ANSWERING IN EMERGENCY: THE LAW AND ACCOUNTABILITY IN CANADA'S PANDEMIC RESPONSE[§]

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Introduction

Throughout humanity's history, epidemics and outbreaks have reinforced the social importance of public health. The COVID-19 pandemic, declared by the World Health Organization on March 11, 2020,[1] is an example of this phenomenon, with wide-reaching social, political, and economic implications. Public health, as Parmet points out, "is not simply a preference or a question of taste. It is a precondition to social life, one of the goods a society must aim for and achieve if it is to survive and attain other ends."[2] To achieve and protect public health, collective action is essential, especially through government intervention.[3] For instance, in combating the COVID-19 pandemic, societies across the globe have allowed governments to exercise extensive emergency powers, which has led to unprecedented measures and responses, including significant restrictions on movement and gatherings. These measures may be taken swiftly, with little (and sometimes no) input from the electorate or from civil society.[4]

Accountability becomes central as interventions to protect some people can detrimentally impact others. Accountability[5] serves many purposes, such as preventing abuses of power and lack of responsiveness, ensuring compliance with procedures,

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[1]See World Health Organization, "WHO Director-General's opening remarks at the media briefing on COVID-19" (11 March 2020), online: *World Health Organization* <://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

[2] Wendy E Parmet, *Populations, Public Health, and the Law*, (Washington, DC: Georgetown University Press, 2009) at 11.

[3] Barbara von Tigerstrom argues that collective action through government is what makes public health "public." See Barbara von Tigerstrom, "Public Health Law and Infectious Diseases" in Erin Nelson, Vanessa Gruben & Joanna Erdman, eds, *Canadian Health Law and Policy*, 5th ed (Toronto: Lexis Nexis Canada, 2017) at 481; See also Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint*, 2nd ed (Berkeley: University of California Press, 2008) at 8–9.

[4] See Grégoire Webber, "The Duty to Govern and the Rule of Law in an Emergency" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: University of Ottawa Press, 2020) 175 at 181–182.

[5] Here, we refer to Mark Bovens' work on defining and conceptualizing accountability. Accountability is defined as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences." The accountability forum can be an agency (like parliament), a court or an audit office, or a person (such as a superior, a minister or even a journalist). See Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13:4 European LJ 447 at 450.

standards and societal values, and improving performance and learning.[6] These purposes are especially important in the context of pandemics, which disproportionately affect vulnerable populations, escalate inequalities, and whose serious and pressing nature may instigate draconian uses of state power.

This paper begins by describing the breadth of public authorities'[7] emergency powers to manage a pandemic, and provides an overview of emergency powers included in public health legislation, as well as the bare ex ante democratic processes that come with the exercise of those emergency powers (I). Next, it assesses avenues for accountability through law – specifically through private, criminal and constitutional law. It argues that accountability through private law litigation is the wrong avenue to pursue in the context of the COVID-19 pandemic (II). It also suggests that criminal law safeguards and constitutional rights litigation only offer limited accountability (III). Finally, it presents an argument in favour of enhancing public accountability to parliaments and citizens through public health legislation (IV). While these are not the only avenues for accountability through law – administrative review may represent another – common themes in these areas suggest that ex post judicial review of emergency responses, whether in public or private law, are limited by characteristic features of emergencies. In particular, the law in each of these areas leaves government with a relatively wide, though not unlimited, margin of manoeuvre in its pandemic response.

I. Enhanced Means of Action Through Emergency Powers

Public health protection is carried out each day by Canadian public authorities (at the municipal, provincial and federal levels), through the use of various powers granted by different pieces of legislation. However, extraordinary threats have the potential to cause extraordinary hardships and, therefore, require extraordinary means. Hence, governments at all levels wield a large range of emergency powers included in general emergency legislation or in public health legislation. The COVID-19 pandemic is one such threat, and has triggered the rare use of these exceptional powers throughout the country.

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[6] See Derick W Brinkerhoff, "Accountability and Health Systems: Toward Conceptual Clarity and Policy Relevance" (2004) 19:6 Health Policy & Planning 371.

[7] Given that this paper is preoccupied with the accountability of the state, we use public authority to refer to the government (the Crown), governmental entities (e.g. Health Canada, Public Health Agency of Canada) and high officials (e.g. ministers, Chief Medical Officer).

At its disposal,[8] the federal government has both the *Emergencies Act*[9] and the Peace Order and Good Government (POGG) power under the *Constitution Act.*[10] The *Emergencies Act* allows the federal government to take temporary measures at the national level to ensure safety and security in times of emergency, and the POGG power allows it to temporarily intervene in areas of exclusive provincial jurisdiction in response to a crisis. While the federal government has not invoked either during the COVID-19 crisis, it has adopted many pieces of legislation specific to the pandemic for the safety and well-being of Canadians. These include fiscal and other financial measures and measures regarding access to justice.[11] It has also applied the *Quarantine Act*[12] to impose testing and quarantine requirements upon travelers.[13]

For their part, all provinces and territories have utilized their emergency powers, either by virtue of their public health legislation (which contain special emergency powers) and/or their general emergency legislation;[14] some provinces like Prince Edward Island, British Columbia, Yukon and Northwest Territories even declared a state of emergency through both of these types of legislation. The province of Quebec was the first in 2020 to declare a state of public health emergency by way of its public health legislation on March 13,[15] followed closely by Prince Edward Island (March 16),[16] Alberta and British Columbia (March 17),[17] Newfoundland and

[8] For a good overview of federal powers relevant to pandemics, see Michael Da Silva and Maxime St-Hilaire, "Towards a New Intergovernmental Agreement on Early Pandemic Management" (2021) 41:2 NJCL 77.

[9] See generally *Emergencies Act*, RSC 1985, c 22 (4th Supp) (as of 29 January 2021). For a critique on this law in the context of the COVID-19 pandemic, see Colleen M Flood and Bryan Thomas, "The Federal Emergencies Act: A Hollow Promise in the Face of COVID-19?", in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: University of Ottawa Press, 2020) at 105–114.

[10] See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91. For a COVID-19 point of view on the use of this power, see Carissima Mathen, "Resisting the Siren's Call: Emergency Powers, Federalism, and Public Policy" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: University of Ottawa Press, 2020) at 115–126.

[11] See e.g. *COVID-19 Emergency Response Act*, SC 2020, c 5; *COVID-19 Emergency Response Act*, No 2, SC 2020, c 6; *Time Limits and Other Periods Act (COVID-19)*, SC 2020, c 11, s 11.

[12] See *Quarantine Act*, SC 2005, c 20. See also *Minimizing the Risk of Exposure to COVID-19 in Canada Order No. 2*, (25 April 2020) C Gaz I, 838 (*Quarantine Act*).

[13] Asha Kaushal, Bethany Hastie & Devin Eeg, "Bordering the Pandemic: COVID-19, Immigration, and Emergency" (2020) 41:1 NJCL 1 at 3.

[14] In this text, we use the term "emergency power" regardless of whether it originates from an emergency declaration (under general emergency legislation or under public health legislation) or from the public health legislation independent of an emergency declaration.

[15] See *Decree concerning the declaration of a public health emergency in accordance with section 118 of the Public Health Act,* OIC 177-220, (13 March 2020) GOQ II, 763A.

[16] See *Declaration State of Public Health Emergency,* EC 2020-174, (16 March 2020) PEI Gaz, 313.

[17] See OIC 80/2020, (17 March 2020), online (pdf): *Government of Alberta* <www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_080.pdf> (Alberta houses its orders in council in a PDF search engine). See also Bonnie Henry, "Provincial Health Officer Notice" (17 March 2020), online (pdf): *Province of British Columbia* <www2.gov.bc.ca/assets/gov/health/about-bc-s-health-

Labrador and Yukon (March 18),[18] and Nunavut and the Northwest Territories (March 18).[19] By April 16, 2020, Ontario, Saskatchewan, British Columbia, New Brunswick, Manitoba, Nova Scotia, Northwest Territories, Yukon and Prince Edward Island had all declared a state of emergency by virtue of their general emergency legislation.[20] Numerous cities across the country also declared their own state of emergency, including Montreal, Vancouver, Toronto and Saint John.[21]

Emergency powers share common features regardless of their legislative source.[22] The first part of this paper aims to illustrate these exceptional means by providing an overview of the emergency powers included in the public health legislation of provinces and territories. Though the federal government has adopted measures to respond to the crisis, the crux of the action has been at the provincial and territorial level. Moreover, provincial and territorial public health emergency powers are rarely discussed in the literature, but the COVID-19 crisis has brought them to the foreground. Yet, managing a crisis of this magnitude does not solely rest on the judicious exercise of emergency powers; it also is contingent on how regular powers included in various laws are used for emergency preparedness. This is particularly relevant to the organization and funding of health services and the stocking of material and equipment. Those powers also raise accountability issues in pandemic times, as is highlighted in Parts II and III of the paper.

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care-system/office-of-the-provincial-health-officer/reports-publications/pho-regional-event-notice.pdf> (letter from the Office of the Provincial Health Officer).

[18] See *Public Health Emergency Declaration,* (18 March 2020) NL Gaz I, 67; "Chief Medical Officer of Health COVID – 19 updates: March 18, 2020 – Chief Medical Officer of Health declares public health emergency" (2020-2021), online: *Yukon Territory* <yukon.ca/en/health-and-wellness/covid-19-information/latest-updates-covid-19/chief-medical-officer-of-health-covid-19-updates> (this webpage is continually updated with all new declarations from the Chief Medical Officer of Health).

[19] See "News Release: Minister of Health Declares Public Health Emergency" (18 March 2020), online: *Nunavut Department of Health* <www.gov.nu.ca/health/news/minister-health-declares-public-health-emergency> (this information was shared in a government news release and was not printed in the Nu gazette); *Declaration State of Public Health Emergency Order,* (March 18, 2020) NWT Gaz II, 21.

[20] For instance, Ontario declared a state of emergency by virtue of its *Emergency Management and Civil Protection Act* on 17 March 2020. See *Emergency Management and Civil Protection Act,* RSO 1990, c E-9 [*ON EMCPA*]; "News Release: Ontario Enacts Declaration of Emergency to Protect the Public" (17 March 2020), online: *Province of Ontario* <news.ontario.ca/en/release/56356/ontario-enacts-declaration-of-emergency-to-protect-the-public>. It did so again on 12 January 2021. See "News Release. Ontario Declares Second Provincial Emergency to Address COVID-19 Crisis and Save Lives" (12 January 2021), online: *Province of Ontario* <news.ontario.ca/en/release/59922/ontario-declares-second-provincial-emergency-to-address-covid-19-crisis-and-save-lives>. Ontario's public health legislation, the *ON HPPA (supra* note 23) does not provide for the possibility to declare a state of health emergency as is the case for the *QC PHA (supra* note 23). However, it grants special powers to public authorities in case of a public health emergency, some of which were utilized during the COVID-19 pandemic. See e.g. British Columbia Minister of Public Safety & Solicitor General, "Ministerial Order No. M073" (18 March 2020), online (pdf): *BC Laws* <www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0073_2020> (on March 18, BC declared a state of emergency under the *Emergency Program Act*).

[21] See City Watch Canada, "An interactive platform that tracks emergency response measures put in place by local governments across Canada" (2020), online: *Canadian Urban Institute* <citywatchcanada.ca/>.

[22] Marie-Claude Prémont, Marie-Eve Couture Ménard & Geneviève Brisson, "L'état d'urgence sanitaire au Québec: un régime de guerre ou de santé publique?" (2021) 55 RJTUM 233.

A. A Plurality of Approaches to Enhance Means of Action

Each province and territory has its own public health legislation[23] which sets out extraordinary powers to protect the health of the population when faced with a public health emergency. Such emergency powers vary from one jurisdiction to another in terms of their content, their trigger process, and the authorities that exercise them.[24] Most provinces and territories activate their emergency powers by declaration of a public health emergency. The declaration is generally made at a high level, either by the Government (QC; AB; PE) or the Minister responsible for the Act (NL, NS, NU, NT)[25], and follows a recommendation from the chief medical officer of health (or equivalent), who is a physician. However, in Yukon and in British Columbia, the decision to declare a public health emergency rests in the hands of the chief medical officer of health.[26]

A different approach is observed in the remaining provinces of Ontario, New Brunswick, Manitoba, and Saskatchewan. In these provinces, a declaration of a state of public health emergency is not required to activate a set of emergency powers under the public health legislation; rather, the simple existence in fact of a public health emergency allows for the exercise of special powers, or for regular powers to be utilized in exceptional ways.[27] In New Brunswick, for example, "(w)here the Minister is of the opinion that a public health emergency exists," he or she may take possession of a land or a building without the consent of the owner or the occupant, if such a measure is required to respond to a public health emergency.[28] Here, there is no need for an official declaration of a public health emergency.

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[23] Ordered alphabetically by province/territory, see *Public Health Act*, RSA 2000, c P-37 (AB) [AB PHA]; *Public Health Act,* SBC 2008, c 28 (BC) [*BC PHA*]; *The Public Health Act*, CCSM c P210 (MB) [*MB PHA*]; *Public Health Act,* SNB 1998, c P-22.4 (NB) [*NB PHA*]; *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3 (NL) [*NL PHPPA*]; *Public Health Act,* SNWT 2007, c 17 (NT) [*NT PHA*]; *Health Protection Act*, SNS 2004, c 4 (NS) [*NS HPA*]; *Public Health Act,* SNu 2016, c 13 (NU) [*NU HPA*]; *Health Protection and Promotion Act,* RSO 1990, c H.7 (ON) [*ON HPPA*]; *Public Health Act*, RSPEI 1988, c P-30.1 (PE) [*PE PHA*]; *Public Health Act*, CQLR c S-2.2 (QC) [*QC PHA*]; Public Health Act, 1994 SS 1994, c P-37.1 (SK) [SK PHA]; Public Health and Safety Act, RSY 2002, c 176 (YK) [YK PHSA]. Subsequently, we will refer to these by short form.

[24] This variation between provinces was also mentioned in the "Naylor Report," published in the aftermath of the SARS crisis. See generally National Advisory Committee on SARS and Public Health, "Learning from SARS: Renewal of Public Health in Canada" (2003) at 163, 174–175, online (pdf): *Health Canada* <www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/publicat/sars-sras/pdf/sars-e.pdf>.

[25] See *QC PHA, supra* note 23, s 118; *AB PHA, supra* note 23, s 52.1(1); *PE PHA, supra* note 23, s 49(1); *NL PHPPA, supra* note 23, s 49(1); *NS HPA, supra* note 23, s 53(1); *NU HPA, supra* note 23, s 40(1); *NT PHA, supra* note 23, s 32(1).

[26] See *YK PHSA, supra* note 23, ss 3(2), 4.3(1); *BC PHA, supra* note 23, s 52(2) (if the event is regional, the Provincial Health Officer provides notice of a public health emergency).

[27] See *ON HPPA, supra* note 23, ss 77.1–77.9*; NB PHA, supra* note 23, s 26(1), 26.1(1)(1.1); *MB PHA, supra* note 23, s 67(1); *SK PHA, supra* note 23, s 45(1).

[28] See *NB PHA, supra* note 23, s 26(1). The Minister may exercise this power subject to the approval of the Lieutenant-Governor in Council.

In both cases, where a declaration approach exists and where it does not, events must meet specific cumulative criteria to trigger either the declaration of emergency or the use of emergency powers. In most jurisdictions, the first criterion is the existence of a *public health emergency*, generally defined as an imminent or immediate threat that poses a significant or serious risk to public health.[29] The second criterion is that prompt coordination or special measures are required to mitigate or remedy the threat and protect the population health.[30] Hence, not all public health emergencies will lead to the use of extraordinary powers; some emergencies might be prevented, reduced, or eliminated through regular means of action.

Emergency powers are generally granted to the chief medical officer of health and/or the Minister responsible for the public health legislation. Quebec, however, is a notable exception to this rule. The Quebec government (members of the Cabinet) itself is tasked with exercising the emergency powers; this reflects a more centralized approach in managing public health crises.[31] The government can delegate one or more of its powers to the Minister of Health and Social Service (MHSS), however,[32] and it has done so extensively since the start of the COVID-19 pandemic.[33]

It is important to note that the exercise of emergency powers by the state is not submitted to formal ex ante democratic processes, such as the legislative process or consultation with representative committees. As a result, public authorities have considerable discretion to act quickly. However, public health emergency declarations[34] and in some cases emergency powers[35] have a time limit.

We compiled all of the emergency powers included in public health legislation across Canada, regardless of their trigger process, as described above. We noted fifty different emergency powers, ranging from compulsory vaccination[36] to the postponement of elections.[37] Some powers exist in a similar way in up to seven or nine

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[29] Definitions of "public health emergency" vary from one jurisdiction to another and some are more detailed than others. See e.g. *AB PHA, supra* note 23, s 1(1)(hh.1); *PE PHA, supra* note 23, s 1(v).

[30] See e.g. *QC PHA, supra* note 23, s 118; *NU PHA, supra* note 23, s 40(1); *NS HPA. supra* note 23, s 53(1).

[31] See *QC PHA, supra* note 23, s 123.

[32] See *ibid,* s 120.

[33] See Marie-Eve Couture-Ménard & Marie-Claude Prémont, "L'exercice des pouvoirs d'urgence prévus à la *Loi sur la santé publique* pendant la crise de la COVID-19" in Barreau du Québec, *Développements récents en droit de la santé,* vol 485 (Montreal: Éditions Yvon Blais, 2020) 29.

[34] See e.g. *QC PHA, supra* note 23, s 119; *NL PHPPA, supra* note 23, s 27(3). See section IV.A, below, for more details.

[35] See e.g. *AB PHA, supra* note 23, s 52.811; *NB PHA, supra* note 23, s 26.1(3).

[36] See e.g. *QC PHA, supra* note 23, s 123(1).

[37] See *AB PHA, supra* note 23, s 38(1)(b).

provinces, like the power to distribute essential supplies.[38] We propose the following categories to organize our findings: (1) powers aimed at mobilizing human and material resources; (2) powers aimed at preventing the spread of communicable disease; and (3) powers allowing authorities to act outside of traditional processes. It is important to note that *powers* are distinct from the *measures* that derive from their application. In the sections that follow, we will provide examples of emergency powers for each category, as well as measures implemented during the COVID-19 pandemic by way of those powers.

B. Powers Aimed at Mobilizing Human and Material Resources

During a public health emergency (like a pandemic), the demands on health care resources are likely to be overwhelming. Therefore, emergency powers enable governmental officials to mobilize human resources to help deliver health care and other services. In the Northwest Territories (and similarly in Yukon and Prince Edward Island),[39] if there is urgent need for professionals, the Minister can issue temporary permits under the *Medical Profession Act* to those who are registered as medical practitioners in other provinces or territories.[40] In the first months of the COVID-19 pandemic, it was reported that dozens of Alberta physicians and locums were granted emergency licences to provide virtual care to the population.[41] Another example in this category involves the power of the Chief Public Health Officer (CPHO) of Prince Edward Island to direct health professionals or health care providers (like pharmacists) to administer immunizations.[42] More broadly, from the outset of the COVID-19 pandemic, Quebec's MHSS, for instance, ordered that all staff from school boards and colleges could be deployed in the health care system, except only for those whose work performance is deemed essential for the maintenance of educational and teaching services during the crisis.[43] This means that teachers could be called upon to perform

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[38] See e.g. *AB PHA, supra* note 23, s 52.6(1)(e); *MB PHA, supra* note 23, ss 67(2)(a)(iv), 112(2); *NL PHPPA, supra* note 23, ss 28(1)(f), 59(i)(ii); *NT PHA, supra* note 23, s 33(1)(g); *NS HPA, supra* note 23, ss 2(b); *NU PHA, supra* note 23, ss 41(1)(c), 85(1)(u)(ii); *PE PHA, supra* note 23, s 49(2)(a)(iv).

[39] See *YK PHSA, supra* note 23, s 4.2; *PE PHA, supra* note 23, s 53.

[40] See *NT PHA, supra* note 23, s 33(1)(c).

[41] See Anna Desmarais, "N.W.T. issued dozens of emergency licenses to Alberta physicians in first stage of pandemic response" (18 December 2020), online: *CBC News* <www.cbc.ca/news/canada/north/n-w-t-issued-dozens-of-emergency-licences-to-alberta-physicians-covid-19-1.5846637>. Eventually, Alberta physicians no longer required an emergency license to practice virtual care "if they are in good standing with the College of Physicians and Surgeons of Alberta."

[42] See *PE PHA, supra* note 23, s 49(2)(a)(v).

[43] See *QC PHA*, *supra* note 23, s 123(6). By virtue of this section, the Government or the MHSS (if so empowered), may "require the assistance of any government department or body capable of assisting the personnel deployed"; See also Ministerial Order of the Minister of Health and Social Service*,* OIC 2020-019, (10 April 2020) GOQ II, 871A.

administrative tasks or answer phones in long-term care centres.[44] Finally, and perhaps most impressively, all "*persons*" in Alberta may be conscripted to respond to an emergency; this is not limited to health professionals and government employees.[45] Powers to mobilize human resources are also essential to the enforcement of public health orders, such as restricting access to some areas and stopping vehicles at certain points of entry.[46]

Emergency powers also allow governments to control material resources, including medical supplies, facilities, and property. For instance, increased demand during a health crisis like the pandemic can lead to drug shortages, as feared in Ontario with regard to medications permitting mechanical ventilation (analgesics and sedative agents).[47] Hence, the Ontario Minister of Health and Long-Term Care (MHLTC), for example, may order emergency procurement, acquisition, and seizure of medications and supplies.[48] Similarly, in Yukon, the Chief Medical Officer of Health may, subject to conditions, order the suspension of the sale, distribution or relocation of any medication, supplies, or equipment by any person.[49] Also, since a large number of people may require health care during a pandemic, including screening tests and acute care for specific conditions, access to suitable premises and other spaces is crucial. To such ends, in many provinces and territories, government officials may order the owner or occupier of any premises to deliver its possession for use as a temporary

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[44] See Caroline Alphonso, "Quebec teachers, school boards await details on government decree to redeploy to health care" (13 April 2020), online: *Globe and Mail* <www.theglobeandmail.com/canada/article-quebec-teachers-school-boards-await-details-on-government-decree-to/>.

[45] See *AB PHA, supra* note 23, s 52.6(c).

[46] Three jurisdictions added new emergency powers to their public health legislation during the COVID-19 crisis, to allow for the appointment of additional public health officials with the authority to administer and enforce the Act (for instance, the ability to stop vehicles at points of entry) For PEI, see Bill 36, *Act to amend the Public Health Act*, 1st Sess, 66th Leg, Prince Edward Island, 2020 (assented to 23 June 2020) s 7(1)(b), 12. See also "Bill 36 - An Act to Amend the Public Health Act", 2nd reading, *Prince Edward Island Legislative Assembly Debates* (*Hansard)*, 66-1 (16 June 2020) at 2385–95. For MB, see Bill 59, *The Public Health Amendment Act,* 2nd Sess, 42nd Leg, Manitoba, 2020 (assented to 15 April 2020) s 5, 9. See also Manitoba, Legislative Assembly, *Official Report of Debates (Hansard*), 42-2, Vol 74 No 27C (15 April 2020) at 912–17. For NL, see Bill 38, *An Act to Amend the Public Health Protection and Promotion Act*, 1st Sess, 49th Leg, Newfoundland, 2020 (assented to 6 May 2020) ss 1–2. See also Newfoundland House of Assembly, *Official Report of Debates (Hansard)*, 49-1, Vol 49 No 35 (5 May 2020) at 1855–65.

[47] See Canadian Association of Emergency Physicians, "The Rational Use of Analgesics and Sedative Agents in the Emergency Department during the COVID Era" (14 April 2020), online (pdf): *Canadian Association of Emergency Physicians* <caep.ca/wp-content/uploads/2020/04/The-Rational-Use-of-Analgesics-and-Sedative-agents-general-public-statement.pdf>; For measures taken, see also Ontario Ministry of Health: Drugs and Devices Division, "Notice: Ontario Drug Benefit (ODB) Program Changes and Guidance for Dispensers during the COVID-19 Public Health Emergency" (20 March 2020), online (pdf): *Government of Ontario* <www.health.gov.on.ca/en/pro/programs/drugs/opdp_eo/notices/exec_office_20200320.pdf>; Ontario Critical Care COVID-19 Command Centre, "Memo #5" (21 April 2020), online (pdf): *Ontario Health* <www.ontariohealth.ca/sites/ontariohealth/files/2020 04/Ontario%20Health%20Recommendations%20for%20Managing%20Critical%20Care%20Drug%20Shortages_21Apr20%20PDF.pdf>.

[48] See *ON HPPA, supra* note 23, s 77.5.

[49] See *YK PHSA, supra* note 23, s 4.6(4).

isolation or quarantine facility.[50] In some jurisdictions, public authorities may acquire or use real property if it will help protect public health.[51] Emergency powers thus clearly illustrate the importance of resources in the management of a crisis.

C. Powers Aimed at Preventing the Spread of Communicable Disease

Unsurprisingly, emergency powers are also aimed at preventing the spread of a communicable disease by restricting the movement or gathering of people. In up to seven jurisdictions, the public authorities may order the closing of public areas and places of assembly, including educational institutions, restaurants, gyms or any other premises.[52] During the COVID-19 crisis, many of these measures were implemented to limit the spread of the virus. When declaring the state of public health emergency, the Government of Quebec promptly ordered the suspension of educational and teaching services, as well as daycare services (except for children of essential workers).[53] Moreover, in exercising its power to confine people,[54] the government suspended all outside outings for residents of residential and long-term care centres (CHSLD).[55] In Manitoba, the Chief Provincial Public Health Officer prohibited persons residing in private residences to let visitors enter or remain in their home, with exceptions.[56] He also prohibited gatherings of more than five people at any indoor or outdoor public place or in common areas of a multi-unit residence, with exceptions.[57] New police powers helped support these emergency measures, as mentioned later in section III.

In most jurisdictions,[58] governmental authorities may also restrict travel, by prohibiting entry into certain areas within the province or territory, or restricting travel to or from the province or territory. For example, to limit the spread of COVID-19 across borders within the country, the Chief Medical Officer of Newfoundland and

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[50] See e.g. *MB PHA, supra* note 23, s 67(2)(b); *NS HPA, supra* note 23, s 55; *PE PHA, supra* note 23, s 49(2)(b).

[51] See e.g. *AB PHA, supra* note 23, s 52.6(1)(a); *NL PHPPA, supra* note 23, s 28(1)(g); *NT PHA, supra* note 23, s 33(1)(h); *NU PHA supra* note 23, s 41(1)(d); *SK PHA, supra* note 23, s 66(1).

[52] See e.g. *AB PHA, supra* note 23, s 38(1)(a); *MB PHA, supra* note 23, s 67(2)(c); *NL PHPPA, supra* note 23, s 28(i); *NS HPA, supra* note 23, s 53(2)(c); *PE PHA, supra* note 23, s 49(2)(c); *QC PHA, supra* note 23, s 123(2); *SK PHA, supra* note 23, s 45(2)(a).

[53] See *supra* note 15 at 763A.

[54] See *QC PHA, supra* note 23, s 123(4).

[55] See *Ordering of measures to protect the health of the population during the COVID-19 pandemic,* OIC 2020-009, (23 March 2020) GOQ II, 782A (Minister of Health and Social Services).

[56] See *Order 1 under* The Public Health Act 149/48 (21 November 2020) M Gaz I, 3 (vol 149, no 47).

[57] See *Order 2 under* The Public Health Act 149/48, (21 November 2020) M Gaz, 4 (vol 149, no 47).

[58] See e.g. *MB PHA, supra* note 23, s 67(2)(a.1); *NL PHPPA, supra* note 23, s 28(1)(h); *NT PHA, supra* note 23, s 33(1)(d); *NS HPA, supra* note 23, s 53(2)(d); *NU HPA, supra* note 23, s 41(1)(e); *PE PHA, supra* note 23, s 49(2)(e); *QC PHA, supra* note 23, s 123(4); *SK PHA, supra* note 23, s 45(2)(b); *YK PHSA, supra* note 23, s 3(2), 4.4.

Labrador prohibited all individuals from entering the province, with exceptions for residents, asymptomatic workers, and individuals with an exemption order.[59]

This category of powers also includes medical preventive measures. In Quebec, Alberta, Prince Edward Island, and Saskatchewan, the authorities may order compulsory vaccination of the entire population (or part of the population) during a public health emergency.[60] In most jurisdictions, the emergency powers provide authorities with far-reaching discretion to adopt any measures necessary to prevent the spread of a communicable disease in the context of a public health emergency, accounting for the broad spectrum of potential threats with varying characteristics.[61] Many provinces have used this discretionary power to order the wearing of masks to limit the spread of the COVID-19 virus.[62] For instance, to impose mask wearing in indoor public places, the Chief Provincial Public Health Officer of Manitoba exercised

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[59] See Government of Newfoundland, "Special Measures Order (Travel): Made pursuant to Section 28 of the Public Health Protection and Promotion Act" (15 May 2020) at s 2, online (pdf): *Government of Newfoundland* <www.gov.nl.ca/covid-19/files/Special-Measures-Order-Travel-May-15-2020.pdf>. Between July and December 2020, the four maritime provinces of NL, NB, NS and PE created the "Atlantic bubble," permitting their residents to travel across their borders freely without the pre-travel approval and self-isolation upon arrival required for other travelers. See Andrea Jerrett, Leigha Farnell & Laura Brown, "Bubble burst: N.L. and P.E.I. are backing out of the Atlantic bubble" (23 November 2020), online: *CTV Atlantic News* <atlantic.ctvnews.ca/bubble-burst-n-l-and-p-e-i-are-backing-out-of-the-atlantic-bubble-1.5200653>. On the constitutionality of these border provisions see also Errol Patrick Mendes, "Restrictions on Mobility Rights of Canadians During the Pandemic; the Critical Need for Proper Scientific and Public Health Rationales" (2020) 41:1 NJCL 57; Emmett Macfarlane, "Public Policy and Constitutional Rights in Times of Crisis" (2020) 53 Can J Political Science 299 at 300.

[60] See *QC PHA, supra* note 23, s 123(1); *PE PHA, supra* note 23, s 49(3); *AB PHA, supra* note 23, s 38(1)(c) (in Alberta, a person who refuses is treated as though proven to be infected); *SK PHA, supra* note 23, s 45(2)(d); *SK PHA, supra* note 23, s 45(2)(d)(ii) (see also s 64 for conscientious objection). In some provinces, the authorities may establish a voluntary immunization program instead. See e.g. *NS HPA, supra* note 23, s 53(2)(a).

[61] See e.g. *BC PHA, supra* note 23, s 56 (Provincial Health Officer or Medical Health Officer); *MB PHA, supra* note 23, s 67(2)(e)(i) (Chief Public Health Officer); *PE PHA, supra* note 23, s 49(3) (Chief Public Health Officer).

[62] See e.g. *Order 16 under* The Public Health Act 149/48 (21 November 2020) M Gaz I, 11 (vol 149, no 47); Alberta Health, "Record of Decision: CMOH Order 41-2020 which amends CMOH Order 38-2020" (2020) at 2, online (pdf): *Government of Alberta* <open.alberta.ca/dataset/f27976e7-9cf6-4d14-a9b3-b410fbc91baf/resource/465cb25b-da04-4d53-8834-c2ea7c2b151e/download/health-cmoh-record-of-decision-cmoh-order-41-2020.pdf>; Chief Medical Officer of Health, "Special Measures Order (Masks): Made pursuant to Section 28 of the *Public Health Protection and Promotion Act*" (24 August 2020), online (pdf): *Government of Newfoundland* <www.gov.nl.ca/covid-19/files/Mandatory-Masking-045993-003.pdf>; "COVID-19 Prevention and Self-Isolation Order" (19 November 2020) at 1, 5, online (pdf): *Government of Prince-Edward Island* <www.princeedwardisland.ca/sites/default/files/publications/covid19_prevention_and_self-isolation_order.pdf>; Ministry of Health of Saskatchewan, "Public Health Order: Masking" (18 November 2020) at 1–3, online (pdf): *Government of Saskatchewan* <publications.saskatchewan.ca/#/products/110891>. The wearing of masks in certain provinces or cities was imposed through other legislation.

its broad power to order "persons to take specified measures to prevent the spread of a communicable disease."[63]

D. Powers Allowing Authorities to Act Outside of Usual Processes

In most jurisdictions, emergency powers allow authorities to act outside of usual legislative requirements included in public health legislation or other enactments, to eliminate processes that would hinder a quick and efficient response to a public health threat; this often leads to less formality, as rules and procedures are temporarily discarded. During a public health emergency in British Columbia, health officers may act outside of requirements related to delays, notices, suspensions, order content, etc;[64] for instance a health officer may "omit from an order things that are otherwise required."[65] In Nunavut, the Chief Public Health Officer can orally do what must otherwise be done in writing, or can act in a shorter or longer timespan than is otherwise required.[66] In Newfoundland and Labrador, the Chief Medical Officer of Health may change deadlines prescribed by the legislation or the regulations.[67] In Quebec, the government may order emergency measures "without delay and without further formality."[68] It may also incur necessary expenses and enter into necessary contracts without the obligation to call for tenders.[69]

Another, more invasive, example of powers in this category lies in the possibility for the authorities to enter or inspect premises without a warrant.[70] For instance, in many jurisdictions, law enforcement authorities can enter private dwellings at any time.[71] Other striking examples in this category are the powers related to obtaining information, a key component in responding to an outbreak of communicable disease. For instance, in Ontario, and similarly in other jurisdictions,

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[63] See Minister of Health, Seniors and Active Living, "Direction under section 67 of the Public Health Act" at 11, online (pdf): *Government of Manitoba* <www.gov.mb.ca/asset_library/en/proactive/2020_2021/orders-soe-11222020.pdf> [Order 16].

[64] See *BC PHA, supra* note 23, s 54.

[65] See *ibid,* s 54(f).

[66] See *NU PHA, supra* note 23*,* s 41(3)(c).

[67] See *NL PHPPA, supra* note 23, s 28(2)(a).

[68] See *QC PHA, supra* note 23, s 123.

[69] See *ibid,* s 123(7).

[70] This represents a substantial grant of power, as evidenced by the fact that it runs contrary to the presumption under s 8 of the *Canadian Charter of Rights and Freedoms* that searches without prior judicial authorization are *prima facie* unreasonable. See *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*], s 8; *Hunter v Southam Inc,* [1984] 2 SCR 145 at 161, 11 DLR (4th) 641.

[71] See e.g. *BC PHA, supra* note 23, s 54(j); *NS HPA, supra* note 23, s 60; *AB PHA, supra* note 23, s 52.6(1)(d); *NL PHPPA, supra* note 23, s 28(1)(j)-(2)(f); *MB PHA, supra* note 23, s 83(6); *NB PHA, supra* note 23, s 43(3)(c); *NT PHA, supra* note 23, s 33(1)(j); *NU PHA supra* note 23, s 41(1)(f); *PE PHA, supra* note 23, s 59(6).

the Chief Medical Officer of Health may use or disclose information obtained through an emergency order despite any legislative provision that protects personal information and privacy.[72] In Quebec, the government may order immediate access to any document or information held by any person, government department, or body, including personal information and confidential documents.[73] For instance, the obligations for bar owners in Quebec to keep a customer register[74] and for private seniors' residences to keep a register of visitors[75] during the COVID-19 pandemic have been interpreted to constitute exercises of this power.[76]

More generally, some jurisdictions grant public authorities the power to modify the law, effectively transferring legislative power to the executive branch.[77] This upheaval of the rule of law, more precisely regarding the separation of powers, underscores the exceptional character of emergency powers. For instance, during a state of public health emergency in Alberta, a Minister may, without consultation, suspend or modify the application of an enactment (or part of it) for which he or she is responsible. A Minister may even specify or set out provisions that apply instead or in addition to any provision, if he or she is satisfied that it is in the public interest.[78] In Quebec, all emergency measures may be ordered in spite of any provision to the contrary in any enactment of the province.[79]

Alongside these three categories of emergency powers, the public health legislation of six jurisdictions grants governmental authorities the power to take *any other measure necessary* to protect the health of the population.[80] This emphasizes the significant discretion granted to public authorities during a pandemic or other health crises.

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[72] See *ON HPPA, supra* note 23, s 77.6(5); See also *SK PHA, supra* note 23, s 45(2.1); *YK PHSA, supra* note 23, s 4.5(6); *BC PHA, supra* note 23, s 53(a), 54(1)(k).

[73] See *QC PHA, supra* note 23, s 123(3).

[74] See *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation,* OIC 2020-063, (11 September 2020) GOQ II, 2635A (Minister of Health and Social Services).

[75] See *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation,* OIC 2020-064, (17 September 2020) GOQ II, 2677A (Minister of Health and Social Services).

[76] See Couture-Ménard & Prémont*, supra* note 33.

[77] On the transfer of the legislative power to the executive branch, see Prémont, Couture-Ménard *&* Brisson, *supra* note 22.

[78] See *AB PHA, supra* note 23, s 52.1(2). There are exceptions and conditions to this power. See *ibid*, s 52.1(2.1)(2.2)(2.3)(2.4). A similar power exists where there is a significant likelihood of pandemic influenza. See *ibid,* s 52.21(2).

[79] See *QC PHA, supra* note 23, s 123.

[80] The exact wording of this power differs across legislations. See e.g. *AB PHA, supra* note 23, s 29(2.1)(b) (Medical Officer of Health); *NL PHPPA, supra* note 23, s 28(k) (Chief Medical Officer of Health); *NS HPA* supra note 23, s 53(2)(i) (Chief Medical Officer); *NU PHA, supra* note 23, s 41(1)(g) (Chief Public Health Officer); *PE PHA, supra* note 23, s 49(2)(g) (Chief Public Health Officer); *QC PHA, supra* note 23, s 123(8) (Government or Minister).

The above overview illustrates the considerable extent of emergency powers and the tremendous impact that measures associated with these powers can have on citizens' lives. The state may need such discretionary powers to act swiftly to protect population health in pandemic times, but it exercises these powers with only bare ex ante democratic mechanisms. For this reason, accountability for state conduct is paramount, especially when the crisis is a long-lasting one. In the context of the above-described regimes for the exercise of public health emergency powers, private, criminal and constitutional law may offer three areas of opportunity for accountability. However, as the following sections suggest, these avenues of accountability are limited.

II. Limited Accountability Through Private Law Litigation

The private law accountability of public authorities[81] in the context of pandemic management is likely to be limited[82] though state decisions made to manage the COVID-19 pandemic (including those made by way of the above emergency powers) have caused immense injury and suffering. This includes sickness and death caused by delays in instating protective measures, loss of revenue and bankruptcy due to the halting of commercial activities, psychological effects of confinement, loss of dignity, suffering and death of senior citizens in long-term care homes, treatment delays caused by hospital overload, and increased family violence associated with confinement and lack of social service resources. In addition to injuries that result from measures taken by way of emergency powers, some may stem from state decisions taken years (and even decades) before the pandemic. When faced with disaster, we often look to assign blame and allocate responsibility, especially when we feel that the causes of our injuries were preventable. This inclination to assign blame may be heightened in an emergency context, where public authorities act by virtue of exceptional and broad powers. Therefore, it comes as no surprise that an increasing number of actions in damages are being undertaken across Canada, some of which blame public authorities for how they have been managing the pandemic.[83]

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[81] We utilize the general terminology of "public authorities" and "state" in this section, though we recognize that, in the common law provinces, whether entities may benefit from the immunity discussed in this section depends on their status and the legislative framework governing them. See Marie-France Fortin, "Liability of the Crown in Times of Pandemic" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 223 at 230–31.

[82] See *ibid* (the author comes to a similar conclusion).

[83] These include liability lawsuits by inmates in federal penitentiaries and several lawsuits against long-term care homes, some of which list governments as defendants. See Paul Cherry, "Quebec inmate pursues attorney general in class action, says COVID-19 measures lacking" (22 April 2020), online: *Montreal Gazette* <montrealgazette.com/news/quebec-inmate-pursues-attorney-general-in-class-action-says-covid-19-measures-lacking>; Kim Bolan, "COVID-19: Inmate suit filed against federal government over Mission outbreak" (24 April 2020), online: *Vancouver Sun* <vancouversun.com/news/crime/covid-19-inmate-suit-filed-against-federal-government-over-mission-outbreak>; *Dumont v CHSLD Pavillon Philippe-Lapointe* (27 April 2020), Terrebonne, Que CA, No. 700 (motion for authorization of a class action), online (pdf): <cbaapp.org/ClassAction/PDF.aspx?id=11918>; *Jean-Pierre Daubois v CHSLD Sainte-Dorothée* (27 November 2020), Montreal, Que SC, No 500-06-001062-203 (motion for authorization of a class action), online (pdf): *Registre Des Actions Collectives* <www.registredesactionscollectives.quebec/fr/Fichier/Document?NomFichier=7200.pdf>; "Class Action

While acknowledging the need for effective accountability mechanisms for state decisions taken in the interest of managing the pandemic, we suggest that liability litigation against public authorities is not an efficient tool to achieve such accountability in the context of COVID-19. There are substantial hurdles in bringing actions against the state in this context. Several decisions taken by public authorities to curtail the COVID-19 pandemic are protected against liability lawsuits through legislative immunity (A) and court-imposed limitations of liability (B). While these protections may seem disconcerting at first glance, some of them are justified by pro-public health arguments (C).

A. Protections Granted Through Legislative Immunity

Though all provinces and territories in Canada provide some form of protection against liability to public authorities in the context of the pandemic, this section specifically delves into the law of Quebec and Ontario as representative examples. These are the provinces with the most COVID-19 cases per capita in Canada. Moreover, as the next sections reveal, they both illustrate the two types of protections against liability for public authorities: those attached to an emergency declaration and those connected to other public health powers.

As we saw in Part I, many governmental decisions in managing the COVID-19 pandemic are undertaken by virtue of powers granted under an emergency declaration. Provinces may declare a state of emergency either under their public health legislation (as in Quebec)[84] or under their civil emergency legislation (as in Ontario).[85] Powers granted to governments and other public authorities through a declaration of emergency are not only strikingly broad and discretionary, but also, in most cases, immune from liability lawsuits.

In Quebec, the *Public Health Act* (PHA) grants immunity to the government, the Minister of Health or "another person" for acts performed in good faith in the exercise of powers or in relation to the exercise of powers held under a declaration of public health emergency.[86] Such protected decisions are numerous and include all of the decisions taken by governmental orders in council or ministerial orders taken by

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Launched on Behalf of Residents of 96 Ontario Long-Term Care Homes" (1 June 2020), online: *Rochon Genova LLP* <www.rochongenova.com/Current-Class-Action-Cases/Long-Term-Care-Covid-19.shtml>. Lawsuits have also been undertaken against airlines, schools, universities, businesses in the artistic sector, insurers, and the Canada Revenue Agency. Class actions have also been instituted against public authorities on the basis of Charter right violations. These lawsuits are not grounded on liability rules and are therefore not discussed in this section.

[84] See the text accompanying note 10. The public health emergency declared on 13 March 2020 under the *QC PHA, supra* note 23, s 118, was renewed regularly for periods of ten days maximum. See *supra* note 15 at 763A.

[85] See the text accompanying note 20.

[86] See *QC PHA, supra* note 23, s 123.

the Ministry of Health and Social Services during the pandemic.[87] Examples include limits on gatherings;[88] compulsory masking and distancing;[89] closure of non-essential businesses;[90] restrictions to travel within the province;[91] and management of the virus in private residential and long-term care centres.[92] Movement of staff between different facilities – which has been linked to the spread of COVID-19[93] – has also been managed through emergency orders.[94]

The above decisions were all taken by the Quebec government and the Ministry of Health Services and Social Services. These actors are both explicitly targeted by the PHA immunity. The "another person" category is broad; it suffices for this "other person" to act in the exercise of the emergency powers[95] or "in relation to the exercise" of these powers. Thus, one could argue that public and private actors

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[87] For a full list of decisions taken in Quebec under *QC PHA*, *supra* note 23, ss 118, 123, see "Measures adopted by Orders in Council and Ministerial Orders in the context of the COVID-19 pandemic" online: *Government of Quebec* <www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/measures-orders-in-council-ministerial-orders/>. The Ministry of Health and Social Services also issues Directives to combat COVID-19. See generally Santé et services sociaux Québec, "Directives COVID-19 du ministère de la Santé et des Services sociaux" online: *Gouvernement du Québec* <publications.msss.gouv.qc.ca/msss/directives-covid-19/>; Santé et services sociaux Québec, "COVID-19 - Directives au réseau de la santé et des services sociaux" online: *Gouvernement du Québec* <www.msss.gouv.qc.ca/professionnels/covid-19/covid-19-directives-au-reseau-de-la-sante-et-des-services-sociaux/>; Santé et Services sociaux Québec, "Directives cliniques aux professionnels et au réseau pour la COVID-19", online : *Gouvernement du Québec* <www.msss.gouv.qc.ca/professionnels/covid-19/directives-cliniques-aux-professionnels-et-au-reseau/>.

[88] See *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation,* OIC 1020-2020, (30 September 2020) GOQ II, 2770A.

[89] See *Ibid;* See also *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation,* OIC 947-2020, (11 September 2020) GOQ II, 2583B.

[90] See *Order concerning the ordering of measures to protect the health of the population during the COVID-19 pandemic situation,* OIC 2020-008, (22 March 2020) GOQ II, 780A; *Ordering of measures to protect the health of the population during the COVID-19 pandemic,* OIC 2020-223, (24 March 2020) GOQ II, 772A.

[91] See Ministerial Order 2020-011, (28 March 2020) GOQ II, 796A; *Ministerial Order concerning ordering of measures to protect the health of the population amid the COVID-19 pandemic situation,* OIC 2020-013, (1 April 2020) online: <cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/AM_numero_2020-013-anglais.pdf?1585753157>.

[92] See e.g. Ministerial Order 2020-097, (1 December 2020) GOQ II, 3162A (Minister of Health and Social Services).

[93] See Romain Schué, "Le personnel de la santé toujours déplacé entre zones chaudes et froides" (13 May 2020), online: *Radio-Canada* <ici.radio-canada.ca/nouvelle/1702463/coronavirus-transfert-infirmieres-preposes-quebec-covid>.

[94] See *Public health emergency order to protect the health of the population amid the COVID-19 pandemic situation,* OIC 2020/007, (21 March 2020) GOQ II, 778A.

[95] Could this include the national public health director by virtue of *QC PHA, supra* note 23, s 124 (2)? This section states that the national public health director assists the Minister but adds that "the orders and instructions given by the national public health director must be carried out in the same manner as those given by the Minister." See also Michelle Giroux, "Réflexions sur la mise en œuvre de la *Loi sur la santé publique* au Québec dans le contexte de la pandémie de COVID-19" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19,* (Ottawa, University of Ottawa Press, 2020) 69 at 73.

acting in accordance with specific orders from the government or from the Ministry of Health and Social Services could be protected, such as is the case for health care establishments,[96] regional public health directors,[97] as well as specific private actors.[98] However, the immunity would only extend to measures taken by virtue of an order from the government or the Ministry of Health.[99]

Ontario, by contrast, declared a state of emergency under the *Emergency Management and Civil Protection Act* (EMCPA) in March 2020 and a second time on 12 January 2021.[100] Examples of measures taken under these emergency powers include the closing of libraries, schools, cinemas, bars, and other venues, the imposition of limits on visitors to long-term care homes,[101] and restrictions to the size of unmonitored and private social gatherings.[102] The January 2021 declaration allowed Ontario to issue a stay-at-home order, limit gatherings, order remote teaching in specific regions, and limit access to stores, restaurants, and bars.[103] The EMCPA provides an immunity benefitting ministers of the Crown, public servants, "or any other individual" acting in good faith pursuant to this Act.[104] However, the government

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[96] See e.g. OIC 177-220, *supra* note 15 at 763A (gives special powers to health and social services establishments).

[97] See e.g. Ministerial Order 2020-015, (4 April 2020) GOQ II, 840A; Ministerial Order 2020-016, (7 April 2020) GOQ II, 843A.

[98] See e.g. Ministerial Order 2020-027, (22 April 2020) GOQ II, 983A (Commission de la construction du Québec); Ministerial Order 2020-063, (11 September 2020) GOQ II, 2635A (holders of a bar permit); Ministerial Order 2020-064, (17 September 2020) GOQ II, 2677A (private seniors' residences).

[99] The Quebec CPA which was used by the City of Montreal to declare a state of emergency in March 2020 also includes an immunity. See *Civil Protection Act*, 2001, c 76, s 126 (QC).

[100] See *Declaration of Emergency,* O Reg 50/20 (emergency declaration renewed on March 17 to cover the period between March 18 to July 23, 2020). See also *Order Made under the Act - Extensions and Renewals of Orders,* O Reg 416/20 (most orders were then extended to 29 July 2020). See also Bill 195, *Reopening Ontario (A Flexible Response to COVID-19) Act*, 1st Sess, 42nd Leg, 2020, c 17 (assented to 21 July 2020) (allows Ontario to continue orders made under the emergency declaration without extending the declaration of emergency, *bid.,* s. 2) and *Declaration of Emergency,* O Reg 7/21 (12 January 2021).

[101] See "News Release: York Region Added to List of Areas of Higher Community Spread" (17 October 2020), online *Government of Ontario* <news.ontario.ca/en/release/58858/york-region-added-to-list-of-areas-of-higher-community-spread>.

[102] See "News Release: Ontario Limits the Size of Unmonitored and Private Social Gatherings across Entire Province" (19 September 2020), online: *Government of Ontario* <news.ontario.ca/en/release/58449/ontario-limits-the-size-of-unmonitored-and-private-social-gatherings-across-entire-province>.

[103] Government of Ontario, "COVID-19 public health measures and restrictions" (2020-2021), online: *Ontario* <covid-19.ontario.ca/zones-and-restrictions#declaration-of-emergency>.

[104] The immunity also applies to members of council, employees of a municipality, of a local services board or of a district social service administration board. More precisely, protected acts are those "done in good faith in the exercise or performance or the intended exercise or performance of any power or duty under this Act or an order under this Act or for neglect or default in the good faith exercise or performance of such a power or duty." See *ON EMCPA, supra* note 20, s 11(1). See also Andrew Flavelle Martin, "Statutory Good-Faith Immunity for Government Physicians - Cogent Policy or a Denial of Justice?" (2011) 4:2 McGill JL & Health 76 at 79–80 (on the meaning of good faith in another, similar, context).

can still be held vicariously liable for the acts or omissions of an immune minister or public servant.[105]

Public authorities also tackle the pandemic by utilizing other powers granted by public health legislation or by COVID-19 specific laws. These powers also provide protections. For instance, Ontario's *Health Protection and Promotion Act* (HPPA)[106] grants immunity[107] to several public health officials[108] for acts done in good faith "in the execution or the intended execution of *any duty or power* under this Act or for any alleged neglect or default in the execution in good faith of any such duty or power."[109] The immunity has a large scope of application and protects all powers exercised under the HPPA as long as they are exercised by the health officials or staff listed.[110] As is the case for the EMPCA, the HPPA maintains the vicarious liability of the government even for immune acts or omissions of a minister or public servant.[111] The HPPA also outlines a specific immunity protecting any person acting in good faith pursuant to specific orders, directives and directions made by the Minister of Health and Long-Term Care (MHLTC) or the Chief Medical Officer (CMO).[112] The specific ministerial orders protected by this immunity are those related to the emergency procurement of medication and supplies described in Part I.[113] As for the CMO orders and directives that are immune, they relate to: the provision of health information; precautions and

[105] See *ibid*, s 11(2). Otherwise, under the *Crown Liability and Proceedings Act*, SO 2019, c 7, s 8 (Ontario), the Crown would not be vicariously liable. Although a state of emergency has not been declared by the federal government so far, it is notable that the *Emergencies Act,* RSC 1985, c 22 (4th Supp), s 47(1) also contains an immunity.

[106] See *ON HPPA*, *supra* note 23, s 95.

[107] See *Health System Improvements Act*, SO 2007, c 10. See also Bill 171, *An Act to improve health systems by amending or repealing various enactments and enacting certain Acts*, 2nd Sess, 38th Leg, Ontario, 2007 (assented to 4 June 2007) s 18 (which broadened the existing immunity, in accordance with the recommendation of the SARS commission). The changes made by this law to the *ON HPPA* (*supra* note 23) also expanded the powers of the Ministry of Health and Long-Term Care and the Chief Medical Officer in curtailing threats to the health of the population. See Martin*, supra* note 104 at 88.

[108] This immunity applies to the Chief Medical Officer of Health, an Associate Chief Medical Officer of Health, a member of a board of health, a medical officer of health, an associate medical officer of health of a board of health, an acting medical officer of health of a board of health or a public health inspector or an employee of a board of health or of a municipality who is working under the direction of a medical officer of health. However, boards of health are not relieved from liability for damage caused by negligence of or action without authority by a person referred to in the list above. See *ON HPPA*, *supra* note 23, s 95(1).

[109] *Ibid,* s 95(1) (emphasis ours). Interestingly, some Canadian public health laws include provisions obliging the payment of compensation for injuries caused by specific public health measures. See e.g. *YK PHSA, supra* note 23, s 4.6 (7); *NT PHA, supra* note 23, s 34.

[110] It has been applied to protect from liability a MOH in a case concerning the inspection of a seniors' home, but it was not invoked in the SARS litigation since claims were not brought against MOHs. See Martin, *supra* note 104 at 83.

[111] See *ON HPPA, supra* note 23, s 95(1.1). Otherwise, under the *Crown Liability and Proceedings Act*, SO 2019, c 7, s 8, the Crown would not be vicariously liable. This Act immunizes the government against direct liability (*ibid,* s 8(2)). No such immunity exists under Quebec law. See CCQ, arts 1376 and 1457.

[112] See *ibid.*

[113] See text accompanying note 48.

procedures to be followed to protect health issued to health care providers or entities; the collection of specimens; and the adoption or implementation of policies or measures concerning notably infectious diseases, health hazards, public health emergency preparedness issued to boards of health or medical officers of health.[114] Examples of immune decisions under the HPPA could therefore include Medical Officers of Health orders made in November 2020[115] to, among others: curtail workplace outbreaks (Peel region);[116] impose prohibitions on indoor dining and indoor fitness classes as well as close casinos, bingo halls, gambling establishments, meeting and event spaces (Toronto);[117] and keep records of persons entering indoor or outdoor dining establishments (Niagara region).[118] Other provinces' public health legislation also provides several actors with immunity;[119] some encompass the Crown in its ambit,[120] while others do not extend immunity to the Crown.[121]

In addition, COVID-19-specific immunity has emerged since the outset of the pandemic. Ontario's Bill 218 strikingly grants immunity to "any person" whose act or omission has directly or indirectly resulted in "an individual being or potentially being infected with or exposed to coronavirus (COVID-19) on or after March 17, 2020."[122] This immunity requires that the person acted, or made a good faith (i.e.,

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[114] See *ON HPPA, supra* note 23, ss 77.5–77.9.

[115] See *ibid*, s 22.

[116] See "Peel to charge businesses that fail to take steps to prevent or stop spread of COVID-19" (14 November 2020), online: *Region of Peel* <peelregion.ca/news/archiveitem.asp?year=2020&month=10&day=14&file=20201014.xml>.

[117] See "News Release: Medical Officer of Health issues Section 22 order to strengthen COVID-19 protections in Toronto" (13 November 2020), online: *City of Toronto* <www.toronto.ca/news/medical-officer-of-health-issues-section-22-order-to-strengthen-covid-19-protections-in-toronto/>.

[118] See "Order under Section 22 of the Health Protection and Promotion Act" (14 November 2020), online: *Niagara Region* <niagararegion.ca/health/covid-19/reopen/section22.aspx>.

[119] See *YK PHSA, supra* note 23, s 21.2 (lists health officials and professionals); *NT PHA, supra* note 23, s 41 (lists health officials, health care professionals and others); *NL PHPPA, supra* note 23, s 55 (lists the Minister administering the Act and the Minister of Justice and Public Safety among protected persons and entities, but does not list the government; this statute is silent on the liability of the Crown).

[120] See *AB PHA, supra* note 23, s 66.1 (applies to a large number of persons and entities in the health, public health, and education sectors, as well as to the Crown or a Minister of the Crown); *SK PHA, supra* note 23, s 68–69. In Manitoba, Nova Scotia and PEI, the immunity granted to individuals and entities by the public health legislation extends to the Crown via those provinces' crown proceedings acts. See *MB PHA, supra* note 23, s 106(1) and *Proceedings Against the Crown Act*, CCSM 2017, c P140, s 4; *NS HPA, supra* note 23, s 12 and *Proceedings Against the Crown Act,* RSNS 1989, c 360, s 5; *PE PHA, supra* note 23, s 22.3 and *Crown Proceedings Act*, RSPEI 1988*,* c C-32, s 4.

[121] In British Columbia and New Brunswick (as in Ontario), though immunity protects a number of entities and persons, the government may be vicariously liable for an immune act. See *BC PHA, supra* note 23, s 92 (government or health authority); *NB PHA, supra* note 23, s 64 (the Crown). See also Martin*, supra* note 104 at 83–84.

[122] See Bill 218, *Supporting Ontario's Recovery and Municipal Elections Act*, 1st Sess, 42nd Leg, Ontario, 2020 (in force as of 20 November 2020), SO 2020, c 26, s 2(1).

honest)[123] effort to act in accordance with public health guidance relating to COVID-19 and relevant federal, provincial or municipal laws relating to COVID-19, as long as the person did not commit gross negligence.[124] This bill thus protects a wide array of public and private actors.[125] In Quebec, an attempt to introduce a COVID-19-specific Bill (which contained a similarly broad, and much criticized immunity)[126] failed in June 2020.[127]

These barriers in seeking state accountability by way of liability lawsuits before the court system are thus significant due to the broad application of legislative immunity. However, not all decisions made by public authorities fall within this protection.

B. Court-Imposed Limits to Liability

Though we have focused in Part I on the exercise of emergency powers (which are the primary beneficiaries of legislative immunity), numerous other powers of public authorities have significance in the context of the pandemic. While undertaking a thorough analysis of all relevant powers under Canadian public health and health care legislation is beyond the scope of this paper, this section briefly comments on additional protections against liability which may be conferred onto non-immune decisions. Decisions that are not covered by legislative immunity include, for instance, measures under the *QC PHA* that are not connected to public health emergency powers, and Ontario government vicarious liability under the EMCPA and the HPPA. Further, some decisions taken prior to the pandemic and which have detrimentally

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[123] See *ibid* at s 1.

[124] See *ibid* at s 2(1).

[125] A discussion of the liability of private actors, as limited by Bill 218, is beyond the scope of this paper. Other provinces similarly limit the lawsuits that can be brought against private entities. See e.g. British Columbia Minister of Public Safety & Solicitor General, “Ministerial Order No. M094” (2 April 2020), online (pdf): *BC Laws* <www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0094_2020>; British Columbia Minister of Public Safety & Solicitor General, “Ministerial Order No. M183” (10 June 2020), online (pdf): *BC Laws* <www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0183_2020> (limits liability for sports). Note that British Columbia Ministerial Orders for 2020/2021 are not found in the Gazette; for a list of all Ministerial Orders, see British Columbia, “Ministerial Orders 2020” online: *BC Laws* <www.bclaws.gov.bc.ca/civix/content/mo/mo/1115649140/?xsl=/templates/browse.xsl>.

[126] See e.g. Elizabeth Leier, “Bill 61 is a troubling sign of rising authoritarianism in Quebec” (24 June 2020), online: *Canadian Dimension* <canadiandimension.com/articles/view/quebecs-bill-61-is-a-troubling-sign-of-rising-authoritarianism>.

[127] See Bill 61*, An Act to restart Quebec’s economy and to mitigate the consequences of the public health emergency declared on 13 March 2020 because of the COVID-19 pandemic*, 1st Sess, 42nd Leg, 2020 (debate to adopt in principle started 12 June 2020 but was adjourned). See “Projet de loi n° 61” online: *National Assembly of Québec* <m.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-61-42-1.html>. See *ibid* at s 51 (provides immunity for the Government, a minister, a public body, or any other person exercising powers granted by this legislation in good faith, or implementing measures pursuant to these powers in good faith).

affected citizens during the pandemic might not be covered by immunity.[128] In Quebec for instance, government's liability may be called into question with regard to how it allocated resources in public CHSLDs long before COVID-19, and for the impact its recent health care system reforms[129] had on pandemic management.[130] Another example of the state's longer-term health priorities which may come under scrutiny is governments' lack of preparation with a sufficient amount of medical protective equipment and emergency supplies[131] and staffing,[132] particularly in light of the research published after SARS that predicted that the world would face another, bigger, pandemic.[133]

Public authorities' decisions that do not benefit from legislative immunity may be, in theory, subject to liability.[134] However, they may be protected by the public law immunity granted to state policy decisions and by limits to the duty of care owed by the state under the tort of negligence when public health matters are concerned. This immunity equally applies in the province of Quebec,[135] as in the rest of Canada.[136]

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[128] See also Giroux*, supra* note 95 at 75. The liability of the government for Charter violations could also be invoked. See *Canadian Charter of Rights and Freedoms*, *supra* note 70, s 24(1). In Quebec, see *Charter of Human Rights and Freedoms*, CQLR c C-12, s 49.

[129] See especially *Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies*, CQLR, c O-7.2 ("Bill 10"); *An Act to enact the Act to promote access to family medicine and specialized medicine services and to amend various legislative provisions relating to assisted procreation,* SQ 2015, c 25 ("Bill 20").

[130] See e.g. Québec Ombudsman, *COVID-19 in CHSLDs during the First Wave of the Pandemic: Learning from the Crisis and Moving to Uphold the Rights and Dignity of CHSLD Residents*, *2020,* (Québec City, Protecteur du Citoyen, 10 December 2020) at 1, 10, 17; "Patient rights groups hopes to sue Quebec over deteriorating CHSLD conditions" (10 July 2018), online: *CBC News* <www.cbc.ca/news/canada/montreal/patient-care-in-quebec-chsld-violates-charter-rights-1.4741052>.

[131] See Québec Ombudsman, *supra* note 130 at 1, 8.

[132] *Ibid* at 10, 16–17.

[133] See e.g. Kumanan Wilson, "Pandemic Threats and the Need for New Emergency Public Health Legislation in Canada" (2006) 2:2 Healthcare Policy 35; Marieke Walsh, Grant Robertson & Kathy Tomlinson, "Federal emergency stockpile of PPE was ill-prepared for pandemic" (30 April 2020), online: *The Globe and Mail* <www.theglobeandmail.com/politics/article-federal-emergency-stockpile-of-ppe-was-not-properly-maintained/>; Evan Dyer, "The great PPE panic: How the pandemic caught Canada with its stockpiles down" (11 July 2020), online: *CBC News* <www.cbc.ca/news/politics/ppe-pandemic-covid-coronavirus-masks-1.5645120>. Ensuring there is adequate personal protective equipment available in the case of an emergency is a responsibility shared by multiple levels of government: "Appendix C: Evaluation of the National Emergency Stockpile System — Current context, roles and responsibilities" (last modified 28 August 2012), online: *Public Health Agency of Canada* <www.canada.ca/en/public-health/corporate/mandate/about-agency/office-evaluation/evaluation-reports/evaluation-national-emergency-stockpile-system/appendix-c.html#app-c>.

[134] See e.g. *Crown Liability and Proceedings Act*, SO 2019, c 7, s 8 (excludes government's direct liability however: *ibid*, s 8(2)); See also art 1376 CCQ (Quebec). Although section II.B may refer to "state liability", it must therefore be understood that this could be in some cases limited to its vicarious liability.

[135] By virtue of 1376 CCQ, which imports this common law concept into the civil law of the province. See also *Finney v Barreau du Québec*, 2004 SCC 36 at para 27; *Prud'homme v Prud'homme*, 2002 SCC 85 at paras 27, 31.

[136] In Canadian common law, the assessment of whether this immunity applies occurs in the second stage of the duty of care test under the tort of negligence. Here, the court examines residual policy considerations.

Legal rules surrounding public law immunity are complex and have been analyzed extensively by courts[137] and scholars.[138] This immunity protects policy decisions made by the state from civil liability, unless those decisions are irrational or taken in bad faith.[139] Policy decisions are defined as involving social, political and economic factors and are typically dictated by financial, economic, social and political considerations or constraints.[140] In health care and public health litigation, this immunity has protected public authorities' decisions related to the imposition of budgets and the allocation of resources,[141] the establishment of priorities in the fight against certain diseases,[142] and the establishment and implementation of screening programs.[143] It also prevents the courts from second-guessing executive decisions that deal with the assessment of risks prior to the adoption of regulations, and prevents

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See *Cooper v Hobart*, 2001 SCC 79 at para 38 [*Cooper*]; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 [*Imperial*]. A detailed analysis of how section 1376 CCQ differs from legislation in the rest of Canada that govern state responsibility is beyond the scope of this paper. Noteworthy, however, is that the Civil Code of Quebec subjects the provincial government to the whole of the law of obligations (subject to the public law immunity discussed in this section). Meanwhile, other provinces' statutes tend to be more specific in describing the types of situations where the provincial state could incur liability. However, where the federal state is concerned, the limits to governmental liability listed in the *Crown Liability and Proceedings Act,* RSC 1985, c C-50 could apply in Quebec. See Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La responsabilité civile. Volume 1- Principes généraux*, 9th ed (Montreal: Yvon Blais, 2020) at paras 1, 130–31.

[137] See e.g. *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66. See also *Imperial, supra* note 136 at para 116; *Hinse v Canada (Attorney General),* 2015 SCC 35.

[138] See e.g. Timothy A Caulfield, "Suing Hospitals, Health Authorities and the Government for Health-care Allocation Decisions" (1994) 3:1 Health L Rev 7; Lorian Hardcastle, "Governmental and Institutional Tort Liability for Quality of Care in Canada" (2007) 15 Health LJ 401; Lorian Hardcastle, "Systemic Accountability Through Tort Claims Against Health Regions" (2010) 18:2 Health L Rev 40; Alexander M Pless, "The Relationship Between Crown Liability and Judicial Review: Notes from Quebec" (2015) 69 SCLR 41.

[139] See *Imperial, supra* note 136 at para 90. To the extent that science grounds the decisions—even if scientific knowledge is constantly changing and evolving— it may be hard to argue that COVID-19 related decisions are taken in bad faith or that they are irrational. See also *Crown Liability and Proceedings Act*, SO 2019, c 7, s 11(4) which, probably seeking to reproduce the common law, grants immunity to the "Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter". Policy matters include: the creation, design, establishment, redesign or modification of a program, project or other initiative; the funding of a program, project or other initiative; the manner in which a program, project or other initiative is carried out (*ibid,* s 11(5)).

[140] See *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 at 441, 112 DLR (4th) 1 [*Brown*]; *Imperial*, *supra* note 136 at para 63. See also *Fortin, supra* note 81 at 228 (this creates a "thoroughly vague zone of action in which the Crown cannot be sued").

[141] See *Cilinger v Québec (PG)*, [2004] RJQ 2943, 2004 CanLII 39136 (QCCA) [*Cilinger*].

[142] *Ibid*; *Tonnelier v Québec (Procureur général)*, 2012 QCCA 1654 [*Tonnelier*].

[143] See *Tonnelier, supra* note 142 at paras 7, 64, 87 (failing to establish effective quality controls for pathological tests performed for breast cancer screening; class action authorization denied).

judicial overreach in how governments choose to regulate.[144] The state is subject to liability if it contravenes legislation that it has itself adopted, however.[145] The policy category may include the allocation of resources made by governments in the past decades for long-term care homes and stockpiling medical supplies,[146] or the priorities set for the vaccination of the population.

While the policy sphere of state action is partially protected, its operational sphere is subject to ordinary rules of civil liability. The line of demarcation between the two spheres is notoriously difficult to draw.[147] The operational sphere is concerned with the execution or implementation of policy decisions:[148] "(o)perational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."[149] Failing to ensure that state regulation is respected could fall within operationalization,[150] as could the carrying out of a plan to combat the spread of infectious disease (its design, however, would fall to the policy sphere).[151] This implementation is often entrusted to another entity, however.[152] For instance, though the state may decide to order the wearing of masks on public transportation, the implementation of this order is likely to fall to private operators of public transport. Negligence in monitoring compliance would therefore likely only raise the potential liability of the private operator. An example of state action that could fall into the operational sphere is the alleged poor prevention measures implemented within different correctional institutions by agents of the state.[153]

[144] See Thomas Moran, Nola M Ries & David Castle, "A Cause of Action for Regulatory Negligence? The Regulatory Framework for Genetically Modified Crops in Canada and the Potential for Regulator Liability" (2009) 6 UOLTJ 1 at 17, 19, 23.

[145] See *Association pour l'accès à l'avortement v Québec (Procureur général)*, 2006 QCCS 4694.

[146] See also *Fortin, supra* note 81 at 229.

[147] See *Imperial, supra* note 136 at paras 78 and 86.

[148] See *Brown, supra* note 140 at 441; *Imperial, supra* note 136 at para 74.

[149] *Brown*, *supra* note 140 at 441.

[150] See e.g. *Bossé v Hydro-Québec*, 2012 QCCS 2919 (rev'd for lack of evidence: 2014 QCCA 323).

[151] Regarding the West Nile Virus ("WNV"), see *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care),* 2006 CanLII 37121 (ON CA), [2006] OJ No 4400 (QL) [*Eliopoulos*].

[152] See *ibid* at para 23 (the province provided general information and coordination regarding a surveillance and prevention plan to deal with WNV, but other measures were to be performed by members of the public, local authorities and local boards of health, who were consequently in charge of the operationalization of the plan).

[153] See e.g. *Beaulieu v Canada (Attorney General)* (20 April 2020), Montreal, Que SC, No 500-06-001061-205 (motion for authorization of a class action). See also in Ontario: *Francis v Ontario*, 2020 ONSC 1644 [*Francis*] (summary judgment in a certified class action case). In Ontario, the province operates correctional institutions (*Ministry of Correctional Services Act* and RRO 1990, Reg 778, cited in *Francis*, *ibid* at para 1). This case was concerned with the administrative segregation of inmates with serious mental illnesses and dealt inter alia with an allegation of "systemic negligence" on the part of the province. The governing statute in this case explicitly provided for a duty in favour of the class member inmates and did not preclude the recognition of a common law duty of care (*ibid* at para 396). The Court also found that the alleged

The government's statutory obligation to prioritize collective interests in public health situations is likely to play an important role in the outcome of any liability lawsuit taken outside of Quebec in the context of COVID-19. In the common law tradition, the tort of negligence governing these lawsuits requires, among other conditions, that the state owes a duty of care to the plaintiff(s).[154] To demonstrate this duty of care, plaintiffs must first show that there exists a relationship of proximity between them and the state.[155] In matters of state responsibility, the proximity condition usually requires courts to study the legislation governing the state action to determine to whom the state owes a statutory duty.[156] If state powers are exercised by virtue of public health legislation that imposes duties to protect the health of the population and to act in the public interest, common law courts are reluctant to impose a private law duty to take into account the specific interests of individuals or groups.[157]

The class action cases undertaken in Ontario in the aftermath of the SARS and West Nile Virus epidemics illustrate this rule and are particularly salient in the COVID-19 context. For instance, *Williams* was a class action commenced by persons who contracted SARS during a second wave of the epidemic, including the representative plaintiff who had contracted SARS while she was a surgery patient.[158] The claim alleged, among other issues, that provincial officials were premature in easing infection control procedures and in lifting the state of emergency in April 2003.[159] It also argued that by issuing detailed Directives mandating standards to be followed and implemented by health care facilities and professionals by virtue of the CMO's powers under the HPPA, the province created a duty of care toward the plaintiff.[160] The Court of Appeal, however, held that the directives did not create a private law duty of care.[161] Moreover, when assessing how to deal with the outbreak, the province was required to address the interests of the public at large rather than focus on the particular interests of individual citizens.[162] The court opined that

misconduct of the civil servants managing the administrative segregation in Ontario prisons was operational (*ibid* at paras 417, 422).

[154] This condition does not apply under CCQ arts 1376 and 1457 which govern state liability in the civil law province of Quebec.

[155] The proximity analysis takes place when resolving the first stage of the duty of care test. The second stage, which is preoccupied with residual policy considerations, is where the aforementioned immunity is considered. See *Cooper*, *supra* note 136 at paras 30–31.

[156] See *Imperial, supra* note 136 at para 43 ("statutory scheme"); *Francis, supra* note 153 at paras 387, 392.

[157] See *Adam, Abudu v Ledesma-Cadhit et al*, 2014 ONSC 5726 at para 27 [*Adam*].

[158] See *Williams v Ontario*, 2009 ONCA 378 [*Williams ONCA*] (motion to strike granted).

[159] See *ibid* at para 6.

[160] See *ibid* at paras 22, 25 and 28. The Directives were issued under what is now *HPPA, supra* note 23 at s 77.7(1). An immunity now protects persons acting under such directives, but does not limit the government's vicarious liability (*ibid*, s 95(1.1)).

[161] See *ibid* at para 28.

[162] See *ibid* at para 31.

"(d)ecisions relating to the imposition, lifting or reintroduction of measures to combat SARS are clear examples of decisions that must be made on the basis of the general public interest."[163] This involved balancing the restrictions limiting access to hospitals to combat the spread of disease against the needs of those who required access for other medical reasons.[164]

Therefore, state actions undertaken in common law provinces under public health legislation that imposes a duty to the public at large are likely to be rejected for want of a duty of care. However, some statutes may impose a duty of care on specific individuals or groups.[165] Moreover, a court may find that the particular circumstances of a situation reveal proximity "in fact". In general terms, this type of proximity may arise from direct and specific interaction between the state and the injured individual.[166] However, the sole interaction of citizens and public authorities in the context of a public health investigation is not sufficient to establish such proximity.[167] The 'proximity in fact' analysis depends on the circumstances of each case; it is difficult to identify the exact situations which would result in a finding of 'proximity in fact' the context of the pandemic. The relationship between the governments and elderly citizens residing in the long-term care homes particularly hit by morbidity and death is probably the most likely candidate. Martin also mentions (albeit in another context) the example of a Minister of Health becoming aware of a specific individual requiring quarantine, examination, or treatment and negligently determining which

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[163] See *ibid.*

[164] See *ibid.* A similar decision was reached in *Abarquez v Ontario,* 2009 ONCA 374 [*Abarquez*], a class action brought by nurses and their family members who had contracted SARS during the second wave of the virus (*ibid* at para 15, 18–19, 20, 23, 25–28 (granting a motion to strike)). See also *Laroza Estate v Ontario*, 2009 ONCA 373.

[165] See e.g. *Ministry of Correctional Services Act*, RSO 1990, c M.22. See also *Francis, supra* note 153 at para 396 ("duty for the superintendent, health care, professionals, and the staff of the correctional institutions to be responsible for the care, health, discipline, safety, and custody of the inmates of the correctional institution"). Federal prisons are managed by Correctional Service Canada, a federal agency within the Canadian government, and the governing statute imposes obligations concerning health, health care and safety: *Corrections and Conditional Release Act*, SC 1992, c 20, s 70, 86.

[166] See e.g. *Attis v Canada (Minister of Health)*, 2008 ONCA 660 at para 66 [*Attis*] (specific interaction or communication between the state and the injured individual in the implementation of a policy, especially if the safety of the individual is in jeopardy); *Sauer v Canada (Attorney General)*, 2007 ONCA 454 at para 62, leave to appeal to SCC refused, 32247 (17 July 2008) (representations to a group or a citizen or commitments that it would act in their interest, and the latter relied on such representations); *Mitchell Estate v Ontario,* 71 OR (3rd) 571, 2004 CanLII 4044 (ON SCDC) at para 19 (if the state has personal knowledge of the claimants or their circumstances, or made representations to them or participated in the treatment which led to the injury); *Taylor v Canada (Attorney General)*, 2012 ONCA 479 (in the presence of false representations of the State, combined with the failure to correct them, knowing of the existence of a serious and continuous risk to which is subject to a clearly identifiable and relatively small group of consumers). See also *Imperial, supra* note 136 at para 45–46. McLachlin CJC (as she then was) also envisions a third situation where proximity could be "based both on interactions between the parties and the government's statutory duties." (*ibid* at para 46).

[167] See *The Los Angeles Salads Company Inc v Canadian Food Inspection Agency*, 2011 BCSC 779 at paras 106–07, 111 [*Los Angeles Salads BCSC*]. The appeal was dismissed. See *Los Angeles Salads Company Inc v Canadian Food Inspection Agency* 2013 BCCA 34, citing *River Valley Poultry Farm Ltd v Canada (Attorney General)*, 2009 ONCA 326 [*Los Angeles Salads BCCA*]. Leave to appeal to SCC refused, [2009] SCC 259 at para 59.

steps are necessary, or negligently enforcing those steps.[168] Concrete communications between specific groups or individuals and the government would need to be scrutinized, to uncover representations or commitments made in the interest of protecting their safety.

Legislative immunity and judicial tools to limit liability work in tandem to protect the majority of government decisions taken to manage COVID-19 pandemic from leading to liability, even if, after the fact, it turns out that the wrong priorities were identified, or the decisions meant to protect one group cause extensive injuries to another. Only a small number of state decisions may be exposed to civil liability: decisions that do not fall under a legislative immunity, that are policy decisions in nature but are irrational or taken in bad faith, or that pertain to the operational sphere, and that (very exceptionally in the common law) give rise to a private duty in the context of public health management. For many commentators, this raises serious concerns,[169] but some of these limits are grounded in public health concerns.

C. Public Health Advantages of Protections Against State Liability

Rather than advocating for reforms to civil liability rules to bolster state accountability, we locate the need for accountability elsewhere (see Part IV). Our position is grounded in the fact that the justifications offered for some of the above protections are favourable, in theory, to the achievement of health protection objectives. Therefore, it is useful to briefly explore the reasoning that justifies these protections to understand their possible benefits in the context of managing a public health emergency. These justifications have mainly been discussed by courts when dealing with the public law immunity and when assessing the duty of care condition under the tort of negligence.

The most important reason invoked by courts in the field of public health is the need for public authorities to prioritize the general interest of the population.[170] The argument is that the analysis of public interest with regard to public health matters should not be influenced by court-imposed private duties to specific individuals or groups that could conflict with the duties owed to the public at large, distort the process and lace it with bias.[171] When mandated to do so by parliament, public authorities

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[168] See Martin, *supra* note 104 at 95.

[169] See e.g. "COVID-19 : l'Ontario envisage de permettre la « bonne foi » comme défense en cour" (17 juin 2020), online: *Radio-Canada* <ici.radio-canada.ca/nouvelle/1713025/bonne-foi-covid>; Valérie Boisclair, "Projet de loi 61 : l'opposition somme Québec de retourner à la planche à dessin" (10 juin 2020), online: *Radio-Canada* <ici.radio-canada.ca/nouvelle/1710858/loi-61-relance-economique-quebec-article-50-etat-urgence>.

[170] This justification is discussed by common law courts mainly when assessing duty of care.

[171] As McLachlin CJC (as she then was) notes, statutes are most often aimed at public goods. In such cases "it may be difficult to infer that the legislature intended to create private tort duties," especially when "the recognition of a private law duty would conflict with the public authority's duty to the public." See *Imperial, supra* note 136 at para 44; *Abarquez, supra* note 164 at para 26 ("the very nature of a duty by a public authority to the public at large is ordinarily inconsistent with the imposition of a private law duty of care to

should be able to pursue the collective interest and the management of conflicting public health priorities, unhindered by other considerations.

Indeed, a second justification is that the collective interest is composed of a prism of varied and divergent interests which public authorities must consider and reconcile in the field of health protection without the threat of judicial oversight.[172] This is particularly so in the context of the COVID-19 pandemic, where groups affected are numerous and have interests that do not always align. For instance, confinement to protect the elderly has caused the permeation of devastating impacts on economic actors. If faced with the threat of future lawsuits, public authorities may be tempted to prioritize the voices of those with higher means and better access to justice, which would be detrimental to the vulnerable populations who are the most affected by the pandemic.[173] While it is true that some actors (like pressure groups)[174] may be able to sway decisions made by the state without the intervention of the courts, the courts typically deem that the judiciary should not have the final word on how to reconcile the myriad of interests at stake.

A final justification revolves around the complexity of public decision-making in the field of health and the recognition of the specific competence of executive powers in matters of health management. This complexity is heightened in the context of a pandemic unprecedented in over a century. State responsibility could produce undesirable effects on the population's health by interfering with the state's primary mandate to establish health priorities.[175] Other justifications are invoked by the courts to explain the limited liability of the state;[176] however, those listed above

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any individual or group of individuals"). See also *Eliopoulos*, *supra* note 151 at paras 32–33. See also *Williams ONCA*, *supra* note 158 at para 35 (obiter), citing *Eliopoulos.*

[172] See *Eliopoulos*, *supra* note 151 at paras 32–33; *Williams ONCA*, *supra* note 158 at para 35 (obiter), citing *Eliopoulos* (the general interest requires the weighing of competing claims against limited resources to promote and protect the health of citizens).

[173] See text accompanying note 225.

[174] See e.g. Rachel Gilmore, "Canadians push back as U.S. Congress pressures Canada to reopen shared border" (10 July 2020), online: *CTV News* <www.ctvnews.ca/politics/canadians-push-back-as-u-s-congress-pressures-canada-to-reopen-shared-border-1.5019295> (pressure from U.S. Congress to reopen land border); Ryan Rocca, "Coronavirus: Doug Ford says he's facing pressure to open Ontario's golf course" (8 May 2020), online: *Global News* <globalnews.ca/news/6922839/coronavirus-ontario-golf-courses-covid-19/> (pressure from businesses to re-open provincial economies); "Thousands rally in downtown Montreal to protest Quebec mask rules" (8 August 2020), online: *CBC Montreal* <www.cbc.ca/news/canada/montreal/anti-mask-march-montreal-aug-8-1.5679598> (protests on mandatory mask regulations in Quebec); Jesse Snyder, "Morneau facing pressure to unwind massive COVID-19 support programs ahead of fiscal update" (7 July 2020), online: *National Post* <nationalpost.com/news/morneau-facing-pressure-to-unwind-massive-covid-19-support-programs-ahead-of-fiscal-update> (pressure from federal opposition parties, academics and industry groups on the federal government to change its aid programs and incentivize people to go back to work).

[175] See *Attis*, *supra* note 166 at para 75.

[176] For e.g. courts express concerns about exposing the government to unlimited private remedies, which could hamper public finances and have a chilling effect on government intervention. See *Los Angeles Salads BCSC, supra* note 167 at para 124, affirmed on this issue by the BCCA. See *Los Angeles Salads BCCA*, *supra* note 167 at para 75, citing *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24.

are particularly central to understanding the role that immunity and limited liability may play in a global public health strategy.

While these justifications are not specifically discussed in relation to emergency powers and other exceptional measures adopted during the pandemic, we posit that they are equally pertinent in this context. When using exceptional emergency powers, the state responds with urgency, acting with limited information and little time to ponder its decisions. This means of governance starkly contrasts the longer, more reflective process that typically underpins legislative action. Therefore, emergency decision-making in the public interest is a risky governance undertaking that is naturally prone to error but needs to be exercised without being hindered by the threat of liability lawsuits.[177] When adopting state immunity, some legislators indeed express the belief that it will encourage actions beneficial to public health,[178] though others worry that it may encourage carelessness.[179]

Despite these justifications, protecting the state against private law liability may engender perverse legal effects. It may cause liability to trickle down to other actors in the social and health care systems that do not benefit from these protections, and are not best placed to reinforce public health systems and interventions.[180] In the COVID-19 context, for instance, many lawsuits will be directed toward health care staff and institutions in the public health care system for failures that may have originated in governmental policy decisions and priority-setting.

In sum, courts are limited in their ability to utilize private law in holding governments accountable for the adverse consequences of their decisions. This may be due to legislative immunity, court-imposed public law immunity or absence of duty of care. As these hurdles are compounded by the lengthy delays and costs associated with liability litigation, it becomes clear that this avenue is not the best tool for securing state accountability. The following section demonstrates that similar conclusions can be drawn with regard to mechanisms for reviewing discretionary police enforcement, as well as reliance on constitutional rights litigation.

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[177] See Martin, *supra* note 104 at 86 (the immunity under the HPPA is not mentioned in any of the legislative debates, which suggests "an absence of conscious policy consideration by legislators").

[178] See e.g. Yukon, Legislative Assembly, "Bill 77, An Act to Amend the Public Health and Safety Act," 2nd reading, *Hansard* 32-1 (2 November 2009) at 4804–06.

[179] See Alberta, Legislative Assembly, "Bill 14, Pandemic Response Statutes Amendment Act" Official Report of Debates (*Hansard*), No 26-3 (14 June 2007) at 1775.

[180] See *Cilinger,* supra note 141 (hospitals settled out of court a class action against them for delays in providing radiation oncology services — due to shortage of staff and equipment caused by budget cuts — after the claim against the government of Quebec was denied authorization due to the immunity provided under CCQ, art. 1376).

III. Limited Accountability for Discretionary Police Enforcement and the Limits of Constitutional Rights Litigation

A. Poor Accountability in Policing

As discussed earlier in this paper, many of the public health and emergency measures relied upon in the pandemic expand the role of law enforcement, whether substantively by creating new offences via orders, regulations, health directives and by-laws prohibiting behaviours that create transmission risks, or procedurally, such as by creating new warrantless search powers to enforce COVID 19-related prohibitions.[181] Early calls for greater use of existing *Criminal Code* prohibitions, such as assault laws, to punish risky behaviour appear to have largely been resisted, though there have been reports of criminal charges laid for incidents of coughing or spitting, particularly in altercations with police.[182] More frequently, governments have relied on new penal-regulatory prohibitions within a patchwork of emergency regulations, public health orders, health directives, and by-laws, backed typically by fines, and occasionally by the possibility of prison sanctions.[183] Yet police enforcement, particularly as the role of the criminal and penal-regulatory law in the daily lives of ordinary people expands, is already under growing criticism for its lack of transparency and accountability,[184] both in terms of fairness in distribution of sanction as well as in terms of the extent to which it achieves desired public health objectives.[185] Police enforcement thus adds yet another layer of accountability challenges beyond those identified in the public health and emergency lawmaking processes described in Part I.

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[181] See e.g. *An Act to Amend the Public Health Protection and Promotion Act*, SNL 2020, s 50(1).

[182] See Lee Seshagiri, "Criminalizing Covid-19 transmission via sexual assault law? No. And that means no." (28 April 2020), online: *The Lawyer's Daily* <www.thelawyersdaily.ca/articles/18817>; "Statement on COVID-19 and Criminalization" (27 April 2020), online (pdf): *Canadian Coalition to reform HIV Criminalization* <www.hivcriminalization.ca/statement-covid-19-criminalization>; Richard Elliott, Ryan Peck & Léa Pelletier-Marcotte, "Prosecuting COVID-19 non-disclosure misguided" (29 April 2020), online: *The Lawyer's Daily* <www.thelawyersdaily.ca/articles/18816>; Alexander McClelland, Alex Luscombe & Nicholas Buhite, "Policing the Pandemic Mapping Project Criminal Enforcement Report" (2020), online (pdf): *Policing the Pandemic Mapping Project* <static1.squarespace.com/static/5e8396f40824381145ff603a/t/5f2452853bd3337789dc0dfe/1596215942723/Police_the_Pandemic_Criminal_Enforcement_Report+%284%29.pdf>.

[183] See e.g Abby Deshman, Alexander McClelland & Alex Luscombe, "Stay Off the Grass: COVID-19 and Law Enforcement in Canada" (June 2020), online (pdf): *Canadian Civil Liberties Association* <ccla.org/cclanewsite/wp-content/uploads/2020/06/2020-06-24-Stay-Off-the-Grass-COVID19-and-Law-Enforcement-in-Canada1.pdf>.

[184] Accountability in this context may be understood to include both information about enforcement and the possibility of sanction whether legal, administrative or political, or failures in policies and practices. See e.g Bovens, *supra* note 5; Robert O Keohane, "The Concept of Accountability in World Politics and the Use of Force" (2003) 24:4 Mich J Intl L 1121 at 1124.

[185] See Stephanos Bibas, "Chapter II: Opaque, Unresponsive Criminal Justice" in *The Machinery of Criminal Justice* (Oxford: Oxford University Press, 2012) at 29–58; Kate Levine, "Discipline and Policing" (2019) 68:5 Duke L J 839 at 843–844. See e.g. Keohane, *supra* note 184 at 1124.

1. Poor accountability for distribution and impact of sanctions

The overall lack of accountability for policing outcomes in Anglo-American legal traditions is linked to two longstanding trends: first, the expansion of the substantive scope of criminal and penal-regulatory law which results in far more violations than can possibly be sanctioned; and second, the near-unreviewability of exercises of police discretion.[186] On the latter point, the Supreme Court of Canada in *R v Beaudry* has affirmed that broad police discretion is an essential feature of the criminal justice system.[187] The Court acknowledged that discretionary decisions need to be justified rationally, and cannot be made based on social stereotypes or favouritism. Nonetheless, it set a high bar for favouritism: the Court was divided 5-4, with a bare majority affirming a trial judge's finding that a police officer exceeded his discretion when he decided not to collect a breath sample from a fellow officer who was driving drunk. The majority also held that any administrative directives guiding the exercise of such powers are not binding.[188] This has meant that courts have generally been absent in identifying and sanctioning enforcement that falls more heavily on racialized or street-involved people, for instance, even when research clearly suggests that race and class do play a role in influencing discretionary decision-making by law enforcement.[189]

More recently, some government actors across Canada – human rights commissions, and even police services themselves – have released reports recognizing the problem of systemic discrimination in exercises of police discretion.[190] Consequent changes have included administrative limits on police powers to stop individuals

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[186] See Bibas*, supra* note 185; William J Stuntz, "The Pathological Politics of Criminal Law" (2001) 100:3 Mich L Rev 505.

[187] 2007 1 SCR 190 at para 37, 276 DLR (4th) 1.

[188] See *ibid* at para 45.

[189] See Marie-Eve Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice" (2010) 55:4 McGill L J 771. See also Tammy Rinehart Kochel, David B Wilson & Stephen D Mastrofski, "Effect of Suspect Race on Officers Arrest Decisions" (2011) 49:2 Criminology 473; Céline Bellot et al, "Judiciarisation de l'itinérance à Montréal: Des données alarmantes témoignent d'un profilage social accru (2012-2019)" (Janvier 20201), online (pdf): *RAPSIM* <rapsim.org/wp-content/uploads/2021/01/VF2_Judiciarisation-de-litine%CC%81rance-a%CC%80-Montre%CC%81al.pdf>.

[190] See e.g. Quebec, Service de Police de la Ville de Montréal, "Les interpellations policières à la lumière des identités racisées des personnes interpellées: Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d'indicateurs de suivi en matière de profilage racial" by Victor Armony, Mariam Hassaoui & Massimiliano Mulone (August 2019), online (pdf): <spvm.qc.ca/upload/Rapport_Armony-Hassaoui-Mulone.pdf> [*Armony Hassaoui Mulone Report*] ; Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*, (Government of Ontario, 2018), online (pdf): < www.ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>; Nova Scotia Human Rights Commission, *Halifax, Nova Scotia: Street Checks Report,* (2018) (Dr. Scot Wortley), online (pdf): <humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf>; Reem Bahdi et al, "Racial Profiling" (2010), online (pdf): *British Columbia Civil Liberties Association* <bccla.org/wp-content/uploads/2012/03/2007-BCCLA-Report-Racial-Profiling.pdf>.

without reasonable suspicion, as well as the mandated collection of some race-based data about policing encounters.[191] As mentioned above, however, guidelines that fall short of statutory regulation are not binding to a judge reviewing the discretionary exercise of police powers. More important in the present context, measures that prohibit, for instance, police stops without reasonable suspicion, do little to address the disproportionate enforcement against those who are racialized or who are more visible to police, and who happen to violate ever-expanding regulatory law.[192] In this context, concerns arise that without the political accountability of ordinary non-emergency lawmaking, government actors will fail to consider or respond to the risks that measures like social distancing and stay-at-home orders may be felt disproportionately by marginalized groups, whether because, like the poor and underhoused, they may have difficulty meeting the demands of those orders, or, like racialized groups, they might be less likely to benefit from police discretionary forbearance.[193]

In the absence of any state accounting for frequency and severity of charges and fines against individuals, much less how enforcement tracks race and social status, civil society actors have taken up the task of monitoring law enforcement against individuals in the context of the pandemic. While all provinces have rolled out substantial monetary fines in connection with emergency orders, these accounts reveal that enforcement through peace officers has been remarkably uneven across provinces.[194] Individual municipal and provincial governments have also vacillated between approaches emphasizing education and restraint in law enforcement, to more punitive orientations, with some even moving back again.[195] Civil society actors have reported that while demographic and contextual factors have been sparse and difficult to access, racialized or immigrant people have reported being targeted by law enforcement, and there have been reports of homeless people receiving large fines.[196]

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[191] See e.g. Clare Loewen, "Montreal police's new street check policy draws criticism" (8 July 2020), online: *CBC News* <www.cbc.ca/news/canada/montreal/montreal-police-street-check-policy-1.5640656>; Phil Tsekouras, "Toronto police to begin collecting race-based data in January" (19 December 2019), online: *CTV News* <toronto.ctvnews.ca/toronto-police-to-begin-collecting-race-based-data-in-january-1.4737508>; O Reg 58/16.

[192] See *Armony Hassaoui Mulone Report*, *supra* note 190; Quebec, *Commission des droits de la personne et des droits de la jeunesse, La judiciarisation des personnes itinérantes à Montréal : un profilage social*, by Christine Campbell & Paul Eid, Catalogue No 2.120-8.61 (November 2009), online (pdf): <www.cdpdj.qc.ca/storage/app/media/publications/itinerance_avis.pdf>; *Bellot et al, supra* note 189.

[193] See Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: University of Ottawa Press, 2020) 287 at 289; Victoria Gibson, "Toronto Police, city bylaw, not collecting data on race when enforcing COVID rules" (1 June 2020), online: *iPolitics* <ipolitics.ca/2020/06/01/toronto-police-city-bylaw-not-collecting-data-on-race-when-enforcing-covid-rules/>.

[194] See Deshman, McClelland & Luscombe*, supra* note 183 at 16–17; McClelland, Luscombe & Buhite, *supra* note 182.

[195] See Deshman, McClelland & Luscombe*, supra* note 183 at 3, 18.

[196] See *ibid*; Alexander McClelland & Alex Luscombe, "Policing the Pandemic: Tracking the Policing of COVID-19 Across Canada" (2020), online: *Scholars Portal Dataverse* <dataverse.scholarsportal.info/dataset.xhtml?persistentId=doi:10.5683/SP2/KNJLWS>; Alex Luscombe & Alexander McClelland, "'An extreme last resort': Monetary Penalties and the Policing of

As rates of COVID-19 infection have risen in the second wave, and with new measures, such as Quebec's 8pm curfew, introduced, so has the number of opportunities for norm violation and the scope for police discretion in determining which violations to enforce, with likely concomitant increase in disproportionate punishment of traditionally overpoliced communities.

2. *Poor accountability for efficacy: Uncertainty about the public health value of coercion in context*

Although the power of the state to use coercion (within constitutional limits) to prevent the spread of disease is a mainstay of public health law, and there is little debate that states may use force to require conformity with publicly established standards of conduct, the wisdom of any particular measure in any given circumstance is a matter of political and scientific debate.[197] The public health value of threats of fine or imprisonment is contingent and contested. Criminological literature about the deterrent value of penal sanction, for instance, suggests that certainty of enforcement is more important in generating compliance than the severity of sanction.[198] This is consistent with insights from public health scholarship that haphazard enforcement risks undermining trust, which is critical for public health compliance. When the prohibitions themselves are viewed as confusing, arbitrary, or mutually inconsistent, trust is further undermined.[199] Finally, public health standards tend to favour least restrictive alternatives in part because of the importance of individual personal rights and freedoms, but also because the burden of restrictions to these personal rights and freedoms often fall unequally on marginalized or stigmatized populations.[200]

The public health value of coercive approaches can be difficult to measure, and appraisals vary across contexts. While the use of harsh penalties to deter impaired driving, for instance, has been cast as a public health success by many, some empirical studies have suggested it is more the fact and certainty of sanction than the severity that drives the successes.[201] Others may argue that the principal value of severe

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COVID-19 in Canada" (November 2020), online: *Center for Media, Technology and Democracy* <www.mediatechdemocracy.com/work/extreme-last-resort-monetary-penalties-and-the-policing-of-covid19-in-canada>.

[197] See Lawrence O Gostin & Lindsay F Wiley, *Public Health Law: Power, Duty, Restrain*t, 3rd ed (Oakland: University of California Press, 2016) at 9.

[198] See Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Just 143. But see Lana Friesen, "Certainty of Punishment versus Severity of Punishment: An Experimental Investigation" (2012) 79:2 Southern Economic J 399.

[199] See Gostin & Wiley*, supra* note 197 at 543; See also Sam Berger & Jonathan D Moreno, "Public Trust, Public Health, and Public Safety: A Progressive Response to Bioterrorism" (2010) 4 Harvard L & Policy Rev 295 at 302–303; Leslie E Gerwin, "Planning for Pandemic: A New Model for Governing Public Health Emergencies" (2011) 37 Am J L & Med 128 at 133.

[200] See Gostin &Wiley, *supra* note 197 at 64.

[201] See Benjamin Hansen, "Punishment and Deterrence: Evidence from Drunk Driving" (2005) 105:4 American Economic R 1581. But see H Laurence Ross & Robert B Voas, "The New Philadelphia Story: The Effects of Severe Punishment for Drunk Driving" (1990) 12:1 L & Policy 51.

sanctions has been in dislodging a long-entrenched norm of the acceptability of impaired driving. Easy resort to harsh penal sanctions may be less valuable where norm-communication can be achieved through the preferred public health approach of less restrictive means, as public health scholarship increasingly recognizes that public health costs and risks of coercive measures need to be weighed against expected benefits.[202] In the early days of the HIV/AIDS epidemic, for instance, many states rushed to coercive measures including criminalization of HIV exposure and transmission, but the resulting stigma and discrimination have come to be viewed as antithetical to an effective public health response.[203] For these reasons, Canada has been moving away from punitive approaches to risky sexual behaviour.[204]

There do not appear to have been any scientific studies on whether fines are an effective way of controlling the spread of a virus like COVID-19, and evidence to date does not provide a basis for firm conclusions as to whether ticketing and criminalization have resulted in decreased risk behaviour. It is worth noting, for instance, that provinces that have had the most ticketing have not necessarily seen consequent decreases in infection rates, or fared better than those that have favoured an "education first" approach.[205]

When new police powers to stop, search and fine are created through emergency legislation and when police forces are ordered to be more proactive in enforcement, there is more opportunity for arbitrariness and less accountability (whether ex ante or ex post) for the exercise of those powers. It is also difficult to determine the extent to which such interventions in fact reduce risk behaviour in different contexts. The overall lack of accountability that plagues police enforcement generally, particularly in the context of regulatory offences against individuals, is only compounded when the underlying laws are passed without the usual democratic input or chance to weigh in on whether the purported benefits of the coercive law outweigh its costs, as described in Part I of this paper.

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[202] See Colleen M Flood et al, "Reconciling civil liberties and public health in the response to COVID-19" (2020) 5 FACETS 887 at 892 [Flood et al, "Reconciling civil liberties"].

[203] See "Community consensus statement" (2019), online: *Canadian Coalition to Reform HIV Criminalization* <hivcriminalization.ca/community-consensus-statement/>; *Declaration of Commitment on HIV/AIDS*, GA Res S-26/2, UNGAOR, 26th special Sess, UN Doc A/RES/S-26/2 (2011).

[204] See e.g. Directive (Office of the Director of Public Prosecutions), (2018) C Gaz 1, 4322, online (pdf): <www.gazette.gc.ca/rp-pr/pl/2018/2018.12.08/pdf/gl.15249.pdf> [perma.cc/ FYN5-KCU7].

[205] See "By the numbers: COVID-19 and law enforcement in Canada" (2020), online (pdf): *Canadian Civil Liberties Association* <ccla.org/cclanewsite/wp-content/uploads/2020/06/2020-06-23-Ticketing-By-the-numbers-1.pdf> (The Canadian Civil Liberties Association & Policing the Pandemic Mapping Project noted that "[t]he vast majority of COVID-related fines – a full 98% of the total dollar amount of fines – have been issued in just three provinces: Quebec (6600 COVID-related charges, 77% of the total dollar amount of fines), Ontario (2853 charges, 18%) and Nova Scotia (555 charges, 3%). On a per capita basis, that's 78 tickets per 100,000 in Quebec, 57 tickets per 100,000 in Nova Scotia, and 20 per 100,000 in Ontario.") See also Eric Mykhalovskiy et al, "Human rights, public health and COVID-19 in Canada" (2020) 111 Can J Public Health 975.

B. Constitutional Rights Review as a Form of Accountability

The accountability gaps described above in the creation and enforcement of the various measures may be filled to some degree through constitutional rights review.[206] The possibility of review of government actions for compliance with provincial and federal human rights instruments can provide an important form of accountability by requiring governments to provide cognizable reasons for any rights-infringing conduct.[207] There are credible arguments that aspects of Canada's pandemic response may infringe freedom of expression, assembly, religion, mobility rights, privacy rights, rights to liberty and security of the person, as well as equality rights.[208] It is beyond the scope of this paper to survey the viability of such rights claims in relation to provincial and federal pandemic responses. It is worth noting, however, that none of these rights in Canadian constitutional law is absolute; each may be limited by government to the extent that state measures are proportionate to a valid government objective.[209] This requires states that infringe rights to marshal evidence that justifies their action in relation to the desired objectives. Specifically, governments must be able to demonstrate that they are pursuing a "pressing and substantial objective", that they do so in a way that is "rationally connected" to that objective, and that any impairment of rights is minimally impairing and proportionate.[210] As rationality, transparency and minimal impairments of individual rights and freedoms are foundational values of public health law,[211] a constitutional requirement that governments be prepared to offer such justification has the potential to compensate for some of the lack of accountability in legislative processes, and might also play a role in accounting for disproportionate impacts felt by marginalized groups.[212]

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[206] See e.g Catherine Régis, Jean-François Gaudreault-Desbiens & Jean-Louis Denis, "Gouverner dans l'ombre de l'État de droit en temps de pandémie" (5 May 2020), online: *Policy Options* <policyoptions.irpp.org/magazines/may-2020/gouverner-dans-lombre-de-letat-de-droit-en-temps-de-pandemie/>.

[207] See Vicki C Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124:8 Yale LJ 3094; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012). On the value of rights analysis for the rationality of state responses to COVID-19, see e.g, Toni M Massaro, Justin R Pidot & Marvin J. Slepian, "Constitutional Norms for Pandemic Policy" Arizona Legal Studies Discussion Paper No 20-29 (2020).

[208] See Flood et al, *"*Reconciling civil liberties*", supra* note 202; Emmett McFarlane, "Public Policy and Constitutional Rights in Times of Crisis" (2020) 53 Can J Pol Sci 299.

[209] See *Canadian Charter, supra* note 70. See also *Charter of Human Rights and Freedoms*, *supra* note 128, s 9.1.

[210] See *R v Oakes*, [1986] 1 SCR 103 at 133–34, 26 DLR (4th) 200.

[211] Christian Munthe, Jan-Christoph Heilinger & Verina Wild, "Ethical aspects of pandemic public policy-making under uncertainty" (6 January 2021), online (pdf): *Competence Network Public Health COVID-19* <www.public-health-covid19.de/images/2021/Ergebnisse/PB_uncertainty_pandemic_olicy_6Jan2021.pdf>;

[212] See Vicki C Jackson, "Proportionality and Equality" in Vicki C Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges* (New York: Cambridge University Press, 2017) 171 at 177; Flood et al "Reconciling civil liberties"*, supra* note 202.

On the other hand, the nature of the COVID-19 pandemic means governments are likely to be accorded a fair amount of deference – at least in the short term – for rights-infringing conduct.[213] The reasons are not dissimilar to those that arise in the context of limitations on negligence claims discussed in Parts II.B and II.C above. Deference to rights infringing government action is higher when governments are balancing numerous interests,[214] protecting the vulnerable,[215] and where science is unclear.[216] Where it is difficult or impossible to provide scientific proof of the rationality of government action, governments may rely on common-sense reasoning to demonstrate, for instance, that a challenged measure is rationally connected to its objective.[217]

Indeed, the Supreme Court of Canada has specifically cited wars, epidemics and natural disasters as circumstances that will give states a greater margin of manoeuvre within the various steps of proportionality analysis.[218] It would be a mistake, however, to assume that deference follows automatically from the fact that the COVID-19 crisis has been designated an emergency. Emergencies, for instance, presuppose something that is sudden and serious. The language of the *Federal Emergencies Act* is instructive. It defines a national emergency as an "urgent and critical situation *of a temporary nature* that…. seriously endangers the lives, health or safety of Canadians…"[219] (emphasis added). When it comes to offering a rationale for deference, "emergency" appears to do little independent work beyond the other factors identified as indicating deference: lack of information, need to protect the vulnerable, and multiple competing interests. If emergencies attract deference beyond these factors, it is because they are temporary.[220] The longer an emergency continues – and certainly COVID-19 has endured longer than previous public health emergencies – the less deference is justified.

Deference due to lack of information should also abate somewhat as we learn more about COVID-19 responses. Consider, for example, a challenge to Newfoundland and Labrador's travel ban pursuant to s. 28(1)(h) of Newfoundland and Labrador's *Public Health Protection and Promotion Act*. In *Taylor v Newfoundland*

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[213] See Amy Goudge, "Balancing Legality and Legitimacy in Canada's COVID-19 Response" (2020) 41:1 NJCL 153 at 171.

[214] See *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

[215] See *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1.

[216] See *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, 111 DLR (4th) 385.

[217] See *ibid* at para 86; *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449.

[218] See *Re BC Motor Vehicle Act,* [1985] 2 SCR 486, 24 DLR (4th) 536.

[219] See *Emergencies Act*, RSC 1985, c 22 (4th Supp), s 3.

[220] See *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 (justifying deference to government emergency measures in part because in emergencies, there "may be little time for legislative debate" at para 462).

and Labrador,[221] the claimant, who sought to enter the province to attend her mother's funeral, argued that the total ban on travel to the province unjustifiably limited her mobility and liberty rights under ss 6 and 7 of the Canadian Charter of Rights and Freedoms, since the less intrusive measure of fourteen-day self-quarantine was available as a less restrictive alternative. Justice Burrage of the Supreme Court of Newfoundland and Labrador cited the precautionary principle to err on the side of caution "until further confirmatory evidence becomes available", as well as reports of individuals failing to comply with self-isolation requirements both in the province and in other countries, to conclude that the travel ban was indeed minimally impairing.[222] Since that time, other states, like New Zealand and Taiwan, have developed more robust forms of managed isolation (as opposed to self-isolation) to permit limited travel.[223] Evidence about the effectiveness of such programs might change the calculus about whether a total travel ban is minimally impairing. Indeed, in a number of cases where the Supreme Court of Canada has been deferential in proportionality analysis in relation to particular types of questions early on, but later more interventionist, a growing evidence base on behalf of rights claimants has been a key factor.[224] At the same time, as previously discussed, the sheer vastness of possible approaches to managing an issue like travel, or to balancing travel needs (and any public costs of serving them) against other needs in a pandemic, suggests deference in such matters should persist.

Finally, while vulnerability and the protection of marginalized groups may be invoked by courts as a reason for deference, measures which disproportionally burden those groups or neglect to properly account for their situations, may militate against deference.[225] As in previous pandemics, notably HIV, infection rates have quickly come to track marginalization,[226] a fact governments may point to in support of a wide margin of manoeuvre. Yet emergency measures may also fall hardest – and

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[221] *Ibid.*

[222] *Ibid* at paras 467–79.

[223] See Jennifer Summers et al, "Potential lessons from the Taiwan and New Zealand health responses to the COVID-19 pandemic" (2020) 4:100044 Lancet Regional Health-Western Pacific 1. See also Ministry of Business, Innovation & Employment, "Managed Isolation and Quarantine" (2020), online: *Government of New Zealand* <www.miq.govt.nz/>

[224] On the constitutionality of medical aid in dying, see *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 107 DLR (4th) 342 and *Carter v Canada (AG)*, 2015 SCC 5. On the constitutionality of prohibitions in relation to sex work, see *Reference re ss. 193 and 195.1 (1)(C) of the Criminal Code (Man.),* [1990] 1 SCR 1123 at 21 and *Bedford v Canada (AG)*, 2013 SCC 72. Governments have also relied on growing evidence bases in support of their policies to attract more deference from courts. See e.g. *Cambie Surgeries Corporation v British Columbia*, 2020 BCSC 1310 (upholding a provincial ban on private health insurance for publicly insured services after a similar ban was ruled unconstitutional in *Chaoulli v Quebec (AG)*, 2005 SCC 35).

[225] See Vicki C Jackson, "Proportionality and Equality" in Vicki C Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges* (New York: Cambridge University Press, 2017) 171 at 194; Alana Klein, "The Arbitrariness in 'Arbitrariness' (and Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" (2013) 63:1 Sup Ct L Rev 377.

[226] See Clare Bambra et al, "The COVID-19 pandemic and health inequalities" (2020) 74:11 J Epidemiol Community Health 964.

sometimes unjustifiably so – on those who are most vulnerable.[227] A Quebec Superior Court recently suspended the application of Quebec's 8pm curfew[228] only 18 days after it came into force upon finding that a challenger had raised a serious argument that the measures violated homeless people's rights to equality and life, liberty and security rights of the person. She noted, for example, the risk that some individuals hiding from police to avoid tickets would be exposed to dangerous winter conditions; the reasonable fear of contracting Covid-19 in crowded shelters with histories of outbreaks; the inaccessibility of certain shelters to those who do not meet conditions of sobriety; and the need for some homeless people to exit shelters during the curfew period to seek drugs or alcohol in order to avoid withdrawal symptoms.[229] Whether the claims in this case would have been successful on the merits — following a full analysis both of the rights violations and of any justification — remains unknown. The Quebec government, having previously resisted pressure to exempt the homeless from the curfew, agreed to amend its decree to ensure the order would not apply to those without a fixed address.[230]

The point, therefore, is less that the various measures and restrictions on liberty are likely to be found unconstitutional, but more that rights review requires government to justify the rationality of its chosen measures and the proportionality of their impacts in light of growing knowledge. In this sense, constitutional review can act as an important avenue of accountability. Yet governments, especially in emergency times, may not have the capacity or inclination to subject proposals to thorough analysis in anticipation of future constitutional challenge. They can also anticipate judicial deference, even if this may abate somewhat as the pandemic period extends, as new information emerges, and as vulnerable groups bear the brunt of ill-considered emergency orders. Further, as previously discussed, ex-post review disproportionately favours those with the resources to bring constitutional claims.[231] As a result, rights review may be understood as a marginal avenue of accountability.

IV. Enhancing State Accountability to Parliaments and Citizens

The above sections have demonstrated the significant limitations in securing proper state accountability through private law litigation, constitutional rights litigation and certain criminal law safeguards. As a result, we argue that public accountability must be reinforced in pandemic times,[232] but through democratic channels rather than the

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[227] *Ibid.*

[228] See *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation*, OIC 2-2021, (8 January 2021) GOQ II, 5B.

[229] See *Clinique juridique itinérante v Procureur Général du Québec*, 2021 QCCS 182 (safeguard order).

[230] See Kalina Laframboise, "Quebec will exempt homeless from COVID-19 curfew after court finds rule endangered safety" (27 January 2021), online: *Global News* <globalnews.ca/news/7602260/quebec-homeless-population-curfew-exemption-reaction/>.

[231] See text accompanying note 173.

[232] We refer to Mark Bovens' definition of public accountability, which "mainly regards matters in the public domain, such as the spending of public funds, the exercise of public authorities, or the conduct of public

courts. Requiring public authorities to explain and justify their conduct in public forums (or directly to the population) is essential to help maintain and bolster the population's trust in public authorities all while improving the government's response to actual and future emergencies.

The COVID-19 pandemic has caused ideologies and sensibilities to clash, as decisions are made to curb outbreaks and manage the spread of disease. Disagreement, dissatisfaction, and distrust permeate the pandemic context. Public trust is vital to the effectiveness of the public health response, especially when this response includes inhibitory interventions encroaching on individual rights and freedoms,[233] such as quarantine and limiting access to certain areas. If citizens are distrustful of public institutions, or consider restrictions to be arbitrary and inconsistent, they are less likely to comply with governmental regulations and orders.[234] Moreover, where citizens suffer harm but are left without recourses to hold governments accountable, trust can be further eroded.

As Lawrence Gostin points out, "[p]andemics are deeply divisive. To be successful, the government must gain the public's trust by acting transparently."[235] Transparency is inextricably tied to public accountability.[236] As the success of public health initiatives depends so heavily on public confidence in the government, public health legislation should itself reflect the importance of accountability. Therefore, we posit that public health legislation should reinforce a type of public accountability that allows for continuous oversight on state action. As MacDonnell explains, the risk of weaker oversight "can be detrimental to civil rights and to the separation of powers in both the short and long term."[237] The COVID-19 pandemic affords us the crucial opportunity to reflect on ways to reinforce political accountability mechanisms during a public health emergency. Though there may be a number of areas of improvement,[238]

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institutions". The term "public" is also understood to mean that account "is not rendered discretely, behind closed doors, but is in principle open to the general public. The information about the actor's conduct is widely accessible, hearings and debates are open to the public and the forum broadcasts its judgment to the general public." There are at least five types of public accountability: political (e.g. before elected representatives), legal (before courts), administrative (e.g. before auditors), professional (before professional peers), and social (e.g. before interest groups). See Mark Bovens, "Analysing and Assessing Public Accountability: A Conceptual Framework" (16 January 2006), *European Governance Papers*, online (pdf): *EUROGOV* <www.ihs.ac.at/publications/lib/ep7.pdf>.

[233] See text accompanying note 199.

[234] See Fazal R Khan, "Ensuring Government Accountability during Public Health Emergencies" (2010) 4:2 Harvard L & Policy Rev 319 at 337.

[235] See Gostin, *supra* note 3 at 458.

[236] See Bovens, *supra* note 5 at 453.

[237] Vanessa MacDonnell, "Enduring Executive and Legislative Accountability in a Pandemic" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19,* (Ottawa: University of Ottawa Press, 2020) 144.

[238] The Canadian COVID-19 Accountability Group notably recommends creating safe processes and systems to encourage and support whistleblowers and the creation of a COVID-19 Ombudsperson. See "Protecting whistleblowers and increasing transparency in Canada in the age of COVID-19" (2020), online:

we will explore three options for increased public accountability that fit broadly within the frameworks of public health emergency law set out in Part I: periodic accountability to legislatures when renewing the declaration of a public health emergency; periodic public reports on emergency measures; and ex post facto evaluative reporting.

A. Periodic accountability to legislatures when renewing the declaration of a public health emergency

During the COVID-19 pandemic,[239] many have called for more legislative oversight of governmental action.[240] A recent study revealed that the activities of most legislatures across the country were considerably reduced in the initial stages of the pandemic; this involved a reduction in their number of meetings, the number of legislators permitted to attend meetings and/or the time allocated to debate (e.g. no question periods).[241] Many factors contributed to this reduction, including social-distancing constraints that complicated the gathering of elected representatives, and the dominant idea that public authorities should utilize their time to focus on responding to the crisis. Also, opposition by politicians in the context of an emergency may be perceived as unpatriotic.[242]

A first viable option to enhance public accountability would be to require public authorities to justify the renewal of public health emergency declarations before elected representatives. Current public health laws allow for declarations to be made without the approval of the legislature. This empowers the relevant public authorities to act promptly in the face of an imminent or immediate threat. Public health emergency declarations are typically limited in time, ranging from 10 days to 30 days

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Canadian COVID-19 Accountability Group <drive.google.com/file/d/1dpm3eQqdfZGLy_YvyK6Sw59mjLA9V3Oa/view>.

[239] See e.g. Jonathan Montpetit, "Parliament is back in session in Quebec – and it's welcome" (13 May 2020), online: *CBC News* <www.cbc.ca/news/canada/montreal/national-assembly-covid-19-opposition-anglade-legault-1.5568595>; Machael Tutton, "N.S. opposition says COVID-19 shutdown of committees prevents oversight" (19 June 2020), online: *Global News* <globalnews.ca/news/7085399/n-s-opposition-says-covid-19-shutdown-of-committees-prevents-oversight/>; Nicola MacLeod, "Official Opposition calls for government' oversight, transparency and accountability' during pandemic" (17 April 2020), online: *CBC News* <www.cbc.ca/news/canada/prince-edward-island/pei-bevan-baker-official-opposition-legislature-covid19-1.5536665>.

[240] We refer here to a visible oversight, that is not done off-stage. It does not mean that off-stage political accountability is not important during a crisis. See MacDonnell, *supra* note 237 at 141.

[241] Researchers have documented how parliaments at the federal, provincial and territorial levels have operated from the declaration of an emergency in each jurisdiction until April 30, 2020. See Erica Rayment & Jason VandenBeukel, "Pandemic Parliaments: Canadian Legislatures in a Time of Crisis" (2020) 53:2 Can J Political Science 379.

[242] See MacDonnell, *supra* note 237 at 144.

(with the possibility of repeated renewal), except in British Columbia where there is no time limit.[243]

The renewal of one such declaration could be a relevant moment for public authorities to explain and justify their conduct, all while outlining their reasons for wanting to maintain the state of emergency. Depending on the applicable time period, this could occur periodically (but not necessarily at each renewal), and would help garner feedback for the period of time targeted by the renewal.[244] Surprisingly, such accountability mechanisms are weak (or entirely absent) in the public health laws of jurisdictions that rely on public health emergency declarations. For instance, in Newfoundland and Labrador, the Minister of Health and Community Services, upon receiving advice from the Chief Medical Officer of Health, has the sole discretion to declare, extend, and terminate the state of public health emergency.[245] No specific political oversight is attached to the exercise of this power, even though the impact of a declaration is significant. It grants the Chief Medical Officer of Health, a non-elected official, the power to order all sorts of emergency measures which are not even exhaustive.[246]

Quebec and Alberta are the only provinces in which the legislation provides for a formal oversight mechanism, but it is undercut by a loophole. In Quebec, the government can renew a declaration of public health emergency for a period no longer than ten days or, with the legislature's approval, for a maximum of thirty days.[247] However, even without parliamentary approval, the government can renew the declaration for consecutive intervals of ten days or less during an indefinite period of time. From March 2020 to January 2021,[248] it did so consecutively for ten months; this was likely unforeseen by legislators when deciding to grant this power to the executive. Yet, the legislature may vote to disallow the declaration of a public health emergency or any renewal thereof. This power is an important safeguard against abuses of power and provides the legislature with the occasion to ask for justifications from the government.[249] However, this disallowing of a public health emergency declaration may undermine public confidence in the government, and is much more drastic than our proposed democratic oversight mechanism. Alberta's legislation offers a more systematic oversight. A declaration of public health emergency lapses

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[243] See *AB PHA, supra* note 23, s 52.8 (in respect of pandemic influenza, the declaration lapses at the end of 90 days); *QC PHA, supra* note 23, s 119; *PE PHA, supra* note 23, s 49(5); *NL PHPPA, supra* note 23, s 27(2); *NU PHA, supra* note 23, at s 40(2); *NT PHA, supra* note 23, s 33(2)(b).

[244] As Bovens indicates, "accountability is not just *ex post* scrutiny, it is also about prevention and anticipation. Norms are (re)produced, internalised and, where necessary, adjusted through accountability." See Bovens, *supra* note 5 at 453, 464. For a thorough argument on the importance of an oversight regarding the declaration of a public health emergency, see Gerwin, *supra* note 199.

[245] See *NL PHPPA, supra* note 23, s 27 (declaration expires after fourteen days).

[246] See *NL PHPPA, supra* note 23, s 28.

[247] See *QC PHA, supra* note 23, s 119.

[248] This paper was submitted for publication at the end of January 2021.

[249] See *QC PHA, supra* note 23, s 122.

after thirty days, or after ninety days in the case of an influenza pandemic, unless continued by a resolution of Parliament.[250] However, parliamentary oversight can be avoided by simply declaring another state of public health emergency once the previous one has expired, thus eluding political accountability.[251]

In jurisdictions where a declaration of emergency is not required to trigger the use of emergency powers, public health legislation could attach to the exercise of one or more emergency powers an obligation to justify before the legislature their continued use after a defined period of time. Though designing this oversight mechanism is outside the scope of this paper, we are confident it could help foster accountability to the elected representatives in a predictable and visible way that would help gain public trust. [252]

B. Periodic Public Reports on Emergency Measures

Governments have also been criticized during the COVID-19 pandemic for not adequately disclosing information such as their response plans, plans for progressive de-confinement,[253] and the reasoning for their responses.[254] This information void undermined public trust and threatened compliance with public health measures; for instance, in October 2020, disgruntled owners of gyms and fitness studios in Quebec, threatened to reopen their shut-down establishments if the government did not provide data justifying the measure.[255] Gerwin confirms that in pandemic times, the public

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[250] See *AB PHA, supra* note 23, s 52.8

[251] John Carpay, "Analysis of Part 3 of Alberta's Public Health Act: (Communicable Diseases and Public Health Emergencies)" (7 April 2020), online: *Justice Centre for Constitutional Freedoms* <www.jccf.ca/analysis-of-part-3-of-albertas-public-health-act-communicable-diseases-and-public-health-emergencies/>.

[252] In his blog post, Maxime St-Hilaire points to the federal *Emergencies Act* as an example of enhanced political accountability mechanisms. See Maxime St-Hilaire, "Urgence et droit n'ont jamais fait bon ménage, mais la Loi sur la santé publique compte certes d'importants défauts (réponse à Martine Valois)" (15 avril 2020), online: *Blogue À qui de droit Université de Sherbrooke* <blogueaquidedroit.ca/2020/04/15/urgence-et-droit-nont-jamais-fait-bon-menage-mais-la-loi-sur-la-sante-publique-compte-certes-dimportants-defauts-reponse-a-martine-valois/>.

[253] See Canadian COVID-19 Accountability Group*, supra* note 238 at 6. In Alberta, pharmacists critiqued the government for not disclosing it would charge for personal protective equipment before orders were fulfilled. See also Kathy Le, "Alberta pharmacists call for government transparency over potential PPE costs" (15 May 2020), online: *CTV News* <calgary.ctvnews.ca/alberta-pharmacists-call-for-government-transparency-over-potential-ppe-costs-1.4942216>.

[254] In Quebec, see e.g. KW Grafton, "Politics or science? Quebec COVID lockdown by the numbers" (25 January 2021), online: *National Opinion Centre* <www.nationalnewswatch.com/2021/01/25/politics-or-science-quebec-covid-lockdown-by-the-numbers/#.YBGcpZNKhQI>. In the Northwest Territories, see e.g. Paul Bickford, "Does the left hand know...?" (23 May 2020), online: *Hay River Hub* <nnsl.com/hayriverhub/does-the-left-hand-know/>.

[255] See Iman Kassam, "Hundreds of gyms and fitness studios threaten to reopen unless Quebec ponies up COVID-19 data" (26 October 2020), online: *CTV News* <montreal.ctvnews.ca/hundreds-of-gyms-and-fitness-studios-threaten-to-reopen-unless-quebec-ponies-up-covid-19-data-1.5161303>

seeks to "understan[d] and believ[e] the government's justification for its actions."[256] Information voids, she explains, create confusion, fear and distrust.[257]

There are very few duties to publish information during an emergency. First, public health laws require public authorities to publish the public health emergency declarations as well as their renewal or termination. These publications must indicate the nature of the threat, the area concerned and, in some jurisdictions, the period of application of the declaration.[258] Second, in some jurisdictions, public authorities shall publish orders declaring new notifiable diseases.[259] In all cases, the information primarily serves to inform citizens of the situation and of the orders with which they need to comply; it does not typically include the data and reasoning that led to the public health order or the declaration of public health emergency. Saskatchewan is an exception, however. There, the Minister of Health or the medical officer who issues an emergency order is required to "set out the reasons for the order."[260] This requirement may increase the accountability of public authorities to citizens.

The COVID-19 crisis[261] has revealed that, throughout the provinces and territories, press conferences by public authorities and the role of the media in asking them questions may informally contribute to this goal.[262] We argue that public accountability could be further reinforced through a formal requirement for public authorities to publish periodic reports providing more information on the rationale behind their public health measures. It could include, for instance, the relevant data available at the time, the advice received from experts or civil society, and the reasons justifying the choice to order a given measure instead of other alternatives. Public authorities could be required to publish such reports within a certain timeline after the adoption of the measure. This could even allow them to publish information on compliance and enforcement, if available. Though it would be difficult to predetermine the appropriate requirements for the publication of reports, public authorities could be required to develop and publish a communication plan during a public health emergency. The public health legislation of Nova Scotia provides a model for such a requirement.[263] The law could detail the obligatory content of the

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[256] See Gerwin, *supra* note 199 at 135. On the importance of information about "why" and not just "what" to ensure accountability, see Brinkerhoff, *supra* note 6 at 372.

[257] See Gerwin, *supra* note 199 at 136.

[258] See e,g, *QC PHA, supra* note 23, s 120–121; *AB PHA, supra* note 23, s 52.4; *NL PHPPA, supra* note 23, s 27(6); *NT PHA, supra* note 23, s 32(5); *NU PHA, supra* note 23, s 40(5); *PE PHA, supra* note 23, s 49(6); *YK PHSA, supra* note 23, s 4.4(4).

[259] This refers to diseases for which cases detected shall be notified to relevant public health authorities. See e.g. *NB PHA, supra* note 23, s 26.1(2)(2.1); *PE PHA, supra* note 23, s 32(2).

[260] See *SK PHA, supra* note 23, s 45(3).

[261] For an analysis of the role of the media during the initial stage of the COVID-19 pandemic in Canada, see Jeffrey Simpson, "The Media Paradox and the COVID-19 Pandemic", in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: University of Ottawa Press, 2020) 201.

[262] See Bovens, *supra* note 5 at 451.

[263] See *NS HPA*, *supra* note 23, s 14(1)(b). During a public health emergency, the Chief Medical Officer shall "develop a communications plan and protocol to ensure that information necessary for proper response

periodic public reports, and the public authorities could in turn be required to determine the specific design of those reports in their communication plan.

C. Ex post facto Evaluative Public Reports

Accountability is not solely focused on finding fault with actors; it also engenders improvement, and helps public authorities learn from past successes and mistakes. Brinkerhoff explains that accountability for improvement "emphasizes discretion, embracing error as a source of learning, and positive incentives."[264] Examples of this include the reports produced in the aftermath of the SARS and H1N1 crises, which helped highlight the strengths and weaknesses of the public health systems and of the governments' response to the outbreaks.[265] These ex post facto reports even led to the creation of the Public Health Agency of Canada in 2004, shortly after the end of the SARS epidemic.[266] Moreover, Bovens suggests that in the context of mass tragedies, "public processes of calling to account create the opportunity for penitence, reparation and forgiveness, and can thus provide social or political closure."[267]

In some jurisdictions, public authorities must report to the Parliament after a public health emergency has ended. [268] However, it is not clear whether the report is

(...) is promptly provided to all necessary and appropriate persons while ensuring that appropriate privacy protections are adhered to" (Ibid).

[264] See Brinkerhoff, *supra* note 6 at 374.

[265] See e.g. National Advisory Committee on SARS and Public Health, "Learning from SARS: Public Health in Canada" (October 2003), online (pdf): *Health Canada* <www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/publicat/sars-sras/pdf/sars-e.pdf>; Public Health Agency of Canada & Health Canada, "Lessons Learned Review: Public Health Agency of Canada and Health Canada Response to the H1N1 Pandemic" (November 2010), online (pdf): *Government of Canada* <www.canada.ca/en/public-health/corporate/mandate/about-agency/office-evaluation/evaluation-reports/lessons-learned-review-public-health-agency-canada-health-canada-response-2009-h1n1-pandemic.html>; Standing Senate Committee on Social Affairs, Science and Technology, "Canada's Response to the H1N1 Influenza Pandemic" (December 2010), online (pdf): *Senate of Canada* <sencanada.ca/content/sen/Committee/403/soci/rep/rep15dec10-e.pdf>. See also Arlene King, "The H1N1 Pandemic – How Ontario Fared: A Report by Ontario's Chief Medical Officer of Health" (June 2020) at 14, online (pdf): *Ontario Library Association* <collections.ola.org/mon/24006/301054.pdf>.

[266] See e.g. Public Health Agency Canada, National Advisory Committee on SARS and Public Health, *Learning from SARS: Renewal of Public Health in Canada*, (Ottawa: Health Canada, 2003), online (pdf): <www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/publicat/sars-sras/pdf/sars-e.pdf>; Public Health Agency of Canada, *Lessons Learned Review: Public Health Agency of Canada and Health Canada Response to the 2009 H1N1 Pandemic*, (2010), online (pdf): <www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/about_apropos/evaluation/reports-rapports/2010-2011/h1n1/pdf/h1n1-eng.pdf>; Manitoba, Health and Seniors Care, *H1N1 Flu in Manitoba: Manitoba's Response - Lessons Learned*, (2010), online: <hwww.gov.mb.ca/health/documents/h1n1.pdf 20p>.

[267] See Bovens, *supra* note 5 at 464.

[268] See e.g. *NL PHPPA, supra* note 23, s 30; *QC PHA, supra* note 23, s 129; *NS HPA*, *supra* note 23, s 6(1)(i). The information required in the report varies slightly from one jurisdiction to another. Note that in Nunavut, the Minister shall prepare an annual report respecting various events including a public health emergency. The law does not specify what information should be reported nor that the report must be submitted to Parliament. See *NU PHA, supra* note 23, s 43(b).

only descriptive, or if it must be evaluative. In Quebec, the *PHA* appears to demand a descriptive report, as it only requires the report to specify the nature and the cause of the threat (if determined), the duration of the declared emergency, as well as the power exercised and the measures implemented.[269] In Newfoundland and Labrador and in Nova Scotia, the relevant Minister must *review* and report on the cause and the duration of the emergency, and on the measures implemented. No jurisdiction requires that the report evaluate, for instance, the sanitary, social, and economic consequences of the emergency, nor the obstacles faced by authorities (in terms of resources, enforcement, or compliance); as a result, the value of these reports as didactic tools for the future is diminished. To address this concern, the *Public Health Act* of Alberta was amended over the course of the COVID-19 pandemic to add a compelling evaluative reporting requirement; it holds that a comprehensive review of the Act must be commenced no later than August 1st 2020. Particularly, it must determine which, if any, of the new provisions of the Act (adopted in the COVID-19 Pandemic Response Statutes Amendment Act)[270] should be modified or repealed. The report can also include any recommendations arising from the review.[271] This new accountability process is a step in the right direction and could inform other jurisdictions. However, it is a one-time requirement linked to a specific crisis and not a systematic ex post facto reporting obligation. Moreover, it is not related to the exercise of legislative powers but to the actual drafting of the legislation.

Given the magnitude of the COVID-19 pandemic, there will almost certainly be evaluative reports in its aftermath (either from the public authorities and/or other public institutions, including ad hoc committees). However, we argue that mechanisms for ex post evaluative public reporting should be included in public health laws. The advance promise of a thorough evaluation of the state's response to a pandemic may reinforce public trust and help victims, all while providing an incentive for public authorities to act in the public interest.

Conclusion

Issues of state accountability are not limited to the COVID-19 context.[272] Still, the pandemic situation has thrust these issues into the limelight, and provides us with a unique opportunity to review and discuss accountability mechanisms. Private and public law provide tools to bring societal actors to account for their decisions, actions, and omissions; however, we have sought to demonstrate that, when dealing with state decisions in emergency situations, the roles of these three fields of law are drastically limited. Moreover, we have expressed the concern that accountability through

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[269] See *QC PHA, supra* note 23, s 129.

[270] See *COVID-19 Pandemic Response Statutes Amendment Act*, SA 2020, c 13.

[271] See *AB PHA, supra* note 23, at s 76.

[272] Marie-Eve Couture Ménard, *La responsabilité publique entourant les collaborations public-privé. Regard sur le domaine de la santé publique au Canada*, (Cowansville: Éditions Yvon Blais, 2014) 327p.

litigation could, in certain cases, negatively impact public health management, all while exacerbating race and class-based inequalities.

Legal preparedness is critical to public health preparedness.[273] One of the core elements of legal preparedness is "the creation of laws and legal authorities conferring necessary powers on various levels of government and, in particular, on public health officials."[274] In keeping with this element, many emergency powers have been adopted or revised in the aftermath of the SARS and H1N1 outbreaks, to equip governments with the tools necessary to respond quickly and effectively to extraordinary threats. Part I illustrated their extraordinary nature, and offered an overview of the emergency powers provided for in public health laws across Canada. It revealed that extensive discretion is conferred to public authorities and noted the quasi-absence of formal ex ante democratic processes. In the context of the COVID-19 pandemic, the need for these emergency powers may have eclipsed the need for a robust system of state accountability.

There has been, and will continue to be, liability litigation to allocate responsibility for harms and recoup damages suffered as a result of the pandemic. Some of these lawsuits, often class actions, will be directed at public authorities; these claims are likely to play out in courts for years to come. The law of civil liability has of course been designed to offer victims the possibility to seek accountability and compensation through the court system. However, we have highlighted that accountability outcomes will likely be poor for victims, due to the many limits on state liability imposed by courts and legislation. We also argued that any discussion of state liability demands the consideration of why these limits exist, and how pro-public health arguments may justify them. Finally, we worry that private law litigation, which require enormous financial expenditures (especially when scientific issues are raised),[275] will be less available to those most adversely affected by the pandemic.[276]

Where public health orders are enforced through policing, accountability issues are aggravated; there is little opportunity within the criminal law to review such exercises of enforcement discretion, which risks disproportionately affecting marginalized groups, and often for uncertain public health benefits. Constitutional rights review offers an opportunity to account for these shortcomings by requiring that governments defend the rationality of any incursions on these rights engendered by the pandemic response. As such, rights review represents an important backstop against government excesses in conception and application of restrictive public health orders. Yet, governments will likely be accorded a wide margin to limit rights in

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[273] Janet E Mosher, "Accessing Justice Amid Threats of Contagion" (2014) 51 Osgoode Hall L J 919 at 921. See also Ontario, the SARS Commission, *Second Interim Report: SARS and Public Health Legislation*, vol 5 (Toronto: Ministry of Health and Long-Term Care, 2005) at 344.

[274] Mosher, *supra* note 273 at 927.

[275] These cases necessitate the opinions of experts.

[276] However, we recognize that the mechanism of class actions, which allow litigants to pool resources and obtain financial support to commence lawsuits (see e.g, in Quebec the *Act Respecting the Fonds d'aide aux actions collectives,* CQLR c F-3.2.0.1.1) may abate this worry.

service of public health in the context of the pandemic for reasons which mirror the ones for which state is granted protection from civil liability. This margin of manoeuvre may narrow as the pandemic continues and our knowledge about the virus and the impacts of possible responses grows. Nonetheless, constitutional rights review remains a last resort measure of post hoc accountability, as constitutional violations will likely result only in cases of the most extreme or irrational of rights infringements by the state.

The law should not simply confer unfettered powers to public authorities in pandemic times; it must also bolster state accountability through different mechanisms. We could have argued in favour of reinforcing accountability mechanisms in private, criminal, and constitutional law, or explored other areas of law which may offer solutions (such as administrative review and international law, both of which deserve the attention of legal scholars). Since we propose ex post state accountability mechanisms for an otherwise unchanged framework of pandemic governance, characterized by broad discretionary powers held by public authorities, we did not analyze possible modifications to how public authorities make their decisions.[277] Moreover, we acknowledge that social tools outside of the law (like civic engagement) provide means of seeking, and hopefully, securing proper state accountability. However, we believe that the pandemic context requires that we closely examine the accountability mechanisms provided for in Canadian public health legislation. These mechanisms were not designed with such a lengthy emergency in mind.

Thus, we posited that the pandemic context requires improved accountability of public health authorities to legislatures and citizens. This could help maintain public trust and compliance with public health measures, especially in the context of long-lasting emergencies like the COVID-19 pandemic. We argued that additional public accountability mechanisms should be included in public health legislation and explored three options: an obligation to periodically account to legislatures when renewing a declaration of a public health emergency, the production of periodic public reports on emergency measures taken, and the communication of an ex post facto report that would not be simply descriptive but would also include an evaluation sufficient for public authorities, and society, to learn from mistakes and successes and improve public health management for the future. The design of this legislative oversight mechanisms deserves more work and research of course, but is sure to provide for more predictable and visible state accountability during public health emergencies.

[277] See e.g. Gerwin*, supra* note 199; Sam Berger & Jonathan D Moreno, "Public Trust, Public Health, and Public Safety: A Progressive Response to Bioterrorism" (2010) 4 Harvard L and Policy Rev 295.