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# COVID-19 and the *Public Health Act* (Alberta)

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**Legislation Commented On:** *Public Health Act*, RSA 2000, c P-37

All levels of government in Canada are working hard to contain the COVID-19 pandemic and mitigate its severe impacts on public health. Despite the fact that COVID-19 is a national emergency, the federal government has not declared it as such under the *Emergencies Act*, RSC 1985, c 22 (4th Supp) (I previously wrote about this here). For now, we have a collaboration of public health emergency declarations made by provincial, territorial and municipal governments. Alberta declared a public health emergency on March 17, on the recommendation of the Minister of Health and on the advice of the Chief Medical Officer of Health, with Order in Council 80/2020 issued under section 52.1 of the *Public Health Act*, RSA 2000, c P-37. This post critically examines how Alberta is exercising its emergency legal power under this legislation.

The public health emergency declared with Order in Council 80/2020 is in place for 90 days, and section 52.8 of the *Public Health Act* requires a resolution of the legislature to extend the emergency beyond this initial time period. The declaration gives extensive law-making power to the executive and the Chief Medical Officer appointed under the *Public Health Act* - Dr. Deena Hinshaw. Like her federal and provincial counterparts, Dr. Hinshaw has become a social media celebrity during the early days of this crisis. It is, however, important to keep in mind that along with this celebrity status she is a non-elected official who now has significant legal power over Albertans.

The *Public Health Act* does not require a cabinet declaration of a public health emergency as a pre-condition to empowering the Chief Medical Officer with sweeping legal powers. Upon being satisfied of the presence of COVID-19 in Alberta, the Chief Medical Officer has the power under sections 29(2) and (2.1) of the *Public Health Act* to take whatever steps she considers necessary to contain the pandemic, protect those who are not infected with the virus, prevent community transmission, and lessen the impact of the emergency. Section 29 does not prescribe the legal form of these 'steps' - in other words, these powers are not described in the legislation as orders, rules, enactments, directives, resolutions, proclamations, or regulations – other than in section 29(2)(b) which states more specifically that the Chief Medical Officer has power to make 'orders' to prohibit the attendance at school, work, or have contact with other persons.

Officially, the Chief Medical Officer has been exercising her powers with respect to COVID-19 by way of a Record of Decision – Order made under the catch-all provision in section 29(2.1) which authorizes her to take any steps necessary to lessen the impact of a public health emergency. These orders – along with ministerial orders issued under the *Public Health Act* relating to COVID-19 powers (discussed below) - are published here. It is noteworthy how few visits are recorded on

this webpage for each of these orders (although the numbers have risen since the first order was issued); lending support to the notion that Albertans have turned to the media as the official government reporter during this crisis.

A chronological summary description of the orders issued by the Chief Medical Officer thus far under section 29 is as follows:

- CMOH Order 01-2020 dated March 16: This Order prohibits K-12 school attendance, in-person classes at various post-secondary and other educational institutions, and public daycare;
- CMOH Order 02-2020 dated March 17: This Order prohibits any person from attending prescribed non-essential public and private places, including a prohibition on gatherings of more than 50 persons;
- CMOH Order 03-2020 dated March 20: This Order limits who can visit a health care facility;
- CMOH Order 04-2020 dated March 21: This Order amends CMOH Order 01-2020 to allow essential services workers to have access to prescribed public day care facilities;
- CMOH Order 05-2020 dated March 25: This Order imposes self-isolation and quarantine requirements;
- CMOH Order 06-2020 dated March 25: This Order imposes operational protocols on health care facilities;
- CMOH Order 07-2020 dated March 27: This Order imposes rules on social distancing and directs prescribed non-essential businesses to close.

The Chief Medical Officer appears to be reading section 29(2.1) as giving her an almost unlimited scope of legal power to impose duties and restrict liberties in order to contain COVID-19. Thus far, the majority of content in these CMOH orders is within the scope of her authority to make 'orders' under section 29(2)(b); however, the authority to close businesses is not and must be sourced in the power to take whatever 'steps' she deems necessary. Order in Council 80/2020 references the need to regulate persons and property in this public health emergency, but does the Chief Medical Officer have legal authority to close businesses? Or should this power be exercised by provincial cabinet under section 38? In thinking about this, consider that the maximum penalty for contravention of a CMOH order is now $500,000 (see below).

The consensus view is that we will be governed by CMOH and executive orders for an extended period of time, possibly months. Accordingly, I suggest more attention to detail and process be included in subsequent orders. For example, some of the orders empower the Chief Medical Officer to grant an exemption from requirements, but there is no mention of how to seek the exemption or any reference to where that process is set out. Who can apply? Who do you contact? What considerations are relevant? Is there a fee? Will reasons be provided if an application is denied? Is there an appeal or dispute resolution mechanism? The absence of a dispute resolution mechanism has also been noted in relation to non-essential business closures in other provinces – see here.

While some key terms and phrases are defined in the orders, others are not. Perhaps most troublesome in this regard is the essential/non-essential dualism being used to make choices on

restricting personal and economic liberties, as well as on who must be exposed to health risk. CMOH 07-2020 prohibits non-essential businesses from offering goods or services to the public in Alberta, however the list of essential businesses allowed to operate is set out on the Alberta government website and is not explicitly linked to CMOH 07-2020. Who made this list? Hopefully it was a cabinet decision, but I have been unable to locate an order-in-council on this. Nevertheless, I am doubtful that even an executive order will be sufficient to quell dissent on how the essential/non-essential line has been drawn should these closures remain in place for any length of time. The potential impact of these choices is so severe I think it behooves government officials to unpack this dualism in democratic debate.

The Minister of Health provides an important backstop to the legal powers of the Chief Medical Officer during a public health emergency. Unfortunately here, the Minister is currently in the news for the wrong reasons. Under the declaration of a public health emergency, section 52.6 of the *Public Health Act* gives the Minister a list of powers: acquire or use any real or personal property; authorize or require any qualified person to render aid of a type the person is qualified to provide; authorize the conscription of persons needed to meet an emergency; authorize the entry into any building or on any land, without warrant, by any person; provide for the distribution of essential health and medical supplies and provide, maintain and co-ordinate the delivery of health services. Notwithstanding the significance of these powers, arguably the most significant legal power given to the Minister (and the rest of the executive) during a public health emergency is that set out in sections 52.1(2) and (3):

> 51.1 (2) On the making of an order under subsection (1) and for up to 60 days following the lapsing of that order, a person referred to in subsection (3) may by order, 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 if the person is satisfied that its application or operation is not in the public interest.
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> 51.1 (3) The following persons may make an order under subsection (2):
> (a) the Minister responsible for the enactment;
> (b) if the Minister responsible for the enactment is not available, the Minister of Health.

This is power to unilaterally suspend or modify the application of any statute or regulation, and to do so without any process or accountability, legislative or otherwise. And pursuant to section 52.811 these modifications may continue to be in force for a period of up to 180 days after the declaration of emergency has lapsed. It is an understatement to say that the Minister of Health needs the full confidence of Albertans to exercise the powers given to him under the *Public Health Act* with credibility and backstop the authority being exercised by the Chief Medical Officer.

To my knowledge (I say that because the Alberta government has a transparency problem and, accordingly, ministerial orders in Alberta are not necessarily published – a few are available on the Queen's Printer here), the Minister has so far used this power twice during the COVID-19 emergency. In Ministerial Order 612/2020 dated March 25, 2020 the Minister of Health modified section 33 of the *Public Health Act* to clarify that a person infected with a communicable disease includes a person with COVID-19, and this Ministerial Order was issued in conjunction with the

quarantine and self-isolation requirements imposed by the Chief Medical Officer in CMOH 05-2020. Ministerial Order 613/2020 dated March 26, 2020 'modified the application' of section 73 to drastically increase the maximum penalty for contravening orders made by the Chief Medical Officer from $100 per day to up to $100,000 for a first offence and $500,000 for a subsequent offence. These 'modified applications' really look like statutory amendments by the Minister outside of the legislative process. Accordingly, the *vires* of these modifications is questionable.

Cabinet and other ministerial orders have also been issued to implement existing statutory powers to address COVID-19. For instance, Order in Council 100/2020 has amended the *Procedures Regulation*, Alta Reg 63/2017 to set a new specified penalty of $1000 with respect to a contravention of an order made by the Chief Medical Officer. This is now the amount payable should someone plead guilty to a social distancing offence set out on a violation ticket issued under the *Provincial Offences Procedure Act*, RSA 2000, c P-34. Other executive orders have been issued thus far with respect to matters such as the closure of provincial parks, extending the expiry date of regulations, residential tenancies, and employment standards.

Time is most certainly of the essence in action to address COVID-19, but having non-elected officials exercise seemingly unlimited legal power or allowing individual members of the executive to unilaterally modify the application of legislation (otherwise known as amending it) also carries significant risks that mistakes will be made which could have been avoided, or worse, power will be abused. As discussed here, the public needs a better understanding of the plan going forward if emergency governance is going to persist with the legitimacy it needs to maintain social order over the long term. The absence of democratic dialogue, legislative process and accountability in the exercise of emergency legal powers under the *Public Health Act* is concerning. At the very least, supervision by the legislative branch over how the executive and its delegates exercise these powers should be considered an 'essential service'.

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