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## COVID-19 and Rule by Fiat under Alberta's *Public Health Act*

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**Matters Commented On:** [Order in Council 354/2020](#), [CMOH Order 38-2020](#), and [COVID-19 info for Albertans: Mandatory public health measures](#)

Alberta declared its second COVID-19 related public health emergency on November 24 with [Order in Council 354/2020](#), which was issued under section 52.1 of the *Public Health Act*, [RSA 2000, c P-37](#) (the Act). This declaration is in place for 90 days, unless extended by resolution of the legislature pursuant to section 52.8 of the Act. This declaration also reinstates the controversial power of ministers to unilaterally amend statutes (see [here](#)) over the holiday season. On the same day as this declaration, the Premier, the Minister of Health, and the Chief Medical Officer of Health announced new restrictions to “bend the curve” at a [news conference](#). The Premier and the Minister of Health stated that many of the new restrictions would take effect immediately with the backstop of legal sanction (including \$1000 tickets). These measures were considered and determined without any legislative debate, despite the fact that the Legislature is currently sitting. Public debate on these new legislative measures seems to have amounted to nothing more than questions from media at the news conference. COVID-19 has many victims; democracy should not be one of them.

While the new measures were described on the Alberta COVID-19 website following the press conference ([COVID-19 info for Albertans: Mandatory public health measures](#)), approximately 24 hours passed before [CMOH Order 38-2020](#) was posted to the website (as a legislative enactment it should also be published in Part 2 of the [Alberta Gazette](#)). Between the press conference and the posting of the Order, there were many concerned social media posts stemming from unclear internet guidance relating to such issues as the lawfulness of co-parenting arrangements, the caregiving exceptions to social gathering rules, and carpooling (see e.g. [here](#), [here](#), [here](#), and [here](#)).

The restrictions set out in CMOH Order 38-2020 include prohibitions on indoor social gatherings in private residences (subject to limited exceptions), and limits of 10 attendees at wedding and funeral ceremonies (with receptions prohibited) and outdoor social gatherings. However, confusingly, section 11 of the Order defines a “private social gathering” as an event where people “move freely around...rather than remaining seated or stationary.” This suggests that you could have a limitless number of people attend a social function so long as they remain seated or stationary at all times. The Order also fails to define the key phrase of what constitutes a “social purpose” for a gathering, other than perhaps the circular reading that a social gathering is one held for a social purpose. These observations arguably make the Order both difficult to justify from a public health perspective and extremely challenging to enforce.

Although gatherings in which “all persons are members of the same household” are exempt from private social gathering restrictions (s 11(a)), “household” is not defined in the Order. The legislative intent was presumably to denote those who normally reside in the same residence and, in fact, this wording is used elsewhere in Part 1 of the Order. The reader is left to wonder if there is a distinction intended between a member of a “household” and a person who “normally resides at a residence.” Similarly, it is curious that Part 2 of the Order incorporates the definition of “private place” from the Act – a definition which includes a private dwelling - but Part 1 of the Order uses the phrase “private residence” instead. The use of different terms to describe the same concept is a fundamental mistake in legislative drafting: Section 34 of the [Uniform Law Conference of Canada Drafting Convention](#) states different terms should not be used to express the same meaning within a single enactment.

In addition to exempting members of the same household from private social gathering limits, the Order also provides special rules for those who live alone. Specifically, the Order clearly allows a person who resides on their own to “have two other persons with whom they regularly interact attend at their private residence” (s 5(a)). However, the Order is unclear with respect to the contacts of the person who lives alone hosting the gathering. The Order allows the person who lives alone to “attend at the private residence of a person with whom they regularly interact” (s 5(b)), without specifying that no one else can be present at that residence. It is futile from a public health perspective to allow a person who lives alone to host a friend who lives with two roommates but prohibit the person who lives alone from visiting that friend and her roommates, since all four would be exposed to one another in any event (either indirectly, in the case of the person who lives alone hosting, or more directly, in the case of the friend with roommates hosting the gathering). Despite these realities of transmission and the Order’s failure to specify that people who live alone can only have contact with others who live alone, the government is insisting on this interpretation of the Order via [Twitter](#). As it was at the outset of the pandemic last March, social media once again becomes an official legal reporter.

In certain regions of the province, individuals are now required to wear masks at indoor public places where businesses or entities operate (subject to limited exceptions) and places of worship must limit attendance to 1/3 capacity. These regions will also see additional restrictions take effect on November 27 that will close certain businesses, limit some businesses to appointment-only services, increase restrictions on bars and restaurants, and limit the capacity of most retail businesses and some entertainment services to 25% of their Fire Code capacity. Despite the fact that businesses need time to understand and prepare for these changes, this public health order is not yet available. An order extending the winter break for elementary and secondary students and moving the latter online that takes effect on November 30 has also not yet been made available. School boards did not receive any advance [warning](#) of these changes.

The failure to draft legal rules clearly and to release them in a timely manner is yet another stumble in lawmaking during the COVID-19 pandemic. And another reminder that behind closed doors our political leaders are scrambling in [chaos](#). Premiers and public health officials across the country are pounding their fists, stomping their feet, and directing the blame at others for the fact that public health restrictions are not being followed; however, the real blame for this lies with these elected and appointed officials. Their failure to adhere to even the most basic and simple aspects of lawmaking in a democracy – such as debate, transparency, coherence, and

clarity – has led to this unfortunate scenario where they are left at the podium making pleas for compliance; pleas which are largely going unanswered, or worse ignored.

We have written extensively about issues with non-transparency and disorganization in lawmaking and public health orders to contain the transmission of COVID-19 (see e.g. [here](#) and [here](#)). Hallmarks of good lawmaking such as organization, coherence, predictability, consistency, transparency, and justification provide the legitimacy to govern and are essential components of the rule of law. These attributes have been impaired at times in the rush to enact rules intended to curb the spread of COVID-19 in all the provinces and territories of Canada. However, urgency was no excuse for Alberta in this case. The Legislature has been sitting since late October, and rather than discuss and debate the most pressing crisis of our time, the government has tabled enactments like the completely insignificant [Bill 48: Red Tape Reduction Implementation Act, 2020 \(No. 2\)](#) – and shockingly chose to continue with second reading of this Bill on the very same day that this public health emergency was declared and new restrictions were announced. This government has a very skewed sense of priorities. To be clear, this is not just an Alberta problem. However, Alberta appears to have taken a step for the worse by choosing to discuss red tape reduction in legislative debate rather than the public health emergency and then having the Premier announce new legal restrictions that take effect immediately at a news conference. Lon Fuller’s [King Rex](#) comes to mind.

Since the outset of the pandemic, there have been concerns with an absence of democratic dialogue, legislative process, and accountability in the exercise of legal powers by the Executive branch in all provinces and territories. During the first wave, governments were the beneficiaries of public goodwill, trust, and a willingness to act collectively to contain the spread of COVID-19. However, that goodwill was largely spent in the spring of 2020 and public trust has been eroded by various missteps, a lack of transparency, and a sense that some governments are being driven more by ideology and the economy than science. Unfortunately, our leaders seem to have lost the legitimacy to inspire collective action when it is needed the most.

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