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COVID-19 and Enforcement of Public Health Orders

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Legislation Commented On: *Procedures (Public Health) Amendment Regulation*, [Alta Reg 92/2021](#)

This amendment to the *Procedures Regulation*, [Alta Reg 63/2017](#), was recently made by the Lieutenant Governor in Council with [Order in Council 124/2021](#) (May 5, 2021). The amendment raises the specified penalty (the violation ticket amount) from \$1000 to \$2000 for contravention of a Chief Medical Officer of Health (CMOH) public health order issued under section 29 of the *Public Health Act*, [RSA 2000, c P-37](#). The amendment came into force on May 19, 2021. This is the fine payable by a person who chooses to plead guilty (see Part 2 of the *Provincial Offences Procedure Act*, [RSA 2000, c P-34](#)) for such things as not wearing a mask where required, gathering in large groups outside, allowing non-family members into their home, or not keeping two metres apart from others. Premier Kenney announced the increased fine on May 4 during the initial ‘Stop the Spike’ [announcement](#) where the Premier also warned Albertans that section 73 of the *Public Health Act* provides for a penalty as high as \$100,000 for a first offence in these matters. This is part of Alberta’s response to calls for stronger enforcement on non-compliance with COVID-19 public health orders. The third wave of this pandemic gave us a full display of just how inadequate the bare threat of legal enforcement is towards ensuring compliance with these rules. This deficiency in the authoritative punch of COVID-19 public health orders is also the reason why Alberta (and other provinces) went to the extreme measure of obtaining an [injunction](#) from the Court of Queen’s Bench to prohibit the very public and orchestrated violations of COVID-19 public health orders. While politicians across Canada begin to engage in what might end up being a foolhardy race to be the first jurisdiction to end COVID-19 restrictions (Premier Kenney announced Alberta’s ambitious [Open for Summer Plan](#) on May 26 – just three weeks after announcing tougher enforcement measures), it would be wise for these lawmakers to pause, reflect, and heed some lessons from the compliance and enforcement mess associated with their COVID-19 public health orders.

To begin with, politicians of all stripes exercised poor judgment in failing to resist the urge to [comment on legal enforcement](#) as the third wave of COVID-19 infections peaked. There is arguably nothing more fundamental to our legal system than the belief that the force of law is administered in a manner which is separate and apart from political or partisan interests. While this separation of law from politics can be more fictional than real - and certainly that is the case in my primary line of work (hint: environmental law) – the COVID-19 pandemic is not an excuse to abandon the [basic principles of justice and fairness](#) which governs our prosecutorial system. History may very well show that the justice system intentionally refrained from exercising the full brunt of its enforcement power on persons who contravene COVID-19 public health orders. However, this would not be an isolated instance where the justice system chooses against

enforcement proceedings for breaches of public welfare rules, and instead uses soft nudges or looks the other way.

An Overview of the COVID-19 Public Health Orders and Exemptions

At the time of writing this post, the [COVID-19 Orders and Legislation webpage](#) listed orders under the categories of (1) Gatherings, activities, masking and business restrictions; (2) Isolation requirements, and measures for airports, including passenger screening; (3) Public access to businesses, schools and places of worship; (4) Visitor restrictions; (5) Health care facility requirements; (6) Physical distancing; (7) Residential addiction treatment service facilities; (8) Mandatory masking in schools. Alberta hopes to eliminate many, if not all, of these restrictions by early July under its [Open for Summer Plan](#).

The gatherings, activities, masking and business restrictions are currently set out in two orders: [CMOH Order 19-2021](#) and [CMOH Order 20-2021](#). These are the restrictions announced by Premier Kenney on May 4 in response to the third wave of COVID-19 infections. Just when you thought the public health orders couldn't get even more difficult to follow and understand, the CMOH demonstrated there is probably no limit to the amount of confusion poor drafting can generate. The primary difference between these two Orders is that Order 19-2021 imposes more stringent restrictions and applies in “. . . areas of the province that have 50 or more active cases of COVID-19 per 100,000 people and 30 or more active cases of COVID-19.” Order 20-2021 applies in “. . . areas of the province that have less than 50 active cases of COVID-19 per 100,000 people and less than 30 active cases of COVID-19.” If you are looking for more specifics or clarity in either Order on this important application measure, you will be disappointed to see that Part 1 in each Order simply refers to a prescribed list of municipalities or areas where the lesser restrictions of Order 20-2021 apply (section 10 of Appendix A to Order 20-2021). One is left to wonder if this list of areas is where the active caseload is below the 50/30 threshold, or is this list of areas in addition to those below the threshold? The COVID [regional active cases webpage](#) certainly suggests the application of these Orders depends on the threshold of active cases as it distinguishes between “high” restrictions and “low” restrictions and presumably readers are supposed to know this is Order 19-2021 and Order 20-2021.

Unlike the morass of gathering, activities, masking and business restrictions imposed and relaxed throughout the pandemic at various times, the physical distancing requirement has remained straightforward and constant since its enactment in March 2020 in CMOH [Order 07-2020](#) and now in CMOH [Order 26-2020](#). This requirement states each person must maintain at least two metres from any other person, except for members of the same household or cohort group. The key terms “household” and “cohort group” have never been defined in the Orders. At one time, the COVID-19 website provided guidance on who falls within a cohort, but I could no longer find that guidance when writing this post.

And finally, no summary of COVID-19 public health orders would be complete without mentioning the growing list of exemptions that the CMOH has been self-empowered to grant in each of these Orders. Section 14.1 in Order 20-2021 is representative of this power: “Notwithstanding anything in this Order, the Chief Medical Officer of Health may exempt a person or a class of persons from the application of this Order.” I noted way back at the outset of this

pandemic that there are procedural problems with how the CMOH grants these exemptions: no published process on how to apply for an exemption; no details on what factors are relevant in considering whether to grant an exemption, and no disclosure on what considerations lead to the CMOH granting an exemption. One could speculate that the absence of transparent procedures is likely to mean those persons with favoured access to the CMOH are also more likely than the rest of us to be relieved from having to comply with public health restrictions. And it appears that the oil and gas industry has enjoyed this kind of preferential access. For example, the COVID-19 public health order webpage includes an exemption issued by the CMOH for oil and gas workers from the traveller [quarantine](#) requirement in CMOH [Order 05-2020](#), a notable exemption given that some think the relatively quick rise of COVID-19 variant infections in Alberta has been facilitated by persons arriving from abroad.

The exemption from the physical distancing requirement in Order 26-2020 is a somewhat less obvious, but still nonetheless problematic, exemption granted to industry. Section 2(3) of the Order provides that a person does not need to comply with the two metre distancing rule if they comply with guidance on physical distancing established by Alberta Health Services (AHS). AHS provides the following [guidance for industrial work camps](#) on physical distancing:

- Physical distancing involves taking steps to limit the number of people you come into close contact with. It is a critical step in slowing down the spread of COVID-19;
- Staff should practice physical distancing, including minimizing close contact with others and limiting the number of clients in given areas at any one time to enable physical distancing by everyone;
- Advise clients to also practice physical distancing. Include information on control measures when this is not feasible (e.g., when two or more individuals are required to turn valves or lift heavy objects);
- All reasonable steps should be taken to maintain a distance of at least two metres (six feet) between individuals at all times;
- Encourage clients to limit widespread social interaction and to develop routines that reduce potential spread and enable easier contact tracing if a confirmed case of COVID-19 appears;
- More information on physical distancing can be found online. (at 4)

In the midst of the ever-changing messaging on COVID-19, one constant has been that [physical distancing](#) reduces community transmission. While the rest of us must keep at least two metres apart from all other persons (except for household and cohort members) and now face the prospect of a \$2000 ticket for failing to do so, and businesses allowed to remain open must do so at very low capacity to ensure safe distancing between patrons, work camps need only to take all “reasonable steps” to be physically distant. Hardly a surprise that these camps became a hotspot for infection – as observed by Premier Kenney – and it also looks like taking all “reasonable steps” to physically distance is not sufficient to prevent COVID-19 [outbreaks in the oilsands](#), where the Premier observed workers are socializing after hours and not wearing masks.

Clearly, we are not all in this together when it comes to applying public health orders and relief granted from the impact of these measures. Familiar lines of justice have appeared in Alberta. The oil and gas industry appears to have privileged access to the ear of the lawmaker, and marginalized

groups do not. Advocates for people with disabilities and other vulnerable groups have been voicing these concerns since the beginning of the pandemic (see for example [here](#), as well as Lorian Hardcastle's post on long-term care facilities [here](#), Jennifer Koshan's post on domestic violence [here](#), and Jonnette Watson Hamilton's post on residential tenancies [here](#)). Voluntary compliance by the general population with public health restrictions is a tall order when the rules change frequently, are hard to understand, seem contradictory at times, are difficult to distinguish from guidance, and when rule-makers grant exemptive relief to some but not others with little or no explanation.

Problems with the COVID-19 public health orders

CMOH public health orders have been plagued with drafting, transparency, and justification issues since the beginning of the pandemic last March – for my initial comments on this, see [COVID-19 and the Public Health Act \(Alberta\)](#). For the most part, the government has left these issues to fester and become problems for compliance and enforcement. During the first wave of the pandemic, none of this seemed to matter because most people were willing to voluntarily comply with the restrictions in CMOH orders and shortcomings in the enactment process were accepted as a price to pay for timeliness. Cracks in compliance appeared during the second wave with [applications](#) seeking judicial review of the restrictions in CMOH orders and isolated instances of civil disobedience. The third wave has led to much more widespread [resistance](#) to the restrictions, [civil disobedience](#), lockdown [protests](#), and an overall [growing dissatisfaction](#) about how governments are addressing the pandemic. Voluntary compliance with the restrictions in CMOH orders has ebbed away, and in the face of a growing collective action problem, government officials began to talk tough on enforcement.

Poor communication is at the top of my list for why compliance and enforcement concerning the CMOH orders is problematic. Not only has public messaging been inconsistent and at times contradictory throughout the pandemic, the rules themselves are also replete with poor drafting. I have commented on this several times on ABlawg; for example, see [here](#) and [here](#). Words and phrases whose meaning is essential to the actus reus (i.e. required elements) of an offence have too often been left undefined or given a vague and indeterminate description in these Orders. There are countless examples to draw upon for illustrations. For example, in relation to the gathering restrictions in Part 4 of both Order 19-2021 and Order 20-2021, the restrictions don't apply to those who are in the same "household" or where a person who "resides on their own" gets together with up to two others with whom the person "regularly interacts". The uncertain meaning or scope of these key phrases is very problematic for compliance and enforcement purposes. And while these drafting problems on gathering restrictions have been around for some time now, even the more recent requirements are plagued with poor drafting. For example, Part 12 in Order 19-2021 and Part 13 in Order 20-2021 states: "An employer shall require a worker to work from their private residence unless the employer determines the worker's physical presence at the workplace is required to effectively operate the workplace." I cannot envision how this provision is even remotely enforceable. Can an employer lawfully dictate exactly where its employees work remotely from? And what does "effectively operate" mean? What is the threshold between just operating and effectively operating? The evidentiary burden on the prosecution to establish an offence on this measure makes you wonder why this provision is even in the Orders.

Pragmatically, the ‘worker shall work from home’ provision should just be guidance, and is thus another example of the very unhelpful mixing of rules and guidance charted by the CMOH – and poor distinguishing of one from the other. This mixing seems to get more and more complex as the pandemic rolls on. Even a cursory stroll through the ‘guidance’ on Alberta’s COVID-19 website reveals plenty of rule-like mandatory language within provisions described as guidance – for example, see the [guidance for retail businesses](#).

My second reason for why compliance and enforcement with the CMOH public health orders is problematic is the apparent disregard by the CMOH for the legislated requirement that general rules of conduct (i.e., physical distancing, masking, gathering restrictions, closures of businesses and public spaces) are regulations and must comply with the basic process of the *Regulations Act*, [RSA 2000, c R-14](#). It certainly makes for a difficult task to convince all Albertans that these orders set out enforceable rules of conduct if the CMOH cannot be bothered even to acknowledge these are regulations that must comply with basic legislative process. Moreover, section 2 of the *Regulations Act* clearly states a regulation that is not filed with the Registrar is not in force. I have yet to see any evidence this filing has occurred, despite the passage of more than a year to fix this shortcoming. I observed this problem back in April 2020 – see [here](#). As my colleague Lorian Hardcastle and I recently wrote on ABlawg [here](#), [Bill 66](#) will attempt to retroactively fix this by exempting CMOH public health orders from the application of the *Regulations Act*. I have previously commented on the perils of retroactive lawmaking and COVID-19 [here](#). Even positivists should have a difficult time getting around this enforcement problem.

My third reason for why compliance and enforcement with the CMOH public health orders is problematic, is the failure of politicians and public health officials to be transparent and give meaningful justifications for the lines drawn by the Orders. The numerous examples of this have been well-documented, so I will only mention a couple here. An Ontario family was [served with an \\$880 ticket](#) for allowing their child to use a skate park on a birthday, but they would have avoided the fine had they chose a [playground](#) to celebrate the occasion instead. What is the reason for a line drawn between a skate park and a playground? Business closures throughout the pandemic have been informed by a mysterious and illusionary dichotomy between essential services (no closure) and non-essential services (closure). This was the basis of a judicial review application made by the Hudson’s Bay Company (HBC) in late 2020. HBC argued that the Ontario public health order closing retail businesses was based on an arbitrary, unsubstantiated, and irrational distinction between allowing retailers who sell groceries along with other goods (the so-called big-box stores such as Walmart or Costco) to remain open while requiring the closure of retailers like HBC that sell similar goods but not groceries. In *Hudson’s Bay Company ULC v Ontario (Attorney General)*, [2020 ONSC 8046 \(CanLII\)](#), the Ontario Superior Court of Justice acknowledged difficulties with the distinction but nonetheless declined HBC’s application:

The wisdom and efficacy of a policy that enables big box stores which happen to sell groceries to remain fully open, and thus generate more in-store customer traffic than would otherwise be the case, is certainly open to question. The logic of reducing community transmission, while allowing people living in lockdown zones to purchase essential services such as groceries, would seem to suggest that only those services deemed essential should be offered for sale and that, subject to social distancing and other protective measures, where possible the public should only be permitted entry into those areas of a mixed retail

establishment where the essential services are sold. We agree with HBC to this extent: one effect of s. 2 of Schedule 2 seems to result in permitting behaviour that is inconsistent with the broader policy goal of reducing community transmission in lockdown zones while permitting the in-store sale of essential items.

As mentioned at the outset, it is not the role of the Court on judicial review to make determinations about the efficacy or wisdom of policy choices otherwise within the scope of the LGIC's executive authority. And it is certainly not within the purview of the Court to potentially make the problem worse by, as HBC urges us to do, ordering the removal of the "selling groceries" limitation under s. 2 of Schedule 2 altogether. Even if we agreed with HBC that s. 2 of Schedule 2 is beyond the jurisdiction of the LGIC under the ROA, it is by no means clear that the appropriate response would be for the Court to open up the exemption to all retailers, whether they sell groceries or not. Legitimate policy choices might equally include narrowing or eliminating the exemption itself. Those are decisions for the government, not the Court, to make. (at paras 72 — 73)

Premier Kenney himself described this essential/non-essential distinction as [arbitrary](#) in late November 2020. Lorian Hardcastle and I remarked [here](#) that the courts will be reluctant to strike down COVID-19 public health orders on legality concerns based on arbitrariness, inconsistencies, or general incoherence – and see more recently *Ingram v Alberta (Chief Medical Officer of Health)*, [2021 ABQB 343 \(CanLII\)](#). However, I do think these legality concerns will also make courts reluctant to convict for breaches of COVID-19 public health orders (there is some [evidence](#) of this already).

A Brief Comparison on Collective Action: Traffic Safety Rules

It is worth a pause here to consider whether expectations might be too high for the ability of the rules in the COVID-19 public health orders to inspire collective action with the threat of more enforcement.

While there are many other regulatory frameworks to draw comparisons with, what comes to mind for me is the traffic safety rules: speed limits; driving proficiency; mandatory third-party liability insurance; seatbelts; distracted driving; etc. At the risk of being accused of making a comparison between ‘apples and oranges’ because driving rules and COVID-19 public health orders clearly address very distinct subjects with different objectives, I suggest it is a useful comparison on compliance and enforcement because those of us who drive are governed by these rules just about every day – much like the COVID-19 public health orders – but notably, there is overwhelming voluntary compliance with the traffic safety rules, and so it might be insightful to consider why that is.

One might observe that most traffic rules are generally knowable, coherent, and understandable, and are thus followed by almost everyone without protests or the need for active enforcement. A posted speed limit and keeping an eye on your vehicle speedometer is about as clear as it gets on what the rule is and what you need to do for compliance. While the exact content of every

individual driver examination is going to vary slightly from one examination to the next, the need to pass that examination and obtain a license to drive a vehicle is clear and understood. Similarly, you will not be allowed to register a vehicle in Alberta without showing evidence of insurance. Sure, there are those who speed excessively or attempt to drive without a license or proper insurance, but these are more the exception than the norm. Most people drive at or under the posted speed limit, have a license, register their vehicle, carry insurance, and wear a seat belt.

The distracted driving rules and their enforcement make for a more revealing comparison to the COVID-19 public health orders. I wrote about these rules a couple of years ago in [Distracted Driving and the Traffic Safety Act](#). In that post, I noted both (1) the confusing [guidance](#) on what constitutes distracted driving and (2) the poor drafting in the general distracted driving prohibition set out in section 115.4 of the *Traffic Safety Act*, [RSA 2000, c T-6](#), as two reasons for why the enforcement [statistics](#) reveal relatively few convictions for the general offence of ‘distracted driving’ in comparison with many more convictions for the specific offence of simply holding a mobile phone while driving. Confusing guidance and messy drafting here seem to correlate with fewer convictions on the general offence of ‘distracted driving’ – something we are likely to see with COVID-19 public health orders as well.

Similarly, there are no apparent *Regulations Act* problems with the traffic safety rules which are set out in the *Traffic Safety Act* and its regulations: speed limits are addressed in sections 106 to 110 of the *Traffic Safety Act*; section 112 of the *Traffic Safety Act* provides the Lieutenant Governor in Council to enact the *Use of Highway and Rules of the Road Regulation*, [Alta Reg 304/2002](#); section 115 of the *Traffic Safety Act* prohibits driving in a manner which contravenes speed limits and the *Rules of the Road Regulation*; the requirement to hold a license that demonstrates driving proficiency is set out in the *Operator Licensing and Vehicle Control Regulation*, [Alta Reg 320/2002](#); section 54 of the *Traffic Safety Act* requires insurance in accordance with the *Insurance Act*, [RSA 2000, c I-3](#); section 82 of the *Vehicle Equipment Regulation*, [Alta Reg 122/2009](#), requires the use of seat belts; sections 115.1 to 115.4 of the *Traffic Safety Act* prohibit distracted driving.

Finally, it is interesting to listen to some [reactions](#) to the mandatory seat belt rule when Alberta enacted it in 1987. Some of these comments sound familiar to the reasons given by some people today for refusing to comply with requirements in the COVID public health orders. Today, it seems indisputable that the justification for a mandatory seat belt rule is plain ‘common sense’: wearing a seat belt significantly reduces the risk of death or serious injury in a vehicle crash. However, this was not generally accepted at the outset and it took years, if not decades, of public messaging and policy to achieve widespread compliance. While the United States [Centers for Disease Control and Prevention](#) (CDC) reports that observed seat belt use is higher in states with direct mandatory seat belt laws, even in states without these requirements, seat belt usage is reported to be as much as 86% - suggesting that today there is significant voluntary compliance with seat belt rules even without the threat of enforcement and fines. All of this seems to confirm how unlikely it will be to achieve voluntary compliance with public health orders which change frequently, are hard to understand, seem contradictory at times, and make distinctions without any apparent rational justification.

Conclusion

The surest indication that there is a compliance and enforcement problem with the COVID-19 public health orders may be that Alberta decided it needed an [injunction](#) to enforce the gathering, masking and social distancing rules for the anti-lockdown [protest](#) at a central Alberta café in early May. The injunction changes the enforcement parameters significantly here because the violation of public health measures in the circumstances addressed by the injunction order (the exact terms of which I have not seen) constitute a breach of a court order and civil contempt of court, rather than an offence under the *Public Health Act*. The common law doctrine of civil contempt of court gives the court power to punish someone for contravening a court order (See *Carey v Laiken*, [2015 SCC 17 \(CanLII\)](#) at para 30). Rules 10.51 to 10.53 in the *Alberta Rules of Court*, [Alta Reg 124/2010](#) set out the sanctions for breaching an order issued by the Court of Queen’s Bench – including imprisonment.

However, it is noteworthy to observe that the Supreme Court cautions in *Carey v Laiken* that the courts should use civil contempt sparingly and as an enforcement measure of last resort:

The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see, e.g., *Hefkey v. Hefkey*, [2013 ONCA 44](#), 30 R.F.L. (7th) 65, at para. [3](#). If contempt is found too easily, “a court’s outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect”: *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, [2012 QCCA 1663](#), at para. [7](#). As this Court has affirmed, “contempt of court cannot be reduced to a mere means of enforcing judgments”: *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992 CanLII 29 \(SCC\)](#), [1992] 2 S.C.R. 1065, at p. 1078, citing *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, [1991 CanLII 3806 \(QC CA\)](#), [1991] R.D.J. 249 (Que. C.A.). Rather, it should be used “cautiously and with great restraint”: *TG Industries*, at para. 32. It is an enforcement power of last rather than first resort: *Hefkey*, at para. [3](#); *St. Elizabeth Home Society v. Hamilton (City)*, [2008 ONCA 182](#), 89 O.R. (3d) 81, at paras. [41-43](#); *Centre commercial Les Rivières ltée*, at para. [64](#). (at para 36)

In other words, injunctions and contempt proceedings should not be used as a general fix for the shortcomings in the COVID-19 public health orders which have bred compliance and enforcement problems.

My own experience throughout this pandemic has been that the most authoritative voice for compliance with public health measures has been the storekeeper who greets customers at the door and asks them to wait outside until someone else leaves; the sign that asks people with infection symptoms to not enter a building; the schoolteacher who reminds students to sanitize their hands upon entering and leaving the classroom; the person who monitors lineups or gatherings in public spaces like malls and asks people to stay two metres apart from each other; the friend who asks their peers to wear a mask; the server who asks those sitting at a table in their restaurant to confirm they are from the same household. These assertions of authority do not rely on Leviathan’s public health orders to achieve compliance, and are better-positioned to avoid the typical collective action problems such as free-riders and effective monitoring.

It was likely always a fiction to believe that the COVID-19 public health orders would inspire voluntary compliance over the long term; however, public health officials and politicians who succumbed to the adage ‘haste makes waste’ and who failed to adhere to basic principles of legality and justice in the enactment of these rules surely worsened the situation. Some may view courts that refuse to convict on contraventions of COVID-19 public health orders to be contributing to the compliance and enforcement problem; however, others will view non-convictions in more realist terms. A reminder to public health officials and politicians that in a democracy governed by the rule of law, the power to legislate and the legitimacy of that authority depends on much more than just podium announcements, slogans, and higher penalties.

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