u>
>
> [Emphasis added.]

43. *R. v. Zundel* (a decision of a 5-member panel of the Ontario Court of Appeal) underscores that judicial notice can pose risks to procedural fairness and to public confidence in the administration of justice, even where the facts sought to be judicially noticed are beyond any reasonable dispute.

44. The Panel's determination about the application of the general law to each of the Notice Facts is set out below. Case law specifically about judicial notice facts related to COVID-19 and vaccination against COVID-19 referred to by the parties is discussed further below under the sub-heading "Notice Facts #2, #3, #4 and #5".

<u>Notice Fact #1</u>

45. The Panel is satisfied based on the parties' submissions that it is appropriate to accept as notorious that COVID-19 can kill or cause other serious effects.

46. This is a slight revision to Notice Fact #1 as framed by the College. The clarification that COVID-19 "can" kill or cause other serious effects reflects that it is notorious that there is a *potential* for the COVID-19 virus to cause death or other serious effects but that the level of risk of death or other serious effects is one of the central issues in dispute between the parties.

47. Dr. Hoffe's submissions on this point do not dispute the notoriety of this fact. Indeed, portions of his expert reports assert that:

    (1) The risk of severe disease and death from COVID-19 is extremely skewed to those above 70 years of age, especially those with multiple comorbidities. The average age of persons that died from COVID-19 in Canada was approximately 84 years old;

    (2) A very low proportion of COVID-19 related deaths in Canada occurred in those under 50 years of age – the data shows very high (although not 100%) survival rates for those under 70;

    (3) The average rate of lethality from COVID-19 for Canadians is much lower than estimates given by public health officials; and

(4) Reported hospitalizations and deaths from COVID-19 have been over-counted, because many hospitalization and deaths “with, and not from” COVID-19 were wrongly attributed to COVID-19.

48. Dr. Hoffe’s submissions demonstrate a significant dispute between the parties about the level of risk from COVID-19 infection for Canadians, particularly to those under 70 and without co-morbidities, and the extent to which COVID-19 was truly responsible for death or other serious effects attributed to it by public health officials. However, they also support the notoriety of the fact that COVID-19 *can* cause death or other serious effects and has done so in some cases. For this reason, the Panel is satisfied that it is appropriate to take judicial notice that COVID-19 can kill or cause other serious effects.

Notice Facts #2, #3, #4, and #5

49. The Panel declines to take judicial notice of Notice Facts #2, #3, #4 and #5, reproduced below for convenience:

2) The virus does not discriminate;

3) Vaccines work;

4) Vaccines are generally safe and have a low risk of harmful effects, especially in children; and

5) Infection and transmission of the COVID-19 virus is less likely to occur among fully vaccinated individuals than for those who are unvaccinated; vaccines do not prevent infection, reinfection or transmission, but they reduce the severity of symptoms and the risk of bad outcomes.

50. In the Panel’s view, finding these Notice Facts on the basis of judicial notice would determine, to a significant extent, that the impugned statements made by Dr. Hoffe were incorrect or misleading, which is the central controversy between the parties. To echo the reasoning of the Ontario Court of Appeal in *R. v. Zundel,* to take judicial notice of these facts would substantially eliminate a portion of the duty incumbent on the College.

51. The centrality of these facts to the matters in issue means that the criteria for judicial notice must be stringently applied.

52. In the Panel’s view, these “facts” are too broad and imprecise to be the subject of judicial notice in the context of this case. Because they are so broad, Notice Facts #2, #3, #4 and #5 are capable of multiple interpretations and their intended interpretation is unclear. Further, in some instances, they suggest opinion or argument rather than an incontrovertible fact capable of being sufficiently notorious or immediately demonstrable so as to justify judicial notice in the circumstances (for

example, the statement that vaccines are “generally” safe and have a “low” risk of harmful effects incorporates two matters of judgment or opinion, rather than specific and objective fact). The Panel’s concerns respecting these issues are discussed further below in relation to Notice Facts #2, #3, #4 and #5.

53. Notice Fact #2 asserts “The virus does not discriminate”. In the Panel’s view, this statement is too vague to properly be a fact appropriate for judicial notice. In his submissions, Dr. Hoffe argues, based on his expert evidence, that the virus does discriminate in terms of who is more likely to get infected and the severity of outcomes if one is infected. The College clarifies in its reply that this Notice Fact is intended to convey the narrower meaning that “all individuals are susceptible to contracting the virus”, and that the College does not dispute that “after contracting the virus, an individual may present a range of symptoms which may be associated with factors including age and pre-existing health conditions”. This amounts to recognition by the College that Notice Fact #2 as framed is overbroad.

54. The Panel is not satisfied that taking judicial notice of a more nuanced and narrower version of Notice Fact #2 would serve any purpose.

55. Notice Fact #3, “Vaccines work”, is also overbroad. Its breadth is demonstrated by the fact that Notice Fact #5 is essentially a qualification of Notice Fact #3 fact, in terms of what COVID-19 vaccines do and do not achieve. Notice Fact #3 cannot be said to be beyond dispute if it requires qualification in order to be accurate. Again, the requirement of notoriety must be applied stringently in these circumstances.

56. The breadth of Notice Facts #2, #3, #4 and #5 distinguishes the Panel’s decision from that of the Federal Court in *Khodeir,* in which the Attorney General asked the Court to take judicial notice of the fact that SARS-CoV-2 exists. The judicial notice sought would have been dispositive of the petitioner’s claim, which was founded on the argument that the federal government’s mandatory vaccine requirement was unreasonable because the virus that caused COVID-19 did not exist: paras. 1, 34. At paragraph 35, the Federal Court emphasized that it was not “called upon to set the outer boundaries of judicial notice in relation to the COVID-19 pandemic”. Rather, the fact for which judicial notice was sought was “a narrow and basic fact regarding the COVID-19 pandemic, namely, the existence of the virus causing the disease”.

57. Notice Fact #4 provides that: “Vaccines are generally safe and have a low risk of harmful effects, especially in children” incorporates two subjective ideas – “general” safety and “low risk” of harmful effects.

58. In *O.M.S. v. E.J.S.,* 2023 SKCA 8 (“*O.M.S. v. E.J.S.*”), the Saskatchewan Court of Appeal wrote that the safety and efficacy of any drug is always relative: “As a rule, the safety and efficacy of a pharmaceutical product cannot be discussed in such a blunt fashion as to say that it “is” or “is not”, safe and effective”: para. 59. Rather,

the potential risk of side effects is always weighed against the potential benefits of the drug: para. 59.

59. Viewed in this light, it is clear that Notice Fact #4 represents an opinion on the risk-benefit analysis of COVID-19 vaccines, rather than an incontrovertible and notorious fact. Because it is the propriety of Dr. Hoffe's opinion on the risk-benefit analysis of COVID-19 vaccines for different populations (including children) that is squarely raised by the allegations set out in the Citation, in the Panel's view, it would be inappropriate in this context to irrefutably establish an opinion on this risk-benefit analysis via judicial notice. To do so would eliminate Dr. Hoffe's ability to make a full answer and defense in this proceeding.

60. Notice Fact #5 states: "Infection and transmission of the COVID-19 virus is less likely to occur among fully vaccinated individuals than for those who are unvaccinated; vaccines do not prevent infection, reinfection or transmission, but they reduce the severity of symptoms and the risk of bad outcomes." It is lengthy and essentially contains three sub-statements: 1) infection and transmission of the virus is less likely among fully vaccinated individuals than for the unvaccinated; 2) vaccines do not prevent infection, reinfection or transmission; and 3) they reduce the severity of symptoms and the risk of bad outcomes.

61. Although Dr. Hoffe is prepared to agree with the middle sub-statement of Notice Fact #5 (i.e. that "vaccines do not prevent infection, reinfection or transmission"), the other two statements within Notice Fact #5 go to the very core of the issues in dispute. Moreover, the relative framing of these statements (the use of "less" and "fully", for example) suggests that expert evidence and argument will be needed to ensure accurate fact finding. In light of the centrality of these statements to the matters in issue, the Panel is of the view that these facts should be resolved with the benefit of tested evidence and argument rather than by way judicial notice.

62. The Panel declines to take judicial notice of the portion of Notice Fact #5 agreed to by Dr. Hoffe in isolation from its other two sub-statements. The full version of Notice Fact #5 can be interpreted to mean that vaccines do not *fully* prevent infection, reinfection or transmission, but that they do have the effect of reducing infection and transmission of the COVID-19 virus among vaccinated individuals, compared to those who are unvaccinated (sub-statement #1), and that they also have an effect on the extent and effects of infection (sub-statement #3).

63. The Panel declines to take judicial notice of the statement that "vaccines do not prevent infection, reinfection or transmission" standing alone without the other two sub-statements included by the College for the same reasons that it declines to take judicial notice of the full Notice Fact #5: the extent to which vaccines are effective to prevent or reduce infection, reinfection or transmission is a central issue in dispute and more nuanced fact-finding about this issue should be made on the basis of evidence. Even if the Panel were to take judicial notice that "vaccines do not prevent infection, reinfection or transmission," in light of the College's position that vaccines

nonetheless reduce infection and transmission, evidence would still be required on the extent of the vaccines' effectiveness in order to determine whether the Impugned Statements were incorrect or misleading.

64. In addition to the above issues with the framing of the Notice Facts and their impact on Dr. Hoffe's ability to make a full answer and defence, the Panel is not satisfied it can resolve the factual disputes raised by this application fairly or accurately in the absence of cross-examination.

65. The College, in its Reply submissions, acknowledges that there are conflicts between Dr. Hoffe's expert evidence and the Notice Facts addressed in this section. The College, at this point, has not objected to the admissibility of Dr. Hoffe's expert evidence (with the exception of one expert report), although it advises that it may do so as the proceeding progresses.

66. The College submits that conflicts on the evidence regarding the Notice Facts do not demonstrate a reasonable dispute about these facts because Dr. Hoffe's expert evidence is not reliable. Specifically, the College submits that Dr. Hoffe's experts' evidence is not supported by data: "e.g., an expert cites no data source, cites a source that does not support an assertion, or cites a source that is not itself reliable". Over its 100 pages, the College's reply submissions delve into the footnotes of the experts' reports and criticize many conclusions as unsupported by the sources cited, or criticize the sources cited as inherently unreliable.

67. In the result, the College seems to take the position that, to determine its application for judicial notice, the Panel must engage in a detailed assessment of the expert evidence to determine the reliability of opinions and reports which have not yet been accepted into evidence. The College asks the Panel to draw conclusions about the weight to be given to Dr. Hoffe's expert reports without giving Dr. Hoffe an opportunity to provide evidence from his expert witnesses in response to the College's criticisms.

68. In the Panel's view, this would significantly impair Dr. Hoffe's ability to make full answer and defence to the allegations against him. As previously noted, Dr. Hoffe is entitled to a high degree of procedural fairness in this proceeding, which could result in the loss of his ability to practice his profession: *Nguyen v. Chartered Professional Accountants of British Columbia,* 2018 BCSC 620 at para. 96, leave refused 2018 BCCA 299.

69. Section 38(4)(b) of the *Health Professions Act* requires that the College and the Respondent have the right to cross-examine witnesses and to call evidence in reply at a hearing of the discipline committee. This language conveys an intention that the Panel engage in a fulsome fact-finding process through which evidence is tested. It would be inconsistent with that intention for this Panel to resolve disputes about the weight to be given to expert evidence without an opportunity for cross-examination or, if appropriate, rebuttal evidence.

70. Resolving the factual disputes raised by the College's Reply in the absence of cross-examination would also put the accuracy and reliability of the Panel's findings at risk. In an adversarial system, cross-examination is one of the primary tools for testing the reliability of evidence. The Panel is not satisfied that it can reach accurate and reliable conclusions on the issues raised in the College's Reply without hearing from Dr. Hoffe's experts and permitting them to be cross-examined.

71. As indicated below, the Panel declines to grant Dr. Hoffe an opportunity for sur-reply, and it would have declined to grant the College leave to cross-examine Dr. Hoffe's witnesses for the purposes of this application, had leave been sought. This degree of fact-finding is fundamentally at odds with the purpose of judicial notice, and the intention of this application: namely, to make the fact-finding process more efficient. After a point, it is inefficient for the parties' resources and the Panel's efforts to be directed at determining the Notice Facts, rather than the facts alleged in the Citation. Engaging in intensive fact-finding or cross-examination on an application for judicial notice is inconsistent with the rationale underlying the doctrine.

72. This is not to say that the Panel accepts that Dr. Hoffe's expert evidence raises a reasonable dispute about the issues comprising Notice Facts #2, #3, #4 and #5. Rather, this application is not the place to make that determination.

73. In its Reply submissions, the College cites three cases in which courts assessed the weight to be given to evidence on an application for judicial notice. However, in the Panel's view these cases are distinguishable from the exercise that the College suggests the Panel should undertake here.

74. *Rashid v. Avanesov,* 2022 ONSC 3401 ("*Rashid*") was a decision on an application for an interim order allowing a parent to obtain vaccinations recommended by public health guidelines for the parties' then seven-year-old child. The Court noted that the doctrine of judicial notice assists litigants and the courts in resolving issues about the safety and efficacy of a vaccine in the absence of expert evidence: paras. 38-39. The Court accepted that Health Canada recommended vaccination, based on documents admitted under the public documents exception to the hearsay rule, and held that this recommendation established a presumption that an eligible child should be vaccinated, which could only be displaced by compelling evidence: paras. 39-41, 65.

75. The Court's assessment of conflicting evidence came in the context of considering whether the father, who opposed vaccination, had presented sufficient evidence to displace the presumption that it was in the best interests of the child to be vaccinated: paras. 74-84. The Court found that the father's materials were insufficient to displace this presumption.

76. The father did not tender expert evidence but cited a video-recorded statement from a Dr. Robert Malone in his materials: para. 79. The Court was not able to conclude

that this recorded statement was from a sufficiently qualified and reputable source, as it was information downloaded from the internet, and the father had not filed any information from government or non-government health agencies that reviewed, supported, or endorsed Dr. Malone's views: paras. 80-82. The information was not reliable when contrasted with information from public health authorities: para. 82.

77. *Rashid* is distinguishable because the Court was not required to consider conflicting evidence about the facts of which it took judicial notice. Rather, the legal framework applied by the Court permitted it to rely on a presumption in favour of vaccination arising from the public health evidence before it. The factual question the Court resolved by way of judicial notice was not whether the father's materials showed a reasonable dispute about the safety, efficacy and risks of the vaccine, but whether the materials were sufficient to displace the legally recognized presumption arising from the public health evidence.

78. The circumstances before the Court were also different in that the materials tendered by the father consisted of a video-recorded statement that the father had downloaded from the internet, rather than a report directly from an expert for the purposes of the case. The Court did not consider the prospect of ordinary fact-finding procedures for assessing the admissibility and weight to be given to expert evidence (like cross-examination.

79. *S.E.T. v. J.W.T.,* 2023 ONSC 5416 ("*S.E.T*"), also cited in the College's Reply, is another case dealing with whether it was in the best interests of a child to be vaccinated. *S.E.T.* is a decision from the Ontario Divisional Court overturning a motion judge's decision that the vaccination question should proceed to a trial.

80. In his decision, the motion judge summarized a number of family law decisions dealing with disputes over vaccination of children against COVID-19 and noted that parties opposing vaccination in several of those cases had relied upon statements from Dr. Malone: *J.W.T. v. S.E.T.,* 2023 ONSC 977 ("*S.E.T Decision Below*") at paras. 62 (citing *A.M. v. C.D.,* 2022 ONSC 1516), 102 (citing *Dyquiangco Jr. v. Tipay,* 2022 ONSC 1441), 116-119 (citing *Rashid*), 138 (citing *K.D.B. v. K.B.*, 2022 NQBQ 74) and 243 (citing *J.N. v. C.G.,* 2022 ONSC 1198).

81. The motion judge relied on the evidence from Dr. Malone put forward in those cases in refusing to take judicial notice of the effectiveness of pediatric COVID-19 vaccines, writing: "Further as referenced through the analysis of other cases, this court has pointed out that people who appear to have expertise, including an individual who is recognized as being the "inventor" or the "founder" of the very vaccine that this court is being asked to take judicial notice is "effective", have now been quoted as saying that they do not agree that it is effective… [W]hen individuals who appear to be "prima facie experts" in a field are questioning the very premise of which a court being asked to take judicial notice that the court should at least consider this in the analysis of judicial notice": *S.E.T. Decision Below* at paras. 442, 446.

82. The Divisional Court held that the motion judge had erred by relying on Dr. Malone's "prima facie" expertise to discount the conclusions of public health authorities in light of the statements in *Rashid* about the risks of relying on Dr. Malone's evidence and the Court of Appeal's conclusion in *J.N. v. C.G.*, 2023 ONCA 77 ("*J.N. v. C.G.*") to the effect that Dr. Malone's evidence was unreliable: *S.E.T* at paras. 18-19. The Ontario Divisional Court held the motion judge also erred in failing to apply the legal principles set out in *J.N. v. C.G.*, which, as further discussed below, provide that courts should take judicial notice of regulatory approval of pediatric COVID-19 vaccines, and that regulatory approval creates a legal presumption that vaccination is in a child's best interests, unless the party objecting to vaccination can adduce compelling evidence to the contrary: paras. 11, 24-26, 34.

83. This case highlights the importance of assessing the indicia of reliability or expertise before concluding that there is a reasonable dispute about facts that could otherwise be judicially noticed, as does *J.N. v. C.G.* However, as stated above, the Panel is not concluding in this decision that Dr. Hoffe's expert evidence raises a reasonable dispute about the Notice Facts. Rather, it is declining to engage in the process that would be required to make that determination at this juncture in time, for the reasons set out above.

84. The intensive weighing of and resolution of conflicts in the evidence necessary to resolve the issues raised in the College's Reply is distinguishable from the summary assessment that the Divisional Court was able to make in *S.E.T.,* finding it was clear from two prior decisions that the evidence on which the motions judge based his findings (evidence not actually tendered before him, but which had only been referred to in other decisions) was unreliable.

85. Finally, in *Khodeir,* the petitioner relied on two affidavits from purported experts to dispute that it was notorious that the virus that causes COVID-19 existed. The first was from an emergency room physician who summarized two papers that had been provided to him by the petitioner and speculated that the virus did not exist: paras. 48-52. The Court held that this evidence amounted to "pure speculation, not fact", was "sorely lacking" as an overview of current knowledge regarding the virus, and that its selective comparison was "fundamentally at odds with the neutrality expected of experts": paras. 51-52.

86. The second affidavit was from a biostatistician, who stated that various institutions worldwide had refused or failed to provide requested records describing the isolation of the virus from a sample taken from a human: paras. 53-55. The Court held that the affidavit did not provide enough information to draw material conclusions, and it was striking that the affiant herself did not attempt to draw any conclusions from the results of the information requests: paras. 55-56.

87. The Court held that the petitioner's evidence "does not erode the notoriety of the existence of the SARS-CoV-2 virus in any way": para. 58. The evidence, even if

accepted, confirmed only that there was no evidence affirming the existence of the virus in the discrete and narrow places that these experts looked. However, “the absence of evidence in one place does not mean that the evidence does not exist elsewhere and tells nothing about the fact in dispute”: para. 58.

88. Put another way, the Court was able to conclude that the evidence presented, regardless of its reliability, did not raise a reasonable dispute about the existence of the SARS-CoV-2 virus. It was therefore not necessary to assess the reliability of the affiants’ opinions. *Khodeir* is distinguishable because it deals with circumstances in which a decision-maker concluded that there was a lack of evidence to dispute the notoriety of the proposed notice fact. In the present case, the College admits that Dr. Hoffe’s evidence contradicts the Notice Facts – necessitating the arguments about reliability and weight set out in its Reply.

89. The Panel recognizes that Notice Facts #2, #3, #4 and (in part) #5 have been the subject of judicial notice in a number of previous court decisions. However, as previously noted, the taking of judicial notice is highly discretionary. In the Panel’s view, those previous decisions are distinguishable because of the context in which the request for judicial notice arose.

90. The largest category of these cases, with the most analysis of the appropriate scope of judicial notice, are family law cases dealing with whether or not it is in a child’s best interests to be vaccinated against COVID-19. Different courts have taken different approaches to the use of judicial notice or exceptions to the hearsay rule to make findings of fact about vaccination issues in decisions released after the approval of pediatric COVID-19 vaccines. Not all of these decisions are consistent with the now-leading authorities from appellate courts in their jurisdictions.

91. Appellate courts have shifted away from using judicial notice to resolve scientific questions about the safety and efficacy of pediatric COVID-19 vaccines and moved towards a presumption in favour of parental decision-making that is consistent with Health Canada recommendations. The case law emphasizes that courts do not need to make fresh determinations about whether COVID-19 vaccines are safe and effective, via judicial notice or otherwise, whenever this is put into issue by the parties before them in family law proceedings. Parents and courts are entitled to rely on Health Canada’s recommendations as indicating the course of action presumed to be in the best interests of children, absent compelling evidence to the contrary.

92. *Inglis v. Inglis*, 2022 SKCA 82 (“*Inglis*”) is the first decision from a court of appeal addressing the role of judicial notice respecting COVID-19 vaccination issues. At paras. 45-51, the Saskatchewan Court of Appeal reviewed prior decisions taking judicial notice of (or declining to take judicial notice of) various facts about the safety and effectiveness of the COVID-19 vaccine. However, at para. 52, the Saskatchewan Court of Appeal declined to comment on the proper approach to judicial notice, writing that the case before it “should be determined on a more straight-forward basis, without the necessity of addressing the propriety of the

judicial notice utilized in the case law in general and this matter in particular. The determination of the proper scope of judicial notice, regarding the issue surrounding COVID-19 and vaccinations, is best left for a case where it is more fully engaged." *Inglis* therefore does not provide guidance about the proper scope of or approach to judicial notice of facts about vaccination or COVID-19.

93. Next, in *Holden v. Holden,* 2022 ABCA 341 at paras. 99-102 ("*Holden*"), the Alberta Court of Appeal noted that courts have justifiably taken judicial notice of Health Canada approval and recommendation of COVID-19 vaccines, and public health opinions that COVID-19 vaccines are safe and highly effective for children. At para. 107, the Alberta Court of Appeal made clear that Health Canada's recommendation in favour of COVID-19 vaccines stands alone, with no further fact-finding necessary: "This Court does not have to and does not assess the wisdom of Health Canada's recommendation… to determine whether Justice Friesen's order under appeal demonstrates any reversible error. It is enough that the Government of Canada has assigned responsibility for this process to Health Canada and Health Canada has spoken."

94. The above-noted quote is effectively a statement that courts do not need to second-guess Health Canada for the purpose of deciding whether its recommended vaccinations are in a child's best interests. If Health Canada approval is demonstrated, courts do not need resolve factual disputes about whether the vaccines work or are safe.

95. This same idea was amplified in *O.M.S. v. E.J.S.*, in which the Saskatchewan Court of Appeal held that the chambers judge erred in taking judicial notice of the safety and efficacy of the Pfizer COVID-19 vaccine, because this was an issue in relation to which expert evidence was required: para. 38. At paras. 45-46, the Saskatchewan Court of Appeal drew a distinction between the fact of safety and efficacy of the vaccine and the fact of Health Canada approval:

> […The fact that Health Canada approval of a new drug can only occur if its safety, efficacy and quality have been assessed does not mean that approval constitutes, in and of itself, evidence that would enable a judge to take judicial notice that it is safe and effective. Quite apart from the fact that such a broad and categorical statement has little meaning or utility in a case such as this, regulatory approval means only that Health Canada has determined, based on a risk-benefit analysis, that a drug is sufficiently safe, effective and of sufficient quality to be approved, if it is used in accordance with the approval, including the product monograph, together with any medical advice and monitoring that may be required. While this would always be the case, the limited meaning to be attributed to Health Canada approval in a case of this kind is particularly clear because of the approval that was granted for the Pfizer vaccine. We also note the existence of easy-to-find case law reports of instances where drug companies have been found to have brought on the market products

> that have passed a regulatory process and have been found to be associated with risks that are later determined to have been misdescribed or missed altogether in the product information that accompanies the distribution of the product.
>
> For these reasons, we find it impossible to say that a conclusion that the Pfizer vaccine is safe because it is government-approved is so "notorious or generally accepted as not to be the subject of debate among reasonable persons" or so "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (Find at para 48). In the result, we respectfully conclude that the Chambers judge erred by taking judicial notice that the Pfizer vaccine was safe and effective on this basis.

96. The Saskatchewan Court of Appeal went on at paras. 47-49 to explain that, in the absence of sufficient evidence to the contrary, Health Canada approval is a sufficient basis to conclude that receiving a drug is in the child's best interest, without the need for further proof or determinations about whether the drug is safe and effective:

> That does not mean, however, that Health Canada approval was irrelevant…. A parent is entitled to make health care decisions for their child as to the administration of vaccines and other drugs based on Health Canada approvals, and on the advice of qualified medical professionals to the extent reasonably required in the circumstances. They need not enter into an independent assessment of the safety, efficacy and quality of the drug.
>
> … In a family dispute, it is both *unnecessary* and, in most cases, *unhelpful*, for the parties and the 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.
>
> All of this means that a parent is not required to *prove* that an approved vaccine or other drug is safe and effective merely because the other parent objects to their decision. That is so because the issue in a case of

> this kind is not whether the vaccine was not safe or effective enough to have been approved at all, for any indication or for any adult or child. Rather, the issue is whether it was in the best interests of this child to be vaccinated, taking account of all of the factors that bear on that decision.

97. Like the Alberta Court of Appeal in *Holden,* the Saskatchewan Court of Appeal in *O.M.S. v. E.J.S.* concluded that, in a family dispute, parents and the courts are entitled to take a Health Canada approval at face value. It is unnecessary and unhelpful for courts to make a separate inquiry into the safety, effectiveness, and desirability of vaccination – on the basis of judicial notice or otherwise – unless there is sufficient evidence to put these issues into question (for example, evidence of child-specific medical concerns). Based on this reasoning, it is legally wrong for courts in the family law context to take judicial notice that "vaccines work", or "vaccines are generally safe with low risk of harmful effects". The only fact that needs to be found is that the vaccines are approved by Health Canada.

98. Finally, in *J.N. v. C.G.,* the Ontario Court of Appeal endorsed *O.M.S. v. E.J.S.*'s holding that "it is both unnecessary and, in most cases, unhelpful, for the parties and court to look for more than the approval of a drug… 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": para. 43. The Ontario Court of Appeal concluded at para. 45 that "judicial notice should be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness". Accordingly, 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.

99. *J.N. v. C.G.* therefore followed the same approach taken in both *Holden* and *O.M.S. v. E.J.S.* Rather than holding that courts should take judicial notice of facts about the safety and efficacy of vaccines, the Ontario Court of Appeal held that judicial notice that a vaccine has received regulatory approval should be sufficient to resolve most cases. *J.N. v. C.G.* directs lower courts to resolve these disputes based on a legal presumption that vaccinations recommended by Health Canada are in the best interests of a child, so that the onus is on the objecting party to prove otherwise. Inquiries into whether vaccines work or are safe are unnecessary unless the objecting party can displace that onus.

100. To summarize, the Panel does not read these cases as supporting the submission that it is appropriate for a decision-maker to simply take judicial notice of the fact that "vaccines work" to resolve a dispute over the efficacy of COVID-19 vaccines, or to take judicial notice of the fact that "vaccines are generally safe with low risk of harmful effects" to resolve a dispute over their relative risks. Rather, these cases stand for the proposition that it is presumptively in the best interests of a child to receive vaccinations recommended by Health Canada, and that courts need not determine questions about the safety of COVID-19 vaccines in such cases unless there is sufficient evidence to displace that presumption. Where a party adduces

such evidence, issues of safety or risk from vaccination should be resolved on evidence.

101. All the cases summarized above – *Inglis, Holden, O.M.S. v. E.J.S.* and *J.N. v. C.G.* – are also distinguishable because of the context in which they arose. The principles that these decisions establish for the resolution of disputes about vaccination are guided by the fact 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": *J.N. v. C.G.* at para. 29. The family law child vaccination context calls for a relatively summary, time sensitive mechanism for the resolution of disputes about parental decision-making, so that the litigation does not overwhelm the parties' resources, or cause delays in a child receiving a vaccination that is presumptively in their best interests.

102. In contrast, the context of this proceeding is starkly different. It is a professional discipline matter, calling for a high degree of procedural fairness. The Citation squarely raises the question: were the Impugned Statements untrue? The fact of regulatory approval does not provide a presumptive answer to this question in the same way that it does for the question of whether a child should receive a vaccine.

103. As a final note, the Panel's decision not to take judicial notice of these Notice Facts should not be read as indicating any pre-judgment of what the Panel intends to find on the evidence. It may be that the facts comprising these Notice Facts will be established by reference to evidence, including evidence from public health authorities or evidence of prior cases considering the same factual issues raised by the Citation. The Panel has simply concluded that it will make its findings using the ordinary methods of fact-finding, on the basis of evidence and in relation to the allegations in the Citation, rather than on the basis of judicial notice and in relation to the Notice Facts, for the reasons set out above.

<u>Notice Facts #6, #7 and #8</u>

104. The Panel is satisfied that the following facts are immediately demonstrable and therefore appropriate for judicial notice:

    6) Health Canada has approved COVID vaccines;

    7) Health Canada has not approved Ivermectin to treat COVID-19; and

    8) Health Canada advises that Canadians should not consume the veterinary version of Ivermectin.

105. The Panel is also satisfied that it can find these facts based on the public documents exception to the hearsay rule from the Health Canada documents included at Tabs 7, 9 and 10 of Appendix B to the College's Application for Judicial Notice.

106. Under the public documents exception to the hearsay rule, reports of public officials are admissible for the truth of their contents: *J.N. v. C.G.* at para. 26. The Panel is satisfied that the narrow facts set out above can be reliably established based on these documents.

107. The Panel declines to take judicial notice of the portion of Notice Fact #6 that reads, “regulatory approval is a strong indicator of safety and effectiveness”. In the Panel’s view, this is not a fact. It is an inference that could flow from the fact of regulatory approval – subject to evidence and argument to be heard on that question – rather than a fact to be judicially noticed.

108. The Panel notes that para. 45 of *J.N. v. C.G.* states that “judicial notice should be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness”. However, the Panel reads this passage as indicating only that courts should take judicial notice of the fact of regulatory approval of pediatric COVID-19 vaccines. This is consistent with the Court’s reading of the same paragraph in *S.E.T* at para. 11.

109. By taking judicial notice of the facts listed at para. 104 above, the Panel does not intend to indicate that a different or reversed onus applies with respect to any of the allegations contained in the Citation. Rather, in the Panel’s view, the reasons and holding at paras. 37-46 of *J.N. v. C.G.* about the onus in a proceeding where one party seeks to have a child treated by a Health Canada-approved medication and the other party objects are specific to that context and not applicable here. Taking judicial notice establishes the noticed statements as fact. It does not displace the College’s onus to prove the allegations in the Citation on a balance of probabilities.

<u>Respondent’s request for sur-reply</u>

110. By email, dated April 18, 2024, the Panel received a request from Dr. Hoffe to make submissions in sur-reply. Although the request for sur-reply mentions several points addressed in the College’s reply, its focus is the need for further submissions on three issues:

   (1) The College’s challenges to the reliability of Dr. Hoffe’s reports;

   (2) The College’s submissions about novel scientific theory or novel scientific technique in relation to Dr. Hoffe’s reports; and

   (3) The College’s argument that Dr. Corneil’s report only addresses “background facts”.

111. For the reasons already given, the Panel has declined to resolve the issues about the reliability of the Respondent’s expert reports raised by the College in its reply. The dispute between the parties about whether Dr. Corneil’s report addresses “background facts” or the facts that the College is required to prove to make out the

allegations in the Citation is not relevant to the Panel's determinations on the judicial notice issues. The Panel notes that Dr. Corneil's report was not included in the materials provided to it for this application. For all of these reasons, the Panel determined that sur-reply from the Respondent was unnecessary.

Dated: June 29, 2024

Darlene Hammell, Panel Chair

Robert Irvine

Valerie Jenkinson

Keith Bracken

Pursuant to s. 38 of the
Health Professions Act, R.S.B.C. 1996, c. 183

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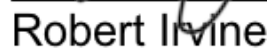

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