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Alberta's Vaccine Passport System: The Good, the Bad, and the Ugly

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Matters Commented On: Chief Medical Officer of Health (CMOH) [Order 42-2021](#) and CMOH [Order 43-2021](#)

Good governance practices by the executive branch in how it addresses COVID-19 have largely been absent throughout the pandemic across Canada, but surely we have hit a new low in Alberta with what transpired last week. Facing criticism from the public, pleas from health care professionals, and a health care system straining under the increasing number of hospitalizations, the Premier reappeared at a September 15 press conference after a lengthy [hiatus](#), along with the Minister of Health, the Chief Medical Officer of Health, and the CEO of Alberta Health Services. The Premier was questioned about the termination of public health restrictions in early July and the decision to move towards treating COVID-19 as endemic by largely eliminating basic public health measures like testing, tracing, and isolating (a decision that the government later backpedalled on). Although the Premier was initially apologetic for ending public health restrictions in an effort to enjoy the “[best summer ever](#),” he later [stated](#) that “I don’t apologize for the decision to relax public health restrictions in the summer...” For her part, the CMOH has [admitted](#) that July’s decisions, which were based on her recommendations, put Alberta on its devastating fourth wave trajectory and has said that she “deeply” regrets contributing to the narrative that COVID-19 was over.

On the day of the September 15 press conference, Cabinet issued Order in Council [255/2021](#), which declared a renewed public health emergency under section 52.1 of the *Public Health Act, RSA 2000, c P-37*. The government also announced new public health restrictions that would come into effect the next day (September 16) and on September 20. The cornerstone of the newly announced public health measures is the so-called “Restrictions Exemption Program”, which allows eligible (i.e., discretionary) businesses that opt into the program to be subject to fewer restrictions than those who do not. The Premier has resisted referring to this measure as a vaccine passport, likely due to his repeated earlier [insistence](#) that “We’ve been very clear from the beginning that we will not facilitate or accept vaccine passports.” However, a vaccine passport is exactly what CMOH Orders [42-2021](#) and [43-2021](#) implement.

This post discusses these recent public health measures and observes more of the same problems that we have seen throughout the pandemic from the CMOH orders: poor drafting, inconsistencies between podium announcements and public health orders, hastily granted non-transparent exemptions, and failing to publish legal rules with adequate notice.

The Good

After proclaiming that we were not only open for summer but that we would be [open for good](#), and unequivocally stating that vaccine passports were off the table, the Premier, Minister of Health, and CMOH were largely unavailable to the media and the public despite a growing crisis in Alberta's hospitals. Some speculated that the Premier was lying low pending the federal election and was avoiding stoking the fires of dissent within his own party, which has [polarized](#) views on public health restrictions, including vaccine passports. Although he should not be congratulated for doing his job and showing some leadership, it was a positive development that the province took action in an attempt to bend the curve. Indeed, in the days following this announcement, appointments for vaccinations [tripled](#).

While the new public health restrictions are not without criticism and certainly should have come sooner, they will hopefully help to mitigate the public health emergency and are certainly better than the province doing nothing to address rising numbers of cases and hospitalizations.

The Bad

CMOH Order 42-2021 reinstates many of the rules that had been imposed during previous waves of the pandemic: mandatory masking (including schools); distancing; working-from-home; limits on gatherings; capacity limits in businesses; restrictions on restaurants and bars; and prohibiting indoor group activities. The passport to avoiding most of these restrictions is to comply with either (1) proof of vaccination/negative COVID-19 test/medical exemption requirement in Order 43-2021; or (2) an exemption granted by the CMOH pursuant to Order 42-2021.

The clarity of the restrictions contained in Order 42-2021 has improved since the early days of the pandemic. This is to be expected given that the CMOH has now had several opportunities to clean up the earlier messy iterations of these rules. For example, Order 42-2021 now at least attempts to define a "cohort" rather than merely referring to guidance on the government's website. This is important because the definition of "cohort" is key in determining the scope of the physical distancing requirement in Part 4 and the limits on private indoor gatherings at private residences in Part 6. That said, there are still a number of problematic uncertainties, such as who fits within the term "household" in the definition of a "cohort", and what amounts to "effectively operating the workplace" for the purposes of the work from home rule in Part 5. There is also an odd tendency to state the general rule and then immediately set out specific instances of the general rule "for greater certainty." For example, see sections 4.1, 4.2, and 4.3 in relation to physical distancing.

Order 42-2021 also has some new additions, which are both odd and noteworthy. For example, section 7.7 states that the limits on gatherings do not apply to protests, but the section seems to imply that a protest is a form of "private social gathering." How is a protest on a matter of the public interest a "private social gathering"? And how is the manner in which the protest disperses a matter which is relevant to the CMOH (see section 7.7(e) - a protest must disperse in a coordinated fashion)?

Things turn for the worse when we look at Order 43-2021, which exempts businesses who have opted into the Restrictions Exemption Program from the rules in Order 42-2021. Here, we provide

just a few examples to illustrate how ‘haste makes waste’ when it comes to drafting public health orders.

Order 43-2021 sets up a regulatory system whereby persons or entities who are “in scope” are eligible to be exempt from the restrictions contained in Order 42-2021 if they require proof of vaccine or a negative test, and those who are “out of scope”, which are not eligible for the exemption program. One area of confusion is post-secondary education. “Schools, K-12” are listed as “out of scope.” It is unclear whether this includes K-12 and other schools (e.g., post-secondary institutions) or whether the order is defining school as only including K-12. In contrast, on the government’s [website](#), “publicly-funded post secondary institutions” are listed as “out-of-scope” with a note that there will be a sector-specific exemption. In the absence of that exemption, it would be contrary to Order 42-2021 for post-secondary institutions to hold in-person classes. Yet, many of these institutions stated publicly last week that such classes would resume September 20. How can this be?

As we write this post, the details of how post-secondary institutions will operate on September 20 in compliance with Order 42-2021 remains a secret. It is frankly unacceptable in our democratic system of government, which purports to be governed by the rule of law, for us to be in such a state of confusion. Then again, perhaps we should not be surprised at this, since the CMOH has consistently been non-transparent in how she grants exemptions from her orders and who gets them since the outset of the pandemic. However, the personal and economic stakes associated with who gets an exemption are creeping higher and higher as we move on, and these so-called “exemptions” to the rules are really just a different set of rules for specified persons. The absence of any due process when the CMOH is applying different rules to different persons, all to address the same problem, is very problematic from a fairness perspective.

Section 5.1 of Order 43-2021 imposes an obligation on “in scope” entities to screen all persons entering their facility at the point of entry for one of (1) proof of vaccination; (2) proof of negative COVID test; (3) proof of medical exemption. Section 5.2 imposes an obligation on each person who seeks entry to provide such proof. It only takes moments to envision how difficult it will be for businesses and other operators to enforce these requirements. Section 5.3 lists the various acceptable forms of proof of vaccines that patrons can provide. For “Alberta residents”, this includes, for example, records from Alberta Health Services, pharmacies, or physician immunization records. According to section 5.4, “for international travellers, an ArriveCan app and a valid international travel document” is acceptable. However, Order 43-2021 completely fails to address the requisite form of proof for individuals who travel to Alberta from other Canadian provinces. Moreover, although Order 43-2021 details the kinds of tests that are acceptable, it says nothing about what constitutes valid proof of a negative COVID test. More information is provided in the government’s so-called guidance [document](#) entitled Requirements for the Restrictions Exemptions Program.

In section 4.2 of Order 43-2021, “a patron or attendee” must wear a face mask “at a wedding ceremony or reception” that is held at the premises of a participant in the exemption program. However, the masking exemptions in section 4.3 include someone who is “participating in” a “performance activity (including a wedding ceremony).” There are two possible explanations for these apparently contradictory sections. First, the government may have intended that while

wedding “attendees” (presumably guests) must mask, those participating in the ceremony do not. It is unclear who would be included as participants in the ceremony beyond the engaged couple, given the absence of definitions. Alternatively, the drafters may have intended to say “a performance activity (including AT a wedding ceremony)” with the intention of exempting, for example, musicians performing at that ceremony.

The Ugly

While an unexpected crisis like a fire or flood or even the first wave of COVID-19 may have provided some leeway for imperfect legal drafting, by this stage of the pandemic, the Alberta government’s pattern of waiting until public health measures are urgently needed before imposing restrictions, followed by hastily drafted and difficult to understand public health orders is inexcusable.

With vaccine passports in particular, several other provinces announced their intent to adopt this reform and even set out the details well in advance of their implementation, allowing time for businesses to prepare for changes to the law. In contrast, Premier Kenney stubbornly reiterated his refusal to implement vaccine passports despite nearly all other provinces doing so and many health experts, members of the business community, and members of the public expressing their support for proof of vaccine to access non-essential businesses. When the government finally yielded on their refusal to implement vaccine passports, it was with little notice to the business community or, evidently, to civil servants, given the fact that the public health order took days to be released, the health records system was plagued with [technical difficulties](#), and the passport itself is an easily [forged](#) editable PDF that may undermine the program’s success.

Not only were businesses caught off guard by the new exemption program, but there were inconsistencies between the initial announcement, which included retailers, and the public health order published on the evening of September 18, requiring them to pivot yet again. As recently as September 16, the CMOH [noted](#) that they were working to define essential retailers (giving examples such as grocery and hardware stores). Retailers [unexpectedly](#) discovered they were all considered “out of scope”, with no distinction between those carrying essential goods and those who could participate in the exemption program, less than two days before the program was set to come into effect.

A universally applicable vaccine passport would arguably be preferable to what Alberta has come up with, given concerns that businesses in areas with the highest infection rates and/or lowest vaccination numbers may not opt into the program. It is hoped that the restrictions applicable to opted out businesses will help to bend the curve by minimizing the number of contacts between unvaccinated Albertans. Whether that occurs likely depends in part on whether those restrictions are enforced (for a discussion on why enforcement is problematic, see [COVID-19 and Enforcement of Public Health Orders](#)).

A universally applicable vaccine passport would also have been easier for the public and businesses to understand and comply with, compared to two separate sets of rules for opted in and opted out businesses. Pushing public health decisions onto individual businesses is part of a broader problematic pattern of choices by the executive branch in Alberta, with the government

frequently seeming to avoid making unpopular decisions and instead to leave those decisions to businesses, schools, municipalities, and others. Finally, to better mitigate the crisis that is currently unfolding in the province's hospitals, which have [cancelled](#) numerous surgeries and are training clinicians in a [triage protocol](#) that could see some Albertans denied life-saving care, this vaccine passport program ought to have been implemented weeks ago.

Finally, there unfortunately remains a question over the legal authority of the CMOH to make legislation of general application as with these Orders. The fact that this remains in question is surprising because, in June, the Legislature passed amendments to the *Public Health Act* to confirm her authority to make these sorts of laws and establish a rudimentary (albeit weak) transparency requirement upon their enactment. These amendments were passed in the *Public Health Amendment Act, 2021*, [SA 2021 c 15](#), and for our comments on these changes, see [Proposed Amendments to the Public Health Act Confirm \(Retroactively?\) the Validity of the Chief Medical Officer of Health's COVID-19 Legislation](#). However, the amendments that confirm the authority of the CMOH to make laws of general application come into force on proclamation (*Public Health Amendment Act, 2021*, section 36), and Cabinet has yet to proclaim these amendments into force! Or, if Cabinet has done so, the Order in Council is not published on the [Queen's Printer](#) website and has not been published in Part 1 of the [Alberta Gazette](#).

Ironically, one amendment made to the *Public Health Act* in June, which is in force and is highly relevant to the current situation, was the repeal of Cabinet's power to order the immunization of persons against a communicable disease. Section 38(1)(c), which was repealed by section 11 of the *Public Health Amendment Act, 2021*, stated:

Where the Lieutenant Governor in Council is satisfied that a communicable disease referred to in section 20(1) has become or may become epidemic or that a public health emergency exists, the Lieutenant Governor in Council may in the case of a communicable disease, order the immunization or re-immunization of persons who are not then immunized against the disease or who do not have sufficient other evidence of immunity to the disease.

Why the government felt it was necessary or prudent to disempower Cabinet of this authority during the midst of a global pandemic is a head-scratcher, to say the least, unless it was done primarily for political purposes.

Conclusion

There are numerous problems with the Alberta government's habitually poor public health lawmaking. First, it is a fundamental principle in a democratic system of government that individuals are entitled to know the laws that bind them, particularly when those laws have penalties attached to them. Second, and relatedly, enforcement of unclear laws is difficult. Third, from a public health perspective, compliance with these rules, which is essential to bending the curve and protecting the health care system, is likely to be poor if the public and businesses cannot understand their legal obligations or they question the legitimacy of those who enact them.

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