Executive Lawmaking and COVID-19 Public Health Orders in Canada

*Shaun Fluker and Lorian Hardcastle**

The primary public health response to COVID-19 has been social and economic lockdowns, which have varied across Canada in scope, timing, and duration. These measures included social distancing, quarantine, masking, school closures, business closures, gathering restrictions, closed borders, and travel restrictions. In most provinces and territories these requirements have been enacted in public health orders issued by a chief medical officer, relying on discretionary authority delegated to them in public health legislation.

COVID-19 public health orders have rarely exhibited the hallmarks of good lawmaking in a democratic society governed by the rule of law. Shortcomings in transparency and accountability are a familiar problem for delegated lawmaking by the executive branch, and the COVID-19 public health orders very clearly illustrate these concerns. The result has been a messy landscape of public health rules, which have attracted resistance, and even defiance. At times, the credibility of public health officials has been placed into question. This is unfortunate, because public confidence in these officials and their orders is essential to controlling the pandemic and saving lives.

COVID-19 has exposed the inadequacies of public health legislation across Canada as a proper governance framework for delegated lawmaking. We argue that it is thus incumbent on legislatures to address three basic issues deserving of law reform attention. First, decide exactly what lawmaking powers public health officials should have and ensure that governing statutes reflect this. In particular, existing legislation is unclear as to whether

Les autorités de santé publique du Canada ont répondu à la COVID-19 en mettant en place des mesures de confinement dont l'intensité, la durée et la célérité avec laquelle elles ont été adoptées ont grandement varié. Ces mesures ont inclus la distanciation sociale, la quarantaine, le port du masque, la fermeture d'écoles et de commerces, les limites aux rassemblements, la fermeture des frontières etc. Dans la plupart des provinces et des territoires, ces exigences ont été adoptées par décret des médecins hygiénistes en chef s'appuyant sur le pouvoir discrétionnaire que les lois en matière de santé publique leur délèguent.

Ces décrets ont rarement respecté les standards juridiques applicables dans un état de droit démocratique. Ils ont amplement illustré les problèmes notoires de transparence ou d'imputabilité que pose la législation déléguée à l'exécutif. Conséquemment, le dédale de règles de santé publique a suscité de la résistance et de la désobéissance au sein de la population en plus d'entacher parfois la crédibilité des autorités de santé publique. Cette situation est déplorable puisque ces officiers publics et leurs décrets sont essentiels pour contrôler la pandémie et sauver des vies.

La COVID-19 a révélé que les lois canadiennes actuelles en matière de santé publique sont incapables de fournir un cadre juridique adéquat de législation déléguée. Nous soutenons qu'il revient aux législatures de se pencher sur trois problèmes de base où des réformes sont nécessaires. Premièrement, établir clairement quels pouvoirs devraient détenir les autorités de santé publique et faire en sorte que leur loi habilitante reflète cette réalité.

* Associate Professors of Law, University of Calgary. We would like to thank Thea Hays-Alberstat for her capable assistance in compiling the provincial and territorial legislation and public health orders. We were also the beneficiaries of insightful and constructive feedback given by anonymous reviewers on an earlier draft.

health officials should have and ensure that governing statutes reflect this. In particular, existing legislation is unclear as to whether chief medical officers are authorized to enact laws of general application. Second, improve the transparency in the exercise of these powers. Third, implement accountability measures to ensure there are proper checks and balances on the exercise of these significant executive powers.

sur trois problèmes de base où des réformes sont nécessaires. Premièrement, établir clairement quels pouvoirs devraient détenir les autorités de santé publique et faire en sorte que leur loi habilitante reflète cette réalité. Plus spécifiquement, la législation actuelle demeure floue quant à l'étendue des pouvoirs législatifs des médecins hygiénistes en chef. Deuxièmement, augmenter la transparence dans l'exercice de ces pouvoirs. Troisièmement, mettre en place des mesures d'imputabilité pour s'assurer que ces pouvoirs exécutifs importants sont soumis à des mécanismes de contrôle et de contre-poids.

Contents

1. Introduction

The COVID-19 pandemic provides a rare opportunity to study the widespread exercise of public health emergency lawmaking powers by governments in Canada. These powers have been used to impose significant restrictions on civil liberties, which is particularly noteworthy in a nation where principles of liberalism underlie the legal system and the protection of liberty is a cornerstone of the Constitution.[1] Provincial and territorial governments have enacted restrictive regulations on a wide range of matters such as physical distancing, self-isolation, curfews, quarantine, and health care.[2] Most of these rules have been legislated by the executive branch[3] using power delegated to them by legislatures in public health or emergency statutes. In this article, we highlight the rule of law problems associated with delegated lawmaking and demonstrate how the response to COVID-19 illustrates these concerns. As the article explains, the COVID-19 public health orders have been problematic in their failure to adhere to basic principles of democratic lawmaking — namely transparency and accountability — and such concerns are amplified by the fact these orders restricted civil liberties for more than a full year and some of these orders may continue to do so for the foreseeable future. We accordingly conclude with a call for governments to revisit their public health legislation in order to address these concerns.

In most provinces and territories, the declaration of an emergency enables the use of two general categories of delegated lawmaking powers: (1) restrictions on property and economic liberties (e.g. the seizure of real property or medical supplies, requiring people to render aid or essential services, or altering landlord-tenant relationships), and (2) restrictions on civil liberties (e.g. physical distancing, quarantine, limiting gatherings).[4] Although there is con-

1 Although this paper does not engage with the protected rights and freedoms set out in Canada's written Constitution, the analysis does engage with unwritten constitutional principles encompassed within the rule of law, which apply to the exercise of delegated lawmaking powers granted by public health and emergency statutes.

2 The federal government has also exercised legal authority intended to limit the spread of COVID-19, for example, by limiting travel with powers set out in the *Quarantine Act*, SC 2005, c 20, ss 12–14. Similarly, municipalities have also enacted bylaws attempting to contain the spread of COVID-19. However, the majority of such measures have been implemented by the provincial and territorial governments, and our analysis in this paper focuses on public health orders issued by provincial and territorial officials.

3 The executive branch of government in Canada encompasses cabinet and individual ministers, as well as appointees or delegates of these officials, such as program directors or administrative agencies charged with implementing regulatory regimes.

4 We acknowledge the division between these categories is not as clear as this suggests. Most provinces and territories purport to draw a line between the type of emergency powers exercisable by

siderable interprovincial variation, the former generally requires a cabinet or ministerial order, while governments allocate the latter powers during a public health emergency between cabinet, individual ministers, and public health officials in various ways.

In a representative democracy, we would normally expect the legislative assembly to deliberate extensively on restrictions to civil liberties, thereby contributing towards political accountability to the electorate for these restrictions. However, there is nothing unusual about the delegation of otherwise extraordinary lawmaking power to the executive branch to restrict liberties in response to an emergency. Emergencies are accepted by most as "exceptional" times when the usual deliberative norms of lawmaking should give way to expedience and an exercise of authority that, while temporary, is more dictatorial than democratic in nature. Indeed, the problem of extensive, thinly constrained discretionary power held by the executive during an emergency is a significant one for legal theorists who seek to explain how the exercise of such draconian powers can still fit within a system of government which adheres to the liberal rule of law.[5]

The need to act swiftly in order to ensure that hospitals had adequate capacity and to flatten the curve on community transmission in the early days of the COVID-19 pandemic in Canada provided ample justification for the emer-

---

the political executive (e.g. ministers) and the type of powers exercisable by public health officials, which sometimes adhere to this division between restrictions on property and economic liberties versus restrictions on individual liberties. For example, sections 38 and 52.6 of Alberta's *Public Health Act*, RSA 2000 c P-37, delegates powers that restrict property and economic liberties to the Lieutenant Governor in Council or the responsible minister, while section 29 delegates the power to make public health orders to the Chief Medical Officer of Health. In British Columbia, section 10 of the *Emergency Program Act*, RSBC 1996, c 111 provides the minister with lawmaking powers to restrict property and economic liberties, whereas section 31 of the *Public Health Act*, SBC 2008, c 28 authorizes the provincial health officer to restrict individual liberties. In practice, COVID-19 public health orders have blurred this line. For example, there is significant overlap in an order that all non-essential business close their doors to the public.

5 The modern debate was sparked by national security measures implemented after 9/11. See e.g. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (New York: Cambridge University Press, 2006); David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27:5 Cardozo L Rev 2005; David Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 21; Bruce Ackerman, "The Emergency Constitution" (2004) 113:5 Yale LJ 1029. Much of this literature responds to the theory of emergency powers developed by the German legal scholar Carl Schmitt, who asserted these powers fall outside the scope of law because of the 'exceptional' nature of an emergency. For a description of Schmitt's work see Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception Dichotomy'" (2000) 21:5–6 Cardozo L Rev 1825.

gency declarations that were issued in the provinces and territories, and for the extensive exercise of lawmaking power by the executive that followed on the heels of these declarations. However, the COVID-19 pandemic differs in important ways from the paradigmatic emergency scenario of a natural disaster or an insurrection: It is clearly not temporary and some public health orders may remain in place for another year or more while vaccines are distributed and administered, and while governments respond to COVID-19 variants. In this regard, the response to COVID-19 increasingly appears to give credence to the concerns levied against the general use of executive lawmaking power during an emergency: What begins as a temporary, exceptional situation slowly creeps towards a sense of normality, a new normality defined by the long-term or perhaps even permanent erosion of civil liberties by executive fiat.[6] COVID-19 also differs from previous public health emergencies in Canada, which did not require such extensive restrictions on civil liberties due, for example, to minimal community transmission or the relatively quick development and distribution of a vaccine.[7] Accordingly, the exercise of delegated lawmaking power to implement severe restrictions on civil liberties in order to limit the spread of COVID-19 provides a unique opportunity (even within the "exceptionalism" of an emergency) to reflect on the dynamic between responding to an emergency and respecting principles of democratic governance and the rule of law.

Hallmarks of good lawmaking such as organization, coherence, predictability, consistency, transparency, justification, and accountability provide both the legislative and executive branches with legitimacy to govern and are essential components of the rule of law.[8] These attributes have been missing at times in the enactment of rules intended to curb the spread of COVID-19. A more pessimistic characterization of delegated lawmaking in response to COVID-19 would be that Canada's landscape of public health orders has been a messy, unpredictable, and inconsistent compilation of rules, guidance, announcements,

6 The concern with 'normalization of the exceptional' or 'normalizing the rhetoric of emergency' is at the core of efforts to show how emergency powers still operate under the rule of law (see generally Dyzenhaus and Ackerman, *ibid*).

7 For a comparative analysis of the SARS, H1N1, and COVID-19 outbreaks, see e.g. Katherine Fierlbeck & Lorian Hardcastle, "Have the Post-SARS Reforms Prepared Us for COVID-19? Mapping the Institutional Landscape" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 31.

8 In *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, 161 DLR (4th) 385 the Supreme Court of Canada stated: "At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs." We consider these hallmarks to be attributes of what Dyzenhaus refers to as the 'rule of law', as opposed to the 'rule by law', in his argument that emergency powers are subject to the principle of legality and that courts should be willing to review the exercise of these powers to ensure compliance with these principles (see generally Dyzenhaus, *supra* note 5).

amendments, and recissions. Even for those trained in law, navigating this landscape has been a frustrating and confusing endeavour.

A sudden rise in the spread of COVID-19 by community transmission and concerns with hospital capacity led to renewed public health restrictions in the fall of 2020.[9] Restrictions were strengthened or reintroduced in winter 2021, when infection rates again spiked due to the emergence of several new variants. In contrast with the more forgiving reception to the mess of initial restrictions imposed at the outset of the pandemic in Canada, government officials were sharply criticized for their confusing presentation of rules and guidance during the second and third waves.[10] However, more than just facing criticism, these second and third waves prompted instances of explicit disobedience to public health orders,[11] the most egregious of which was when government officials failed to comply with their own travel guidance over the 2020 holiday season.[12]

The concern legal theorists tend to have with emergency lawmaking is the risk that temporary executive rule has the potential to morph into a quasi-dictatorial and essentially lawless state in which officials abuse their discretionary power by enacting partisan rules without due process or rational justification. The COVID-19 public health emergency perhaps demonstrates that the real risk is less alarming but nonetheless still problematic from a rule of law perspective. Shortcomings in good lawmaking impair the credibility and legitimacy of public health authorities who thus fail to compel obedience with their restrictive measures, despite ruling with *bona fide* intentions. Theorists disagree over which branch of government should be primarily responsible for taking steps to address this problem, and our analysis in this article sides with the view that

9 See e.g. Joel Dryden, "Hundreds of Alberta doctors, 3 major health-care unions join calls for 'circuit-breaker' targeted lockdown", *CBC News* (12 November 2020), online: <cbc.ca/news/canada/calgary/alberta-tehseen-ladha-heather-smith-jason-kenney-deena-1.5798897> [perma.cc/J552-QZ2G].

10 See e.g. Liam Casey, "Mixed messaging on COVID-19 pandemic is leading to distrust in Ontario, experts say", *The National Post* (6 October 2020), online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/mixed-messaging-on-covid-19-pandemic-is-leading-to-distrust-in-ontario-experts-say> [perma.cc/7N6X-WNXM].

11 See e.g. Austrin Grabish, "Church minister fined twice for breaking Manitoba's public health order" *CBC News* (23 November 2020), online: <cbc.ca/news/canada/manitoba/church-service-steinbach-manitoba-covid19-1.5812531> [perma.cc/34VB-C8WT]; "Etobicoke BBQ restaurant owner arrested, faces 13 charges after defying COVID-19 lockdown orders", *CBC News* (26 November 2020), online: <cbc.ca/news/canada/toronto/adamson-bbq-locks-changed-1.5817090> [perma.cc/YE38-FEYT]; Sarah Rieger, "Anti-mask protests show need for better public health messaging, Calgary researcher says", *CBC News* (28 November 2020), online: <cbc.ca/news/canada/calgary/anti-mask-rally-calgary-1.5820904> [perma.cc/U4LY-RC34].

12 Samantha Beattie, "Here's a list of Canadian politicians caught travelling over holidays", *Huffington Post* (3 January 2021), online: <huffingtonpost.ca/entry/list-canadian-politicians-travel_ca_5fec992ac5b6ff747985d01e> [perma.cc/T4XG-VPMN].

the legislature has the primary role in the context of managing a disease outbreak that is widespread, long-term in duration, and requires constant changes in the law in response to various health, social, and economic considerations.

This article takes a critical look at how executive lawmaking powers have been exercised to enact COVID-19 public health orders in Canada.[13] Our analysis begins with a short overview of the lawmaking process at the executive branch, noting its inherent limitations in meeting the hallmarks of good lawmaking noted above, such as transparency or accountability, and noting that these limitations are very likely to be exacerbated when responding to a public health emergency. As an illustration of a public health measure imposed in response to COVID-19, we set out the language used by a selection of provinces and territories in their physical distancing orders. We chose to focus on physical distancing orders in particular because the need to maintain at least two metres between persons has played a key part of public health strategies in all provinces and territories, — even as governments relaxed and reimposed other restrictions — and because of its importance as a measure to prevent the spread of COVID-19.

In the remainder of the article, we examine the legislation in each province and territory that authorizes COVID-19 public health orders, what powers it delegates and to whom, and the transparency and accountability mechanisms that apply to the exercise of these powers.[14] We conclude that public health statutes in most jurisdictions are deficient in relation to the key attributes of good lawmaking insofar as they (1) fail to clarify and confirm the authority of public health officials to enact laws of general application; (2) lack transparency requirements on the enactment process for public health orders; and (3) contain no accountability measures to allow for review of the substance of these orders.

2. Lawmaking by the Executive

Legislation enacted by the executive is referred to as "delegated," "executive," or "subordinate" legislation.[15] These labels signify that it is legislation made under the authority of a statute, and that it must be enacted within the parameters established by the statute. The parent statute may include procedural requirements applicable to the enactment of subordinate legislation and may also pre-

13 The research was initially conducted in June 2020, and then updated in September 2020 and February 2021.

14 This examination is primarily a descriptive account.

15 For a detailed account of executive lawmaking in Canada see John Mark Keyes, *Executive Legislation*, 2d ed (Toronto: LexisNexis Canada, 2010).

scribe the substantive topics that can be addressed by the subordinate legislation. While this type of lawmaking is often described as the administration or implementation component of a statutory regime by government officials who are "in the field," so to speak, in practice legislatures frequently delegate broad and sweeping legislative powers that far exceed mere administration. As we discuss in the next section, provincial and territorial public health laws delegate broad powers to respond to communicable disease outbreaks that do not merely relate to administration. In extreme instances, a legislature will enact a statute that does little more than empower the executive branch to establish all the rules governing a program or policy.[16]

The volume of subordinate legislation enacted by the executive branch exceeds, by a significant margin, the volume of statutes enacted by legislatures as statutes in Canada today. Subordinate legislation comes in many different forms, including regulations, orders, directives, resolutions, and bylaws, and has the same general application and binding authority as a statute enacted by a legislature. Subordinate legislation to contain the spread of COVID-19 has been enacted in the provinces and territories by cabinets or ministers in the form of regulations, or by a chief medical officer (or equivalent) in the form of a public health order.

Transparency and accountability are essential components of any credible system of law governing the exercise of public authority. At its most basic, transparency requires laws to be published and knowable. However, meaningful transparency should also reveal how public power is exercised and why a decision was made, both of which help justify the exercise of authority and contribute to the legitimacy of power. In the context of a disease outbreak, knowing what the restrictions are and why they were imposed can improve compliance with those restrictions, thereby helping the law achieve its purpose. Accountability, on the other hand, serves both a democratic and a legal function. In a democratic sense, political accountability requires regular elections, whereby a government places its governance record before the public and seeks a renewed mandate. Political accountability also functions at the delegated level: ministers and other executive delegates (for example, the chairperson of an administrative tribunal) can be relieved of their duties if their actions are inconsistent with government policy. Legal accountability, by contrast, is ultimately administered by the judicial branch of government. The judicial review of legislative decisions focuses on whether these decisions are sourced in law

16 For a recent critical account on delegated lawmaking in Canada, see (Alyn) James Johnson, "The Case for a Canadian Nondelegation Doctrine" (2019) 52:3 UBC L Rev 817.

and accord with legal principles, ensuring that the legislative and executive branches do not overstep or abuse their legal authority.[17]

Transparency is hard to come by in executive lawmaking. The deliberations and the enactment process are usually hidden from public view, and subordinate legislation is often enacted without prior notice by the order of cabinet or a minister. Canadian legislatures sometimes impose public notice and comment procedures for the enactment of subordinate legislation, especially on the lawmaking of delegates of the executive, like tribunals. However, the extent to which these procedures add real transparency depends significantly on the details set out in the statute, such as how notice is to be issued, whether comments are published, and how the lawmaker responds to comments that are received. The delegated lawmaker is typically not required to give a justification or provide written reasons for the enactment, although sometimes an explanation is provided either at the discretion of the lawmaker or because the governing statute makes this a requirement.[18] As we discuss below, demands for the government to justify its public health restrictions have grown over the course of the pandemic, particularly when rules have been perceived as inconsistent or not based on evidence.

Accountability in executive lawmaking begins with the words of the enabling section(s) in the governing statute. The grant of authority will vary from a broad, open-ended description of delegated power to legislate on any matter related to the purpose of the statute, to a more restricted delegation to legislate on specific matters set out by the statute. Accountability has far less rigour when the grant of authority is written with few constraints. As we describe later, one of the problems with COVID-19 public health orders is their source of authority, usually a broad grant of discretion set out in a public health statute which was arguably never intended to provide general lawmaking power.

The effectiveness of mechanisms of political accountability to constrain the exercise of delegated lawmaking power is also impaired by the fact that legis-

17 Legislatures can also create tribunals and empower them to review the exercise of executive power on principles of legality, although these statutory tribunals themselves are also ultimately legally accountable to the judicial branch.

18 Federal regulations issued by the executive, which are governed by the *Statutory Instruments Act*, RSC 1985, c S-22, must comply with the transparency requirements set out in the *Cabinet Directive on Regulation* (Treasury Board of Canada Secretariat, "Cabinet Directive on Regulation" (1 September 2018), online: *Government of Canada* <canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/cabinet-directive-regulation.html> [perma.cc/2HVT-GYFP])). Subordinate legislation enacted by delegates of the executive are encouraged to comply with these requirements.

latures have no point-in-time review over the enactment of subordinate legislation. In order to partially overcome this difficulty, a legislature may require a delegate of the executive to obtain the prior approval of cabinet or a responsible minister before enacting subordinate legislation. However, the strength of this requirement as a means of accountability is questionable given the relationship that often exists between an appointed official and the minister who appointed them and given the fact that cabinet or ministerial approvals may not be published or otherwise transparent. Regulations enacted by cabinet or individual ministers are usually subject to some minimal oversight by a registrar or similar authority established in statutes governing the enactment of regulations, but this review is also usually non-transparent. Some legislatures provide for additional accountability by requiring a periodic review conducted by a committee of the legislature on subordinate legislation enacted by the executive, and this review may even go further by empowering the elected assembly to revoke subordinate legislation.[19] However, in practice these powers are used sparingly.[20]

When it comes to legal accountability, Canadian courts are reluctant to review the exercise of legislative authority by the executive branch, particularly in the absence of a constitutional ground for the review.[21] Judicial review is almost completely unavailable in relation to the enactment process for subordinate legislation[22] unless the legislation is construed as targeting specific person(s) or the alleged procedural error involves a failure by the delegated lawmaker to comply with directions set out in the governing statute.[23] This means that, in the absence of explicit statutory direction, choices made by the executive on how or whether to engage in democratic deliberation with the public regarding subordinate legislation are largely immune from legal scrutiny in Canada. Courts may review the substance of subordinate legislation, but this review should be conducted without questioning the merit or policy

19 See e.g. *Statutory Instruments Act*, *ibid*, ss 19, 19.1 and the *Cabinet Directive on Regulation*, *ibid*. For a discussion of this process at the federal level see House of Commons, Standing Joint Committee for the Scrutiny of Regulations, *In Brief*, No 2014-18-E, by Cynthia Kirkby (2 April 2014), online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2014-18-e.pdf> [perma.cc/6QAQ-LY96].

20 See e.g. Standing Joint Committee for the Scrutiny of Regulations, *ibid* at 4.

21 Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3d ed (Toronto, ON: Emond Montgomery, 2018) 307 at 327-328, 333-339.

22 *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 83 DLR (4th) 297. This reluctance by the judiciary to review subordinate legislation for procedural fairness has been questioned in the literature, see Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53:3 UTLJ 217.

23 *Homex Realty v Wyoming*, [1980] 2 SCR 1011, 116 DLR (3d) 1; *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24-28 [*Katz Group Canada*].

objective of the legislation and the reviewing court will afford significant deference to the lawmaker.[24]

In this regard, it is unsurprising that attempts to impose legal accountability on COVID-19 public health orders have thus far been unsuccessful. At the time of writing, there are numerous ongoing and decided cases in which applicants assert that restrictions in these orders constitute an unjustifiable breach of *Charter* rights and freedoms; however, the courts have denied interim injunctive relief in many of the ongoing cases and dismissed other applications outright, with strong reasoning in favour of the restrictions and deference to public health officials.[25] For example, in upholding the province's travel restrictions as a justifiable limit on *Charter*-protected mobility rights, the Supreme Court of Newfoundland and Labrador stated that in the context of a public health emergency "the time for seeking out and analyzing evidence shrinks."[26] Relying on the precautionary principle, the Court accordingly concluded that uncertainty in the evidence should not preclude officials from taking action.[27]

Apart from the *Charter* challenges, the *Hudson's Bay Co ULC v Ontario (Attorney General)* decision issued by the Ontario Superior Court of Justice also dims the prospect of a successful challenge to the validity of a COVID-19 public health order based on a failure to adhere to the attributes of good lawmaking described here.[28] Hudson's Bay Company (HBC) sought judicial relief to vary Ontario's public health order requiring the closure of retail businesses in late November 2020, alleging that the order made an arbitrary, unsubstantiated, and irrational distinction insofar as it allowed 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.

Several of the problems associated with COVID-19 lawmaking were apparent in this case: the public health order was amended with little advance notice at a time (holiday season) where its impacts would obviously be severe to those affected by the restrictions; the terms of the order changed over time —

24 *Katz Group Canada, ibid*.

25 See e.g. *Sprague v Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335; *Springs of Living Water Centre Inc v Manitoba*, 2020 MBQB 185; *Ingram v Alberta*, 2020 ABQB 806; *Black et al v Toronto (City of)*, 2020 ONSC 6398; *Toronto International Celebration Church v Ontario (AG)*, 2020 ONSC 8027 [*Toronto International*]. For an example where the court did grant limited interim injunctive relief, see *Clinique juridique itinérante c Procureur général du Québec*, 2021 QCCS 182.

26 *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para 411.

27 *Ibid*.

28 *Hudson's Bay Co ULC v Ontario (AG)*, 2020 ONSC 8046 [*Hudson's Bay*].

and in rapid succession as the holiday season approached — breeding confusion about its scope and intention; and no explicit justification was provided by lawmakers to connect the distinction made in the order with a public health objective.[29] However, the Court dismissed all of these concerns, and in doing so provided some remarkable commentary that seems to both acknowledge the deficiencies of the order and confirm that there is no recourse to address them in the courts:

> 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.[30]

29 *Ibid* at paras 7-26, 66-69, 84-86. In *Toronto International*, the Court made similar observations on the absence of data or other information to support distinctions between allowable and prohibited activities in public health orders, but likewise was willing to look past these justification gaps with blanket deference to public health officials (*supra* note 25 at paras 19-32). Some other provinces made a similar distinction between big box stores and other retailers and, in some cases, subsequently admitted that these policies were arbitrary. For example, Alberta Premier Jason Kenney stated that his government made "a grave mistake" and "a stupidly arbitrary distinction between essential and non-essential retail businesses that had the unintended consequence of allowing Walmarts and Costcos to sell darn near everything because they have a grocery section, where they sell pharmaceuticals, while shutting down thousands and thousands of retail small and medium businesses." Graham Thomson, "Kenney's COVID-19 apology a calculated political move", *CBC News* (26 November 2020), online: <cbc.ca/news/canada/edmonton/alberta-covid-coronavirus-jason-kenney-1.5816786> [perma.cc/J45F-H7K8].

30 *Hudson's Bay, supra* note 28 at paras 72-73.

In sum, then, existing jurisprudence strongly indicates that judicial review is an unlikely avenue for addressing the lawmaking deficiencies apparent in the exercise of delegated legislative authority to enact COVID-19 public health orders.[31] Having briefly described the difficulties associated with executive lawmaking in response to the COVID-19 pandemic, the next section will turn to a concrete example of these difficulties: namely, physical distancing rules.

3. Physical Distancing — the "Two Metre Rule"

In this section we set out the language used in a selection of provincial and territorial public health orders respecting physical distancing to illustrate some of the difficulties described above. The terms "physical distancing" and "social distancing" hit the mainstream with the onset of the COVID-19 pandemic. The US Centers for Disease Control and Prevention (CDC) states that limiting close contact with others is the best method to control the spread of COVID-19, and describes the practice as follows:

> Social distancing, also called "physical distancing," means keeping a safe space between yourself and other people who are not from your household.
>
> To practice social or physical distancing, stay at least 6 feet (about 2 arms' length) from other people who are not from your household in both indoor and outdoor spaces.[32]

The rationale for this practice is that COVID-19 spreads most readily when people in close contact share moisture droplets. As Prime Minister Justin Trudeau infamously put it early in the pandemic, we need to avoid "speak-

31 *Hudson's Bay*, *supra* note 28 at paras 37-70, applies the principles set out in *Katz Group Canada, supra* note 23, to conduct a very limited review on the *vires* of the public health order and confirm it falls within the ambit of the governing statute. This, together with the absolute deference shown by the courts in the *Charter* cases thus far, seems to be an example of what Dyzenhaus refers to as judicial review which engages in only a shallow review of delegated authority to confirm there is 'rule by law' and avoids a deeper probe into whether the exercise of authority conforms with the 'rule of law'; the result is 'grey holes' of emergency governance where there is only a façade of legality (see Dyzenhaus generally, *supra* note 5). See also Paul Daly, "Governmental Power and COVID-19: The Limits of Judicial Review" in Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 211.

32 "Social Distancing", online: Centers for Disease Control and Prevention <cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [perma.cc/TD7K-2FTK]. Other experts do not view these terms as synonymous and encourage individuals to find ways to remain socially connected while still remaining physically distant.

ing moistly" to each other.[33] Since then, the need to physically distance has remained a central component of COVID-19 public health strategies across Canada, even as other requirements such as limits on gatherings, business closures, and travel restrictions have been cyclically imposed and relaxed during the pandemic.

A COVID-19 public health order that requires all persons to keep two metres from others is clearly a legislative enactment: it is issued under authority granted by statute; imposes a norm of general application; is written in mandatory language; and contravention leads to sanction.[34] Notably in relation to sanction, some governments significantly increased the penalties for the contravention of orders issued under public health legislation in order to encourage compliance with the COVID-19 rules, including the "two metre rule." For example, Alberta increased fines payable for contravening COVID-19 orders from $100 per day to up to $100,000 for a first offence and $500,000 for a subsequent offence.[35] Similarly, Ontario increased the sanction payable for contravention of a COVID-19 order by an individual to a maximum of $100,000 and one year imprisonment.[36]

The "two metre rule" has been expressed differently across the provinces and territories, and in some jurisdictions the terms of the rule have been altered over time as new versions of public health orders are issued, usually with no explanation given for the changes. Oddly, it isn't clear whether all jurisdictions have enacted a stand-alone rule on this requirement during the pandemic, or at least it isn't clear enough. For example, the *Civil Emergency Measures Health Protection (COVID-19) Order* enacted in the Yukon Territory at the time of writing prohibited more than ten persons from congregating in the same place, but did not mention the "two metre rule," other than for individuals entering the territory.[37] Other jurisdictions only referenced the "two metre rule" within

33 John Paul Tasker, "Canada's top doctor says she'll wear mask when physical distancing isn't possible", *CBC News* (7 April 2020), online: <cbc.ca/news/politics/canada-top-doctor-physical-distancing-1.5524974> [perma.cc/FUW2-MNBH].

34 For a discussion of the relevant factors in determining whether an instrument is legislative see *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras 58-66.

35 *Public Health (Emergency Powers) Amendment Act*, SA 2020, c 5, s 9. This Act also granted the executive extraordinary power to unilaterally amend any statute during a public health emergency, and to do so retroactively. See also Shaun Fluker, "COVID-19 and Retroactive Law-Making in the Public Health (Emergency Powers) Amendment Act (Alberta)" (6 April 2020), online (blog): *ABlawg* <ablawg.ca/2020/04/06/covid-19-and-retroactive-law-making-in-the-public-health-emergency-powers-amendment-act-alberta/> [perma.cc/XDW4-WQWZ].

36 *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020 c 17, s 10(1).

37 YMO 2020/50, ss 1(3), 5.

their public gathering restrictions, and in these instances the legal duty to ensure physical distancing is imposed on property owners/occupiers, rather than on all individuals. Jurisdictions that have not enacted a stand-alone "two metre rule" of general application are perhaps acknowledging the significant difficulties associated with the enforcement of such a requirement. Others attempted to address this problem by importing a *mens rea* component, requiring that a person not *knowingly* come within two metres of others. There are also inter-jurisdictional differences in the exceptions to the rule: some jurisdictions have allowed close contact between members of the same household, some refer to family or friends, and others have referred to social circles, cohorts, or bubbles. Few jurisdictions provided a definition to clarify the reach of these exceptions. Similarly, many of these enactments have left much to the interpretation of the reader in relation to what constitutes a "reasonable" measure or attempt to physically distance.

To better illustrate these observations, a selective sampling of the language used in COVID-19 public health orders at the time of writing is provided below.[38]

Manitoba: The *Public Health Act Order* issued by the Chief Provincial Public Health Officer distinguishes physical distancing in a specific place from that in gatherings more generally.[39] The Order imposes the obligation to maintain distancing on the owner of a premises. Section 4(2) states that, "if a business listed in the Schedule allows members of the public to attend, the operator of the business must implement measures to ensure that members of the public attending the business are reasonably able to maintain a separation of at least two metres from other members of the public." In contrast, the obligation to physically distance rests with individuals in other circumstances. For example, individuals engaging in outdoor sporting or recreational activities must maintain a distance of two metres between one another, subject to limited exceptions (e.g. where they live in the same household).[40]

Saskatchewan: The *Public Health Order* issued by the Chief Medical Health Officer permits public and private outdoor gatherings with up to ten persons as long as physical distancing of at least two metres is maintained between in-

38 These references are to public health orders as they were enacted in June 2021. As we have noted, COVID-19 public health orders frequently change. Another issue with these orders in most jurisdictions is that their enactment process did not follow statutory requirements and they were not published in official government reporters. Accordingly, there is no official citation.

39 Manitoba, Chief Provincial Public Health Officer, *Public Health Act Order*, (12 February 2021), online (pdf): <gov.mb.ca/asset_library/en/proactive/2020_2021/orders-soe-02112021.pdf > [perma.cc/5PQS-MVGD].

40 *Ibid*, s 12(3).

dividuals from different households.[41] According to section 1(b) of the Order, this is subject to certain exceptions:

> …[A]ll indoor public gatherings are prohibited except in the following circumstances where 2 meter distancing between people can be maintained:
>
> (i) Settings where people are distributed into multiple rooms or buildings, and workplaces; and
> (ii) Are a critical public service or an allowable business service.

While the onus is on "persons in attendance" to maintain distancing at gatherings,[42] the responsibility falls to business owners in other circumstances. For example, under section 1(q)(ii) of the Order, owners or operators of retail stores shall ensure that either certain occupancy restrictions are met or "that 2 meters of physical distance is maintained between non-household members at all times." The Order does not give a definition to clarify who qualifies as members of a household.

Prince Edward Island: The *COVID-19 Prevention and Self-Isolation Order* issued by the Chief Public Health Officer imposes an obligation on owners and operators of businesses, services, and organizations that are permitted to operate to, among other things, "take every reasonable step to ensure minimal interaction of people (including employees and patrons) within two metres of each other."[43] Sections 25 and 26 place the same obligation on persons who organize gatherings. In contrast, section 23 places the obligation on individuals who partake in unorganized gatherings. Members of one household are permitted to gather with no more than ten individuals from one or more other households if "each individual at the gathering takes every reasonable step to maintain a distance of two metres or more from persons who do not reside in their household."[44] Unlike in most other jurisdictions, the PEI Order actually defines the term "household" in section 1(d), defining it to mean "persons who normally reside together at a residence."

Alberta: Alberta is one of the provinces with a general rule on physical distancing. Section 2.1(1) of *CMOH Order 26-2020* issued by the Chief

41 Saskatchewan, Chief Medical Health Officer, *Public Health Order*, (26 January 2021), s 1(c), online (pdf): <saskatchewan.ca/-/media/files/coronavirus/public-health-measures/public-health-orders/provincial-order-jan-26-2021.pdf > [perma.cc/W5KX-9G6W].

42 *Ibid*, s 1(c).

43 Prince Edward Island, Chief Public Health Officer, *COVID-19 Prevention and Self-Isolation Order*, (22 January 2021), s 19(a), online (pdf): <princeedwardisland.ca/sites/default/files/publications/covid-19_preventionandself-isolation_order.pdf> [perma.cc/NVG6-39V5].

44 *Ibid*, s 23.

Medical Officer of Health requires that "every person attending an indoor or an outdoor location must maintain a minimum of 2 metres distance from every other person."[45] Section 2.2(2) exempts persons "who are all members of the same household or cohort group" from this requirement. The Order does not define the term "household," but it does refer to Alberta Health guidance on what qualifies as a cohort, and this guidance describes the different types of cohorts in a very imprecise manner.[46] For instance, a "core cohort" may consist of up to 15 persons, including those who form part of a regular routine or a closest tightknit social circle, but these key terms and phrases are not defined.[47]

British Columbia: The *Gathering and Events Order* issued by the Provincial Health Officer requires the organizer of an event to ensure that "there is sufficient space available to permit the patrons to maintain a distance of two metres from one another" and that patrons maintain this distance "when standing or sitting, unless they reside together."[48] The *Food and Liquor Serving Premises and Retail Establishments Which Sell Liquor Order*[49] imposes the same requirement on the owner or operator of food and drink establishments, except where a physical barrier separates persons.

Ontario: Section 3 of Schedule 1 to the *Rules for Areas in Stage 3* enacted pursuant to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*,[50] provides as follows:

> 3. (1) The person responsible for a place of business or facility that is open to the public shall limit the number of persons in the place of business or facility so that every member of the public is able to maintain a physical distance of at least two metres from every other person in the business or facility, except where Schedule 2 allows persons to be closer together.

45 Alberta, Chief Medical Officer of Health, *Record of Decision - CMOH Order 26-2020*, (26 June 2020), online: <open.alberta.ca/publications/cmoh-order-26-2020-covid-19-response> [perma.cc/P3FJ-UAXY]. (NOTE: this site is from June 23, 2020)

46 *Gatherings and Cohorts* (24 September 2020), online: (NOTE: Need to ensure this is the accurate site here as this refers to June 23, 2020☺ https://www.alberta.ca/assets/documents/covid-19-relaunch-guidance-cohorts.pdf

47 *Ibid*.

48 British Columbia, Provincial Health Officer, *Gatherings and Events*, (Order) (10 February 2021), s 4, 13, online (pdf) : <www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-february-10-2021.pdf>.

49 British Columbia, Provincial Health Officer, *Food and Liquor Serving Premises and Retail Establishments Which Sell Liquor Order*, (Order) (30 December 2020), online (pdf): <www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-december-30-2020.pdf>.

50 *Supra* note 36, s 2.

> (2) For greater certainty, subsection (1) does not require persons who are in compliance with public health guidance on households to maintain a physical distance of at least two metres from each other while in a place of business or facility. [51]

The term "household" is not defined in the regulation. Oddly, subsection (1) imposes an obligation on the owner/operator of a facility, and subsection (2) purports to create an exception to this requirement which rests entirely on judgment of individual patrons.

Nova Scotia: Nova Scotia is another one of the provinces with a general rule on physical distancing. Section 13 of the *Public Health Order* issued by the Chief Medical Officer of Health states: "All persons present and residing in Nova Scotia must maintain physical distancing of 2 metres (6 feet)."[52] Section 13.2 exempts "persons living in the same household, whether indoors or outdoors, up to the maximum of the number of immediate family members residing in the same the household," individuals with households of two or fewer persons (who can cohort with two other persons), and "social groups of up to 10 persons outdoors" from this requirement. It is not clear from the terms of the Order who qualifies as a "family member" or "social group," or whether "same household" means the same physical location. It is also unclear why individuals who live together but who are not "family" would be required to physically distance from one another.

New Brunswick: New Brunswick is another province with a general rule on physical distancing, like Alberta, and includes an element of intention in the requirement. Section 14 of the *Mandatory Order — COVID-19* issued by the Minister of Public Safety states: "Everyone is prohibited from knowingly approaching within 2 meters of every other person, except members of their expanded household bubble." [53] This bubble is defined as "a group of persons that includes everyone who lives in the household plus any fifteen other persons, whom the members of the household agree to list" and this list "is fixed once created."[54] A person does not violate this prohibition if they approach within

51 O Reg 364/20.

52 Nova Scotia, Chief Medical Officer of Health, *Restated Order of the Chief Medical Officer of Health Under Section 32 of the Health Protection Act 2004, c. 4, s. 1*, (9 October 2020), online (pdf): <novascotia.ca/coronavirus/docs/health-protection-act-order-by-the-medical-officer-of-health.pdf> [perma.cc/9Y5B-R6H3].

53 New Brunswick, Minister of Public Safety, *Renewed and revised Mandatory Order COVID19,* (10 October 2019), online (pdf): <www2.gnb.ca/content/dam/gnb/Corporate/pdf/EmergencyUrgence19.pdf> [perma.cc/RWF2-BAWG].

54 *Ibid*, s 14.

two metres of another person inadvertently or despite best efforts to avoid close contact with others.

One can speculate on the reasons for why there have been so many differences in the requirements for physical distancing across the provinces and territories. These discrepancies may be attributed to variation in the timing of when COVID-19 hit different regions of Canada (and the state of the scientific evidence at the time), variation in infection rates across regions, differences in availability of testing or testing protocols, or various other factors. However, the underlying rationales and evidence actually relied on are unclear because lawmakers provided limited explanations for the requirements set out in public health orders. Further complicating matters, these requirements have changed frequently during the pandemic and the language in public health orders is sometimes at odds with the explanations of restrictions by government officials.

The absence of an explanation or justification for why there is significant variation in the terms of such a basic rule — a rule that is a central component of the public health strategy across Canada — and the frequency with which these terms have changed explains why some people view the physical distancing rule as arbitrary, and refuse to comply with it.[55] These inconsistencies and transparency problems undoubtedly emanate, at least in part, from the inherent shortcomings in delegated lawmaking noted above. These shortcomings are exacerbated by the fact that governing public health legislation in most of the provinces and territories was never intended to provide the general lawmaking power which has been exercised by public health officials to contain the spread of COVID-19, and as the following sections outline, such legislation is silent on transparency and accountability measures we would expect to be imposed on general executive lawmaking powers which have been exercised to restrict liberties for more than a year.

4. Enabling Statute and Delegation

The power to impose physical distancing and other public health restrictions (e.g. gathering limits, masking requirements, and business closures) varies by

55 Other commentators have called for minimum standards to address inconsistencies across the provinces and territories. See e.g. Amir Attaran, "Trudeau needs a COVID-19 Emergency Order. Here's how to do it", *Maclean's* (27 November 2020), online: <macleans.ca/opinion/trudeau-needs-a-covid-19-emergency-law-heres-how-to-do-it/> [perma.cc/UDZ7-YKMH]; Vincent Lam, "Canada must invoke the Emergencies Act now", *The Globe and Mail* (27 November 2020), online: <theglobeandmail.com/opinion/article-canada-must-invoke-the-emergencies-act-now/> [perma.cc/Z9AN-G4FG].

jurisdiction but is found in either public health or emergency legislation in each of the provinces and territories. There is also interjurisdictional variation in terms of which powers are delegated to the cabinet or a minister and which are delegated to public health officials (typically the Chief Medical Officer of Health or equivalent). In this section of the article, we outline the different provincial and territorial approaches to delegating the power to impose public health restrictions.

Provincial and territorial public health laws typically grant ministers of health and chief medical officers various powers upon the declaration of a public health emergency. Nova Scotia's *Health Protection Act* illustrates the language typically used to describe a public health emergency: an "imminent and serious threat to the public health that is posed by a dangerous disease or a health hazard," which "cannot be mitigated or remedied without the implementation of special measures."[56] While some provinces have continued to renew their declaration of a public health emergency throughout the pandemic, others have been operating under an emergency at some times but not others. In most jurisdictions, the declaration of an emergency enables the use of two general categories of delegated lawmaking powers: (1) restrictions on property and economic liberties (e.g. the seizure of real property or medical supplies, requiring people to render aid or essential services, or altering landlord-tenant relationships), and (2) restrictions on civil liberties (e.g. physical distancing, quarantine, limiting gatherings). While restrictions on property are generally implemented through a ministerial order, the powers to restrict civil liberties are allocated between cabinet, ministers, and chief medical officers of health in various ways.

Apart from authorizing certain actions during a public health emergency, most public health statutes grant medical officers of health widespread authority to issue orders in response to communicable diseases. Many COVID-19 public health orders cite these catch-all communicable disease powers either exclusively or in addition to emergency powers. For example, Nova Scotia's Chief Medical Officer of Health issued an order requiring symptomatic people to isolate, mandating social distancing, and closing various premises under his generic power to "require a person to take or refrain from taking any action" where necessary to contain a communicable disease.[57] Similarly, the Provincial Health Officer in British Columbia limited gatherings under non-emergency public health powers, namely the authority to "do anything … necessary … to

56 SNS 2004, c 4, s 4(p).
57 *Ibid*, s 32.

prevent the transmission of an infectious agent," including "order a person to … remain in a specified place, or … avoid physical contact with, or being near, a person or thing."[58] Similarly, a public health order issued by Alberta's Chief Medical Officer of Health on social distancing, gathering restrictions, and the closure of non-essential businesses cited her authority to "take whatever steps" she "considers necessary" to lessen the impact of a public health emergency.[59] The exercise of these powers is not contingent on the declaration of a public health emergency.

Instead of relying on public health statutes to impose restrictions, a small number of provinces and territories made use of their powers under emergency statutes to enact physical distancing requirements or other measures to contain the spread of COVID-19. These emergency statutes not only apply to disease outbreaks but to other kinds of emergencies such as floods, wildfires, and other natural disasters. For example, Ontario's *Emergency Management and Civil Protection Act* allows the Lieutenant Governor in Council to make orders respecting a variety of matters, including "closing any place, whether public or private, including any business, office, school, hospital or other establishment or institution."[60] Unlike most other provinces and territories, which relied on their public health statute to make COVID-19 public health orders, Ontario initially exercised its general emergencies powers, until the province could enact its dedicated COVID-19 response legislation.[61] Ontario's unique approach may be attributed in large part to the limited public health emergency powers contained in its *Health Protection and Promotion Act*.[62]

To illustrate the interjurisdictional variation in public health restrictions, Table 1, below, identifies the enabling statute and specific provision relied upon in each province and territory to legislate the "two metre rule," as well as the entity that is granted this authority. As the table indicates, in most jurisdic-

58 *Public Health Act,* SBC 2008 c 28, *supra* note 4, ss 28-29.

59 *Public Health Act*, RSA 2000 c P-37, *supra* note 4, s 29. The Chief Medical Officer of Health's order was issued pursuant to section 29 of the *Public Health Act*, and the power to issue the order is not contingent on a declaration of public health emergency made by the Lieutenant Governor in Council under section 52.1 of the Act. Alberta, Chief Medical Officer of Health, *Record of Decision – CMOH Order 19-2021*, (6 May 2021), online: <https://open.alberta.ca/dataset/5c4fd9f7-82bb-4a0b-ae7f-67f6b44b0157/resource/b231400c-39e7-4149-9e1f-2e0161ee0346/download/health-cmoh-record-of-decision-cmoh-order-19-2021.pdf> [perma.cc/VW2X-S3BJ].

60 RSO 1990, c E-9, s 7.0.2(4).

61 *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, *supra* note 36.

62 Unlike other jurisdictions where the public health statute addresses powers to close public spaces, close schools, limit travel, and require physical distancing, the *Health Protection and Promotion Act*, RSO 1990, c H.7, only references power to issue directives to local public health authorities and procure supplies (*ibid*, ss 77.5, 77.9).

tions, the physical distancing rule is legislated in a chief medical officer order issued under authority granted by a public health statute. These officials have often relied on broadly worded "catch-all" provisions that empower them to take actions aimed at preventing communicable diseases.

Table 1

Province or Territory	Enabling Legislation	Authority to enact physical distancing requirement
British Columbia	*Public Health Act*, SBC 2008, c 28, ss 30, 31, 32, 39(3)	Health Officer
Alberta	*Public Health Act*, RSA 2000 c P-37, s 29(2)	Medical Officer of Health
Saskatchewan	*Public Health Act, 1994*, SS 1994, c P-37.1, s 45	Minister of Health issued order to delegate authority to Chief Medical Health Officer
Manitoba	*Public Health Act*, CCSM c P210, s 67(2)	Chief Public Health Officer with approval of the Minister of Health
Ontario	*Emergency Management and Civil Protection Act*, RSO 1990, c E.9, s 7.0.2(4) and *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020 c 17, s 2	Lieutenant Governor in Council
Quebec	*Public Health Act*, CQLR, c S-2.2, s 123	Lieutenant Governor in Council or Minister of Health
Nova Scotia	*Health Protection Act*, SNS 2004, c 4, s 32	Medical Officer
New Brunswick	*Emergency Measures Act*, RSNB 2011, c 147, ss 12-12.1	Minister of Justice and Public Safety
Prince Edward Island	*Public Health Act*, RSPEI 1988, c P-30.1, ss 39(1), 49(2), 49(3), and 56(1)	Chief Public Health Officer
Newfoundland and Labrador	*Public Health Protection and Promotion Act*, SNL 2018, c P-37.3, s 28	Chief Medical Officer of Health
Yukon	*Civil Emergency Measures Act*, RSY 2002, c 34, s 9	Minister of Community Services
Northwest Territories	*Public Health Act*, SNWT 2007, c 17, ss 25, 33	Chief Public Health Officer
Nunavut	*Public Health Act*, SNu 2016, c 13, s 41(1), 55	Section 41: Chief Public Health Officer Section 55: Medical Health Officer

Although most provinces and territories have relied heavily on catch-all communicable disease powers to make sweeping societal restrictions, it is unlikely that these provisions were ever intended to empower public health officials to make laws of general application. In most provinces, these catch-all powers are accompanied by specific enumerated powers suggesting that public health orders will typically bind a particular individual rather than all of society. For example, Nova Scotia's *Health Protection Act* grants a general power to "require a person to take or refrain from taking any action that is specified in the order in respect of a communicable disease."[63] However, this should arguably be read in light of the specific enumerated powers which include, for example, requiring the owner of a premises to close, any person who has been exposed to a communicable disease to quarantine, or the cleaning or disinfecting of anything specified in a relevant order.

At least two provinces acknowledged the limitation of these catch-all provisions as a proper basis for general lawmaking, following the SARS outbreak. This issue was raised by the SARS Commission, which noted that the Ontario government had amended its public health legislation during SARS to explicitly empower the medical officer of health to make legal rules applicable to groups of individuals, and not just specific individuals.[64] This would certainly suggest that legislative amendments would be required to impose orders that are binding on the population as a whole. As Toronto's Medical Officer of Health explained at the time,

> There was an instance wherein we had an entire group of people who needed to be put into quarantine on a weekend. It was physically and logistically impossible to issue orders person to person on a Saturday afternoon for 350 people who happened to live in three or four different health units all at once.[65]

British Columbia similarly amended its public health statute post-SARS to explicitly state that a public health order may be made "in respect of a class of persons."[66] Interestingly, British Columbia explains these public health powers as applying, for example, to a situation where "employees at a work site or group of people at a social gathering were exposed to a disease that posed a serious public health risk" and does not mention them being used as measures

63 *Supra* note 56, s 32.

64 Specifically, the law was amended to specify that an order made with respect to a communicable disease "may be directed to a class of persons who reside or are present in the health unit served by the medical officer of health". *Health Protection and Promotion Act, supra* note 62, s 22(5.0.1).

65 Ontario, The SARS Commission, *SARS and Public Health Legislation: Second Interim Report*, vol 5 (Toronto: The SARS Commission, 2006) at 320.

66 *Public Health Act,* SBC 2008 c 28, *supra* note 4, s 39.

of general application.[67] Many provincial laws do not explicitly contemplate the application of these catch-all provisions to groups or classes of people, let alone to the general population.

5. Transparency and Accountability

To summarize what has been described thus far, COVID-19 public health orders are examples of executive or subordinate legislation which have been issued pursuant to authority granted in public health or emergencies statutes. In most provinces and territories, these orders have been made under an enabling provision in public health legislation authorizing an appointed official to take whatever steps are necessary to prevent the spread of communicable diseases. This delegation of broad discretionary power has produced a messy landscape of public health orders across Canada. The rules have continuously changed as governments respond to the rise and fall of COVID-19 transmission rates and hospital capacity, and attempt to balance restrictions on civil liberties against other social, economic, and political factors.[68] In this section, we examine the specific transparency and accountability deficiencies which have arisen in the exercise of this delegated power to impose public health restrictions.

COVID-19 public health orders have been enacted and amended with little or no advance notice.[69] New rules and changes to existing rules have some-

67 "Overview of Public Health Act", online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/legislation/public-health-act/overview- of- public-health-act>.

68 In Ontario, for example, the initial restriction on public gatherings stated that "all organized public events of over fifty people are hereby prohibited including parades and events and communal services within places of worship." This restriction was then elevated in late March to prohibit any person from attending a public event or social gathering of more than 5 persons, and later relaxed to allow gatherings of up to 10 persons. See *Emergency Order Under Subsection 7.0.2 (4) of the Act - Organized Public Events, Certain Gatherings*, O Reg 52/20. This Order lapsed on July 17, 2020, but on a Saturday in mid-September, the Premier of Ontario announced a reinstatement of restrictions to limit indoor public gatherings to 10 persons and outdoor gatherings to 25 persons. "Premier limits gathering sizes province wide as Ontario reports 407 new cases of COVID-19", *CBC News* (19 September 2020), online: <cbc.ca/news/canada/toronto/premier-ontario-cases-covid-sept19-1.5731049> [perma.cc/E5KU-2PJ3]. And then, on October 9, the Friday before the Thanksgiving long weekend, Ontario announced that effective the following day restaurants, bars, gyms, casinos, movie theatres, and other businesses in Toronto, Ottawa and the Peel region would be ordered closed for a minimum of 28 days (Laura Stone, "Ontario restricts businesses in hot spots as COVID-19 spreads at 'alarming' pace", *The Globe and Mail* (9 October 2020), online: <theglobeandmail.com/canada/article-ontario-cabinet-reviewing-strict-new-restrictions-in-toronto-ottawa/>) [perma.cc/GD8Q-3GHN].

69 Lawmaking with minimal advance seems to have become the norm, and there are countless examples of this. Just as we were finalizing this manuscript in February 2021, Newfoundland and Labrador reinstated a near-complete lockdown in the midst of voting during a provincial election (Malone Mullin, "Coronavirus variant puts N.L. back in lockdown; in-person voting in provincial election

times been proclaimed into force from the podium in media briefings, and in the most egregious instances the actual written order has not been published until sometime later.[70] At times, it has seemed like media scrums replaced the legislative assembly as a forum for democratic debate, and social media is the official legal reporter. In most jurisdictions, COVID-19 public health orders have never been published in an official government reporter, and governments have instead used dedicated websites to publish the legislation. These websites vary significantly in terms of their user friendliness, and they typically set out other COVID-19 information such as data on reported cases and testing results, protocols, guidance, and educational tools. Accordingly, it can be difficult to distinguish legal rules from guidance or recommendations on these websites. This has led to confusion and to questions about the legitimacy of orders, such as the controversy that arose in Alberta on masking and social distancing requirements in K-12 schools and the subsequent need for clarifying remarks from the Chief Medical Officer.[71]

Public health officials have generally offered minimal explanation or justification for choices made in establishing the scope of restrictions. Similarly, they have offered scant guidance on how to apply for an exception to the rules set out in the orders, or what justification is needed to obtain an exception.[72] Other transparency-related concerns have included: Ontario's underreporting of cases due to test rationing, backlogs, and flawed test results;[73] delays in releasing models showing how the pandemic might play out at a provincial or territorial level;[74] a failure to release information on metrics that would trigger

suspended", *CBC News* (12 February 2021), online: <cbc.ca/news/canada/newfoundland-labrador/newfoundland-labrador-election-lockdown-1.5913042> [perma.cc/PR8Y-EQ5J].

70 Shaun Fluker & Lorian Hardcastle, "COVID-19 and Rule by Fiat under Alberta's *Public Health Act*" (26 November 2020), online (blog): *ABlawg* <ablawg.ca/2020/11/26/covid-19-and-rule-by-fiat-under-albertas-public-health-act/> [perma.cc/9AND-XNN4].

71 Shaun Fluker, "COVID-19 and Masking in Alberta K-12 Schools" (3 September 2020), online (blog): *ABlawg* <ablawg.ca/2020/09/03/covid-19-and-masking-in-alberta-k-12-schools/> [perma.cc/6UBK-QY4S].

72 See e.g. Sarah Kester, "Mount Pakenham ski hill gets special permission from province to open: health unit", *CBC News* (12 February 2021), online: <cbc.ca/news/canada/ottawa/mount-pakenham-open-special-permission-province-1.5910833> [perma.cc/NSN3-LW63]; "Open City of Winnipeg gyms highlight lack of clarity around public health orders, mayor says", *CBC News* (20 January 2021), online: <cbc.ca/news/canada/manitoba/city-of-winnipeg-gyms-mayor-bowman-1.5880561> [perma.cc/DLP6-M62A].

73 Kate Allen, "Ontario is not reporting more than 1,000 likely COVID-19 cases", *The Toronto Star* (1 April 2020), online: <thestar.com/news/canada/2020/04/01/ontario-is-not-reporting-more-than-1000-likely-covid-19-cases.html> [perma.cc/7K7H-MJKV].

74 Stuart Thomson & Ryan Tumilty, "'Shocking' and 'indefensible': Feds should release national COVID-19 modelling information, experts say", *The National Post* (2 April 2020), online:

renewed restrictions;[75] and an overall failure to publish data on COVID-19 transmission and infection.[76]

The foregoing observations provide illustrations of how executive lawmaking and COVID-19 public health orders have failed to adhere to what we have referred to throughout this article as attributes of good lawmaking in accordance with the rule of law: organization, coherence, predictability, consistency, transparency, justification, and accountability. Our approach might be criticized for accepting these attributes as self-evident goods in a legal system, as well as for loosely bundling them under the categories of transparency and accountability. Nonetheless, executive lawmaking is clearly a very closed process which stretches its democratic legitimacy when used extensively to govern — on an ongoing basis — with minimal political or legal accountability. These difficulties have been elevated to new heights with COVID-19 public health orders. Deficiencies in the transparency or accountability of emergency lawmaking may have been reasonable at the start of the pandemic, when governments were making quick decisions based on limited evidence in response to an emergent public health crisis. However, as the orders have been in force for more than a year, this emergency justification no longer applies with the same persuasion, and lawmakers had ample opportunity to ensure they were adhering to the usual level of transparency and accountability associated with good lawmaking.

It is also apparent that Canadian courts will be reluctant to even address these shortcomings, let alone solve them. Accordingly, it will likely be left for the legislatures to ensure appropriate checks are in place. In order to establish the starting point for this work, we reviewed the enabling statute for COVID-19 public health orders in each province and territory, searching for measures which insert transparency and accountability requirements into the executive lawmaking process. Table 2 sets out the findings of our review.

<nationalpost.com/news/politics/shocking-and-indefensible-feds-should-release-national-covid-19-modelling-information-experts-say> [perma.cc/XR7C-FTBM].

75 Jeff Gray, "Doug Ford's critics call for more transparency on pandemic decisions", *The Globe and Mail* (9 October 2020), online: <theglobeandmail.com/canada/article-doug-fords-critics-call-for-more-transparency-on-pandemic-decisions/> [perma.cc./8X8H-9DRV].

76 Globe and Mail Editorial Board, "Does Canada need another lock down? Show us the data", *The Globe and Mail* (2 October 2020), online: <theglobeandmail.com/opinion/editorials/article-does-canada-need-another-lock-down-show-us-the-data/> [perma.cc./CQ9N-RQ94].

Table 2

Province or Territory	Enabling Legislation	Publication Requirement	Other Transparency Requirements	Mandatory Review
British Columbia	*Public Health Act*, SBC 2008, c 28	None	None	None
Alberta	*Public Health Act*, RSA 2000 c P-37	Newspaper (s 68)	None	None
Saskatchewan	*Public Health Act, 1994*, SS 1994, c P-37.1,	Newspaper television/radio public places (s 45(5))	Must be written and specify reasons (s 45(3))	None
Manitoba	*Public Health Act*, CCSM c P210	Newspaper television/radio website public places (s 101)	None	None
Ontario	*Emergency Management and Civil Protection Act*, RSO 1990, c E.9 and *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020 c 17	E-laws as per *Legislation Act*, 2006, SO 2006, c 21	n/a	Premier reports to the public and the Legislature (ss 11 – 13 in SO 2020, c 17)
Quebec	*Public Health Act*, CQLR, c S-2.2	Quebec Gazette (s 121)	n/a	Minister reports to National Assembly (s 129)
Nova Scotia	*Health Protection Act*, SNS 2004, c 4	Any means considered appropriate (s 33)	Must be written and specify reasons (s 35)	Minister reports to Legislature (s 6(1))
New Brunswick	*Emergency Measures Act*, RSNB 2011, c 147	Means most likely to make contents known (ss 11, 12.3)	None	None
Prince Edward Island	*Public Health Act*, RSPEI 1988, c P-30.1	Any means considered necessary (s 49)	Must be written and specify reasons (s 39)	None
Newfoundland and Labrador	*Public Health Protection and Promotion Act*, SNL 2018, c P-37.3	Reasonable steps to notify affected person(s) (s 39)	Must be written and specify reasons (s 40)	Minister reports to Legislature (s 30 Review by Chief Medical Officer of Health (s46)
Yukon	*Civil Emergency Measures Act*, RSY 2002, c 34	Yukon Gazette	n/a	None
Northwest Territories	*Public Health Act*, SNWT 2007, c 17	Any means considered necessary (s 26)	Must be written and specify reasons (s 42)	None
Nunavut	*Public Health Act*, SNu 2016, c 13	Reasonable steps to notify affected person(s) (s 60)	Must be written and specify reasons (s 61)	Review by Chief Public Health Officer (s 67)

Table 2 demonstrates that most governing statutes include few (if any) transparency or accountability measures applicable to the enactment of COVID-19 public health orders.

In relation to the most basic transparency requirement — the dissemination of public health orders — a surprising number of provinces and territories empower their appointed public health official with full discretion to decide how to publish the COVID-19 legislation they enact. The absence of explicit publication requirements in this discretionary approach arguably reflects an intention or expectation that these officials would normally be enacting health orders directed at specific person(s) or places, which would then be served on those individuals, rather than enacting the general application legislation being made with COVID-19 public health orders. In practice, the selected means of communication regarding new public health orders has often been via press conference, sometimes with discrepancies between the official public health order and what officials verbally communicated.[77]

Ontario, Quebec, and the Yukon Territory are noteworthy as the jurisdictions that follow their usual legislated enactment process for subordinate legislation for making COVID-19 public health orders, and accordingly have published this legislation in an official government reporter.[78] Given that COVID-19 public health orders are clearly legislative enactments, it is surprising how few legislatures appear to have even contemplated following the usual enactment process for regulations, with some jurisdictions explicitly exempting public health orders from the legal filing and publication requirements that normally govern the enactment of regulations. In Alberta, for example, it seems as if the Chief Medical Officer of Health completely overlooked these statutory requirements, as her COVID-19 orders are not exempt from the *Regulations Act* and have not been filed with the Registrar of Regulations in Alberta or published in the Alberta Gazette.[79] This is yet another indication that legislatures did not intend or expect these public health officials to have general lawmaking powers.

77 Fluker & Hardcastle, *supra* note 70.

78 Table 1 also shows that Ontario and the Yukon relied on their general emergencies statute to enact COVID-19 orders. The use of this statute, rather than a public health statute, is perhaps another reason why COVID-19 orders are published in official government reporters.

79 RSA 2000, c R-14. For some commentary on this, see Shaun Fluker, "COVID-19 and the Exercise of Legislative Power by the Executive" (22 April 2020), online (blog): *ABlawg* <ablawg.ca/2020/04/22/covid-19-and-the-exercise-of-legislative-power-by-the-executive/> [perma.cc/E3DY-MHPS]. The Alberta legislature subsequently addressed this shortcoming in the *Public Health Amendment Act, 2021*, SA 2021 c 15 by retroactively exempting these orders from the requirements of the *Regulations Act*, as well as requiring the Minister of Health to publish online Chief Medical Officer of Health

In addition to these rule of law concerns, the failure to publish orders in an official reporter is also problematic from a public health perspective. Individuals must be able to access and understand their obligations in order to comply with them. When officials do not make laws easily accessible or there is a lack of clarity about those laws, that may undermine public trust in public health measures, which is essential to compliance. It is also crucial that researchers are able to study the efficacy of particular public health interventions both for the ongoing response to COVID-19 and for future disease outbreaks. This evidence helps to ensure that public health interventions are evidence-based and impair rights as little as possible. By publishing public health orders only on websites where they are comingled with recommendations and in a format whereby past versions of the orders may or may not be available, governments will unnecessarily increase the difficulties for researchers studying the efficacy of particular restrictions.

Putting publications requirements to one side, it is also notable that none of the provinces or territories have public participation requirements in relation to the enactment process for COVID-19 public health orders, which is typical for delegated executive lawmaking but problematic for orders which impose restrictions on civil liberties for long periods of time. This democratic deficit is amplified in those jurisdictions which do not require any published justification for the orders. Of the jurisdictions which do not require published reasons for a public health order, British Columba and Alberta stand out due to the fact that their public health statutes grant general lawmaking power to a public health official with no direct ministerial oversight (see Table 1). While about half of the provinces and territories require the provision of reasons in public health orders, the explanation given in COVID-19 public health orders has typically amounted to little more than bald declarations of a public health emergency. The extensive use of this blanket emergency justification for public health measures that have been in place for more than one year, particularly in instances where there is no longer an active declaration of an emergency in the province, merely provided fuel for conspiracy theories that assert COVID-19 public health orders were intended to permanently erode liberties.

It is perhaps the lack of justification which, more than any other transparency shortcoming, shines a light on the absence of meaningful accountability measures. It is noteworthy to observe in Table 2 that only a few jurisdictions have any accountability provisions at all in their governing legislation. A hand-

orders which apply to more than one person. As of the time of writing, these provisions in the *Public Health Amendment Act, 2021* had not been proclaimed into force.

ful of provinces require a report to the legislature, but no jurisdiction requires any sort of review on the exercise of these powers. In contrast to the absence of reporting and review provisions in most provinces and territories, and as an example of what could be legislated, the federal *Emergencies Act* requires that executive lawmaking made under the declaration of an emergency be subsequently debated in Parliament, gives Parliament the power to revoke these enactments, and requires a post-emergency public inquiry into the exercise of these powers.[80]

Accountability is somewhat enhanced, however, by the declaration of a public health emergency, particularly in jurisdictions where the exercise of executive powers to address COVID-19 is contingent on the declaration. These declarations have statutorily imposed time limits, and they are made by the executive, which is directly accountable to the legislature. For example, Nova Scotia's *Health Protection Act* states that within one year of the declaration of a public health emergency, the Minister must provide a report to the legislative assembly on the measures implemented in response to the emergency (see Table 2). However, surprisingly few jurisdictions include even this sort of limited reporting requirement in their public health statute.

While the declaration of a public health emergency by cabinet as a prerequisite to the exercise of executive emergency lawmaking powers may be preferable from a democratic accountability perspective, some argue that it is crucial to ensure that public health orders are not influenced by partisan interests, and that primacy should accordingly be given to the need for guarantees of independence for officials who enact these requirements. For instance, one of the recommendations from the SARS Commission report was that the chief medical officer "should have operational independence from government,"[81] given the need to "ensure public confidence that public health decisions during an outbreak are free from political motivation"[82] and that the chief medical officer can provide information "without [it] going through a political filter."[83] It is beyond our scope here to fully address this, other than to point out that the issue remains largely unaddressed in the 15 years that have elapsed since the SARS report was published.

The lawmaking difficulties with COVID-19 public health orders will surely by scrutinized *ex post* by one or more independent commission of inquiry.

80 RSC 1985, c 22 (4th Supp), ss 58-60, 62-63.
81 The SARS Commission, *supra* note 65 at 505.
82 *Ibid* at 510
83 *Ibid*.

These inquiries will be important not only for accountability but also for public health reasons. For example, following SARS, government decisions were scrutinized by public inquiries held both in Ontario and at the federal level.[84] The reports generated by these inquiries revealed the successes and shortcomings of the response to the disease outbreak, which generated some improvements to Canada's public health system.[85] In this regard, we note that none of the provinces or territories have a requirement in their enabling statute for a post-emergency public inquiry into the exercise of executive powers to contain COVID-19.

6. Conclusion

The COVID-19 pandemic presents an unprecedented opportunity to observe the exercise of legislative power by the executive branch in Canada. The arrival of COVID-19 in the spring of 2020 demanded immediate action from public officials and governments in order to ensure that hospitals had adequate capacity to handle an influx of cases, to protect vulnerable people (such as those living in long-term care or working in essential industries), and to slow the spread of community transmission. The primary response was to suspend most economic and social activities across Canada for approximately two months: schools were shuttered; access to public spaces was restricted or prohibited; citizens abroad were directed to return to Canada; travel for non-essential reasons was discouraged; the Canada-United States border was closed for the first time; all businesses other than those deemed to be "essential" were ordered to cease in-person services; contact with persons outside of immediate family or household members was discouraged; and people congregated in empty parking lots as places to socialize in accordance with physical distancing rules. Almost all of these restrictions were implemented by the exercise of legislative authority by the executive branch, which is a surreal and unbelievable reality in a liberal democracy governed by the rule of law. Provincial and territorial governments imposed a second round of restrictions during the fall of 2020 and again in early 2021, as they tried to protect hospital capacity while rolling out vaccines. As we write this paper in June 2021, it appears that many, if not most, provinces and territories will have some form of restrictions throughout the summer and possibly longer, depending upon how well the vaccine protects against emerging variants. Some restrictions, such as those on travel, could persist for years as we wait for other countries to vaccinate their populations and as new variants continue to emerge.

84 *Ibid.*

85 For a discussion of these improvements, see e.g. Fierlbeck & Hardcastle, *supra* note 7.

During the early days of the initial wave of COVID-19, scrutiny was light on the extensive legislative authority exercised by ministers or appointed public officials to enact public health orders that significantly curbed civil liberties to contain the spread of the disease. It did not seem to matter that these rules were being announced on social media with no advance notice; that exceptions to the rules appeared in an ad hoc manner; that the rules themselves were sometimes confusing and hard to understand; and that little justification was offered by officials beyond their bald assertions of the need to act in the public interest. Principles of democratic governance and the rule of law were seemingly cast aside, casualties in the rush to respond to the COVID-19 public health emergency.

Problems with transparency and accountability in the exercise of public health orders, which were swept under the carpet during the initial wave of COVID-19, intensified when what was once an emergency demanding prompt action became normalized. Public officials who continued to issue confusing rules with little advance notice and scant justification faced real scrutiny, resistance to stricter public health measures and, in some cases, blatant defiance of these rules. The response in some jurisdictions was for officials to plea with the public to comply with the measures, conveying a discomforting sense that they had lost confidence in their own ability to impose enforceable rules. Unfortunately, confidence in public health measures is essential to controlling the spread of COVID-19.

We have argued that these problems emanate from the inherent nature of delegated executive lawmaking, which is a closed process with few checks and balances to ensure it adheres to the attributes of good lawmaking: organization, coherence, predictability, consistency, transparency, justification, and accountability. Our review of public health statutes across the provinces and territories demonstrates that enabling legislation for COVID-19 public health orders provides an inadequate governance framework for the exercise of general lawmaking powers by the executive. Ongoing and decided cases with applicants unsuccessfully challenging the legality of public health restrictions confirm that judicial review is unlikely to resolve the lawmaking deficiencies associated with the exercise of delegated authority to enact COVID-19 public health orders. Accordingly, it is incumbent on legislatures to address this with statutory reform.

Although a detailed discussion of these reforms is beyond the scope of this paper, there are three basic issues that governments ought to consider. First, they should assess what powers public health officials ought to have and ensure

that governing statutes reflect this. Provincial and territorial statutes are unclear as to whether chief medical officers of health are authorized to enact laws of general application, despite the fact that they have done so throughout the pandemic. In our view, it is imperative that this authority be clarified by the legislature. Second, governments should consider how to improve transparency in the exercise of these powers, for example, by specifying exactly how public health orders must be published, confirming whether these orders are exempt from the legislated rules on the enactment of regulations, imposing meaningful justification requirements for these orders, and establishing some form of process for public deliberation such as written notice and comment. Third, governments should explore ways in which to enhance political and legal accountability, for example, with ministerial or judicial oversight, legislative assembly review, statutory appeal mechanisms, and reporting requirements.

Factors such as the globalization of trade and travel and human incursion on animal habitats make a future pandemic almost inevitable and governments must be prepared to learn from mistakes made during COVID-19 so that we are better prepared for the next one. This clearly includes improvements to the public health system and the management of infectious diseases, but governments can also ensure that they are better prepared from a governance perspective by revisiting their public health legislation to ensure that it fosters a more appropriate balance between principles of legality and democratic lawmaking, on the one hand, and the ability of governments to respond effectively to the exigencies of public health crises, on the other.