



# Governments' accountability for Canada's pandemic response

Lara Khoury<sup>1</sup> · Alana Klein<sup>1</sup> · Marie-Eve Couture-Ménard<sup>2</sup> · Kathleen Hammond<sup>3</sup>

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## Abstract

The COVID-19 pandemic—with its wide-reaching social, political, and economic implications—showcases the importance of public health governance. Governmental accountability is at the forefront of societal preoccupations, as state actors attempt to manage the pandemic by using sweeping emergency powers which grant them significant discretion. Though emergency measures have tremendous impacts on citizens' lives, elected officials and civil society have little input in how governments wield these powers. We reviewed available mechanisms in Canadian private, constitutional, and criminal law and found them to be unlikely sources of much-needed accountability. Therefore, we propose that provincial and territorial legislatures modify public health legislation to expand mechanisms to foster public confidence in decision-makers, and bolster accountability to parliaments and citizens.

**Keywords** COVID-19 · Pandemic response · Governmental accountability · Emergency powers · Public health legislation

## Key messages

- Canadian provinces and territories have extensive public health emergency powers with tremendous impacts on citizens' lives.
- Court intervention grounded on private, criminal, and constitutional law is insufficient to ensure state accountability in times of emergency.

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✉ Lara Khoury  
lara.khoury@mcgill.ca

<sup>1</sup> Faculty of Law, McGill University, 3644 Peel St., Montreal, QC, Canada

<sup>2</sup> Faculté de Droit, Université de Sherbrooke, 2500 Bd de l'Université, Sherbrooke, QC, Canada

<sup>3</sup> The Lincoln Alexander School of Law, Ryerson University, 350 Victoria street, Toronto, ON, Canada



- Provincial and territorial legislatures need to add public accountability mechanisms to their public health legislation.
- These mechanisms should include the following: periodical accounts to legislatures when renewing a declaration of a public health emergency, public reporting on emergency measures taken, after the emergency has ended, and reports to Parliament in order to learn from mistakes and successes and to improve public health management for the future.

## Introduction

To protect population health during the COVID-19 pandemic, governments across the globe have exercised extensive emergency powers, leading to unprecedented measures and responses. Governments often implement these measures and responses swiftly, with little input from the electorate and from civil society organizations. Accountability serves many purposes, such as preventing abuses of power and lack of responsiveness, ensuring compliance with procedures and standards, and improving performance and learning [1]. These purposes are especially important during pandemics, which escalate inequalities and disproportionately affect vulnerable populations. Using Canada as an example, we discuss the lack of legal accountability of governments when they exercise broad public health emergency powers to manage a pandemic. We then propose that provincial and territorial legislatures amend their respective public health laws to enhance state accountability to parliaments and citizens. They should accomplish this by requiring public authorities to provide more information on emergency management and explain their decisions, during and after the crisis.

## Broad public health emergency powers

Because extraordinary threats require extraordinary means, all three levels of Canada's government (federal, provincial/territorial, and municipal) wield a large range of emergency powers, many of which are listed in public health legislation. Canada is a federal state made up of ten provinces and three territories. Of these, the two most populated provinces are Ontario and Quebec. While Canada's 1867 Constitution Act established the different powers of the federal and provincial governments, territorial governments were created by, and obtained their powers through, federal statute. Despite shared jurisdictional authority over public health between federal and provincial/territorial governments, provinces and territories bore the bulk of responsibility for the COVID-19 crisis response. This responsibility was exercised through the exceptional powers that their respective public health laws grant them. The Canadian literature has rarely discussed emergency powers in public health legislation, which vary from one province or territory to another in terms of content, trigger process, and the authorities that exercise them. Nevertheless, they share common features.



In most provinces or territories, the first criterion to trigger use of emergency powers is the existence of a public health emergency, often defined as an imminent or immediate threat that poses a significant or serious risk to public health. The second criterion is that mitigating or remedying the threat and protecting population health requires coordination or special measures. When public authorities use their emergency powers, they are not required to consult with elected representatives or other democratic forums beforehand. As a result, public authorities have considerable discretion to act quickly.

As mentioned, the pandemic response in Canada came very predominantly from the provinces and territories, rather than from the federal government or municipal authorities. Therefore, we limited our review to the public health acts of each province and territory in aims of identifying the emergency powers they have at their disposal to respond to an emergency situation like the COVID-19 pandemic. This review allowed us to identify fifty emergency powers in public health legislation across Canada. We classify these emergency powers into three categories:

1. *Powers to mobilize human and material resources to respond to the overwhelming demands for health care and other services:* These include the possibility for government to grant medical practitioners in other provinces or territories temporary permits if there is urgent need for professionals (for example, in the Northwest Territories and the Yukon); the Chief Public Health Officer's power to direct health care providers (such as pharmacists) to administer immunizations (for example, on Prince Edward Island); and the power of the Minister of Health and Long-Term Care to control material resources, including medication and medical supplies, facilities, and property (for example, in Ontario).
2. *Powers to prevent spread of communicable disease by restricting the movement or gathering of people:* Several provinces used this power to order closing of public areas and places of assembly, including educational institutions, restaurants, and gyms. Governmental authorities may also restrict travel by prohibiting entry into certain areas within a province or territory, or by restricting travel between them, as done by the Atlantic provinces (forming the "Atlantic bubble"). Medical preventive measures, such as compulsory vaccination (in Quebec and Alberta) and obligatory wearing of masks in public places also belong in this category.
3. *Powers for authorities to act outside of usual legislative requirements:* These powers eliminate processes and formalism that would hinder a quick and efficient response to a public health threat. These powers allow authorities to dispense with delays or in-writing requirements, inspect premises without a warrant, and take extraordinary measures to obtain, use, or disclose relevant information. The province of Quebec used this power to compel bar and restaurant owners to keep a register of all customers (and customers' name, phone number, email address if available) on the premises during a particular period of time [2].

More generally, some provinces grant public authorities the power to modify laws, thereby transferring legislative power to the executive branch (as done in



Alberta and Quebec). Additionally, the public health legislation of six provinces/territories grants government authorities power to take *any other measure necessary* to protect the health of the population.

Emergency powers are extensive, and the measures associated with them can have tremendous impacts on citizens' lives. Consequently, accountability for state conduct is paramount, especially when a public health crisis is long-lasting. Since the start of the pandemic, citizens have sought such accountability through appeals to judicial intervention. Indeed, mechanisms within tort law, criminal law, and constitutional law offer the courts tools to intervene to impose state accountability. In the following section, we argue that these avenues of accountability are, however, insufficient.

### **Limited accountability through private, criminal, and constitutional law**

When faced with disaster, we often look to assign blame and allocate responsibility. Indeed, victims of the pandemic have undertaken an increasing number of liability lawsuits. Class action liability lawsuits are ongoing in Quebec, Ontario, and Alberta against long-term care homes claiming damages for residents' deaths which occurred as a result of alleged negligence during the first wave of the pandemic. Moreover, in response to outbreaks in a restaurant and federal prisons, patrons and inmates have undertaken liability class action lawsuits against, respectively, an Alberta restaurant owner and the Attorney General of Canada.

Substantial hurdles hinder liability claims against governments. Public health and civil emergency laws across Canada provide varying forms of immunity against liability for decisions taken by public actors to curtail the COVID-19 pandemic. For instance, the Quebec *Public Health Act* grants immunity to the government, the Minister of Health and Social Services 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. This effectively protects almost all governmental decisions taken in Quebec during the pandemic.

State actors' decisions not explicitly targeted by a legislative immunity are, in theory, subject to liability. However, Canadian courts have upheld a public law immunity, which protects governmental *policy* decisions from civil liability, unless found to be irrational or taken in bad faith. For instance, this immunity has protected public authorities' decisions related to the imposition of budgets and the allocation of resources, the establishment of priorities in the fight against certain diseases, and the establishment and implementation of screening programs [3, 4]. The immunity also prevents courts from interfering with how governments choose to regulate a particular matter [5]. For example, under Quebec's *Public Health Act*, the Minister of Health and Social Services has the power to establish standards concerning the disinfection or decontamination of persons, premises or things in contact with certain agents, so as to avoid more widespread contagion or contamination. Should the Minister decide to exercise this power, the standards they establish are considered a discretionary policy decision that courts will usually not interfere with. In the



context of the COVID-19 pandemic, the category of state action immune to liability could include, for instance, the priorities that provincial governments set for vaccination of the population, and their decision to require a proof of vaccination to enter certain premises.

Public law immunity does not extend to the operational sphere of state action—actions concerned with the execution or implementation of policy decisions. The Canadian judiciary itself struggles with the policy/operational distinction, however. To explain the distinction, the Supreme Court of Canada offers the example of where a government agency decides to regulate the inspection of certain premises to ensure their safety, in addition to regulating the frequency of inspections that must occur given available resources. While that decision is likely a policy decision, the actual manner in which the government agents carry out the inspections imposed by regulation falls into the operational sphere.

In addition to the public law immunity, if the state exercises powers by virtue of legislation that imposes duties on government to act in the public interest (as public health laws often do), common law courts (i.e., courts of all the Canadian provinces/territories except the province of Quebec where liability is governed by civil law) are generally reluctant to superimpose a private law duty of care to address specific interests of individuals or groups [6], except in exceptional circumstances. In this way, Ontario courts refused to certify class action lawsuits against the province by victims of the West Nile Virus and SARS epidemics. For instance, in one of the class action lawsuits against Ontario in the aftermath of the SARS epidemic, the Ontario Court of Appeal refused to recognize that the province had a specific duty to the victims who claimed injury resulting from certain actions (or inaction) of the province. Included actions, among others, were the province's failure to control an outbreak which led to the second wave of the epidemic, the province's failure to maintain a public health system adequately equipped to deal with outbreaks, failure to issue proper directives to hospitals to control or limit the spread of SARS, and finally the premature lifting of the state of emergency before the first outbreak was eradicated [7].

Canadian courts offer public health-based justifications for some of the above protections against liability. These justifications include that public authorities need to prioritize the interests of the general population in public health matters, taking into account the varied and divergent interests it is composed of. Courts are also concerned that imposing duties to the benefit of only specific individuals or groups may conflict with the duties the state owes to the public at large [8]. For instance, recognizing a duty of care to protect the health of healthcare workers during an epidemic may conflict with the public interest in ensuring healthcare facilities remain open for patients who need access to them. Furthermore, under the threat of possible future lawsuits related to the handling of the COVID-19 pandemic, public authorities may be tempted to prioritize the voices of those with wealth and power—for instance, industrial actors with a financial interest in reopening the economy—to the detriment of vulnerable populations most affected by the pandemic—for instance, the elderly.

In sum, judges' predictable reluctance to use civil liability principles to review government decisions taken to manage the COVID-19 pandemic, compounded by



the lengthy delays and costs associated with liability litigation, demonstrates that this avenue is not the best tool for securing governments' accountability.

We draw similar conclusions with regard to criminal law mechanisms, particularly those for reviewing discretionary police enforcement. Many public health and emergency measures the provinces and territories relied upon in the pandemic expand the role of law enforcement. These include prohibitions of risk-associated behaviors backed by fines or even imprisonment, as well as new warrantless search powers. The executive branch of government, taking action without the usual extent of public debate and scrutiny before elected representatives within the legislative assembly, may not consider how sanctions for violating emergency measures disproportionately affect marginalized groups. Those with limited resources and without adequate housing, for instance, may have difficulty meeting the demands of social distancing and stay-at-home orders. Racialized groups may be less likely to benefit from police discretionary forbearance. Civil society actors monitoring patterns of police enforcement of COVID-related restrictions, such as restricted use of parks and physical distancing, have reported troubling enforcement that tracks race and social status [9].

Police enforcement in Canada is already under growing criticism for lack of transparency and accountability, both in terms of fairness in distribution of sanctions and the extent to which enforcement achieves public objectives [10]. Nonetheless, Canadian courts have maintained the high value typically placed on police discretion in Anglo-American legal traditions. For example, the Supreme Court of Canada acknowledges the duty incumbent on police officers to use their discretion to 'adapt the process of law enforcement to individual circumstances and to the real-life demands of justice,' so long as they can justify their decisions rationally [11]. Though the Court states that the exercise of discretion based on cultural, social, and racial stereotypes cannot be justified, courts have played little role in identifying and sanctioning enforcement that falls disproportionately on racialized people or people living on the streets. This continues to be the case, even as research demonstrates that race and class play a role in influencing discretionary decision-making by law enforcement [12], and despite recent government reports decrying systemic discrimination in exercises of police discretion. For example, an independent report prepared for the Montreal (Quebec) police service in 2019 and using the service's own data found that the black community is disproportionately challenged by the police force, and that Indigenous people, black people, and young Arabs are several times more likely to be arrested than white people [13].

Although the power of the state to use coercion to prevent the spread of disease is a mainstay of public health law, and there is little debate that states may use force in service of public health goals, the wisdom of any particular measure in any given circumstance is a matter of political and scientific debate. Consistent with the public health insight that haphazard enforcement undermines trust needed for compliance, criminologists note that certainty of enforcement plays a more important role in deterrence than severity of sanction [14]. When people subject to the prohibitions view them as confusing, arbitrary, or mutually inconsistent, trust is further undermined [15]. Public health benefits of coercive approaches can be difficult to measure. The value of heavy penalties for impaired driving, for instance, is contested



[16]. Likewise, concerns from global actors over stigma and discrimination cast the early reliance in some jurisdictions on coercive measures in response to HIV exposure and transmission as antithetical to public health [17].

We have not found any scientific studies on whether fines are effective for controlling the spread of a virus like COVID-19. Provinces that have issued the most tickets have not always benefitted from consequent decreases in infection rates, nor fared better than those that have favored an “education first” approach [9].

In the absence of meaningful judicial oversight of police enforcement patterns, review of government measures for compliance with provincial and federal human rights instruments offers an alternative avenue of accountability. There are credible arguments that aspects of Canada’s pandemic response may infringe constitutional rights and freedoms, including freedom of expression, assembly, religion, mobility rights, privacy rights, rights to liberty, and security of the person, as well as equality rights. But 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. Specifically, governments must be able to demonstrate that they are pursuing a “pressing and substantial objective,” that they are doing so in a way that is “rationally connected” to that objective and that any impairment of rights is minimally impairing and proportionate [18]. Though these requirements do not force governments to formally account for the wisdom and effectiveness of their punitive measures, they allow the courts to require justification for any rights-infringing responses of governments, in the absence of which judges may strike them down.

However, the nature of the COVID-19 pandemic means that governments are likely to be accorded greater deference than usual—at least in the short term—for rights-infringing conduct. In other words, courts are less likely to intervene in the context of COVID-19, even where government action infringes on citizens’ rights. The reasons are similar to those related to limitations on liability claims. Deference to rights-infringing government action is higher when governments are balancing numerous interests [19, 20], protecting the vulnerable [21], and where science is unclear [22]. The Supreme Court of Canada has specifically cited epidemics as a circumstance that gives states greater leeway at each step of proportionality analysis [22].

That said, the governmental designation of the COVID-19 pandemic as an emergency does not entail automatically that courts will be willing to defer to the governmental conclusion that right infringements are justified in the current circumstances. The existence of an emergency adds little to the list of factors contemplated in justifying judicial deference in other contexts: 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. The longer an emergency continues—and certainly COVID-19 has endured longer than previous public health emergencies—the less deference is justified. Further, deference due to lack of information should similarly abate as we learn more about COVID-19 responses, their effectiveness, and alternative approaches. Finally, while courts show deference to governments when they protect the vulnerable and marginalized, less deference may be afforded where government measures disproportionately burden those groups or





neglect to properly account for their situations [23]. For example, the fact that social distancing disproportionately impacts low-income youth and families, already in situations of disadvantage, may encourage courts to inquire as to the proportionality of the measure vis-a-vis the government's objectives.

Canadian courts are unlikely to strike down most emergency measures. Nonetheless, by requiring governments to justify the rationality of their measures and the proportionality of their impacts in light of growing knowledge in the field, constitutional review offers 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 may 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. As previously discussed, the review by courts of the constitutionality of some measures implemented to fight the pandemic disproportionately favors those with the resources to bring constitutional claims. As a result, rights review remains a marginal mechanism of accountability.

## **Proposing better state accountability to parliament and citizens**

Because the limitations for securing sufficient state accountability through private law and constitutional rights litigation and certain criminal law safeguards are substantial, we argue in favor of ways to reinforce public accountability through democratic channels other than the courts. The COVID-19 pandemic affords a crucial opportunity to reflect on ways to reinforce accountability mechanisms by including into public health legislation mechanisms of continuous oversight on state action.

A first option is for legislatures to require that public authorities periodically justify the renewal of a public health emergency declaration before the legislature in order to renew emergency measures. This option would require that provincial/territorial legislatures amend their current public health legislation to encode this requirement in statute. Current Canadian public health laws allow authorities to declare public health emergencies without legislative approval. Declarations are typically limited in time, ranging from ten to thirty days (with the possibility of repeated renewal), except in British Columbia where there is no time limit. The moment at which a government renews a public health emergency declaration could be an important time for public officials to explain and justify their conduct, and to outline their reasons for maintaining the state of emergency. If governments would do this periodically (but not necessarily at each renewal), this would allow elected representatives to garner feedback about the nature and impact of the measures enacted since the previous renewal of the public health emergency declaration and about the evolving data justifying another renewal. While Quebec and Alberta's laws provide for a formal oversight mechanism, their governments can avoid it either by renewing the declaration for shorter periods of time (Quebec) or by declaring another state of emergency once the preceding one has elapsed (Alberta).

Critics such as the media, political oppositions, and affected citizens have complained throughout the pandemic that governments fail to adequately disclose





information such as their pandemic response plans and the reasons underlying their responses. This information void undermined public trust and undercut compliance with public health measures [24]. For instance, in October 2020, owners of gyms and fitness studios in Quebec threatened to reopen their establishments if the government did not provide data justifying their closure. Public health authorities and their superiors in government have few informational duties during an emergency. Specifically, they are only required to provide information when accompanying the publication of a public health emergency declaration, its renewal, or its termination. Even in these instances, they are only required to publish extremely limited information. Saskatchewan is an exception: legislation in the province requires the Minister of Health or the medical officer who issues an emergency order to “set out the reasons for the order” [25]. Therefore, a second option for reform is for lawmakers to amend public health laws by adding a requirement for governments to produce periodic public reports with information on the rationale behind measures, so as to facilitate their subsequent evaluation and the reporting of results to the public. The reports containing the rationale could include, for instance, relevant data available at the time, advice received from experts or civil society, and reasons justifying the choice to order a given measure instead of alternatives. Public health legislation could further require that public authorities only publish reports once a delay has elapsed after adoption of a given measure. This would allow officials to include information on compliance and enforcement once measures have been implemented.

Finally, in some Canadian provinces, public authorities must report to their legislature after a public health emergency has ended; however, it is not always clear whether the report must be evaluative. For instance, Quebec public health legislation 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 measures implemented. 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 measures implemented. No Canadian jurisdiction requires that the report evaluate, for instance, the health, social, and economic consequences of any emergency, nor obstacles faced by authorities (in terms of resources, enforcement, or compliance). Given the magnitude of the COVID-19 pandemic, there will almost certainly be evaluative reports in its aftermath. However, we argue that legislators should amend public health laws to impose mechanisms for retrospective evaluation and reporting of results to the public. An advance promise for 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.

## **Additional public accountability mechanisms**

Our research reveals that accountability through litigation is ineffective and could, in certain cases, negatively impact public health management, while risking exacerbating race and class-based inequalities. Civil liability litigation, which requires enormous financial expenditures (especially when scientific issues are raised), will be less available to those most adversely affected by the pandemic, and outcomes



for victims will be poor due to the many limits on state liability imposed by courts and legislation. Moreover, enforcing public health orders through policing aggravates accountability issues; criminal law offers little opportunity to review such exercises of enforcement discretion. These circumstances elevate risks of governments' use of emergency powers affecting disproportionately marginalized groups, and often for uncertain public health benefits. Cases inviting courts to review whether pandemic curtailing measures respect constitutionally protected human rights serve as an important backstop against government excesses. However, they remain a last resort measure of accountability, as Canadian courts are likely to find constitutional violations only in cases of the most extreme or irrational rights infringements by the state.

Given those important limits and the need to maintain public trust and compliance with public health measures, especially in the context of long-lasting emergencies, we argue that the aftermath of the COVID-19 outbreak should be used to, notably, improve the public accountability mechanisms surrounding public authorities' public health powers. In order to do so, provincial and territorial legislators must modify their respective public health legislation to include an obligation for governments to:

- (i) periodically account to legislatures when renewing a declaration of a public health emergency,
- (ii) produce periodic public reports on emergency measures taken, and
- (iii) disseminate, post-emergency, a public report that should include an evaluation sufficient for public authorities, and society, to learn from mistakes and successes and to improve public health management for the future.

Such oversight mechanisms are sure to provide for more predictable and transparent state accountability during public health emergencies. That said, the exact design of such legislative oversight mechanisms deserves more research, as well as the engagement of elected representatives and insights from organizations, such as advisory committees, commissions of inquiry, and audit offices, whose task is to advise governments on ways to improve the performance of systems.

## Conclusion

Emergency powers in public health laws across Canada equip governments with tools to respond quickly and effectively to extraordinary threats. However, the need for these emergency powers, which became obvious in the aftermath of the SARS and H1N1 outbreaks, may have eclipsed the equally important need for a robust system of state accountability. The COVID-19 pandemic provides us with a unique opportunity to review and discuss such a system. The issue of public accountability of the state is not a solely Canadian preoccupation; governments around the world used exceptional and far-reaching powers to respond to the COVID pandemic. Inevitably, questions of state accountability in times of crisis arise in the global public health community as they do in Canada. Our work demonstrates that even in a democratic country with a strong parliamentary system like Canada, governments



hold extensive discretionary powers to face emergencies without adequate systems of accountability. Accordingly, judicial tort or rights-based interventions are likely to prove insufficient at remedying this situation, which instead calls for reforms of public health legislation to promote public accountability.

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**Lara Khoury, Ad E, DPhil, BCL, LLB**, is an Associate Professor at McGill University's Faculty of Law, Montréal, Québec, Canada

**Alana Klein, JSD, LLM, BCL/LLB, BA**, is an Associate Professor at McGill University's Faculty of Law, Montréal, Québec, Canada

**Marie-Eve Couture-Ménard, DCL, LLM, LLB**, is an Associate Professor at the University of Sherbrooke, Faculty of Law (Faculté de droit, Université de Sherbrooke), Sherbrooke, Québec, Canada

**Kathleen Hammond, JD/BCL, PhD, MPhil, BA**, is an Assistant Professor at The Lincoln Alexander School of Law at Ryerson University, Toronto, Ontario, Canada

