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## COVID-19 and Masking in Alberta K-12 Schools

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**Order Commented On:** Record of Decision CMOH Order [33-2020](#)

Many parents and their children are excited about the return to K-12 school, but they are also anxious about the potential for a COVID-19 outbreak at their schools. The barrage of information delivered to parents in the past week by schools regarding protocols for COVID-19 probably isn't helping to ease any feelings of discomfort. Nor are [reports](#) that some schools have already delayed the start of classes because of an infection. Now is the time for a voice of authority to give assurance that the Government of Alberta has taken all possible measures to assess and mitigate the risk of contracting COVID-19 in schools. These measures would include the enactment of rules governing a return to school which are clear, organized, justified, and developed in a transparent process. Instead, the Chief Medical Officer of Health (CMOH) and the Premier have been responding to criticism and confusion about the return to school plan, and in particular the rules pertaining to masking and social distancing in Alberta's K-12 schools. This is a very unfortunate outcome and is raising questions of [trust](#) in the CMOH, but it does not come as a surprise to me. I have been following Alberta's COVID-19 law and policy since the declaration of the public health emergency in March, and I have consistently remarked that CMOH decisions have been plagued with non-transparency and disorganization (see [here](#)). This messy approach to lawmaking breeds confusion, and that is exactly what has transpired here. With these thoughts in mind, this post takes a critical look at the back to school rules set out in CMOH Order 33-2020.

The CMOH has been criticized for apparently changing the rules on the wearing of masks in schools. Dr. Hinshaw [responded](#) by stating the provisions in CMOH Order 33-2020 are consistent with provincial guidance issued earlier in August, and merely clarify outstanding questions arising from the earlier announcement. The masking guidance in Alberta's [School Re-Entry Plan](#) states: ". . . it is required that all staff, teachers and students in grades 4 to 12 wear non-medical face masks while in shared areas of the school outside of the classroom where physical distancing may not be possible and on school buses. Staff, teachers and students do not have to wear masks while seated in the classroom during instruction where there is appropriate distance between the staff and students." (School Re-Entry Plan at page 17). CMOH Order 33-2020 states masks are required for grade 4 to 12 students, staff, and visitors, but this is subject to several additional exceptions besides classroom work. The classroom exception states that masks are not required while students are seated in the classroom during instruction, are not facing each other, and the seating arrangement allows for the greatest possible distance between seated persons.

Whether there is a discrepancy on the matter of masks between the guidance on the website, what was announced earlier in August, the School Re-Entry Plan and CMOH Order 33-2020 is not really my concern here. In fact, I suspect many schools will simplify matters by requiring students to always wear masks in the classroom, regardless of their seating arrangement. I simply want to highlight that this dispute, if we can call it that, is a direct result of poor delineation between guidance and rules on the Alberta COVID-19 website, as well as awful drafting in CMOH Order 33-2020.

CMOH Order 33-2020 is clearly intended to be a set of rules. The Order indicates it is enacted pursuant to statutory authority, explicitly states that it applies to the entire province, uses mandatory language which purports to establish obligations, provides for exceptions to these obligations, and contravention of a provision in the Order is a regulatory offence under the *Public Health Act*, [RSA 2000, c P-37](#), punishable with a fine of up to \$100,000. CMOH Order 33-2020 is not amending a previous enactment on masks in schools, and so accordingly, the Order is not changing the rules, it established them. This should not be much of a debate, but the [Alberta COVID-19 website](#) confuses the matter somewhat because it uses mandatory language such as “must” or “required” in its description of masking in schools, and states that masks are required in the classroom when close contact is occurring between persons. This description is not consistent with what is set out in CMOH Order 33-2020, and so if someone is not able to distinguish website information from a legal rule, then the Order does appear to be changing the rules, even though it is not. As well, the CMOH orders themselves have a bad habit of incorporating website information, which has an unknown author and can be changed at any time without notice (to mention just a couple problems with this style of order). For an example of this comingled assembly of website guidance and rules by the CMOH, see [CMOH Order 26-2020](#) on social distancing which requires all persons to keep at least 2 metres apart unless they comply with Alberta Health guidance. Similarly, the now-rescinded [CMOH Order 07-2020](#) required non-essential services to close their doors to the public in March, but the list of “non-essential” services was set out on the website. The CMOH and the Minister of Health are both responsible for this messy compilation of rules and guidance, and perhaps a botched back to school program will be the impetus for them to clean this up.

Another significant problem here is the timing of the Order. The CMOH has been criticized for issuing CMOH Order 33-2020 on a Saturday, just a few days before the start of the school year. She deserves the criticism for such short notice, but again, this doesn’t come as a surprise to me. The CMOH has been issuing her COVID-19 orders, and exemptions to them, without notice since the onset of the pandemic. In response to criticism in this instance, Dr. Hinshaw [stated](#) Order 33-2020 was supposed to be issued earlier but was delayed by “processes and legal tools.” One struggles to envision exactly what is meant by her reference to processes and legal tools, particularly in light of the fact that the *Public Health Act* is silent on process requirements for the issuance of her orders and, unlike some other provinces, doesn’t even require the Minister of Health to approve of them. Moreover, the Alberta government seems to think it is okay for these legislative orders to be non-compliant with the registration and publication rules set out in the *Regulations Act*, [RSA 2000, c R-14](#) (for my criticism of this see [here](#)), which would actually be a legitimate source of some process-based delay if they were being followed.

CMOH Order 33-2020 is also difficult to understand in places because of poor drafting, which is surprising given we are told that the delay in its enactment was due to process. It is odd to me that the CMOH felt it was necessary to modify the definition of “school” without noting the term is defined in the enabling statute (the *Public Health Act*), but she didn’t feel it was necessary to define “operator of a school” despite the fact that the Order imposes legal obligations on whomever falls into this category of person(s). Presumably the “operator of a school” is the board of trustees for a school division as per the *Education Act*, [SA 2012, c E-0.3](#), but why not explicitly state that in the Order? The Order excludes a “face shield” from serving as a mask to comply with the Order, but it fails to give any criteria upon which to distinguish a mask from a face shield despite the fact that the ordinary meaning of these terms would seem to overlap.

Aside from the definitions (or absence thereof), there are also some troubling aspects to how the substantive rules are drafted in this Order. A key aspect of the exception from masking in the classroom is that desks and chairs are arranged in a manner to “allow the greatest possible distance between seated persons.” Greatest possible distance? What exactly does this even mean? The vagueness of this phrase in establishing an exception to the mask requirement suggests to me that, in practice, this will be more of a ‘black and white’ decision for teachers: Schools will either require or not require masks in the classroom, regardless of seating arrangements and distance between students. This language in the exception to masking would certainly be one basis for the concern of critics who accuse the CMOH of changing the rules on masks in schools, on the eve of opening day. Physical distancing in the classroom seems to boil down to what is possible, versus what is necessary. Not only does this seem inconsistent with earlier messaging on the COVID-19 website and [CMOH Order 26-2020](#) on social distancing indoors, but it also pours fuel on speculation that there was a heavy hand of politics involved in the drafting of CMOH Order 33-2020.

The provisions in CMOH Order 33-2020 also fail to interact properly and are confusing when read together. Section 6 imposes an obligation on an operator of a school to ensure students, staff, and visitors wear a mask, but makes this obligation subject to section 8 which places an obligation on students, staff and visitors themselves to wear a mask except in prescribed circumstances (one of which is noted above re seated in the classroom). Presumably the intention here is that the section 6 obligation doesn’t apply to an operator of a school when the student, staff or visitor is exempt themselves from wearing a mask pursuant to section 8, but it is poor drafting to link section 6 and section 8 as such because each section is imposing obligations on different subjects (operator of a school in section 6; students, staff and visitors in section 8).

Then there is sections 13 to 15. These sections seem to say that masking is not required in schools if the operator of a school can (1) ensure at least 2 meters of distance is kept between persons and (2) the CMOH has approved a physical distancing plan submitted by the school. On the one hand, it isn’t clear to me what these sections accomplish that hasn’t already been addressed in this Order or in [CMOH Order 26-2020](#). On the other hand, section 14 seems to contradict or override other provisions in that it expressly precludes anyone from attending an indoor location in a school without a mask (classroom or elsewhere) if the school has not submitted a physical distancing plan which has also been approved by the CMOH. As an observation, it seems very late in the day for schools to be developing physical distancing plans for approval by the CMOH. Lastly, section 13 as drafted exempts an operator of a school from

obligations which are imposed on students, staff and visitors! These sections are very confusing to read, to say the least.

The upshot here is that CMOH Order 33-2020 is an exhibit of very poor drafting and it has landed in a context that was already plagued by confusion and deprived of transparency. The blame for whatever turmoil emanates from this enactment should fall squarely on whomever is responsible for drafting this mess of an instrument. Albertans deserve much better from their lawmakers..

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This post may be cited as: Shaun Fluker, “COVID-19 and Masking in Alberta K-12 Schools” (September 3, 2020), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2020/09/Blog\\_SCF\\_COVID19\\_CMOH\\_Order\\_33-2020.pdf](http://ablawg.ca/wp-content/uploads/2020/09/Blog_SCF_COVID19_CMOH_Order_33-2020.pdf)

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