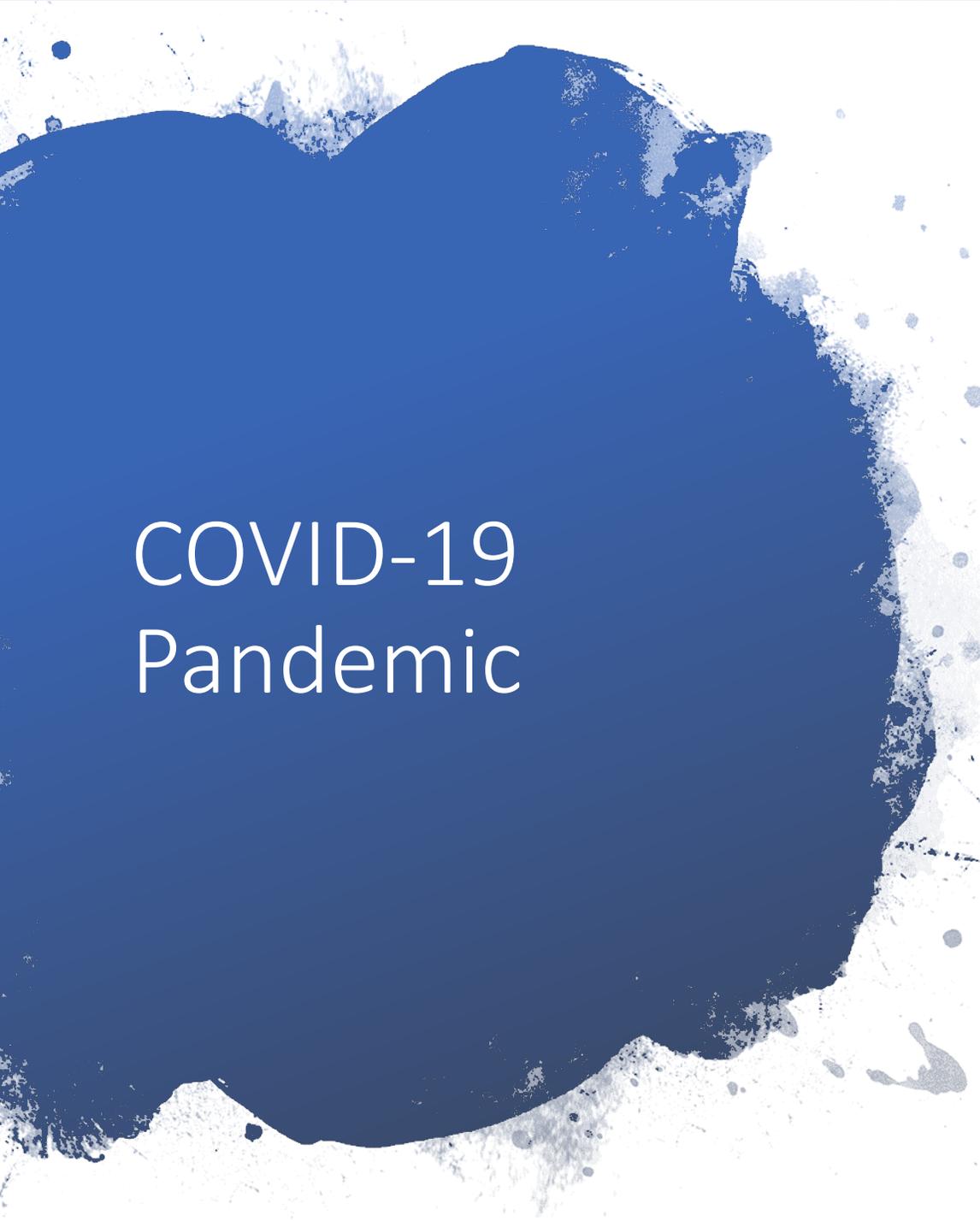


Government Powers in COVID-19:  
Balancing Public Health and Civil  
Liberties in a Public Health  
Emergency

# Tracey M. Bailey, Q.C.

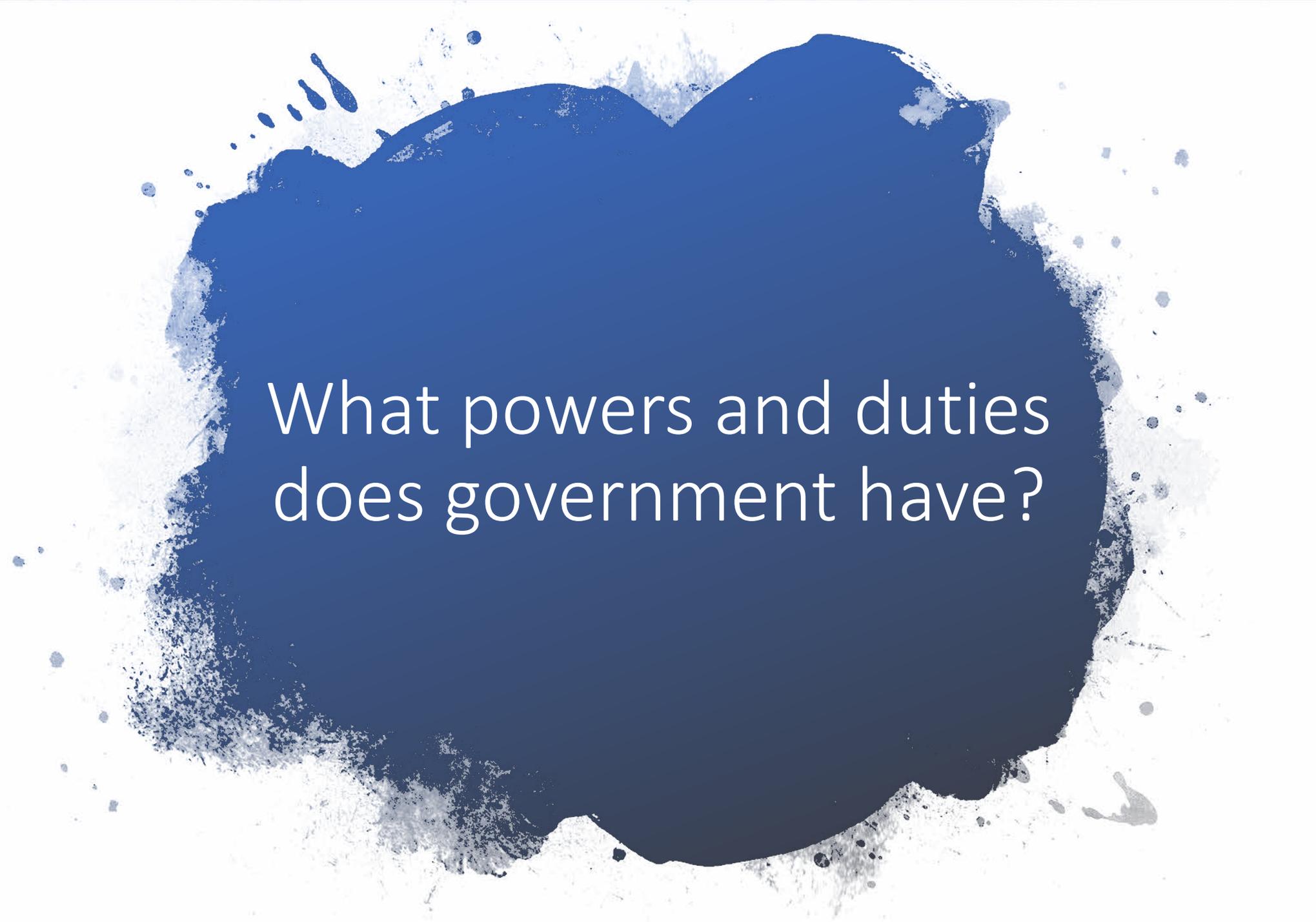
- No financial conflicts of interest
- Not speaking on behalf of any person or organization
- Public education – not legal advice
- Long-standing affiliation with John Dossetor Health Ethics Centre
- Intent of talk – solidarity as opposed to critique
- Acknowledgement of enormous efforts of others





# COVID-19 Pandemic

- Our current state
- Public health (or other) emergencies declared

A dark blue, irregularly shaped graphic with a splatter effect, containing white text. The graphic is centered on a white background and has a rough, ink-like border. The text is written in a clean, white, sans-serif font.

What powers and duties  
does government have?



What limits exist?

# We will talk about...

- Governmental powers at different levels (e.g. internationally, federally, provincially, municipally)
- Our focus: Alberta and its *Public Health Act*
  - Public health powers, duties and safeguards in “normal” times
  - How is a public health emergency declared? And how long can it last?
  - What extraordinary powers exist during a public health emergency?
  - How have those powers been recently enhanced?
  - How have those powers been exercised?
  - Reflections so far...



# Public health ethics and law

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How is it different when compared  
to many other health/societal  
decisions?

# Public Health Law Landscape

- International
- Federal
  - *Quarantine Act*
  - *Public Health Agency of Canada Act*
  - *Department of Health Act*
  - *Emergencies Act*
  - *Emergency Management Act*
- Provincial/Territorial
- Municipal



# Provincial legislation

- Every province and territory in Canada has different laws
  - Many differences
  - Some key similarities
    - E.g. appointment of public health officials (MOH; EO)
    - Powers and duties to contain the spread of infectious disease



## Person with active TB

- Unlike most health care – powers to detain and compel assessment, treatment, etc.
- Unwritten law of public health powers: only use when needed
- Also limits on use of powers in legislation. In Alberta:
  - Only re: “recalcitrant patient”
  - Only re: specified diseases
  - Person-specific – whether re: quarantine or isolation
  - Person may appeal to court



# Possible challenges

- Appeal or other court review to determine issues such as:
  - Was there legal authority to use the power/was it used appropriately?
  - Was the law or action constitutional?
    - Did the government have to power to create the law?
    - Does it violate a constitutional right or freedom and the violation is not justified?

# Constitution Act 1867

- SCC: “amorphous”
- While jurisdiction mostly provincial, both federal and provincial governments can pass valid legislation re: health – often in the same area.



# *Charter of Rights and Freedoms*

- Some freedoms/rights:
- Section 2: Freedom of peaceful assembly; freedom of association
- Section 6: Right to enter, remain in and leave Canada
- Section 7: Right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
- Section 9: Right not to be arbitrarily detained or imprisoned



*Justified  
breaches of  
Charter  
freedoms/rights*

- Section 1: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

# Oakes test

1. Is the governmental action directed at a pressing and substantial concern?
2. Is its goal rationally connected to the limitation imposed on an individual's rights?
3. Does the limitation impair the individual's rights in a minimal fashion?
4. Is there proportionality between the benefits of the limitation and its harmful impact?

# Powers of MOHs in “normal” times

- Investigate to determine whether action needed to protect the public health from real or suspected communicable disease or public health emergency [29(1)]
- Collect information from any person to assist with an investigation (and for other purposes) [many sections]
- “Take whatever steps the MOH considers necessary” to suppress the infectious disease, protect unexposed persons, break the chain of transmission/prevent spread, and remove the source of infection. [29(2)(b)(i)]
- Prohibit by order a specific person from:
  - attending a school
  - working
  - having contact with other specific persons or classes or persons

for any period and subject to any conditions where the person’s engaging in that activity could transmit an infectious agent [29(2)(b)(ii)]

- Order the decontamination or destruction of any contaminated articles or articles the MOH reasonable suspects have been contaminated [29(2)(b)(iii)]

# Powers of MOHs in “normal times”

- Enter any place without a warrant where the MOH knows or has reason to believe that a person who has an infectious disease may be found at that place, or the place may be contaminated to examine/determine the existence of the disease [30, 31]
- Approve a place for the quarantine or isolation of a person [33(1)]
- To issue “certificate” re: “recalcitrant patient” [39] (quarantine)
- To have a person formerly under a certificate apprehended and returned to facility when not complying with conditions [43]

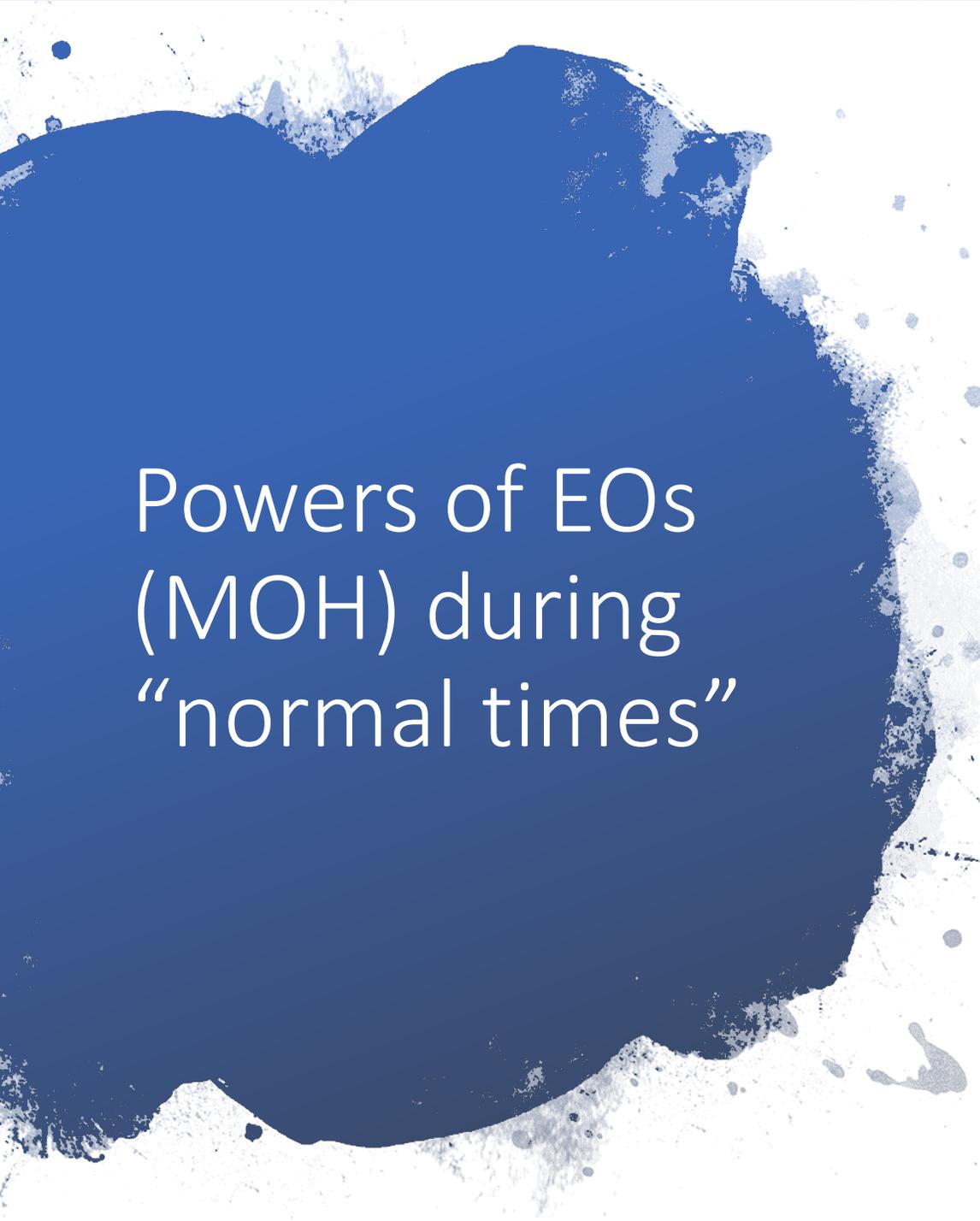
# Duty/Power of physicians in “normal times”

Issue an isolation order re: a recalcitrant patient [44]

## Duties of MOHs if person ordered into quarantine or isolation

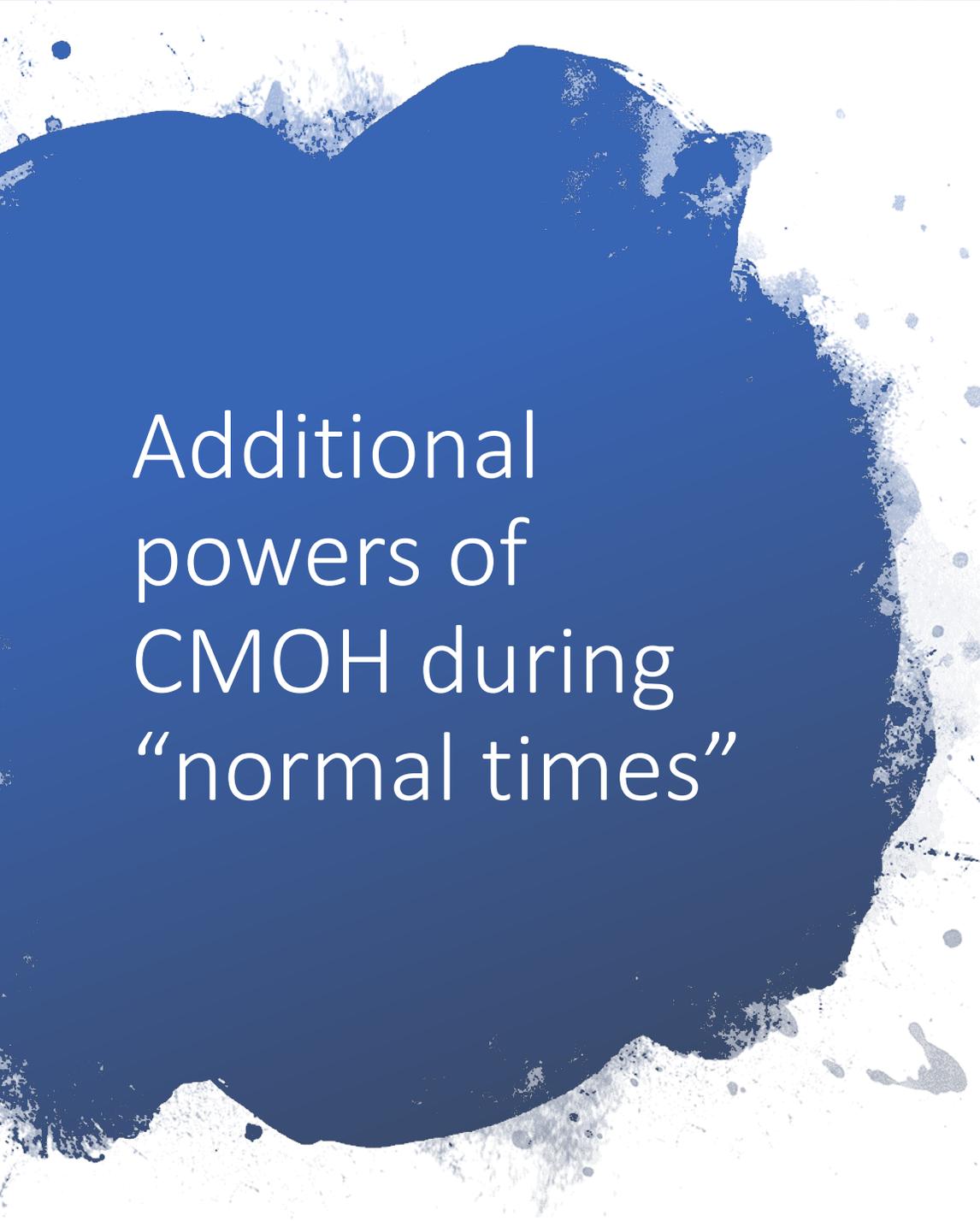
Ensure that the person is provided with all supplies and services necessary for the person's health and subsistence [34(1)]

Ensure that any person providing supplies or services (under this section) takes adequate precaution to avoid contracting the disease [34(2)]



# Powers of EOs (MOH) during “normal times”

- Broad powers to inspect public places for nuisance or compliance with PHA [59]
- “Public place” includes any place in which the public has an interest arising out of the need to safeguard the public health and includes, without limitation:
  - public conveyances and stations/terminals;
  - places of business;
  - learning institutions;
  - places of entertainment or amusement;
  - places of assembly;
  - dining facilities and licensed premises;
  - accommodation facilities (including all rental accommodations);
  - recreation facilities;
  - medical, health, personal and social care facilities; and
  - any other building, structure or place visited by or accessible to the public.
- Powers to inspect private place (e.g. dwelling) [60]
- Power to issue a broad range of orders [62]



## Additional powers of CMOH during “normal times”

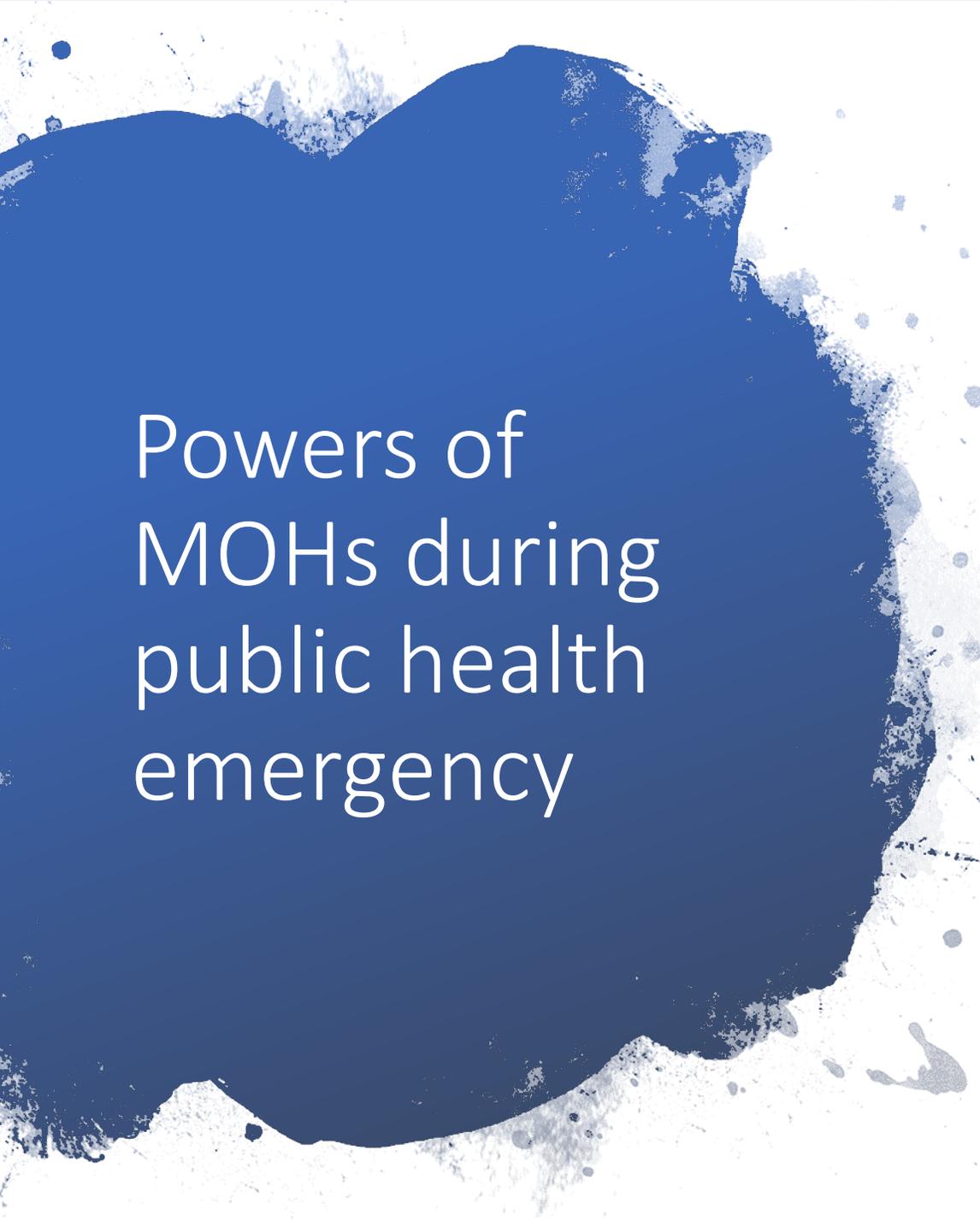
- Power to give directions to AHS, MOHs, EOs in the exercise of their powers and the carrying out of their responsibilities under the PHA
  - Disease-specific powers in Communicable Diseases regulation
- Power to delegate in writing any of her powers, duties and functions to Department of Health employees

# Duties/powers during epidemic

Duty of MOH to immediately inform Minister of Health if disease is epidemic and hospital facilities in the area are inadequate to provide the necessary isolation or quarantine facilities [37(1)]

Power of Cabinet to order hospital or owner of “facility” (any place person can receive treatment for the disease) to provide isolation or quarantine in the amount and manner prescribed [37(2)]

Re: facilities (not hospitals) - duty of Crown to assume responsibility for any reasonable expense incurred by owner of a facility in compliance with the order [37(3)]

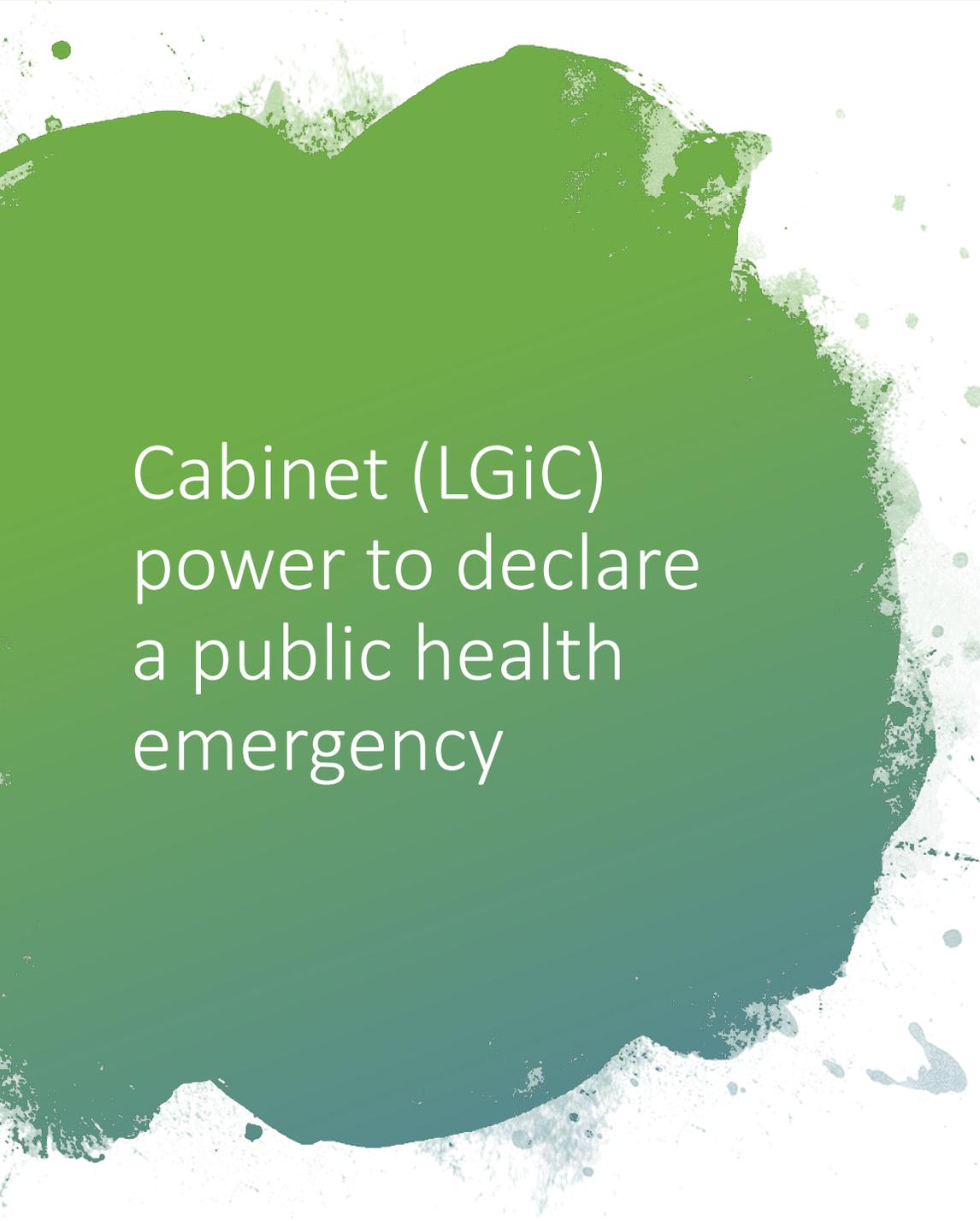


# Powers of MOHs during public health emergency

- All of those same powers, and
- Require a person to provide any information requested by written notice to the MOH (or designated EO or community health nurse) to assist the MOH in carrying out duties/exercising powers under s. 29 re: the public health emergency [19.1]

Additional  
power of CMOH  
during  
**pandemic  
influenza** public  
health  
emergency

- If the declaration of a public health emergency by Cabinet is in respect of pandemic influenza, CMOH may authorize the absence from employment of any persons who are ill with pandemic influenza or who are caring for a family member ill with pandemic influenza.

A large, abstract green watercolor splash graphic on the left side of the slide, with various shades of green and some white speckles. The text is overlaid on this graphic.

## Cabinet (LGiC) power to declare a public health emergency

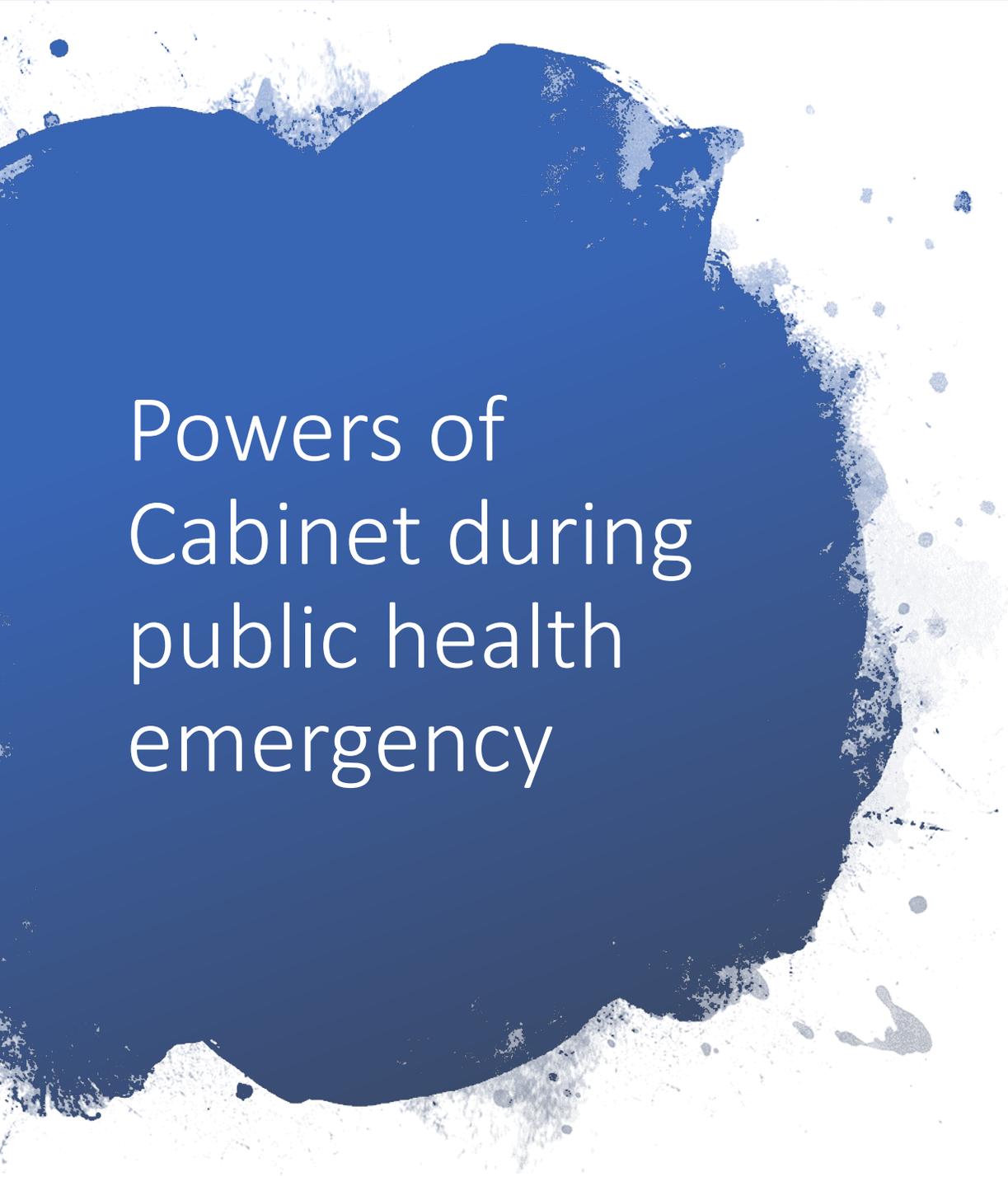
- Power to declare a public health emergency where, on the advice of the CMOH, it is satisfied that a public health emergency exists (or may exist), and prompt co-ordination of action or special regulation of persons or property is required in order to protect the public health
- “Public health emergency” means an occurrence or threat of an epidemic or pandemic disease that poses a significant risk to the public health”
- Note re: AHS

# PHA checks and balances re: declaration

In addition to the criteria that must be met, it is time-limited. It lapses automatically at the earliest of:

- 30 days – or 90 days if re: pandemic influenza
- When the order is terminated by Cabinet. (Cabinet must terminate where it considers the emergency no longer exists based on advice from CMOH.)

It may be continued beyond that via a resolution of the Legislative Assembly



## Powers of Cabinet during public health emergency

- Order the closure of any “public place”
- Order the postponement of an intended election for not a period of not more than 3 months
- Order the immunization of persons who are not then immunized against the disease or not not have sufficient other evidence of immunity to the disease

# Powers of Minister of Health during public health emergency

- For the purpose of preventing, combating or alleviating the effects of the public health emergency and protecting the public health:
  - Acquire or use any real or personal property
    - Duty to reasonably compensate [52.7]
  - Authorize or require any qualified person to render aid of a type the person is qualified to provide
  - Authorize the conscription of persons needed to meet an emergency
  - Authorize the entry into any building or on any land, without warrant, by any person
  - Provide for the distribution of essential health and medical supplies and provide, maintain and co-ordinate the delivery of health services [52.6(1) and Emergency Powers Reg]

Powers of  
Ministers  
during public  
health  
emergency and  
for up to 60  
days (no + 60  
days if  
pandemic  
influenza)

- Before PHAA (Bill 10): Power by order to suspend or modify the application or operation of all or part of enactment – without consultation – subject to the terms and conditions prescribed – if the Minister is satisfied that its application may directly or indirectly unreasonably hinder or delay action required in order to protect the public health. [52.1(2)]
- After PHAA (Bill 10), in addition to suspend/modify application/operation:
  - specify or set out provisions that apply in addition to, or instead of, any provision of an enactment
  - If Minister satisfied that doing so is in the public interest
  - Order may be made retroactive to date of declaration of emergency
  - Order cannot impose/increase any tax, appropriate public revenue, create a new offence with retroactive effect [new 52.1(2) and (2.1-2.4)][similar amendments to 52.21 – but note Cabinet orders needed to authorize Ministers to make such orders]



# Publication duties re: details of orders

- Minister of Health:
  - declaration of public health emergency
  - Cabinet orders authorizing Ministers to suspend, modify, etc laws if pandemic influenza up to 60 days following
- Minister who made order (either re: public health emergency, or because of authorization by Cabinet re: pandemic influenza) [52.4]

# When do M.O.s end?

- Applies to M.O.s made as a result of a public health emergency OR Cabinet authorization to specific Ministers because of significant likelihood of pandemic influenza
- Earliest of:
  - 60 days after declaration or authorization lapses
  - When order terminated by Minister who made it
    - Duty of Minister to terminate order when satisfied it is no longer in public interest
  - When order terminated by Cabinet

UNLESS Cabinet continues an order for up to 180 days maximum (beyond end of emergency/authorization order)

# Protection from liability

- Specified persons (e.g. Crown, Minister, AHS, MOHs and EOs, health practitioners) always have certain protection from liability for anything done/not done in good faith while carrying out duties/exercising powers [66.1(1)]
- Public health emergency: That protection extended to any person or organization who acts under the direction of the Crown, CMOH or other MOH related to the public health emergency [66.1(2)]

# Use of powers and publication

- <https://www.alberta.ca/covid-19-orders-and-legislation.aspx>
- 4 Bills (including PHA and *Emergency Management Act*)
- 3 O.C.s – declaration of public health emergency and 2 new regs
- Numerous M.O.s – including 2 in-force M.O.s to amend the PHA (so not all changes are in Bill 10)
- Numerous orders, etc of CMOH



# Future ethical/legal evaluation of powers/use of powers

- Power/action directed at pressing/substantial concern? (e.g. does individual pose significant risk of spreading a dangerous, infectious disease?)
- Are goal and action rationally connected? (e.g. Will intervention(s) be likely to ameliorate risks?)
- Least-restrictive means necessary to achieve public health aims?
- Are benefits of action (e.g. use of coercion) proportionate to the risk?
- Are assessments based on best available scientific evidence? “Precautionary principle” reasonable where science is uncertain/during emerging crisis. And – even emergencies do not warrant use of powers that are indiscriminate, overbroad, excessive or without evidentiary support.



Thank you

Discussion