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Proposed Amendments to the *Public Health Act* Confirm (Retroactively?) the Validity of the Chief Medical Officer of Health’s COVID-19 Legislation

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Bill Commented On: [Bill 66](#), *Public Health Amendment Act, 2021*, 2nd Sess, 30th Leg, Alberta, 2021 (first reading 12 April 2021)

On April 12, the Minister of Health tabled [Bill 66](#), the *Public Health Amendment Act, 2021*, in the Legislative Assembly for first reading. This Bill proposes amendments to the *Public Health Act*, [RSA 2000, c P-37](#), on matters such as the qualifications for public health officials, developing plans to address chronic disease and injury prevention, the privacy of certain public health records, and decriminalizing the inhalation of intoxicants. As we discuss in this post, the Bill also proposes to address governance issues associated with the exercise of legislative powers by medical officers of health and Ministers under the *Act*, issues that have previously been identified on ABlawg (see e.g. [here](#), [here](#), and [here](#)). These amendments are a step in the right direction, but far more needs to be done to preserve the rule of law during exceptional times where executive rule by fiat has been uncomfortably normalized within a democracy.

Alberta’s Current *Public Health Act*

Throughout the pandemic, Alberta’s Chief Medical Officer of Health (CMOH), Dr. Deena Hinshaw, has issued public health orders to protect hospital capacity and slow community transmission of the COVID-19 virus by restricting liberties with rules on matters such as gatherings, social distancing, masking, and business closures. These orders are subordinate legislation and rely on statutory authority given by section 29 of the *Public Health Act*. This section authorizes the CMOH to “take whatever steps the medical officer of health considers necessary” to respond to a communicable disease or public health emergency. And, specifically, the CMOH can issue an order to “prohibit a person from attending a school, prohibit a person from engaging in the person’s occupation, or prohibit a person from having contact with other persons or any class of persons.” Section 29 also authorizes the CMOH to “take whatever other steps are...necessary in order to lessen the impact of the public health emergency.”

These ‘catch-all’ provisions in section 29 are a very dubious source of authority for the CMOH to exercise general lawmaking power for sweeping society-wide orders that restrict liberties and close businesses. However, these provisions are all that there is, since most of the section refers to making orders directed at specific problematic situations. Indeed, prior to COVID-19, typical orders made by public health officials applied narrowly to specific individuals or places, such as requiring someone with an infectious disease to isolate or ordering a restaurant to close due to a failure to follow public health rules.

To make matters worse from a governance perspective, CMOH public health orders have been issued with very little transparency and justification, exemptions from these requirements for specific persons and groups have often been issued under a veil of secrecy, and the *Act* provides for no accountability on the exercise of these legislative powers by the CMOH. Judicial decisions reviewing the orders of public health officials thus far strongly suggest that the courts will not be filling that accountability void (see e.g. *Taylor v Newfoundland and Labrador*, [2020 NLSC 125 \(CanLII\)](#); *Hudson's Bay Company ULC v Ontario (AG)*, [2020 ONSC 8046 \(CanLII\)](#); *Toronto International Celebration Church v Ontario (AG)*, [2020 ONSC 8027 \(CanLII\)](#)).

Proposed Changes to Alberta's *Public Health Act*

Bill 66 proposes four amendments to the powers granted to the CMOH under section 29 of the *Act*, which are an improvement in the sense that they more explicitly confirm the authority for general lawmaking, but they fail to address more fundamental questions like whether a delegated official ought to have these powers at all, particularly outside of a declared public health emergency.

First, the Bill proposes to broaden the wording of section 29(2) to explicitly authorize the CMOH to prohibit “a class of persons” from attending school or work or having contact with others. The current wording in section 29 only refers to the CMOH prohibiting “a person” from doing these things. Interestingly, a couple of other provinces recognized this issue after the 2003 SARS outbreak and made broadly similar [changes](#) to their public health laws at that time.

Second, the Bill proposes to add a new subsection (2.2) to section 29 which clarifies that the CMOH can, in writing, exempt a person or class of persons from the application of public health orders.

Third, the Bill proposes to add several new subsections that address the authority of the CMOH to make laws of general application. These new provisions are as follows:

29 (2.3) Where an order under subsection (2) or (2.1) or an exemption under subsection (2.2) is not made in respect of a specific person or persons, the medical officer of health who makes the order or exemption, or the Chief Medical Officer if the Chief Medical Officer makes the exemption, shall provide a copy of the order or exemption to the Minister as soon as is reasonably possible.

(5) An order made under subsection (2) or (2.1) or an exemption made under subsection (2.2) may incorporate, adopt or declare in force a code, standard, guideline, schedule or body of rules as amended or replaced from time to time, including a code, standard, guideline, schedule or body of rules developed by the Minister or the Chief Medical Officer, that relates to the order or exemption.

(6) The *Regulations Act* does not apply to an order made under subsection (2) or (2.1) or an exemption made under subsection (2.2) or to a code, standard, guideline, schedule or body of rules that the order or exemption incorporates, adopts or declares in force.

(7) If an order under subsection (2) or (2.1) or an exemption under subsection (2.2) is not made in respect of a specific person or persons, the Minister shall

(a) post the order or exemption online as soon as is reasonably possible after the order or exemption is made, and

(b) ensure that any code, standard, guideline, schedule or body of rules that is incorporated, adopted or declared in force by the order or exemption is readily available to the public.

These amendments confirm the CMOH can rely on section 29 to enact laws of general application, such as those on social distancing or masking. This clarification should put to rest the issue of whether the CMOH is merely an advisor or is exercising decision-making authority. While the government has described her role in varying ways during the course of the pandemic, the CMOH has consistently [asserted](#) that she merely advises the government. The legislation makes clear that she is not, nor has ever been, merely an advisor in issuing public health orders. However even with these amendments, the *Act* still fails to impose meaningful constraints on the exercise of general lawmaking powers by the CMOH, who is an unelected official. Low hanging fruit in this regard would include as pre-requisites to the exercise of section 29 orders of general application: (1) a Cabinet-declared public health emergency under section 52.1(1) of the *Act* which has not lapsed; and (2) prior ministerial [approval](#) of a public health order, such as what Manitoba requires (*The Public Health Act*, [CCSM, c P210, s 67\(3\)](#)).

These amendments also fail to address the significant lack of transparency surrounding the enactment of these orders. There have simply been far too many instances of lawmaking from the podium, whereby the Premier or Minister of Health proclaim at press conferences that new public health rules will take effect “immediately” with the orders themselves not available to the public until sometime thereafter on a government website that has been difficult to navigate at times. The exemption from the requirements of the *Regulations Act*, [RSA 2000, c R-14](#), means that these public health orders – which constitute subordinate legislation – are exempt from the filing and publication requirements in the *Regulations Act* and do not have to be published in the *Alberta Gazette*. The new requirement that the Minister post the order or exemption online as soon as is reasonably possible is a weak and poor substitute for democratic governance and the rule of law.

Fourth, the Bill appears to acknowledge that all public health orders of general application issued by the CMOH to date actually do rest on a shaky legal foundation because of non-compliance with the *Regulations Act*, as [discussed](#) on ABlawg a full year ago. The Bill proposes to add a new section 29.1 to the *Act* that purports to validate any public health order issued prior to these amendments coming into force.

Bill 66 also proposes to repeal a controversial provision in the *Act* that provides Ministers with extraordinary lawmaking powers during a public health emergency. Specifically, a Minister can by order, and without consultation, “suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions that person may prescribe” (section 52.1(2)).

In April 2020, the government expanded its powers under this section with the [Public Health \(Emergency Powers\) Amendment Act, 2020](#) by further permitting a Minister to “specify or set out provisions that apply in addition to, or instead of, any provisions of an enactment if the person is satisfied that doing so is in the public interest.” Alberta is the only jurisdiction in Canada which grants this power to the Executive. As reported on ABlawg last year (see e.g. [here](#) and [here](#)), these powers were exercised extensively – and in a very sloppy manner – in the early days of the pandemic.

The proposed amendments would repeal not only these April 2020 amendments currently set out in section 52.1, but would remove this power in its entirety from the *Act*. The Bill also proposes to eliminate specific powers, such as those permitting the Lieutenant Governor in Council to order the immunization of individuals during an epidemic or public health emergency (section 38(1)(c)) and authorizing the Minister of Health to conscript individuals needed during a public health emergency (section 52.6(1)(a)).

Conclusion

When COVID-19 first emerged in Canada, governments scrambled to enact rules that would contain the spread of the disease. This led to sloppy lawmaking practices that would not meet democratic muster outside of a pandemic, such as announcing new rules at press conferences or on social media with no advance notice and without giving the public immediate access to the text of those rules. For the most part, these shortcomings were accepted as the price to pay for expediency. However, instead of taking steps to reform these practices once the initial emergency subsided, governments across Canada have allowed these problems with transparency and accountability to fester and become normalized over the past year.

The failure to follow basic practices of good governance in a democratic society governed by the rule of law is surely one reason (but certainly not the only reason – [#AlohaAllard](#)) why ministers and public health officials have lost much of their legitimacy to govern – at the worst possible time. These officials have vacillated between imploring the public to cooperate with restrictions, scolding people for failing to exercise personal responsibility, and making typically hollow threats about stricter enforcement. Unfortunately, compliance with measures that are essential to controlling the spread of COVID-19 hinges on public trust and confidence in the lawmaking process. Alberta is not unique in struggling with these issues, and we have a paper forthcoming this summer in the [Review of Constitutional Studies](#) that examines public health statutes across the country and observes that most contain an inadequate governance framework for the exercise of general lawmaking powers by public health officials. Bill 66 takes small steps in the right direction, but much more work is needed.

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