NOVEMBER 2023

PUBLIC HEALTH EMERGENCIES GOVERNANCE REVIEW PANEL

FINAL REPORT

Transmittal Letter
November 7, 2023

Dear Premier Smith:

Please find herewith the Report of the Public Health Emergencies Governance Review Panel (PHEGRP), as established by Ministerial Order 01/2023.

As you are aware, the assignment you gave us was to review the legislation authorizing the orders and regulations whereby the Province responded to the COVID-19 crisis and to recommend improvements that would better equip Alberta to respond to future public emergencies.

This we have endeavoured to do to the best of our ability.

On many of the issues addressed in our report, there were a variety of perspectives and differences of opinion as to the most appropriate conclusions and recommendations to put forward. The fact that we have been able to generally agree on the final text of the report and the recommendations it offers indicates that it is possible, through respectful listening and thorough discussion, to arrive at a consensus on appropriate responses, even on issues as challenging as those raised by the COVID-19 crisis.

It is our hope that this will also prove to be the case among those who consider the conclusions and recommendations of this report – to the benefit of all Albertans – especially when facing future public emergencies.

Yours sincerely,
Preston Manning
Chair
Public Health Emergencies Governance Review Panel

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Disclaimer

Please note that the papers and memoranda obtained from third parties and included in these appendices represent the views of the sources and authors identified, not those of the Panel, although the Panel has drawn extensively upon them.

Appendices are available to view online at https://open.alberta.ca/publications/public-health-emergencies-governance-review-panel-final-report

CHAPTER 1
INTRODUCTION

This introduction to the Report of the Public Health Emergencies Governance Review Panel describes its origins, scope of work, statutory focus and factors to be balanced in its deliberations. It also describes the Panel's membership, contractors and advisors; its procedures and provisions for public input; and a synopsis of the chapters of this report. It concludes with an appeal that its content be the subject of "constructive and democratic discourse" rather than the negative and rancorous discourse that increasingly characterizes public debate of important issues in an age of political polarization and cancel culture.

CHAPTER 1
INTRODUCTION

The Public Health Emergencies Governance Review Panel

Before describing the origins, membership, scope of work and procedures of the Panel, it is important that the reader understand the following:

- That the goal of the Panel's work is to protect and enhance the well-being of the people of Alberta during and after any public emergency, including a public health emergency.
- That the Panel fully appreciates the role that medical science played in coping with the COVID-19 crisis and seeks through its recommendations to broaden and deepen the role of science in coping with future emergencies.
- That it is not the intent or purpose of the Panel and its work to criticize or attack the performance of Alberta's healthcare practitioners or the province's public healthcare system during the COVID-19 crisis. Rather, the intent is to learn from that experience and propose positive measures to improve the capacity of our province to cope with future emergencies.
- That while it has been a public health emergency that prompted the establishment of the Panel and its assignment, the Panel's recommendations are intended to better prepare the province to respond to any future public emergency regardless of its nature.
- That just as no single narrative has proven sufficient to explain the origins of the COVID-19 crisis or to guide governmental responses to it, so no single narrative – including that of the Panel – will be sufficient to better prepare the province to respond to future public emergencies. Alternative perspectives and views on how to do so are therefore most welcome.

Mandate

The COVID-19 crisis of 2020-2022 caused global suffering and turmoil. Many governments tackled the crisis by implementing stringent and unprecedented measures, followed by debates on their effectiveness.

In January 2023, Premier Danielle Smith appointed Preston Manning to chair the Public Health Emergencies Governance Review Panel,[1] hereinafter referred to as the Panel. Its purpose is to review the legislation and governance employed during the COVID-19 crisis and to recommend changes and additional legislation to better prepare the province to meet future public emergencies.

Note that the mandate of the Panel, contrary to some initial media reports, is not to conduct an overall inquiry into the government's response to COVID-19. The ministerial order establishing the Panel and defining its terms of reference is attached as Appendix 1.

1 Ministerial Order 01/2023 established the Public Health Emergencies Governance Panel and appointed Preston Manning as chair.

Scope of Work

The statutes of Alberta currently include hundreds of laws. The Panel has reviewed the statutes that provided the legal basis for the government's response to COVID-19, particularly those statutes authorizing orders in council, ministerial orders and regulations. They include:[2]

- *Administrative Procedures and Jurisdiction Act*
- *Alberta Bill of Rights*
- *Alberta Human Rights Act*
- *COVID-19 Related Measures Act*
- *Education Act*
- *Emergency Management Act*
- *Employment Standards Code*
- *Health Professions Act*
- *Judicature Act*
- *Public Health Act*
- *Regional Health Authorities Act*

As the reader will discover, the Panel has recommended many amendments to these statutes. Where legislative changes are proposed, the intention is that the proposal be read as "with all necessary modifications" to related legislative measures.

The Panel has also been directed to consider and appropriately balance such factors as:

- general public health and health information
- mental health and wellness
- child and student health, mental health and education
- practice standards of health professionals
- effective implementation of emergency measures
- protection of rights and freedoms
- economic and financial factors
- employment standards

The Panel has also tried to learn from the management of the COVID-19 crisis in other provinces, territories and countries,[3] and from the management of public emergencies other than public health emergencies.[4]

Focus on the Public Healthcare Sector

The spectrum of healthcare services provided in Canada includes: 1) care that is publicly funded and delivered; 2) care that is publicly funded and privately delivered; and 3) care that is privately paid and privately delivered, with healthcare spending divided between the public and private sectors at roughly a 70/30 per cent split.

Without denying that the private healthcare sector has a role to play in responding to public health emergencies and that expansion of its role and that of public-private partnerships could expand the overall capacity of the healthcare system, it should be noted that the Panel's focus is on the role of the public healthcare sector in responding to public health emergencies such as the COVID-19 crisis. As such, its recommendations focus on improving the capacity of the public healthcare system to better respond to future public health emergencies.

2 This list does not include: federal legislation that was relevant and impacted Alberta's COVID-19 response; provincial regulations; orders or directives by the chief medical officer of health; and other legislation that was relevant, including the *Labour Relations Code*, *Alberta Housing Act*, *Alberta Health Care Insurance Act*, *Nursing Homes Act* and others.

3 Of particular interest is the United Kingdom (UK) Covid-19 Inquiry set up to examine the UK's response to and impact of the Covid-19 pandemic: https://covid19.public-inquiry.uk/

4 Of relevance will be experience gained from the current (spring of 2023) efforts in Alberta to manage the wildfire emergency.

Panel Members

The Panel is composed of the following six members:[5]

- **Michel Kelly-Gagnon**, lawyer and president emeritus of the Montreal Economic Institute. He provides expertise related to the safeguarding of civil liberties and the legislative foundations and operations of European and Canadian healthcare policies and systems. Research papers prepared by Mr. Kelly-Gagnon and his colleagues provide the basis of Chapters 7 and 9 of our report.
- **The Honourable John C. (Jack) Major** CC KC, former justice of the Supreme Court of Canada. He provides expert analysis of Alberta legislation pertaining to healthcare and emergency management, as well as proposed amendments.
- **Preston Manning**, PC CC AOE, former member of Parliament for Calgary Southwest, leader of the opposition in the House of Commons, and his party's critic for science and technology. As the son of long-time Alberta Premier Ernest Manning, he brings the Manning family's 55 years of familiarity and experience with the statutes of Alberta and Canada to bear on the Panel's legislative assignment.
- **Dr. Jack M. Mintz**, president's fellow of the School of Public Policy at the University of Calgary and a distinguished senior fellow of the MacDonald-Laurier Institute. He provides expertise in the areas of Alberta public policy, the operations of Alberta Health Services (AHS), and the economic impact of health protection measures adopted to cope with COVID-19.
- **Dr. Martha Fulford**, retired chief of medicine, McMaster University Medical Centre Site, Hamilton Health Sciences, and infectious diseases specialist for both pediatric and adult patients. Her contributions include both medical and external perspectives on the province's response to COVID-19, as well as identifying potential measures for improving Alberta's response to future health emergencies.
- **Dr. Rob Tanguay**, psychiatrist and clinical assistant professor with the departments of psychiatry and surgery at the Cumming School of Medicine, University of Calgary. He is also the medical lead for the AHS addiction education sessions, thus contributing insights into COVID-19's impact on mental health and the measures employed to cope with that impact.

5 Members of the Panel other than the chair were appointed by ministerial order 04/2023.

Contractors and Advisors

The Panel sought advice from a variety of individuals and sources – referenced throughout the report – and contracted out essential research which was then reviewed by the Panel in virtual sessions. The major research papers and memos commissioned by the Panel are appended to this report.

The Panel especially wishes to thank the following for their contributions and services.

- **Dr. Ari Joffe**, MD, FRCPC, whose specialties are in pediatric infectious diseases and pediatric critical care. He is a clinical professor in the department of pediatrics at the University of Alberta and adjunct clinical professor at the John Dossetor Health Ethics Centre at the university.
- **Mr. Gerard Lucyshyn**, is an economist and founder/ executive director of the Regulatory Research Institute of Canada. He brings an economic, mechanism design and regulatory perspective to the work of the Panel. His contributions form the basis of Chapters 4 and 6 of this report.
- **Dr. Irvin Studin** is the founder, editor-in-chief, and publisher of Global Brief magazine, as well as president of The Institute for 21st Century Questions. He brings an international and private sector perspective to bear on the work of the Panel. His work forms the basis of Chapter 5 on educational rights, duties and school lockdowns.
- **Mr. Tom Ross**, KC, is a principal of McLennan Ross and an expert in employment law whose analysis of Alberta's *Employment Standards Code* has informed the narrative and recommendations of Chapter 8 dealing with this subject.
- **Ms. Tracey Bailey**, KC, is associate counsel with Miller Thomson LLP, with both public and private experience with the health professions. Her analysis of Alberta's *Health Professions Act* has also informed the narrative and recommendations of Chapter 8 dealing with that subject.
- **Mr. Daniel Dufort and Ms. Krystle Wittevrongel** of the Montreal Economic Institute, which has long been a reputable source of research on healthcare systems in Canada and abroad. Their work forms the basis of Chapter 9 dealing with ways and means of improving the capacity and performance of Alberta's healthcare system.

The Executive Council office of the Government of Alberta has provided organizational and logistical support to the Panel. Its services have greatly facilitated the work of the Panel and are sincerely appreciated.

It should be understood, however, that the conclusions and recommendations of this report are solely the responsibility of the Panel. They are to be attributed solely to the Panel and not to those who so generously shared their insights, advice and expertise with us – insights, advice and expertise for which we are truly appreciative.

Public Input

A website has been the primary conduit for the Panel's work: https://www.alberta.ca/public-health-emergencies-governance-review-Panel.aspx.

The Panel gathered initial public input by asking for response to one simple question:

What, if any, amendments should be made to the legislation that governed Alberta's response to COVID-19 in order to better equip the province to cope with future public health emergencies?

For the most part, the public response did little to address this question as most respondents had little idea of which laws governed Alberta's response to COVID-19. When more information was provided concerning the applicable laws, the relevance of public input to the work of the Panel improved significantly. A summary of the most relevant and helpful public input is contained in Appendix 2.

Communications Guidance to Consulted Experts

The Panel has specifically reminded each of the experts we have engaged as advisors and consultants that, besides elected officials, our report will have two main audiences. The first is composed of other knowledgeable people with expertise and experience in each of the areas covered by the report. They will bring their critical judgment to bear on its contents and their perspectives and feedback are welcome. But the other, and the most important audience, is composed of the people of Alberta whose lives were profoundly affected by the COVID-19 crisis and whom this report is particularly intended to serve by better preparing the province to cope with future public emergencies.

These people have neither the time, nor patience, nor inclination to delve into the depths and intricacies of the subjects covered by the experts who have informed this report. So in communicating their findings and advice to the Panel, our experts have been asked to err on the side of making their findings as straightforward and intelligible as possible to public audiences, even if in so doing they must sacrifice providing the degree of depth of reasoning and presentation that their fellow experts might expect and even demand. We very much appreciate that the experts we have consulted, and whose valuable input is contained in the appendices to this report, have acceded to this communication request and have endeavoured to make their input as intelligible as possible to non-experts and the general public.

Process

The Panel chair, with assistance from legal counsel, briefly examined the statutes of Alberta to identify laws having any bearing, direct or indirect, on Alberta's responses to public emergencies. An inventory of the orders in council, ministerial orders and regulations whereby the Alberta government responded to COVID-19 was also provided by Executive Council. These orders and regulations, and their statutory foundations then became a primary focus of the Panel's review. A scope of work was defined in accordance with the Panel's terms of reference.

Starting in January 2023, Panel consultations, with advisors and contractors frequently present, were then conducted every week to 10 days. The results of these sessions were posted on a secure website under chapter headings, with participants invited to add comments and modifications until a rough draft was developed. The draft was discussed in further Panel sessions until a consensus was achieved (with divergent opinions acknowledged). The resulting recommendations with relevant explanations and commentary form the essence of the Panel's report.

Democratic Discourse or Polarization?

The Panel is aware that the COVID-19 crisis of 2020-2022 has raised many issues of significance, many of them controversial and some well beyond the Panel's terms of reference and capacity to address. The Panel is hopeful, however, that its final report will contribute to constructive democratic discourse on its subject matter and on additional, but equally important, related issues that its report does not adequately address.

By constructive democratic discourse, the Panel refers to open and courteous exchanges of information, as well as consideration of alternative positions and convictions characterized by a willingness to listen. It assumes the motives of participants are honourable; it uses positive and constructive language, and it trusts its report will lead to beneficial results.

CHAPTER 2
LEADING THE RESPONSE TO EMERGENCIES

The three main groups responsible for dealing with an emergency in Alberta are:

1. Elected officials (Premier, cabinet, cabinet committees and the Assembly)
2. The Alberta Emergency Management Agency (AEMA)
3. Alberta Health and Alberta Health Services, in the case of a public health emergency

This chapter seeks to define the optimal relationship among these entities to ensure the most effective response to a provincewide emergency, and to recommend changes in legislation to establish, strengthen and maintain that relationship.

CHAPTER 2
LEADING THE RESPONSE TO EMERGENCIES[6]

At the start of its work, the Panel was provided with an overview of the organizational structures and processes used by the Province to respond to the COVID-19 crisis of 2020-2022.

The individuals within those structures and processes did their best under trying circumstances. While it may be easy in retrospect to criticize them, that is neither the assignment, nor the purpose, nor the intent of the Panel.

Rather, its assignment is to determine and analyze the hard-learned lessons and insights taught by Alberta's responses to COVID-19 and other emergencies (such as floods and wildfires) and recommend changes to the statutory base authorizing and shaping those responses.

This chapter provides recommendations for legislation to improve structures and processes at the macro level.

Major Decision-Making and Implementation Entities

Responding[7] at the provincial level to a public health emergency such as the COVID-19 crisis involves the following entities:

- The Premier, cabinet committees, cabinet and the assembly[8] (elected officials responsible to the people of Alberta).
- The officials that support the Premier and the cabinet, including the Department of Executive Council.
- Individual ministers with the responsibilities and authority to issue ministerial orders, such as the minister of the recently established Department of Public Safety and Emergency Services and the minister of Health. Also, highly relevant to Alberta's COVID-19 response are Alberta Health Services (AHS) and the medical officers of health, including the chief medical officer of health (CMOH).
- The Alberta Emergency Management Agency (AEMA), established and guided by the provisions of the *Emergency Management Act*.
- Subject-matter agencies or departments, in the case of a public health emergency, Alberta Health, established and guided by the *Public Health Act* and related statutes.

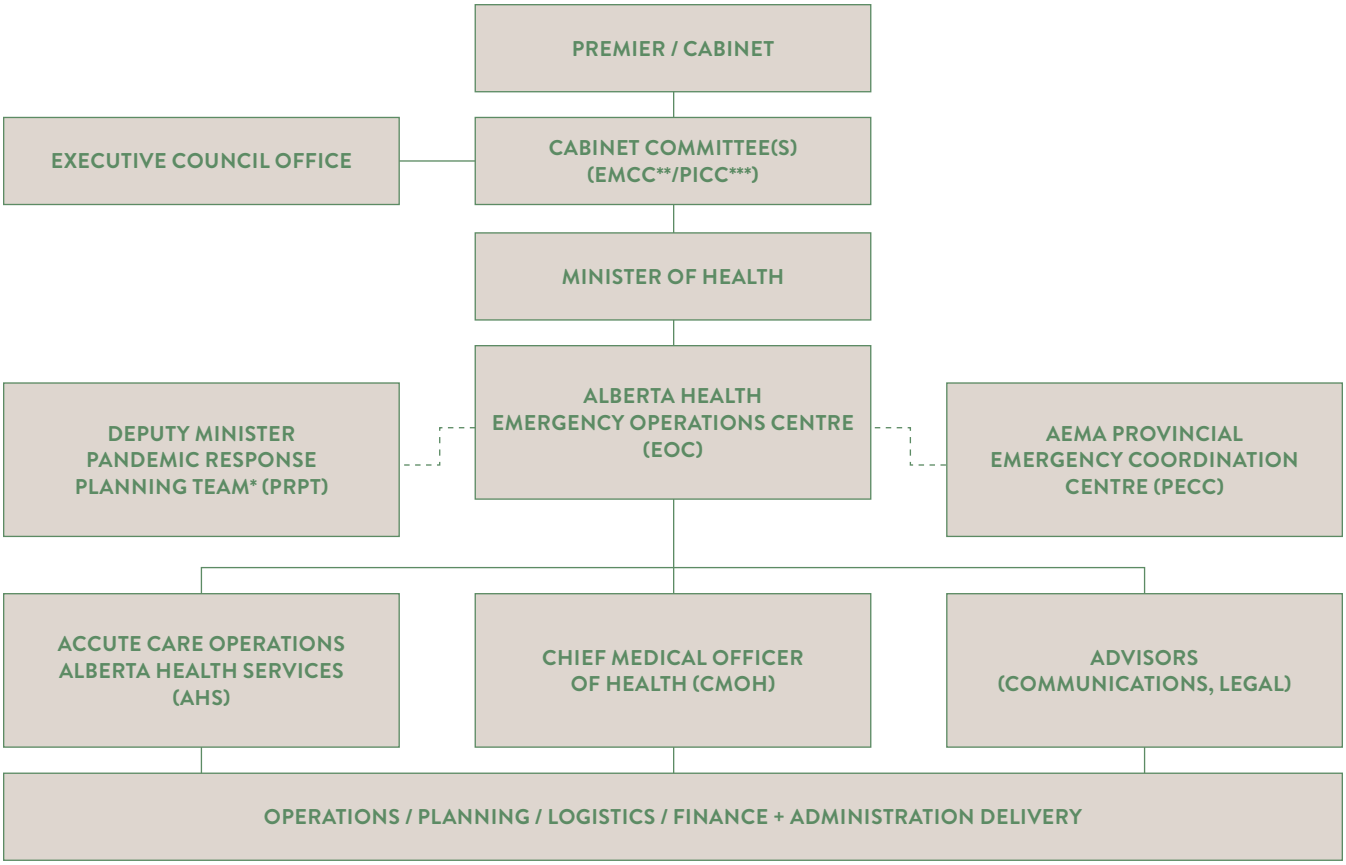
6 The Alberta *Emergency Management Act* refers to emergencies. The *Public Health Act* refers to public health emergencies. This chapter is concerned with provincewide emergencies of any kind.

7 Throughout this chapter, and indeed throughout the Panel's entire report, the phrase "responding to a public emergency" occurs numerous times and in various forms. For the sake of clarity "responding" in its broadest sense includes everything from declaring and planning a response, to securing any necessary cabinet or other approvals, to assigning responsibilities for necessary measures, and to implementing those measures and any necessary follow up. In a narrower sense, "responding" may refer to the actions required of cabinet, as well as agencies like AEMA and subject-matter entities like Alberta Health in the case of a public health emergency. The text will clearly indicate when using the narrower interpretation of response.

8 While the terms "legislative assembly" and "legislature" are often used to mean the same thing, technically they are different. The assembly consists of the members elected to it pursuant to the *Election Act*, as stated in s. 2 of the *Legislative Assembly Act*. The legislature is defined in s. 2 of the *Alberta Act* and includes the Crown, represented by the lieutenant governor and the assembly.

FIGURE 1.

ORGANIZATIONAL STRUCTURE IN PLACE TO COPE WITH THE 2020-2022 PUBLIC HEALTH EMERGENCY



*Temporary initiative was completed end of 2020
**Emergency Management Cabinet Committee
***Priorities Implementation Cabinet Committee

Strengthening Co-operation and Co-ordination Among Key Respondents

Improving the response capacity of the Province requires clarifying and strengthening the roles of the key respondents within government – the elected officials, the AEMA and the relevant subject-matter agency or department.

In the judgment of the Panel, the most important step toward improving the response capacity of the Province is to clarify and strengthen co-operation and co-ordination among the key respondents.

To this end, the Panel recommends amending the relevant statutes to:

2.1 Ensure that it is the elected officials accountable to Albertans and the assembly (the Premier, cabinet and key ministers) who have the ultimate authority and responsibility:

- To make decisions on the emergency response measures adopted, accounting for key values, priorities and trade-offs.
- To approve or disapprove of any and all emergency response measures proposed by officials.
- To create and sustain a "culture of cooperation" among responsible agencies and departments.
- To incorporate regular feedback from the public and all relevant sources of expertise to update evidence-informed decision-making, correct mistakes and improve the management of any given emergency.

2.2 Focus the authority and responsibility of the AEMA, by and upon direction from cabinet or the appropriate cabinet committee,[9] on:

- Developing emergency response plans, both prior to and during an emergency.
- Co-ordinating and managing the emergency response once a state of public emergency is declared by elected officials, including conducting a cost-benefit/harms-benefit review which should be made public.

2.3 Focus the authority and responsibility of the subject-matter agency or department, by and upon direction from cabinet or the appropriate cabinet committee, on:

- Proposing measures to respond to the emergency, based on its specialized knowledge and expertise.
- Enforcing/implementing emergency measures that are within its jurisdiction and approved by elected officials.

Specific amendments for clarifying, strengthening and co-ordinating the roles and responsibilities of the key respondents are presented hereafter.

Authoritarian vs. Democratic Governance in a Public Emergency

A growing international debate is focused on which system of government – democratic or authoritarian – responded most effectively to the COVID-19 crisis, with some commentators concluding that authoritarian governance systems were better equipped to do so.[10] The temptation, therefore, is for democratic societies to increasingly imitate the authoritarian model in their responses to emergencies, with the executive branch of government (not the legislative or judicial branches) dictating the response, issuing (with minimal public consultation) authoritarian orders and directives accompanied by harsh penalties for violations, and mobilizing the police to force compliance and suppress protests.

It is beyond the scope and capability of the Panel to thoroughly analyze what needs to be done to ensure that the governance model followed by Canada and Alberta is democratic, not authoritative. However, suffice it to say that, at a minimum, a democratic governance response should be characterized by:

- A more meaningful role for the elected assembly (briefly discussed hereafter).
- Transparency – full public disclosure of the "who," the "what" and the "why" of any and all orders and regulations promulgated to cope with the emergency.
- Regular feedback from the public and other sources of information and expertise on emergency measures, with the aim of rapid correction of mistakes on the ground (noting that such traditional feedback mechanisms often broke down during the management of the COVID-19 pandemic).
- Open and public inquiries, once the emergency has passed, that identify lessons to be learned and applied to the management of future emergencies.

9 During the COVID-19 crisis of 2020-2022 the relevant cabinet committees would have been the Priorities Implementation Cabinet Committee (PICC) and the Emergency Management Cabinet Committee (EMCC). At present (2023) the relevant committee is the Emergency Management Cabinet Committee.

10 As an example: Rachel Klinefeld, "Do Authoritarian or Democratic Countries Handle Pandemics Better?" Carnegie Endowment for International Peace, March 31, 2020, Commentary, https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404

With respect to ensuring a meaningful role for the assembly when the province is in a state of public emergency, questions may be asked as to why this is necessary, whether this is actually feasible given the urgency of the situation, and how best to involve the assembly if its involvement is considered a necessity.

A thorough public discussion of these questions is needed to ensure that the future response of Alberta to public emergencies is genuinely democratic rather than authoritarian. And while a thorough treatment of this subject is beyond the terms of reference and capability of the Panel, we offer the following points for consideration as part of any broader public discussion:

- The government needs to involve the assembly for the following reasons:
  - To be as united as possible in coping with a public emergency. This will ensure there are no serious cleavages between the cabinet, the caucuses and the assembly due to the latter entities not being consulted on the major response measures.
  - To receive public feedback on the response, thus enabling the government to adjust its response as needed. The elected members of the assembly are an important source of feedback from constituents and the public.
  - To secure the support of the assembly for any legislative changes required to cope with the emergency, and to secure any additional public funds (budgetary measures) needed.
- In each public emergency, there will be exceptional circumstances[11] that will affect the advisability, feasibility and extent of involvement by the assembly. Government should not allow these circumstances to preclude a role for the assembly, however modified, in responding to public emergencies.
- Involving the assembly can be made more feasible by advanced preparation for emergency sessions,[12] and by the adoption of legislation that requires the initial involvement of the assembly in only the most dire provincewide public emergencies as determined and declared by cabinet (see Recommendation 2.4).

Clarifying and Strengthening the Role of Elected Officials

In a democratic society, the leadership in a public emergency, in law and in practice, must come from elected officials accountable to the people – in this case from the Premier, cabinet, cabinet committees and members of the assembly:

- The cabinet may, at any time when it is satisfied that an emergency exists or may exist, make an order for a declaration of a state of emergency relating to all or any part of Alberta. The declaration must identify the nature of the emergency and the area of Alberta in which it exists. (*Emergency Management Act*, s. 18(1) and (2)).
- The cabinet may also make an order declaring a state of public health emergency relating to all or any part of Alberta (*Public Health Act*, s. 52.1(b)) if, on the advice of the chief medical officer of health (CMOH), the cabinet is satisfied that: (a) a public health emergency exists or may exist; and (b) prompt co-ordination is needed to protect the public health.

In either case, as such orders involve government actions and may involve major expenditures of public funds, and since strengthening democratic governance involves strengthening the role of the assembly in emergency situations, it is recommended that special efforts be made to secure maximum support from the assembly at the very outset of the emergency. The earlier the members of the assembly are involved, the more likely they are to understand, help shape and support subsequent measures. To that end, it is more specifically recommended:

2.4 That both Alberta's *Emergency Management Act* and the *Public Health Act* be amended to require that a motion to confirm an order in council declaring a provincewide state of public emergency be immediately submitted to the assembly for debate and a vote within X days after the tabling of the motion.[13]

Note that this measure applies only in the case of a provincewide public emergency and would rarely be employed (perhaps on only a few occasions per decade). The capability of the government to respond rapidly to so-called "local emergencies" would not be subject to this provision.[14]

11 For example, in May 2023, the wildfire emergency required immediate action by the cabinet and several government agencies and departments. It occurred during the writ period for the Alberta provincial election when assembling the legislature would have been impossible and inadvisable even if possible.

12 Such preparations might include provisions for "virtual sessions" of elected assemblies on special occasions when they are not in formal session, but urgency demands their consultation.

13 Such an amendment would be like s. 7(1) of the federal *Emergencies Act*: "A declaration of a public welfare emergency is effective on the day on which it is issued, but a motion for confirmation of the declaration shall be laid before each House of Parliament and be considered in accordance with ….". The Province may wish to consider special measures, such as provisions for virtual sittings if the legislature is not sitting.

14 The state of emergency for wildfires in the spring of 2023 was treated as a provincewide emergency.

It has also been drawn to the Panel's attention that certain emergencies, like wildfires and floods, may be "regional" rather than local or provincewide, and may require a co-ordinated response across several municipalities. Again, it is the Province that is responsible for the organization of this response, and the assembly need not be consulted as it would be in the case of a provincewide emergency.

As already mentioned, the Premier, cabinet and ministers responsible for the agencies and departments involved constitute the highest level of leadership in a public emergency. It is imperative that they have the freedom, flexibility and capacity to provide that leadership.

Normal cabinet committees may need to be streamlined or supplemented in an emergency. Advisory and administrative resources may also need to be temporarily increased.

To provide the Premier and Executive Council with objective, specialized knowledge and expertise, the Panel further recommends:

2.5 That a small strategic advisory secretariat, reporting directly to the Premier, be established for the purposes of:

- Advising the Premier on the strategic aspects of emergency management issues and operations.
- Keeping a watching brief on emerging and future emergencies of all types, provincially, nationally and internationally.
- Challenging conventional wisdom and providing strategic advice on other issues, as requested by the Premier.

This secretariat would be modelled after similar units in other cabinet offices in Canada and abroad, created in response to national and international emergencies.

Most importantly, if the people of Alberta are to be able to hold their provincial government responsible for the overall conduct of the response to a provincewide public emergency, it is recommended:

- That the Premier and cabinet (or a committee thereof) provide direction to the AEMA and the subject matter department/agency as to their respective responsibilities in responding to a public emergency.
- That any orders or regulations promulgated by officials of the AEMA or the subject matter department/agency be subject to approval by elected officials, in particular the Premier and cabinet, prior to implementation.
- That any cabinet directives to the AEMA and the subject matter department/agency, and any emergency orders or regulations approved by cabinet, be clearly and transparently communicated to the public to facilitate understanding and support for emergency response measures.
- That the enabling statutes of the AEMA and the subject matter department/agency be amended to ensure implementation of the above recommendations. (More on this in the following sections.)

It should be emphasized again that the structure shown in Figure 2 (page 16) is proposed only for the situation when a provincewide state of public emergency has been declared by order in council. Under non-emergency conditions the structure would revert to that shown in Figure 3 (page 17).

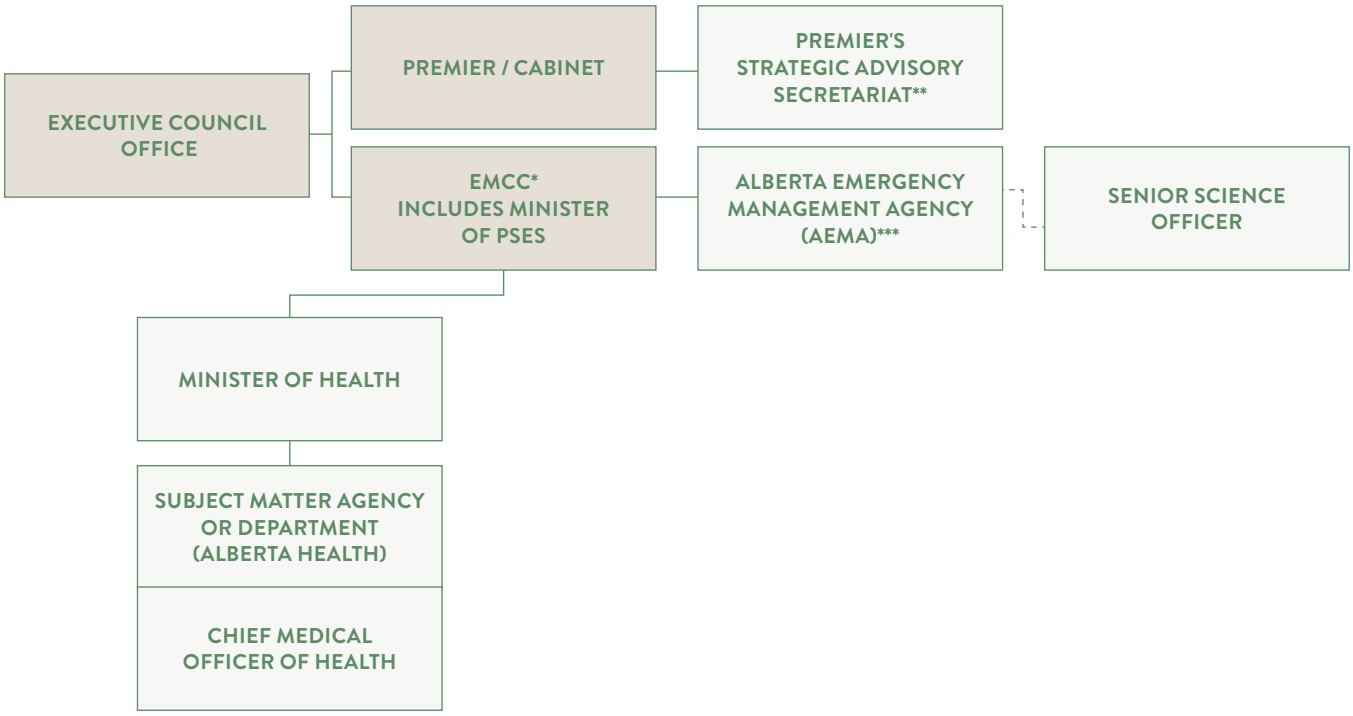
The Panel therefore recommends:

2.6 That in the event of a provincewide public emergency, cabinet direct and authorize the AEMA to co-ordinate the overall response to the emergency; and it direct and authorize the subject matter department/agency (Alberta Health in the case of a public health emergency) to contribute its specialized knowledge and expertise to the development and implementation of response measures within its particular area of jurisdiction.

2.7 That the *Emergency Management Act* be amended to require that any orders or regulations promulgated by the AEMA be subject, prior to implementation, to approval by elected officials, in particular the Premier and cabinet.

FIGURE 2.

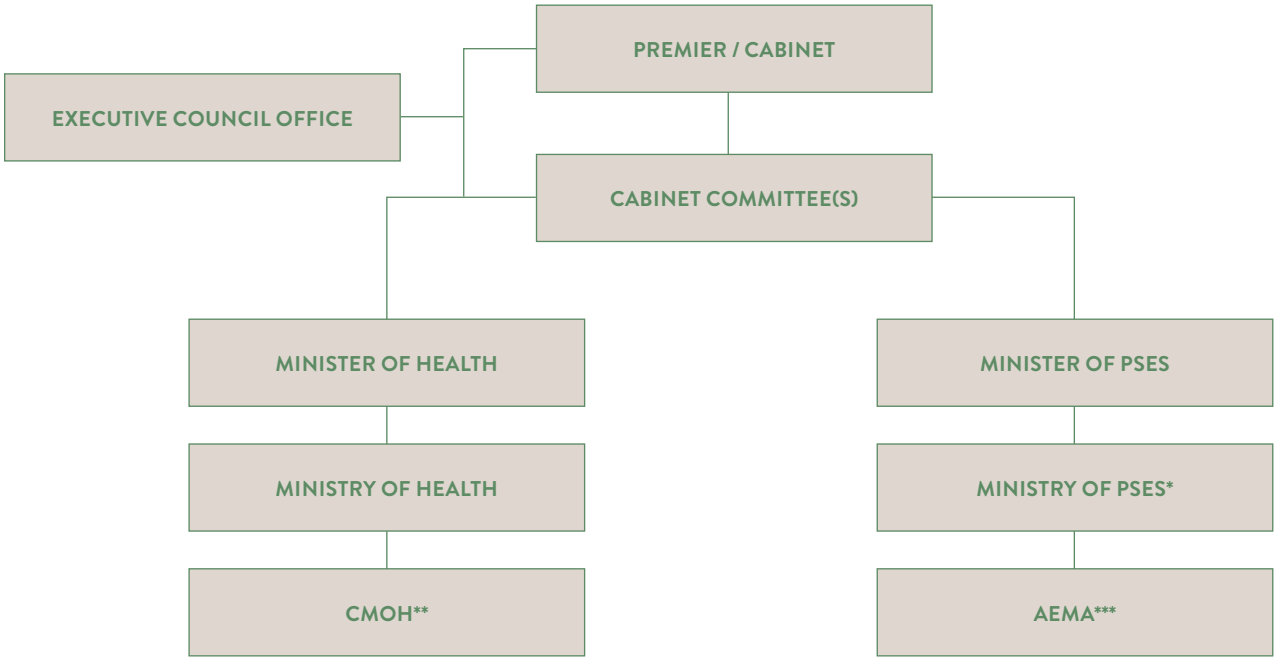
PROPOSED ORGANIZATIONAL STRUCTURE TO COPE WITH FUTURE PUBLIC HEALTH EMERGENCIES



*Emergency Management Cabinet Committee – Chaired by Premier, includes minister of Public Safety and Emergency Services (PSES) and other supporting ministries
**Receives direction from and advises the Premier
***Part of the ministry of Public Safety and Emergency Services (PSES)

FIGURE 3.

ORGANIZATIONAL STRUCTURE UNDER NON-EMERGENCY CONDITIONS



*Public Safety and Emergency Services
**Chief Medical Officer of Health
***Alberta Emergency Management Agency

2.8 That the *Emergency Management Act*, s. 3.1 of which establishes the AEMA, be further amended to clarify and strengthen the capacity of the agency, subject to cabinet direction, to co-ordinate and manage the response to public emergencies.

2.9 That a preamble,[15] along the following lines, be provided to the bill amending the *Emergency Management Act*, identifying the objectives and reasons for the amendments and the act itself:[16]

> WHEREAS serious or unforeseeable public emergencies may exceptionally require the rapid adoption of temporary measures in furtherance of the government's obligation to protect the safety, health and property of Albertans, and,
>
> WHEREAS the government must be vested with sufficient powers to develop plans for coping with public emergencies, to respond rapidly and effectively to such emergencies, and to organize the recovery from such emergencies, and,
>
> WHEREAS these powers should be vested in an emergency management agency capable of exercising them quickly and effectively under public emergency conditions with due regard to the costs and benefits of alternative courses of action, and,
>
> WHEREAS even in a declared state of emergency, the government and the management agency have the paramount obligation to protect the rights and freedoms to which Albertans are entitled under the common law, the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, and the *Canadian Charter of Rights and Freedoms* (*Constitution Act*, 1982), and,
>
> WHEREAS any emergency measures adopted must be appropriately tailored so as not to impair, beyond reasonable and justifiable limits, the civil rights of Albertans; the personal, family, community, and social relations of Albertans; and the performance of the Alberta economy,
>
> THEREFORE, HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

The *Emergency Management Act* grants the responsible minister the authority "to put into operation an emergency plan or program" (s. 19 (1)) once a state of public emergency is declared. But it is unclear as to the content of that plan or the role of the AEMA in its development and implementation. Therefore, it is recommended that the act be amended to specify:

2.10 That the AEMA be directed to develop and maintain a general plan for responding to and recovering from public emergencies, regardless of their nature, and that the plan must include measures:

- To clearly communicate the plan's existence and its content to Albertans.
- To address the need for co-ordination with other provinces in the event of a regional emergency, and with the federal government and federal emergency agencies in the event of a national or international emergency.

It should also be noted again that all the above recommendations pertain to provincewide emergencies. Localized public emergencies, and specialized emergencies, such as a health emergency in a particular community or facility, can be satisfactorily addressed by the provisions of existing legislation. The Panel makes no recommendations for amending those portions of the relevant legislation.

Additional Measures for Strengthening the Capacity of the AEMA to Respond to Public Emergencies

The Panel has been tasked to recommend amendments to legislation to strengthen the capacity of the Province to respond to emergencies. Thus, much of the above has been focused on strengthening the role of the AEMA through amendments to the *Emergency Management Act*. But the Panel has also considered measures for strengthening the role of the AEMA that are more of a policy and administrative nature, and these also deserve attention.

These measures are summarized in Appendix 5 entitled Additional Measures for Strengthening the Capacity of the AEMA to Respond to Public Emergencies. They include recommended measures for strengthening the planning process, employing a "systems approach," securing expert advice, providing ministerial and staff training in emergency management, and positioning the AEMA during non-emergency periods.

15 Note that in Alberta, according to s. 12(1) of the *Interpretation Act*, "The preamble of an enactment is a part of the enactment intended to assist in explaining the enactment."

16 While this draft preamble is proposed for the bill amending the *Emergency Management Act*, the assembly may wish to consider adding a similarly worded preamble to the act itself.

Clarifying and Strengthening the Role of Alberta Health in Responding to a Public Health Emergency

In Canada – at the federal level and in every provincial and territorial jurisdiction – and in most countries around the world, the primary responsibility for managing the response to COVID-19 was assigned to the health department of the responsible government. This decision was understandable in that, even in those jurisdictions having emergency management agencies, in many cases those agencies had neither the capacity nor the knowledge to deal with a public health emergency of the nature and scale of the COVID-19 crisis.

In retrospect, however – and it is always admittedly easy to be wise and insightful in retrospect – the Panel is convinced that the Province of Alberta would be better prepared to respond to future public health emergencies if greater clarity could be established regarding:

- The respective roles of the AEMA and Alberta Health, so that each clearly recognizes and builds upon the specialized knowledge and expertise of the other.
- The relationship and responsibilities of each in terms of receiving high level direction from elected officials (cabinet and cabinet committees), as well as cabinet approval of the orders and regulations proposed by each.

The doctors and administrators that lead provincial health departments have exceptional training and experience in treating the sick and managing healthcare programs and facilities, but in managing widespread public emergencies, the majority do not have such training or experience. Similarly, the specialists and administrators that lead provincial emergency management agencies are neither trained nor experienced in proposing or implementing health protection measures in a pandemic, their exceptional training and experience being in managing public emergencies regardless of their cause or nature.

Hence, as suggested earlier, a better division of labour and responsibility between the AEMA and Alberta Health, would be for the Premier and cabinet:

- To assign the overall co-ordination and management of the response to a provincewide public health emergency to the AEMA, including addressing and mitigating the social, economic and legal impacts beyond the health sector.
- To assign to Alberta Health the development of the specific health protection measures required – and implementation of those measures approved by cabinet and subject to co-ordination by the AEMA.

Under such a division, responsibility for measures to reduce health harms would be primarily the responsibility of Alberta Health, but overall responsibility for considering, devising and implementing these and other measures for total harm reduction[17] would be that of the AEMA.

If the emergency management agency in a particular jurisdiction lacks the capacity and resources to manage a response, it would be better to rapidly expand them rather than to delegate responsibility by default to a subject-matter agency lacking the broader expertise and experience required to manage the broader aspects of a provincewide public emergency.

The proposed division of responsibility between the AEMA and Alberta Health strengthens the role of the latter by enabling it to concentrate all its experience, expertise and resources exclusively on the health dimensions of the crisis, leaving the co-ordination and management of the broader aspects to the AEMA.

The Panel is also aware and appreciative of the fact that many of the medical professionals and healthcare workers of Alberta were subjected to exhausting, prolonged workloads and schedules, with all the attendant strains on personal health and family relations, during the COVID-19 crisis of 2020-2022.

To ensure that this situation is not repeated, in coping with future public health emergencies, the Panel recommends that the plan to be submitted to the assembly proposed in Recommendation 2.4, along with the order in council declaring the state of public emergency, contain an explicit provision to immediately increase the capacity of Alberta Health and Alberta Health Services in order to meet the expected surge in demand for their services.

17 The concept of total harm reduction recognizes that even in a public health emergency there will be other harms, such as those to the economy, social interactions, and impacts on rights and freedoms. The aim of total harm reduction is to reduce all potential harms, not only those impacting health.

An Essential Amendment

In the Court of Queen's Bench of Alberta decision,[18] CM v Alberta (2022 ABQB 716 October 26, 2022) Justice G. S Dunlop found that the chief medical officer of health (CMOH), in seeking the advice or approval of elected officials (cabinet) for an order under s. 29 of the *Public Health Act*, acted improperly and in violation of the act, thus making the order illegal.

To quote Justice Dunlop:

> The *Public Health Act* specifically permits the Chief Medical Officer of Health to delegate her powers in writing to either the Deputy Chief Medical Officer (s. 13) or an employee of the Department of Health (s. 57). An interpretation of the *Act* as permitting the Chief Medical Officer of Health to delegate her authority to a committee of Cabinet, is not reasonable. There is simply no way to interpret the *Act* as permitting delegation to anyone other than the specifically identified possible delegates. The *Public Health Act* did not authorize Dr. Hinshaw to delegate her powers to PICC (the Priorities Implementation Cabinet Committee).
>
> Applying a broad and purposive interpretation to both the *Public Health Act* and the Order and starting with the presumption that the Order is valid, the Order was unreasonable because it was the implementation of PICC's judgment and decision, and not that of the Chief Medical Officer of Health. The Order was unreasonable because it was based on an unreasonable interpretation of the *Public Health Act* as giving ultimate decision-making authority over public health orders during a public health emergency to elected officials, specifically PICC.

Likewise, in the Court of Queen's Bench decision, Ingram v Alberta (2023 ABKB 453 July 31, 2023), Justice B. E. Romaine found that the CMOH had improperly delegated her decision-making power to cabinet in contravention of s. 29 of the *Public Health Act* thereby making the orders under review ultra vires i.e., outside the jurisdiction of the act.

To quote Justice Romaine, at par. 520 of her decision: "In summary, I find that the impugned Orders are ultra vires section 29 of the *Public Health Act* in that the final decision makers were the cabinet and committees of cabinet, rather than the CMOH or one of her statutorily authorized delegates."

To address the contradiction between the current provision of s. 29 of the *Public Health Act* and the earlier recommendations of the Panel that the orders and regulations of both the AEMA and Alberta Health be subject to approval by the elected representatives of the people of Alberta, it is further recommended:

2.11 That the *Public Health Act* be amended to require that any orders or regulations promulgated by the CMOH during a public health emergency be subject to prior approval by elected officials, in particular, the Premier and cabinet, after receiving the advice of the CMOH.

For example, the act might be amended to include a provision such as that found in Manitoba's *Public Health Act* that reads, under the heading Minister's approval required, "The chief public health officer must not issue a direction or order under clauses (2)(a) to (d.1) without first obtaining the minister's approval. (s. 67(3))" – where the referenced clauses are those authorizing special measures to cope with a public health emergency."

18 Note that this decision has been appealed.

An Important Condition

With respect to clarifying and altering the roles of the AEMA, Alberta Health and Alberta Health Services, the Panel wishes to make the following clear:

- That the Panel's recommendations pertain only to their respective roles in the event of a declared public health emergency.
- That there is no intent to alter their roles or their relationship to one another, or to cabinet, when no declared state of emergency exists.
- That the sole intent of the Panel's recommendations is to make the AEMA the principal co-ordinator and organizer of the government's overall response to the emergency (which has legal, social and economic impacts beyond health) and to focus the role of Alberta Health and Alberta Health Services solely and most importantly on responding to the health impacts.

Leading Co-operation and Co-ordination

If, as asserted earlier, we need a more co-ordinated and supportive relationship between the AEMA, Alberta Health and elected officials, then this can be facilitated by legislative amendments that provide authorities, administrative structures and processes.

However, those elements in themselves are not sufficient. Leadership from the top is essential. Elected officials (the Premier, cabinet and individual ministers) must accept the responsibility for creating a "culture of co-operation."

Defining what elected officials can do here is beyond the terms of reference and capacity of this Panel. No doubt that to-do list should include such things as "leading by example" – ministers resisting the temptation to operate solely within their departmental silos or to engage in turf wars with other ministers. No doubt it also should include enforcing "an obligation to consult" across departmental and administrative lines, especially during times of emergencies, and dedicating efforts to recognize and reconcile conflicting interests sooner rather than later.

Efforts to better co-ordinate and co-operate are essential if the legislative amendments proposed in this report are to achieve the desired objective.

The Ultimate Objectives

Albertans continually strive to be the best in the world at whatever they do. In keeping with that ambition, the ultimate and combined objective of all the recommendations of this chapter is to ensure that Alberta has the best and most advanced public emergency response capability in Canada.

As this objective is achieved, the knowledge and expertise of the AEMA will of course be at the service of Albertans. During non-emergency periods, however, it will become an exportable service/product to other jurisdictions in Canada and internationally. Thus, the agency will always be engaged somewhere in emergency management, constantly learning and improving its readiness and capabilities. It will also be earning revenues to offset the cost of providing emergency services to Albertans.

Likewise, Alberta should strive to have the best and most advanced healthcare system in the country, not only to meet the surge in demand for healthcare during public health emergencies, but also to meet the unmet needs of those on healthcare waiting lists. More on incremental steps to achieve this objective in Chapter 9.

Conclusion

To achieve an optimal relationship between the three main entities responsible for dealing with a provincewide public emergency in Alberta, the Panel recommends:

- Assigning ultimate responsibility for responding to any provincewide public emergency to the elected officials accountable to the people of Alberta.
- Assigning specific responsibility for the co-ordination and management of the response to public emergencies, regardless of their nature, to the AEMA.
- In the event of a public health emergency, assigning Alberta Health specific responsibility for devising and implementing, within its jurisdiction, approved health protection measures to reduce health harms.

CHAPTER 3
BRINGING SCIENCE TO BEAR ON PUBLIC POLICY

This chapter briefly identifies factors to be considered and conditions to be satisfied in order to effectively bring science to bear on public policy. It then extends these considerations to the expertise of medical science and its bearing on policies and actions for responding to public health emergencies. To facilitate such application, the Panel recommends the appointment of a Senior Science Officer to the AEMA with the responsibility of establishing and maintaining an Inventory of Scientific Advice and Advisors that can be drawn upon in a public emergency.

CHAPTER 3
BRINGING SCIENCE TO BEAR ON PUBLIC POLICY

Science obviously has an important role to play in ascertaining the causes of health emergencies and in helping to fashion appropriate responses. A key question is how to bring science most effectively to bear on the situation while ensuring that science is not used to justify positions and actions rooted in something else – like political expediency or ideology.

The Panel's Approach

In establishing this Panel, the Premier specifically asked, "In what ways should Alberta's legislation be amended to improve the quality, breadth and application of the medical expertise and advice available to assist the government in responding to future public health emergencies?"

To address this question, the Panel found it helpful to first briefly address the broader question of how best to bring science to bear on any public policy. In particular, the Panel sought advice from knowledgeable sources in the science community as to what factors would need to be considered and what conditions would need to be satisfied before it could be truthfully claimed that a public policy is "science informed." The Panel then sought to apply its understanding of the factors and conditions to the specific question of amendments to legislation that bring medical science more effectively to bear in a public health emergency.

In seeking outside advice on the question, the Panel's attention was drawn to two instances of science being brought to bear in two non-medical policy areas of vital importance to Alberta, namely agriculture and energy policy:

- The BSE crisis of 2003[19] involved the Canadian Food Inspection Agency, which played the role of the emergency management agency. It contracted the implementation of science-based response measures to provincial entities such as the AEMA and Alberta's Agriculture department.
- In 1974, the Province created a "science and technology authority" outside the government's normal research and departmental structures – the Alberta Oil Sands Technology Research Authority (AOSTRA)[20] – to bring advanced science and technology to bear on the in-situ development of oil sands.

In-depth investigation of these two instances is beyond the terms of reference of the Panel. Such investigations would likely produce insights relevant to bringing science to bear on other areas of public policy, including health and emergency management.

The Application of Science to Public Policy: Definitions and Limitations

a) Terminology: Science-based and Evidence-informed Decision-making

Use of the term "evidence-informed decision-making" is preferable because the evidence used to develop a public policy invariably includes more than scientific factors. Developers and implementers of public policy may claim to be "following the science" and that the resultant policy is "science-based," but these claims are usually only partially accurate.[21]

19 The foot and mouth disease or bovine spongiform encephalopathy (BSE) outbreak among cattle in 2003 may be thought of as the animal equivalent of the COVID-19 pandemic among humans in 2020-22.

20 The story of AOSTRA and its relevance to the application of science to public policy is told in part in *Once a Great Notion: The Oil Sands, Climate Change, and the Future of Canadian Energy* by John J. Barr, energy industry historian and public policy consultant.

21 Christopher Bruce (Professor Emeritus, Economics; University of Calgary), "Why it is impossible for public policy to rely entirely on science," The Conversation, June 13, 2023. https://theconversation.com/why-its-impossible-for-public-policy-to-rely-entirely-on-science-206587

Scientific Method

In applying the scientific method, a researcher develops a hypothesis, tests it, and then modifies it based on the outcome of the tests and experiments. The modified hypothesis is then retested, further modified, and tested again, until it becomes consistent with observed phenomena and testing outcomes. If the hypothesis is ultimately not supported by experiment, it is modified or rejected.

Evidence-informed Decision-making

Evidence-informed decision-making, broadly defined and applied to public policy development, entails identifying, appraising and mobilizing the best available evidence and reasons for arriving at sound decisions – where evidence includes the results of scientific investigations and logical reasoning, as well as historical insights, cultural realities, future anticipations, and the acknowledgment of alternatives and uncertainties.

b) Role of Elected Officials

In a democratic society, public policy and decision-making ought to begin with consideration of the societal values – ideals, aspirations and priorities – to be acknowledged, sustained and advanced. Defining and applying these societal values to a public issue is primarily the responsibility of elected officials, not that of the scientific community.

Elected officials are responsible for public policy, generally defined as the product of government decisions involving objectives, means and resources associated with a given environment or social context. Public policy pertains to the use of public power (elected government) through a variety of means and instruments to achieve specific objectives for society.

c) Role of Science

Once policy objectives and decisions based on societal values have been made, science can make vital contributions such as:

- Establishing certain relevant facts by investigating and verifying through experimentation and testing of alternative hypotheses.[22]
- Proposing and evaluating alternative ways and means of achieving the value-based objectives of the policy proposed.
- Identifying factors that threaten or contribute to the advancement of the societal values espoused and policies based upon them.
- Helping decision-makers and policy-makers understand the effects of the decisions and policy choices they make.
- Distinguishing between factual claims that are appropriately informed by scientific evidence and those that are inappropriately informed.
  - A decision or policy that is appropriately informed by scientific evidence is derived from the application of one or more elements of the scientific method.
  - A decision or policy that is inappropriately informed is one that is informed by factual claims that have not been substantiated, that is tainted by systemic bias or selective sampling, or that is inadequately evaluated and inappropriately weighted.
- Making clear that science is open to the consideration and investigation of alternative hypotheses, is constantly changing as hypotheses are verified, disproven or modified, and is subject to some degree of uncertainty as an ever-present characteristic of scientific deliberations.

d) Contextual Dimensions

Public policy decision-making occurs in at least three contextual dimensions, which the Panel considered in developing the recommendations that follow:

- **The type of decision involved** – statutory, regulatory, policy-related or implementation-related.
- **The time frame in which a decision is required** – ranging from very hot (immediate) to very cold (long-term).
- **The type of science and knowledge involved** – including the traditional Western conception of science and the scientific method, but also other sources of non-scientific knowledge and experience.

22 For insightful commentary on the need to distinguish between facts, hypotheses, theories, laws (like the law of gravity) and beliefs, see https://chem.libretexts.org/Bookshelves/Introductory_Chemistry/Introductory_Chemistry/01%3A_The_Chemical_World/1.06%3A_Hypothesis_Theories_and_Laws also https://www.youtube.com/watch?v=GyN2RhbhiEU

Applying Medical Science in Public Health Emergencies

Defining Values and Societal Objectives

If it is agreed that public policy development begins with identification of values and societal objectives and builds a consensus on them, and that this activity is first and foremost the responsibility of the elected officials, then it is recommended:

3.1 That in a public emergency, elected officials clearly communicate the societal values and objectives[23] that inform their decisions. For example, protection of the vulnerable, priority to the most needy (the triaging principle), minimization of collateral harms, preservation of rights and freedoms, and others.

One respondent on this subject has suggested the key to securing a "balanced response" to a public emergency is in prioritizing objectives; then immediately securing and evaluating feedback on the impacts of the initial policy response; and changing priorities and policy responses as suggested by the feedback.

For example, suppose the number one priority when a pandemic breaks out is protection of the most vulnerable. This becomes the initial focus of the response. However, systematically secured feedback begins to show that impacts on personal and social relationships, or on the economy, or on rights and freedoms are becoming a growing concern. So then, priorities may change to address one or more of these impacts, again by measuring and securing feedback on the results; and so on, until a "balanced response" is achieved – not by trying to define and secure a balanced response at the outset of the emergency, but by a process of prioritizing, securing feedback on the results, and adjusting priorities and future responses accordingly.

3.2 That consideration should be given to the inclusion of preambles[24] and/or purpose[25] clauses of enabling statutes, such as the *Public Health Act* and others, declaring the intent of the statute and the principles on which it is based.[26]

Provision of the content and wording of such preambles and purpose clauses is not the responsibility or expertise of the civil servants drafting the legal and operational dimensions of a bill destined to become law. Rather, the provision of such content and wording is primarily the responsibility of elected officials accountable to the electorate. This includes all members of the legislature, not just the cabinet. The content may periodically change as the composition and perspective of the legislature changes.

The preambles and purpose clauses in draft bills, such as those authorizing the policy response to public health emergencies, give added substance and relevance to the debate on second reading of such bills – the legislative stage, which is supposed to be debate on "the principles" of the legislation.

Securing and Applying Scientific Advice

With respect to securing scientific advice, it is further recommended:

3.3 That a clear and conscious decision be made by elected officials as to the scope of the scientific advice to be sought and that this decision not be left entirely to the subject-matter agency or department, given that it may have a narrower perspective than that actually required.

For example, in managing the COVID-19 crisis, most jurisdictions considered a relatively narrow scope of science: virology, epidemiology, immunology and genetics. More broadly defined, the scope could have been expanded to include psychiatry, gerontology and pediatrics. Or, as has been suggested in retrospect, it is multiple disciplines that ideally should be brought to bear – not just the life and medical sciences but also psychology, economics, sociology, philosophy and ethics, all required to understand and predict the social, economic and institutional impacts of pandemic measures.

23 A systems approach to defining these objectives means that officials must not be dogmatic or reductionist, but rather consider all of the moving parts of Alberta's complex society.

24 For example, Alberta's *Health Facilities Act* begins with a preamble composed of eight "Whereases" defining the healthcare commitments espoused by the Government of Alberta.

25 For example, s. 2 of Alberta's *Environmental Protection and Enhancement Act* reads: The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following…with 10 stated factors then defined.

26 A legitimate difference of opinion exists between legal experts who feel that preambles containing references to principles and values – especially if they are generally and loosely worded – can lead to misinterpretations of the statute by the courts or undercut other provisions of the statute, whereas preambles carefully worded can be very useful to legislators in securing caucus or public support for a law, and in shaping second reading of a bill in the assembly which is supposed to be a focused debate on "principle." In making recommendations concerning the inclusion or amendment of preambles the Panel has sought to find the balance between these two perspectives, both of which are legitimate.

3.4 That whatever scientific advisory committees, advisors and contractors are assembled to support the response should be broadly based, multidisciplinary in nature, and appropriately balanced from both inside and outside government.

3.5 That evidence-informed decision-making consider non-scientific evidence as well.

As Professor Christopher Bruce has pointed out: "...the costs and benefits of any public policy are composed of both objective (scientific) and subjective (psychological) elements. Although both need to be considered when developing sound policy, science is only able to measure the objective elements, leaving the remaining, subjective elements to be determined in some other manner."[27]

Methodology and the Tolerance of Alternative Narratives and Uncertainty

Relying on a single scientific narrative to guide the response to a public health emergency is, ironically, un-scientific, since science progresses by considering a variety of hypotheses for explaining a particular phenomenon and only discards competing hypotheses when they have been disproven by rigorous experimentation and testing.

To support policy appropriately informed by science, it is therefore recommended:

3.6. That elected officials, the AEMA and the subject-matter ministry should be open to considering and investigating alternative scientific narratives and hypotheses, even at the risk of acknowledging some uncertainty as to which scientific narratives are most relevant to the emergency at hand.

A public emergency in the form of a pandemic like COVID-19 may understandably be conceptualized initially as a health emergency, with the health sciences being the most obvious source of scientific knowledge and expertise to be consulted in fashioning a response. But if that initial health emergency, in part because of the response measures adopted, soon becomes a broader public emergency with major social, economic and legal impacts, then multiple sources of scientific knowledge and expertise will need to be consulted in fashioning the appropriate response going forward.

If the initial emergency is narrowly defined, the natural tendency will be to bring a narrow range of knowledge and expertise to bear on dealing with it. But a major provincewide public emergency by definition has multiple dimensions. Thus, as a general rule in fashioning public policies to cope with major public emergencies, multiple sources of scientific knowledge and expertise are to be sought out and given opportunity for expression, consideration and application.

To facilitate adherence to this rule the Panel therefore recommends:

3.7 That both the AEMA and the subject-matter agencies or departments involved in responding to a declared public emergency be mandated to seek out and use multiple sources of scientific knowledge and expertise in fashioning their responses to the emergency at hand.

If openness to alternative narratives and multiple scientific sources cannot be achieved by informal agreement among the responsible parties, then it may need to be achieved by strengthening and more rigorously enforcing constitutional guarantees of freedom of belief and freedom of speech, as discussed and recommended in Chapter 7.

3.8 That a frank acknowledgment of uncertainties should accompany communication of the values and priorities on which the emergency response is based, as well as communication of the science informing the policies. These uncertainties open the door to understandable changes in priorities and responses as more becomes known about the emergency.

In other words, it should be acceptable, even preferable, for those responsible for announcing and communicating evidence-informed decisions and policies at the outbreak of a public health emergency to say: "These decisions and policies are based on the best of our understanding at this time, but changes may be required as our understanding of the science and other factors improves" – rather than insisting prematurely on a single scientific narrative that may prove inaccurate or even wrong with the passage of time.

21 See Footnote 21.

Current Sources of Scientific Knowledge and Expertise

The many sources of scientific knowledge and expertise available to the province include the science faculties of the universities in Alberta and the rest of Canada, as well as the services of science-based institutes and consulting firms in the private sector. Within government itself, sources include:

- **The Alberta Research and Innovation Advisory Committee**. Reporting through the minister of Jobs, Economy and Trade, the primary focus of this committee is economic. Among other things, it also deals with emergencies and public safety.
- **Alberta Innovates**, an Alberta government corporation accountable to the minister of Technology and Innovation and responsible for promoting innovation in the province. Its thrust is economic. Under its one umbrella, the provincial government has realigned 10 provincially-funded research organizations, including the Alberta Research Council.
- **The Alberta Oil Sands Technology and Research Authority**, an Alberta Crown corporation created by Premier Peter Lougheed to promote development of new technology for oil sands development, heavy crude oil production and enhanced recovery of conventional crude oil. It was dissolved in 2000, but it serves as a model of using external research authorities with diverse scientific expertise for pursuit of a public policy objective.
- **The COVID-19 Scientific Advisory Group**, organized by Alberta Health Services (AHS). Its terms of reference state it "will use evidence and consider resource availability to provide recommendations to support policy and operational decision-making to the AHS Emergency Coordination Center for the COVID-19 incident response."
- Also, during the COVID-19 crisis, policy decisions were made by two cabinet committees – **the Emergency Management Cabinet Committee** and **the Priorities Implementation Cabinet Committee** – based on the health minister's recommendations, which were informed by expert advice provided by the chief medical officer of health (CMOH) as well as other subject-matter experts.[28]
- **Scientific advice sought by the CMOH** from various experts in addition to that provided by the COVID-19 Scientific Advisory Group.

Strengthening the Sources of Scientific Advice and Expertise

Two options have been considered by the Panel:

1. Creation of an Inventory of Scientific Advice and Advisors that can be drawn upon through the recommendation of a Senior Science Officer attached to the AEMA.
2. More substantial institutionalization of the acquisition and application of scientific knowledge and expertise to the operations of the Alberta government by the appointment and use of permanent science advisors to various departments and agencies under the direction of a chief scientist for Alberta attached to the cabinet.

Option 1 can be achieved by amendments to the *Emergency Management Act* and is favoured by the Panel as a first step toward using science more effectively in relation to public emergencies. Its advantages are its informality, flexibility, relatively low cost and diversity, in that it draws heavily on scientific expertise from outside government.

Option 2 might best be achieved by passing a stand-alone Alberta science advisory act. It would provide for the appointment of a number of senior departmental science advisors, a chief scientist attached to the cabinet, and a chief science advisor attached to the legislature – all of whom would meet as required as an Alberta science advisory council.[29] Its chief advantages would be its weight and permanence; its chief disadvantages would be the tendency of such structures to become increasingly internally focused and to overexpand.[30]

While each option has strengths and weaknesses, the Panel recommends that the Alberta government proceed with Option 1 through amendments to the *Emergency Management Act*, recommending in particular:

3.9 That the *Emergency Management Act* be amended to require the minister to appoint a Senior Science Officer to the AEMA.

28 See, for example, the Alberta Influenza Pandemic Response Document at https://open.alberta.ca/publications/alberta-s-pandemic-influenza-plan

29 This model is very similar to that currently in place in the United Kingdom where, with the onset of COVID-19, the original provisions for a chief scientist with departmental scientific advisors expanded – some would say over-expanded – into the Scientific Advisory Group for Emergencies that provides scientific and technical advice to support government decision-makers during any emergency.

30 These amendments to the Alberta *Emergency Management Act* are quite similar to sections 15.1 and 15.2 of the *Environmental Protection and Enhancement Act*. They provide for the appointment of a chief scientist to the Environment Department and the establishment of a related science advisory panel.

3.10 That the *Emergency Management Act* be amended to charge the Senior Science Officer with establishing and maintaining an Inventory of Scientific Advice and Advisors that can be drawn upon in the event of a public emergency, according to the recommendation of the Senior Science Officer.

This inventory would include the names and co-ordinates of medical scientists such as those who served on the COVID-19 Scientific Advisory Panel assembled by Alberta Health to advise on how to respond to COVID-19. But it would also include the names and co-ordinates of scientists from a much broader range of disciplines essential to bringing science to bear on the economic, social, psychological, legal, and other impacts of a health emergency, as well as on future non-health emergencies.

Identifying and Addressing Special Challenges

Addressing the various challenges raised by a more vigorous effort to bring science to bear on public policy is beyond the scope of the Panel's terms of reference and our capability to address them. Significant challenges arise, however, with using science to support decision-making and public policy, especially during a public emergency. They should receive priority attention, whichever option is pursued.

The Challenge of Urgency

As noted, one of the dimensions of an emergency is the time frame of a decision – ranging from very hot (immediate) to very cold (long-term). In a public emergency, the time frame is HOT, leaving neither time nor patience for time-consuming considerations or procedures.

All very well to say: "The scientific method needs to be applied to the decision and policy-making process, and impact assessments should be done on proposed health protection measures before they are implemented."

"But," replies the harried Premier, cabinet minister or the chief medical officer of health, "we simply don't have the time or energy to do that in the midst of a public emergency that threatens human lives."

However, is this necessarily the case, or does it need to be the case? As one observer asks: "Is it perhaps more the case that decision-makers in emergencies, under the pressure of urgency, feel that they don't have the time and resources to practice evidence-informed decision-making?" Cannot steps be taken to alleviate this perception and the pressures that it generates, such as:

- Optimizing evidence gathering, solicitation, analysis and synthesis in advance of the crisis – being better prepared – so that initial preliminary impact assessments, for example, can be produced in three days, not three weeks, and preliminary testing of hypotheses can be completed in six weeks, not six months?
- Anticipating the stress levels that a constant state of urgency generates, and having contingency plans and substantial relief resources to alleviate them?

Acknowledging Uncertainty While Still Achieving Compliance

Another challenge, briefly touched upon in relation to Recommendation 3.8 but deserving of more consideration than the Panel has been able to give it, is the conflict between the honest acknowledgment of the uncertainty that scientific inquiry demands, and the requirement for public compliance with protection measures.

Those managing the response to a public health emergency, such as that created by COVID-19, may acknowledge in private that there is uncertainty as to the efficacy of measures proposed. But if they were to acknowledge that uncertainty publicly, how could public compliance with the proposed health protection measures be achieved? Is it not true that "If the trumpet gives an uncertain sound, who will prepare themselves for battle?" – especially the battle against a virus?

Application of the scientific method and evidence-informed decision-making to public policy involves entertaining alternatives, even conflicting hypotheses, until experimentation and testing verifies or disproves one or more of the options. But does not securing public confidence and compliance with necessary measures require the development and communication of a single scientific narrative to the exclusion of all others?

This is the communications challenge: Is it possible, especially at the start of a public health emergency, to frankly acknowledge uncertainties and the existence of alternative scientific narratives that time may well prove to be valid and require a change in the original narrative while securing and maintaining public confidence? As will be pointed out in Chapter 4 dealing with the promulgation of necessary regulations, complete and honest transparency will be one of the chief means of securing and maintaining public confidence under such circumstances.

Hopefully, Alberta's experience with managing its response to COVID-19 will better prepare the government to meet this communications challenge the next time the province is faced with a provincewide public emergency.

Concluding Comment

The application of science to public policy is a vast, complex subject, as is the application of medical science to public health. Advances in artificial intelligence and its application to public policy promise to further enlarge the scope and complexity of this topic.

While much of this subject matter is beyond the terms of reference and analytical competence of the Panel, it is hoped that this chapter's brief review of this topic will at least stimulate and focus much needed examination and discussion of this subject within Alberta's political, civil service and scientific communities.

A variety of conditions need to be satisfied in order to bring science effectively to bear on public policy, and there are various options for bringing the relevant science to effectively to bear on policies and actions to deal with a public health emergency. As a step in the right direction, the Panel recommends the appointment of a Senior Science Officer to the AEMA with the responsibility of establishing and maintaining an Inventory of Scientific Advice and Advisors that can be drawn upon in the event of a public emergency upon the recommendation of that officer.

CHAPTER 4
ANALYZING AND IMPROVING THE REGULATORY FRAMEWORK

This chapter identifies necessity, effectiveness and accountability as the three essential characteristics of a regulatory framework required to respond to a public emergency. It identifies five more additional and desirable qualifications for such a framework – a capacity for evidence-informed decision-making, transparency and openness, conformity and consistency, balance and fairness, and correctability via feedback. The Province's legislation is then analyzed, and amendments are proposed to fortify existing strengths and to remedy perceived deficiencies.

CHAPTER 4
ANALYZING AND IMPROVING THE REGULATORY FRAMEWORK

Introduction

Why this focus on "the regulatory framework" which governed much of the Alberta government's response to COVID-19? Because the major part of that response was via "delegated legislation" whereby the legislature delegates decision-making to the cabinet, individual ministers, officials such as the chief medical officer of health (CMOH), and even non-governmental bodies such as the College of Physicians and Surgeons of Alberta (CPSA) and various professional associations.

More specifically, the terms of reference of the Public Health Emergencies Governance Review Panel instructed the Panel to examine the legislation that authorized the orders in council, the ministerial orders and regulations used by the Province to respond to the COVID-19 crisis of 2020-2022; and to propose amendments that would improve the capacity of the Province to respond to future public emergencies.

The Panel has therefore performed the following steps:

- Identified the orders and regulations used by the Province during the COVID-19 crisis and the relevant sections of the statutes authorizing them.
- Identified the essential characteristics of a regulatory framework that is responsive and effective, especially under emergency conditions.
- Specified five additional and desirable qualifications.
- Analyzed the extent to which the Province's regulatory framework possesses those essential characteristics and additional qualifications.
- Proposed amendments to the authorizing statutes to establish and maintain those essential characteristics and additional qualifications.

To accomplish the first of the above steps, the Panel obtained a list of the orders and regulations proclaimed in responding to the COVID-19 crisis in 2020, 2021 and 2022.

To accomplish the rest, the Panel engaged the services of Mr. Gerard Lucyshyn of the newly formed Regulatory Research Institute of Canada. The result is a comprehensive 76-page paper attached as Appendix 3. The Lucyshyn paper begins with a formal definition of a regulatory framework and provides a distinction between principle-based and rule-based criteria. These are defined as follows:

- Definition of a regulatory regime as a collection of laws, rules, policies and procedures established by a governing body that has been tasked to oversee and control a specific industry or sector. Its purpose is to establish the standards and guidelines that all individuals, organizations and businesses (including the government) must comply with in order to operate legally within the industry or sector, or in society as a whole.
- It distinguishes between principle-based regulatory criteria – referring to standards or guidelines that are based on fundamental principles or values rather than specific rules or procedures – and rule-based regulatory criteria that are more prescriptive and specific.

The Lucyshyn paper concludes that principle-based criteria are more appropriate to regulation in emergency situations because they can be applied in diverse contexts, alongside flexible guidelines, and in accommodation with competing interests and factors. The Panel agrees with this conclusion.

An Overview of Criteria for Evaluating Regulatory Frameworks

To identify the most important criteria for evaluating and improving regulatory frameworks for public emergencies, the Lucyshyn paper drew on several academic and non-academic sources which included:

A Federal Regulatory Perspective

In 1971, the Standing Joint Committee for the Scrutiny of Regulations (SJC) was established in Canada under the federal *Statutory Instruments Act*. Over the past 52 years, the SJC has refined its set of significant regulatory criteria to 13 elements, including: authorization, conformity, retroactive effect, charge on public revenues, authority to impose, exclusion of the courts, compliance, infringement, trespass, unduly dependent, unusual use of power, substantive legislative power and drafting defects.

Alberta's Regulatory Review Secretariat

In 1994, the Province established the Alberta Regulatory Review Secretariat (RRS) as an independent body responsible for reviewing and recommending changes to government regulations. During its existence, the RRS's mandate was to promote efficiency and reduce regulatory burden. It ensured regulations were necessary, effective and in the public's interest. From the perspective of the secretariat, the ideal regulatory framework should be characterized by necessity, effectiveness, proportionality, accountability and consistency.[31]

Comprehensive List of Criteria and Check Elements

After the review, the Lucyshyn paper produced a comprehensive list of 17 principle-based criteria and 13 "check elements" – summarized in Table 1 below – to be used in evaluating regulatory frameworks. Definitions of each criterion and check element are included and thoroughly discussed in the Lucyshyn paper.

TABLE 1.

PRINCIPLE-BASED CRITERIA	CHECK ELEMENT CRITERIA[32]
1. Accountability	1. Authority to impose
2. Balance	2. Authorization
3. Constructive dialogue	3. Charge on public revenues
4. Efficiency	4. Compliance
5. Effectiveness	5. Conformity
6. Equity/Fair	6. Drafting defect
7. Consistency	7. Exclusion of the courts
8. Impact assessment (cost-benefit analysis)	8. Infringement
9. Learning systems	9. Retroactive effect
10. Maintaining control	10. Substantive legislative power
11. Necessity	11. Trespass
12. Open/Transparency	12. Unduly dependent
13. Outcome-orientated	13. Unusual use of power
14. Policy coherence	
15. Precautionary principle (public interest and good governance)	
16. Proportionality	
17. Scientific/Evidence-based	

31 It should be noted that Alberta has very limited review by elected representatives of regulations or delegated legislation once they are enacted. While there is no dedicated committee of the assembly to review regulations, Standing Order 52.03 provides that: "A Legislative Policy Committee may on its own initiative, or at the request of a Minister, review any regulation, amendment to a regulation or prospective regulation within its mandate".

32 A check element ensures individuals with delegated authority remain answerable to the legislature.

An Effective Regulatory Framework: What are the Essential Characteristics?

This question is worthy of broad public discussion and debate in the legislature, especially when considering the statutory amendments recommended in this report. Several relevant observations by Panel members and by those consulted were:

- That the fewer the criteria recommended and adopted, the better for public understanding and support.
- That while there are recognizable and appreciable differences between the criteria, the Panel believes that grouping similar criteria into broader categories is more accommodating to the task at hand. For example:
  - Equity, fairness, balance and proportionality all reference similar things.
  - Accessibility, openness and transparency cover similar ground.

After discussion and debate the Panel concluded that, in establishing and maintaining a regulatory framework for dealing with public emergencies, the three essential characteristics are necessity, effectiveness and accountability:

a) The importance of necessity requires answering the question, on initially establishing the regulatory framework and periodically thereafter, "Is it truly necessary?" Additionally:

- The criterion of necessity requires demonstrating that there is justification to regulate. Once regulation is implemented, there must be ongoing review to ensure it remains relevant.[33]
- Justification also considers the "do-nothing" option, which maintains the status quo by not implementing new regulations or changing existing ones. The do-nothing option serves as a baseline for comparing the costs and benefits of a regulatory proposal.[34]
- The necessity criterion must also be applied at the micro-level – "Is this regulation necessary?" – to prevent an overburden of regulation. (More on this later.)

b) The importance of effectiveness requires the systematic use of feedback mechanisms, consistently inquiring whether the framework is achieving the results intended and adjusting its operations based on that feedback. Additionally:

- The effectiveness of regulations hinges upon adopting a results-oriented approach to their design and implementation, ensuring they are feasible for compliance and enforceable in practice.[35]
- Impact effectiveness pertains to the degree to which each regulatory option could modify the targeted behavior or result in better conditions in the world (e.g., to enhance public safety during a pandemic, which alternative would cause the largest reduction in fatalities and other harms?).[36]
- Cost-effectiveness evaluates the expense associated with each regulatory option for a given level of behavioral change or reduction in the problem. (In other words, it assesses the cost-per-unit of each alternative.)[37]

Effectiveness

The effectiveness of a regulatory framework or regulation refers to its success in producing a desired result or preventing an undesirable result. It is most effective when the regulations are known by the regulated (transparency) and can be complied with. Analysis of cost-effectiveness compares the relative costs and outcomes of different courses of action. Analysis of cost-effectiveness is distinct from cost–benefit analysis, which assigns a monetary value to the measure of effect.

c) The importance of accountability is often uppermost in the mind of the public and of legislators, particularly during and after the use of orders in council, ministerial orders and regulations to respond to a public emergency such as the COVID-19 crisis. It requires further examination and clarification, provided later in this chapter.

33 Definition of necessity used by the Alberta Regulatory Review Secretariat (which no longer exists).

34 Summation by Lucyshyn of various definitions and comments on necessity in the literature and commentaries examined.

35 See Footnote 33.

36 Coglianese, C. (2012). Measuring Regulatory Performance: Evaluating The Impact Of Regulation And Regulatory Policy. OECD, 2012. https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=47319685d34eb420539054e46149673271 5207a2

37 Whereas cost effectiveness and cost-benefit analysis are well defined in the economic literature, harm-to-benefit or risk-to-benefit ratios are somewhat broader terms referring to the risk of harm to an individual or group versus the potential benefit to the individual and/or society. For example, see Is the Harm-to-Benefit Ratio a Key Criterion in Vaccine Approval? https://www.frontiersin.org/articles/10.3389/fmed.2022.879120/full

Accountability

Accountability is the acknowledgment of and assumption of responsibility for actions, decisions and policies such as administration, governance and implementation. It includes the obligation to report and justify the consequences, as well as to be answerable for them.

Additional Qualifications for an Effective Regulatory Framework

As mentioned, there is extensive literature concerning the characteristics of effective regulatory frameworks, described in the Lucyshyn paper, drawn from the studies of academics and practitioners. In evaluating this body of information, the Panel is aware of its own limitations, and that others, reviewing the same subject, may come to different conclusions.

What is important is that Albertans – especially their elected representatives – enter the discussion in a principled, constructive and well-informed manner. The Panel hopes that this chapter of the report contributes to the effectiveness and productivity of that public discussion.

To that end, the Panel proposes:

- That any regulatory framework governing the response to a public emergency in a free and democratic society possesses, as a minimum, the five additional and desirable qualifications described hereafter.
- That establishing accountability involves assessing the extent to which essential characteristics and these additional qualifications are embodied in the structure and activity of the regulatory framework.

Five Additional and Desirable Qualifications

a) Evidence-informed Decision-making

"Evidence-based decision-making" is defined in the Lucyshyn paper as meaning "that regulations and policies are grounded in factual information, rigorous cost-benefit analysis, and risk assessment, and are transparent to the public for scrutiny." As discussed in Chapter 3 on bringing science to bear on public policy, the Panel chose to employ the broader term of "evidence-informed decision-making," one that considers non-scientific[38] as well as scientific evidence.

The Panel also notes that the legal, science and public policy communities have differing views on what constitutes evidence. Conceptions of evidence that are strictly "data based" tend to preclude imagining and anticipating future scenarios on which there is little data, but that need to be considered. "Reasoned" decision-making is a broader concept allowing for decisions and actions to be guided by more than data analysis. Whatever terms are used – reasoned, evidence-based or evidence-informed decision-making – for emergency management and evaluative purposes, they must be clearly defined.

b) Transparency and Openness

The transparency of the regulatory framework – the availability of those regulations to the public and their openness to public scrutiny and commentary – needs to be established at the outset of a public emergency. As referenced in the Lucyshyn paper:

- The principle of transparency is critical in regulatory decision-making as it requires the regulator to be open and accessible to the public. When making regulatory decisions, it is essential to ensure that the process is open and accessible to the public, promoting efficiency and accountability.
- Transparency in cost-benefit analysis implies that the methods employed for data collection, the underlying assumptions, and resulting calculations based on such data and assumptions are open and available to the public[39] and that both the costs and benefits are conspicuous.

38 The evidence brought to bear on developing a public policy invariably includes more than scientific evidence – cultural and subjective factors not always measurable or testable by the scientific method. See Footnote 21.

39 Belfield, C. R. et.al. "Evaluating Regulatory Impact Assessments in Education Policy," American Journal of Evaluation, 2018, https://journals.sagepub.com/doi/10.1177/1098214018785463

The achievement of transparency and openness requires:

- A communications policy and plan on the part of the regulator to achieve these two objectives.
- Adequate communication tools for achieving these objectives – an advertised online presence,[40] website, periodic public briefings, etc.
- A willingness to secure and adjust to public feedback, including an openness to alternative hypotheses and challenges to official narratives.
- Periodic polling to determine how much the public knows about the regulations and the reasons for their proclamation.

The Panel has observed that the public may have uncertainty and confusion as to the public accessibility and applicability of orders in council, ministerial orders and regulations, as well as orders issued by the CMOH and regulations made by third parties such as the College of Physicians and Surgeons of Alberta (CPSA), both of which are directly granted the authority to make orders and regulations under such statutes as the *Public Health Act* and the *Health Professions Act*.

The Panel subsequently requested a clear statement from the Alberta government on where and how these orders and regulations can be viewed by Albertans. That statement is appended to this report as Appendix 4.

To enhance the transparency and openness of the regulatory framework, the Panel also recommends:

4.1 That the Alberta *Emergency Management Act* be amended[41] to include a provision requiring the responsible minster to ensure that all orders and regulations pertaining to the management of a public emergency are adequately communicated, on a timely basis and in an appropriate form, to the general public and especially to those directly affected by said orders and regulations.[42]

c) Conformity and Consistency

Conformity and consistency of a regulatory framework refers to the need to align with other relevant laws and policies of the government. For example, are the regulations positively aligned with the provisions of the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, the *Public Health Act*? Or are there inconsistencies and conflicts conducive to public confusion and non-compliance? As referenced in the Lucyshyn paper:

- Conformity requires that the regulation under review aligns with other relevant legislation including the *Canadian Charter of Rights and Freedoms*, Canada's *Constitution Act*, and the *Alberta Bill of Rights*.
- Consistency ensures regulatory requirements imposed on different sectors of society are consistent and co-ordinated. Consistency is also crucial in regulatory practices to harmonize requirements, reduce duplication and promote clarity. The principle of consistency fosters predictability, stability and a level playing field for all stakeholders, making compliance easier and more effective. In summary, consistency ensures clear, co-ordinated and cost-effective regulatory requirements.

To ensure conformity of the regulatory framework, in particular with Alberta legislation for the protection of rights and freedoms, the Panel notes that the *Alberta Bill of Rights* and the *Alberta Human Rights Act* both specifically say that those acts apply to all Alberta legislation including the *Emergency Management Act* and the *Public Health Act*. But "conformity in law" and "conformity in practice" can be two different things – particularly during a public emergency when the urgency and seriousness of the situation appears to justify severe limitations on rights and freedoms which would never be justifiable under non-emergency conditions.

Thus, the Panel recommends:

4.2 That major amendments be made, especially to the *Alberta Bill of Rights*, to significantly strengthen the protection of the rights and freedoms of Albertans under both emergency and non-emergency conditions – in particular the amendments proposed in Chapter 7 of this report.

40 It should be noted that the most comprehensive statutory requirement in Alberta law for online posting of orders, regulations and other information related thereto, is found in the *Education Act*, s. 225.9998, which requires the establishment and maintenance of an online registry for the purpose of providing the public with information specified by the act.

41 As an example of this type of provision, see s. 61 (4) of the *Occupational Health and Safety Act* which reads: The Minister shall ensure that the Occupational Health and Safety Code is adequately published in such form as the Minister considers will make it reasonably available, which may include publication on the Minister's website, at no expense or at reasonable expense, to all those likely to be affected by it.

42 While statutes such as the *Interpretation Act* and the *Regulations Act* require that regulations be published in the Alberta Gazette, it is the opinion of the Panel that this does not constitute "adequate communication" as called for by Recommendation 4.1. Most Albertans have never heard of the Alberta Gazette, never visit its website, and if they did, would discover that while the "what" of a regulation is described, the "why" of it and the "who is accountable for it" are not.

In striving for consistency in regulations to cope with a public emergency, adherence to s. 15 of the *Canadian Charter of Rights and Freedoms* requires special attention. According to s. 15 (1), "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Thus, regulations which limit freedom of assembly for individuals engaging in religious activities, while not limiting the freedom of assembly of other individuals in the same community engaging in various economic activities, might well be regarded as inconsistent with this provision of the charter and deserving of correction.

d) Balance and Fairness

This principle is mentioned and defined in Lucyshyn's paper under such headings as Equity/Distributional Fairness/Proportionality, meaning:

- The need to evaluate the potentially unequal impact of various options on distinct groups of people, where certain individuals may bear greater costs while others experience more benefits. This principle requires determination of which option would result in the most just distribution of impacts.[43]
- With respect to proportionality, regulations should be proportionate to the risk or harm they aim to prevent. This principle underscores the significance of balancing regulatory benefits with the associated costs, preventing the imposition of undue burdens on individuals, groups or organizations.[44]

e) Correctability Based on Feedback

This qualification refers to identifying the nature and sources of the feedback required from both public and private sectors. Securing essential feedback on a regulatory framework requires mechanisms to ascertain:

- The existence of obstacles to the securing of necessary feedback and "gaps" in existing feedback loops.
- The extent to which the public and targeted interests are aware and adequately informed of the regulations.
- The extent of compliance and non-compliance with the regulations and the reasons for compliance/non-compliance.
- The positive and negative consequences of the imposition of the regulations.
- The nature and extent of increases or decreases in public support for the regulations.
- The nature and extent of increases or decreases in public opposition to the regulations.
- The nature, magnitude and reasons for the reactions to the regulations on the part of key constituencies.

Feedback is then used to amend the regulations and to communicate the reasons for the changes.

One of the most obvious ways of securing feedback on a public policy decision or regulation is to simply invite it. The Panel therefore recommends:

4.3 That statutes such as the *Emergency Management Act* be amended to obligate ministers or agencies to disclose plans, decisions and regulations via publication and other means and to invite public input and feedback through appropriate mechanisms for receiving it.

In Quebec, ministers and regulators are obliged[45] to draft and publish a notice of intention to adopt a regulation, thus providing an opportunity for the public to respond. This practice would be well worth adoption by other jurisdictions.

As a general summary, in the judgment of the Panel, the more that a regulatory framework, particularly one dealing with a public health emergency, possesses the above characteristics – evidence-informed decision-making, transparency and openness, conformity and consistency, balance and fairness, and correctability based on feedback – the more effective and accountable it will be.

The Panel therefore recommends:

4.4 That the duties of those governing the regulatory response to a public emergency include an obligation to ensure that the regulatory framework possesses certain essential characteristics and qualifications (described in this chapter) required for the system to be effective, so that establishing accountability involves assessing the extent to which the framework exhibits those features.

43 The principle of equity or distributional fairness assesses the differential impact of various options on different groups, some of which may incur more costs than others or reap greater benefits. Consequently, the equity principle evaluates which option results in the most equitable distribution of impacts and ensures that regulatory burdens and benefits are proportionally distributed.

44 Insisting on "balance and fairness" need not preclude "disproportionate responses" as in some circumstances as such responses may still be "fair." See Daugbjerg, C., McConnell, A., "Rethinking disproportionate policy making by introducing proportionate politics," Policy Sci 54, 691–706 (2021). https://doi.org/10.1007/s11077-021-09426-2

45 *Québec Regulations Act*, (https://canlii.ca/t/55668). s. 8: Every proposed regulation shall be published in the Gazette officielle du Québec... s. 10 Every proposed regulation published in the Gazette officielle du Québec shall be accompanied with a notice stating, in particular, the period within which no proposed regulation may be made or submitted for approval, but within which interested persons may transmit their comments to a person designated in the notice.

Achieving Accountability for a Regulatory Framework and the Performance of the Regulators

Accountability means taking responsibility for one's actions. This holds true for governments and the regulatory agencies working on their behalf. If citizens are to be held accountable for compliance with regulations, those responsible for directing and managing an emergency response must also be held accountable.

Definition of Duties

One of the first and most obvious steps to establishing accountability for the performance of regulatory systems is to ensure that the duties of the regulators are clearly defined in the statutes authorizing their actions.

As an example, Alberta statutes such as the *Occupational Health and Safety Act* (https://canlii.ca/t/b5f1) already define and impose duties or obligations on those specified in the statute.

- Section 25 of the act, for example, describes the powers and duties of the minister, declaring that the minister:
  - (a) is responsible for occupational health and safety, generally, and with the maintenance of reasonable standards for the protection of the health and safety of workers in Alberta,
  - (b) is responsible for the administration of this Act, the regulations and the *Occupational Health and Safety Code (OHS)*,
  - (c) shall (not may) review this Act and its administration or designate a body to do so at any time but at least once every 10 years and publish a report,
  - (d) shall (not may) publish a plan for the review of the OHS Code every 3 years.
- The act (section 3 and sections 4-12) also defines the obligations of others responsible for ensuring the occupational health and safety of Albertans, in particular the obligations of employers, owners, supervisors, prime contractors, service providers and workers.

With respect to establishing greater accountability on the part of those responsible for responding to a public emergency, the Panel therefore recommends:

4.5 That the *Emergency Management Act* be amended to provide that, upon the declaration by the cabinet of a public emergency, it is the duty/obligation of the minister and the agency to act expeditiously, transparently, fairly and in conformity with legislation[46] protecting basic rights and freedoms.

The Panel also recommends amendments to the acts establishing subject-matter agencies, such as Alberta Health and regional health authorities in the case of a public health emergency, to provide:

4.6 That upon the declaration by the cabinet of a public emergency, it be the duty/obligation of the subject-matter ministers and their agents "to act expeditiously, transparently, fairly and in conformity with legislation protecting basic rights and freedoms."

Clarification of the Responsibilities of the Alberta Emergency Management Agency

In Chapter 2 of this report the Panel made several recommendations clarifying the responsibilities of the AEMA and strengthening its capacity to discharge them.[47] To further clarify and strengthen the role of the AEMA the Panel also recommends:

4.7 That the *Emergency Management Act* be amended to state that, once a provincewide public emergency has been declared, the AEMA shall provide strategic policy direction and leadership to the government and its emergency partners and shall be the coordinating agency for the duration of the provincewide public emergency. In addition, the act should be amended to state that the AEMA shall develop, implement, manage and maintain the Alberta emergency management system.[48]

4.8 That the *Emergency Management Act* be reviewed with the intention of determining which sections defining the minister's responsibilities should say "the minister shall" – making the discharge of the minister's responsibilities under that section mandatory – and which sections should say "the minister may" – making the discharge of the minister's responsibilities under that section discretionary.[49]

46 In particular, the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, and the *Constitution Act, 1982*.

47 See recommendations 2.6 to 2.10 Chapter 2 as well as Appendix 5.

48 This wording structure already exists under s. 2(1) of the Government Emergency Management Regulation (GEMR), which states "The Agency [AEMA] shall: (a) be the co-ordinating agency for and provide strategic policy direction and leadership to the Government and its emergency management partners; (b) develop, implement, manage and maintain the Alberta emergency management system as described in the Alberta Emergency Management Plan."

49 Under section 28(2) (d) and (f) of the *Interpretation Act*, "must" and "shall" are "construed as imperative." "May" is "construed as permissive and empowering."

While the need for flexibility of action under public emergency conditions might favor making the discharge of some of the minister's responsibilities under such conditions more discretionary, the need for swift and decisive actions under such conditions would favor making the discharge of the most important of the minister's responsibilities under such conditions mandatory.

Clarification of the Responsibilities of the Subject Matter Agency or Department – Alberta Health in the Case of a Public Health Emergency

In reading the *Public Health Act* – a highly relevant statute with respect to the management of public health emergencies – it is possible for legislators, let alone the media and the general public, to be confused as to:

- Who then has the ultimate authority with respect to the issuance of orders and regulations during a declared state of public emergency?
- Which orders and regulations require ministerial or cabinet approval during a public emergency and which do not?

In Chapter 2 of this report, for example, the Panel took note of court cases which clearly established that section 29 of the *Public Health Act* does not allow the CMOH to delegate decision-making (i.e., order-making) powers to the Premier and cabinet during a public health emergency. If the CMOH submits a proposed order to the cabinet for approval or even for consultation, that is a violation of the act and the order is illegal.

To address the contradiction between the current provision of section 29 of the *Public Health Act* and the earlier recommendations of the Panel that the orders and regulations of both the AEMA and Alberta Health (including the CMOH) be subject to approval by the elected representatives of the people of Alberta, the Panel has already recommended (Recommendation 2.11):

- That the *Public Health Act* be amended to require that any orders or regulations promulgated by the CMOH during a public health emergency be subject to prior approval by elected officials, in particular, the Premier and cabinet, after receiving the advice of the CMOH.

Enforcing Accountability

The Panel has considered three possibilities for securing a greater degree of accountability – especially achieving accountability in the event there has been demonstrable negligence or a wilful failure to perform a duty defined by statute – on the part of regulators and those responsible for dealing with a public emergency.

One approach is to remove or rewrite those sections of the authorizing statutes which render those empowered by it immune to any form of liability or penalty for their actions. For example, this could involve:

- Revising sections 27-29 of the *Emergency Management Act* which limit the liability of essentially everyone involved in handling a public emergency:[50] No action lies against the minister, a person acting under the minister's direction or authorization, a local authority or a person acting under the local authority's direction or authorization, for "anything done or omitted" to be done in good faith while carrying out a power or duty under this act or its regulations.
- Revising s. 66.1(2) of the *Public Health Act* which states, "No action for damage may be commenced against any person or organization acting under the direction of the Crown, a Minister of the Crown, the Chief Medical Officer, the Deputy Chief Medical Officer or a medical officer of health for anything done or not done by that person or organization in good faith directly or indirectly related to a public health emergency while carrying out duties or exercising powers under this or any other enactment."
- With respect to future public emergencies, reducing the protection from liability that is currently provided by sections of the *COVID-19 Related Measures Act*, such as:
  - Section 4.1 which reads in part that "no action for damages lies or shall be commenced or maintained against a health service facility, regional health authority or person referred to in section 2 as a direct or indirect result of an individual being or potentially being infected with or exposed to COVID-19 on or after March 1, 2020 as a direct or indirect result of an act or omission of a health service facility, regional health authority or person, as the case may be…"
  - Section 5 which reads: "No person is entitled to any compensation or any other remedy or relief for the extinguishment or termination of rights under this Act."

50 If a policy of limiting the protection from liability were to be adopted in relation to actions under the *Emergency Management Act*, the question would be raised, "What about other limitations of liability in other statutes?"

It should be noted that ministers, civil servants and agencies of government are protected from liability by the above statutes provided they acted in "good faith." A "good faith effort" is simply defined in the *COVID-19 Related Measures Act* as "an honest effort, whether or not that effort is reasonable." Any such protection could also be made dependent on "an absence of negligence," the absence or presence of negligence being easier to prove than whether actions were done or not done "in good faith."

It should also be noted that what constitutes "negligence" under the pressures of a declared public emergency may be different than what constitutes negligence under different circumstances where the pressure of urgency is not a factor.

A second approach is to amend the authorizing statutes to specifically provide a penalty, such as being liable upon conviction of a "summary offense"[51] or some other penalty, for failure to perform a duty defined by the statute. And a third approach would be to do both – to reduce the current protections from liability and provide some form of penalty for failure to perform.

Endevouring to enforce greater accountability by such measures is a highly controversial subject, but the following observations and comments are offered with the hope of informing the discretion of those who choose to consider it:[52]

- The subject of enforcing accountability cannot be considered in a legislative or administrative vacuum. According to the doctrine of ministerial responsibility, ministers are accountable to Parliament or the legislature for all areas of responsibility, whether they are assigned by statute or otherwise. And all members of the ministry are individually and collectively responsible for carrying out the government's policies and directives as established by the cabinet. If the principle of ministerial accountability is enforced, are any further provisions required for holding ministers accountable for their decisions and actions?
- When significant harms are caused by the implementation of an ill-advised regulation or policy, "I was just following orders" should not be an acceptable excuse. On the other hand, it is not in the public interest to define the accountability of public officials for the consequences of policy and regulatory decisions in such a way as to open the floodgates to hundreds of legal charges and civil actions against those officials.
- But how is an elected member of the Alberta legislature supposed to respond, when a constituent asks at a town hall meeting: "Why is it that I can be held accountable – fined or even imprisoned – for failure to comply with a public health emergency regulation, but the politicians, regulators and civil servants cannot be held accountable at all if that regulation proves to be ill-advised and even harmful?"
- If the penalties for failure to adequately discharge duties defined by statute are too severe, the net effect will be to discourage innovation and risk-taking by the regulators and civil servants, especially in emergency situations. But if there are no penalties or negative consequences for the failures of public polices and actions attributable to the actions or inactions of public servants, does not genuine "accountability" become unattainable?
- Are there not "levels of accountability" that need to be defined and even spelled out in the legislation? The primary duty of ministers is to appoint those responsible for managing the emergency, to provide the necessary budget, and to provide high-level policy direction – and they should be held accountable for discharging those duties. The regulators, policy implementors and service providers have a duty to perform those functions – regulating, implementing and providing service – to the best of their abilities, and should be held accountable[53] for discharging those duties, which are quite different from those of the minister.
- Elected officials and those employed by the government in professional positions should be held more rigorously to professional standards such as those currently defined in the codes of conduct[54] for civil servants and those of other professions.

51 A summary offence is a violation of a law whereby the accused can be tried "summarily" without a jury or indictment. It is a "less serious" offence versus its counterpart (an indictable offence) and its imposition can be "discretionary" (at the discretion of the attorney general) and not "obligatory." In Alberta, a summary conviction carries a maximum penalty of a six-month prison sentence, a $5,000 fine or both, and the accused is tried by the Alberta provincial court instead of being sent to a Superior Court.

52 The discussion of this issue should also be informed by the following: That while s. 5 of the *Proceedings Against the Crown Act* provides for Liability of the Crown in Tort, according to common law and s. 14 of the *Interpretation Act*: "No enactment is binding on His Majesty or affects His Majesty or His Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds His Majesty." Note also that Court decisions at all levels in Canada have held that the Crown is not liable for policy decisions.

53 See s. 53 of the *Public Service Act* for some current accountability requirements.

54 See the current Code of Conduct for Alberta civil servants – https://www.alberta.ca/code-of-conduct-and-ethics-for-the-alberta-public-service.aspx. Also note that Alberta Health Services already has a code of conduct based on five principles: compassion, accountability, respect, excellence and safety.

- What can be learned, especially about penalizing regulators and policy implementors for failures, from such public emergencies involving public health issues as:
  - The 2002 tainted blood scandal investigated by the Krever Inquiry that led to the RCMP laying 32 charges against various parties including two Health Canada bureaucrats and an agency to which Health Canada had contracted blood services.
  - The 2004 Walkerton E. Coli outbreak, after which two employees of the Walkerton Public Utilities Commission were charged and convicted of negligence.
- Accountability under emergency conditions is quite different from accountability under non-emergency conditions. Do not we, the public and the legislation that governs accountability, need to recognize, and consider the distinction? For example, that accountability for actions taken under the pressures of urgency and in the absence of complete information is different from accountability for actions taken when time and information constraints are not major factors.
- Is not accountability easier to achieve without punitive measures when there is genuine transparency? Regulations, especially those that may have negative as well as positive consequences, need to be made subject to a risk/benefit analysis which should be published and strongly communicated. The public need to be informed as to the "who and the why" of a regulation – the reasons behind it and the persons responsible for it – not just the "what." The public will be more sympathetic to the regulator and less likely to demand punitive accountability if they have a better idea of the factors the regulator was trying to balance.

At the end of the day, it is for the legislature to decide which of these measures, or other measures, are to be employed to increase accountability for the performance of duties and obligations defined by Alberta's statutes. It is the observation of the Panel, however, that the status quo with respect to accountability for actions taken by government officials during a declared state of public emergency is inadequate and needs to be rectified. Hopefully, the foregoing discussion will be helpful to the legislature in doing so.

Application of Evaluative Criteria to Relevant Legislation

To recap, the Panel identifies three essential characteristics for any regulatory system intended to cope with public emergencies: necessity, effectiveness and accountability. The Panel identifies five additional qualifications essential for effective and accountable performance of the regulatory framework: evidence-informed, transparency/openness, conformity/consistency, balance/fairness, and self-correcting via feedback.

The Lucyshyn paper (Appendix 3) contains several tables to apply evaluative criteria to the regulatory framework.

The first table invites evaluators to assess the extent to which Alberta's *Emergency Management*, *Public Health*, and *Regional Health Authorities Acts* are necessary, effective and conducive to achieving accountability.

In performing this evaluation, the Panel concludes that all these acts are necessary to provide the statutory base for responding to a public health emergency, but that each could be improved with respect to their effectiveness and provisions for accountability.

A second Lucyshyn table then asks evaluators to assess the strengths and weaknesses of each act and subordinate legislation, particularly from the standpoint of providing evidence-informed decision-making, transparency, openness, consistency, fairness and balance, and self-correctability.

In performing this evaluation, the Panel does not want to give the erroneous impression that Alberta's legislative and regulatory framework for responding to public emergencies is wholly defective and in need of wholesale replacement. While the focus of this report, and this chapter, is on identifying and remedying weaknesses and deficiencies, the Panel wishes to officially acknowledge the wisdom and experience incorporated in much of the existing legislation, the skills and good intentions that those responsible for its implementation bring to their tasks, and the evolution of the regulatory framework overall.

At the same time, in performing this evaluation of strengths and weaknesses, the Panel concludes that major deficiencies in the legislative and regulatory systems do exist, particularly with respect to transparency, effectiveness, accountability, and self-correctability through feedback.

To correct these deficiencies, the Panel therefore reiterates the following recommendations, already discussed in this and earlier chapters:

- That the deficiency in transparency be remedied by amendments requiring all orders and regulations pertaining to the management of a public health emergency to be adequately communicated, on a timely basis and in an appropriate form, to the general public and especially to those directly affected by such orders and regulations. (Recommendations 4.1 and 4.3.)
- That the deficiency in effectiveness be remedied primarily by:
  - The amendments proposed in Chapter 2 – achieving a clearer division of responsibility between elected officials, the AEMA and the subject-matter department (Alberta Health in the case of a public health emergency).
  - Amending the Alberta *Emergency Management Act* as follows: "In the event of a conflict between this Act and other legislation, the *Emergency Management Act* will prevail."
- That the deficiency in self-correctability due to the lack of adequate feedback mechanisms be remedied by amendments obligating ministers and agencies to disclose plans, decisions and regulations via publication and other means; to disclose the "who and the why" as well as the "what" of those plans, decisions and regulations; to specifically invite public input and feedback; and to provide a mechanism for receiving such input and feedback (Recommendation 4.3).
- That the deficiency in accountability be remedied by amendments clearly defining the duties, responsibilities and obligations of those responsible for the management of the response to a public emergency, in particular, the duty "to act expeditiously, transparently, fairly and in conformity with legislation protecting basic rights and freedoms" and to be subject to penalties for failure to discharge such obligations (Recommendations 4.5 and 4.6).
- That any confusion over what agency or department has overall responsibility for managing the response to a public health emergency, or the relation between the cabinet and the chief medical officer of health be clarified by the implementation of recommendations on this subject in Chapter 2 and further discussed in this chapter.

In Conclusion

Albertans have never been willing to settle for mediocrity. Since a comprehensive regulatory framework is obviously necessary to respond to future provincewide public emergencies, the aim should be to establish and maintain a framework that is the most effective and responsible in the country. The recommendations in this chapter are made to facilitate the attainment of that objective.

This chapter evaluates the legislation underpinning the regulatory framework employed by the Province to respond to public emergencies from the standpoint of necessity, effectiveness and accountability, as well as transparency, consistency, fairness and self-correctability. It then proposes amendments to that legislation to ensure the regulatory framework possesses these characteristics, thus ensuring an improved capability to respond effectively to future public emergencies.

CHAPTER 5
EDUCATIONAL RIGHTS, DUTIES AND SCHOOL CLOSURES

In this chapter, the Panel examines the long-term impacts of school closures in response to COVID-19, as well as the inadequacies of the Alberta *Education Act* and related statutes for authorizing and managing school closures. The Panel's recommendations strengthen the educational rights of students enrolled in Grades 1-12[55] and the duty of parents and governments to respect and support those rights. Recommendations also prohibit school closures as a policy option, including in response to public emergencies, except for the very short-term in exceptional circumstances.

CHAPTER 5
EDUCATIONAL RIGHTS, DUTIES AND SCHOOL CLOSURES

Introduction

As stated, the COVID-19 crisis of 2020-2022 produced responses of unprecedented magnitude and diversity from governments throughout the world.[56] Of all the governance decisions of this period, however, the one most likely to have the greatest implications for the future – implemented by the governments of all Canadian provinces and territories and internationally as well – was the closure of schools on a massive scale.

Among the provinces of Canada, British Columbia's schools were closed for the shortest period, Ontario's for by far the longest, and Alberta's school closures were roughly comparable to the mean across the country. Alberta's schools were closed:

- from March 16 to June 30, 2020
- from November 30 to December 23, 2020 (Grades 7-12)[57]
- from January 4-8 and May 7-21, 2021
- from January 3-7, 2022[58]

With respect to the immediate impact of the school closures in Alberta:

- Some 2,600 schools in Alberta,[59] employing some 55,000 teachers and many more administrative and maintenance staff, were directed to switch within a very short time (in many cases within two weeks) from in-school teaching to online, at-home teaching.
- Most seriously, some 766,000 kindergarten, primary and secondary school students (as at the end of the pandemic period)[60] – among the least susceptible of the Alberta population to the COVID-19 virus – experienced learning loss and diminished socialization, both fairly predictable before the pandemic due to weak online-learning regulation and experience across Canada.[61]
- Over one million parents, grandparents and near relatives were called upon, with very little preparation, to assume the burden of online, at-home teaching and learning. This included the provision of technology, facilities and supervision often beyond the capabilities of lower-income homes, those where both parents were working, or households where language differences, illness or abuse created barriers to online instruction.
- Thus, some 1.8 million Albertans were directly or indirectly affected by governance decisions related to school closures. Of that total, approximately 40 per cent were children, on whom the very future of Alberta depends.

In Alberta, there are numerous statutes governing the education system,[62] the central one being the *Education Act*. The intent of the legislature over the past century was to provide for the mass compulsory education of children, with no anticipation of prolonged mass school closures ordered and enforced by the state. As such, the closures in response to COVID-19, while well-intentioned, were largely improvised without legislative guidance.

In commissioning this Panel, the Province asked it to review the *Education Act* and to suggest amendments to better cope with public health emergencies. The Panel was instructed "to consider and appropriately balance, in the context of a public health emergency, such factors as child and student health, mental health and education."

55 Note that the *Education Act* distinguishes between "students" enrolled in Grades 1-12 and "children" enrolled in an early childhood services (ECS) program, which includes kindergarten. ECS programs, including kindergarten, are not mandatory.

56 Internationally, the COVID-19 pandemic has been described as resulting in "the largest, mass supervised, synchronized public administration move in human history across national, continental, and civilizational borders – to wit, the closure of schools in March of 2020. From South Asia to North America, passing through Africa, the Middle East and Latin America, schools in most countries were closed for prolonged periods. Some were reopened and reclosed. Some, as in Uganda, remained closed until early 2022. These closures were generally done with the best of intentions, albeit with minimal forward calculation." Dr. Irvin Studin, *Canada Must Think for Itself - 10 Theses for our Country's Survival and Success in the 21st Century,* Institute for 21st Century Questions, 2022, pp. 2021.

57 The focus on school closures for Grades 7-12 was apparently based on assumptions that teenagers were more likely to transmit COVID-19; at the same time, younger children were deemed less susceptible.

58 It should be noted that, in Alberta, the longest period of school closures was the initial one, from March 16 to June 30, 2020. As the inadvisability of school closures became more apparent, closures during 2021-2022 were for much shorter periods than in the previous year.

59 Note that in describing Alberta schools, the province uses the following divisions: early childhood (includes kindergarten), elementary (1-6), junior high school (7-9), senior high school (10-12). See: https://www.alberta.ca/albertas-school-system.aspx

60 Government of Alberta, "Student Population Statistics," https://www.alberta.ca/student-population-statistics.aspx

61 Michael K. Barbour, Randy LaBonte, "State of the Nation: K - 12 E-Learning in Canada," CANeLearn, 2019 https://k12sotn.ca/wp-content/uploads/2020/02/StateNation19.pdf; https://eric.ed.gov/?id=ED587940

62 These include the *Education Act*; *Child, Youth and Family Enhancement Act*, *Children First Act*, *Northland School Division Act*, *Protection of Sexually Exploited Children Act*, *Family Support for Children with Disabilities Act*, *Early Learning and Child Care Act*, *Child and Youth Advocate Act*, *Teaching Profession Act*, *College of Alberta School Superintendents Act*.

For assistance, the Panel contracted Dr. Irvin Studin, president of The Institute for 21st Century Questions, who has studied and written extensively on this subject from international and national perspectives. The result is a short, well-indexed and helpful paper, attached as Appendix 6.

In preparing this paper, Dr. Studin has made clear that his intention in drawing attention retrospectively to the negative consequences of the school closure decisions is not to lay blame for policy mistakes[63] committed in an unprecedented situation. Rather, his primary focus is future-oriented and practical – how to better manage future public emergencies, particularly in relation to the rights and well-being of children, while learning from past mistakes.

Educational Rights and Duties

Canada's Constitution assigns, with one exception,[64] exclusive legislative jurisdiction over education to the provinces (*Constitution Act*, s. 93). For Alberta, the principal provincial statute is the *Education Act*. However, the only reference to educational "rights and privileges" in the text of the Constitution pertains to the rights of denominational and separate schools (s. 93 of the *Constitution Act* and s. 17 of the *Alberta Act*) and educational language rights (s. 23 of the *Canadian Charter of Rights and Freedoms*).

It should also be noted that Canada subscribes to the United Nations Convention on the Rights of the Child, s. 28, which is labelled "access to education" and states that "every child has the right to an education." Prolonged school closures would appear to compromise the exercise of this right.

The eighth and ninth clauses of the preamble to Alberta's *Education Act* mention "rights," but they are the rights of parents (adults), namely:

- Parents have the right and the responsibility to make informed decisions respecting the education of their children.
- Parents have a prior right to choose the kind of education that may be provided to their children.

Section 3(1) of the act, labelled "Right of access to education," declares that "Every person (a) who at September 1 in a year is 6 years of age or older and younger than 19 years of age, (b) who is a resident of Alberta, and, (c) who has a parent who is a resident of Canada, is entitled to have access in that school year to an education program in accordance with this Act."

But section 2 of the act also declares that "the exercise of any right or the receipt of any benefit under this Act is subject to the limitations that are reasonable in the circumstances under which the right is being exercised or the benefit is being received." The Panel believes that the situation created by the declaration of a provincewide public emergency must not by definition or presumption be considered a "circumstance under which limiting the right to an education" is considered reasonable and justifiable, and that additional protection of this right is required especially under public emergency conditions. Recommendations as to how to provide this additional protection are included in Chapter 7 of this report.

Moreover, the preamble of the *Child and Youth Advocate Act* declares that the "Government of Alberta is committed to ensuring that the rights, interests and viewpoints of the most vulnerable children and youth in provincial government systems are considered in matters affecting those children and youth." Section 9 of that act also declares that it is the role of the child and youth advocate to represent the "rights, interests and viewpoints of children," including promoting their well-being through education. However, nowhere in this act are the rights and interests of children as such defined.

Thus, as Dr. Studin points out:

> Neither the Constitution of Canada nor the provincial education statutes have any provisions explicitly envisioning mass shutdown of schools. Critically, the Constitution of Canada – both textually (s. 93 of the *Constitution Act* and s. 23 of the *Canadian Charter of Rights and Freedoms*) and jurisprudentially – is nearly silent on both the right of the child to education in general (right to education as a fact; separate from, say, the right to instruction in a given language) and the duty of the state or governments in Canada to educate children. These rights and duties are implicitly presumed to exist, and not imagined to be endangered or stressed at scale.

63 As will be made clear in the following analysis of this chapter, in the judgment of Dr. Studin and the Panel, the policy decision to close Alberta schools for a lengthy period in 2020 was a mistake, and that in coping with future public health emergencies affecting school children, massive and lengthy school closures should not be considered an acceptable policy option.

64 The one exception is the education of "on reserve" children which is within federal jurisdiction and governed by the *Indian Act*.

The jurisprudence on education access in Canada, in leading cases like Eaton v. Brant County Board of Education and Moore v. British Columbia, deals principally with inequality of educational access or discrimination in the provision of education. The existence of education is presumed – that is, it goes without saying that the state will provide education for the bulk of the youth population. In short, the fact of education is not explicitly protected because there is no implicit (or felt) anticipation that it would or could ever disappear or be severely compromised.

One might also say, on inspection, that our constitutional structure in Canada is, for all practical intents and purposes, an adult structure, written by adults about adults. The child is missing, and education is a debate about adult considerations – not the future of the child, and the future of our society because of successful, or poor, education and childhoods.

Statutory and Regulatory Basis of School Closures in Alberta

As documented in Appendix 6, the school closures in Alberta were undertaken on the authority of orders[65] by the chief medical officer of health (CMOH), as empowered by the *Public Health Act*. (See Appendix 11 for a copy of the CMOH order regarding school closures.)

With respect to the formulation and implementation of the school closure order, especially in March of 2020, it is the understanding of the Panel that:

- Consultations occurred between officials of Alberta Heath and Alberta Education under the direction of the CMOH.
- The recommendation for school closures came from the CMOH to the emergency management committee of cabinet, of which the minister of Education was a part, and that this recommendation was approved by cabinet.
- Consideration was given to the issue of how best to balance the objectives of Alberta Health and Alberta Education: the first to minimize the COVID-related health harms to school children and their contacts; and the second to minimize the social and educational harms caused by school closures. It was also considered that, as in other Canadian provinces and territories shifting to online, at-home teaching and learning was the best way to accomplish this.[66]
- Once this decision had been made, Alberta Education's primary challenge was to effect the shift to online, at-home teaching and learning at the provincial, school district and individual school levels.
- The few follow-up regulations promulgated thereafter dealt primarily with:
  - Allowances for at-home learning under certain conditions.[67]
  - Application of related regulations to private[68] and charter[69] schools, including those preventing such schools from denying in-person learning to students not wearing a face mask or other face covering.

The above understandings are primarily based on publicly available information and a limited number of personal interviews with decision-makers. While a more thorough investigation into the three most important and far-reaching decisions made in Alberta in response to the COVID-19 crisis – the government decision to mandate mass vaccinations, masking and social distancing; the decision to close certain economic activities; and the decision to close schools – is beyond the capability and terms of reference of the Panel, the Panel recommends:

5.1 That such investigations be conducted, not for the purpose of second-guessing the decisions made or attaching blame for identified negative consequences, but for the purpose of ascertaining the lessons learned so that the province is better equipped to handle future provincewide public emergencies.

Impacts of School Closures

The closure of Alberta schools was no doubt well-intended and authorized for the purposes of protecting school children from contracting or contributing to the spread of COVID-19. While evidence existed early in the pandemic that school children, especially the youngest cohort, were among the least susceptible to COVID-19,[70] some uncertainties existed as to their potential to spread COVID-19 to their teachers and family members, particularly in the case of multi-generational households. The school closures were also consistent with, and often coincident with, closures in other Canadian jurisdictions, where they were used as a signal to society of the seriousness of government in tackling the pandemic.

65 See CMOH Order 01-2020 Re: 2020 COVID-19, the school closure order issued and signed on March 16, 2020, by Deena Hinshaw MD, CMOH for Alberta.

66 It should be noted that the shift from in-school learning to online, at-home learning was not so much a denial of the right of Alberta's children to education as it was an imposed, manifest limitation on their right to access quality in-person education.

67 Alberta Regulation 226/2022 on "in-person learning."

68 Alberta Regulation 127/2022 on "private schools."

69 Alberta Regulation 85/2019, amended through to Alberta Regulation 227/2022 on "charter schools."

70 Report of a task force led by the Chief Science Advisor of Canada," July 2020, https://science.gc.ca/site/science/en/office-chief-science-advisor/initiatives-covid-19/covid-19-and-children

On the other hand, mass school closures had decisively negative impacts on children in Alberta and other Canadian jurisdictions, well-documented in Appendix 6, including the following:

1. Large-scale learning losses and diminished socialization experienced by students, variously in-person or online, as students had highly disrupted and limited in-school training and extracurricular development.[71]

While a small number of schools in Alberta attempted to continue in-person learning, most attempted, with varying degrees of efficiency and effectiveness, to pivot online to virtual schooling. Switching between the two states was, especially in the earlier stages of the pandemic, logistically clumsy and complex, destabilizing the quality and intensity of pedagogy and student learning. Moreover, the absence of physical and social contact with teachers, friends and scholastic communities meant that straightforward delivery of courses and curricula online came with deficiencies for K-12 students:

- diminished academic standards
- diminished motivation to learn
- diminished social skills and habits due to decreased socialization[72]
- diminished feedback, correction and remedial support from teachers to students
- diminished school spirit supporting learning
- increased non-school pressures and distractions emanating from non-school learning settings

2. Ouster/defection from – and post-COVID non-enrolment in – schooling by "third bucket kids," where "first bucket" refers to physical/classical in-school attendees; "second bucket" refers to online at-home schooling attendees; and "third bucket" refers to those receiving neither.

A variety of factors contributed to the third bucket[73] in Alberta, Canada and around the world, including lack of access to the internet, computers and learning software (at the moment of school closure or over the course of a school closure); household illnesses during the pandemic; abusive or dysfunctional households; learning or linguistic difficulties when online; leakage from the second bucket or online schooling once school standards disappeared and exit costs decreased; and premature leakage of students to the labour force. These same factors contributed to – and anticipated – the general destabilization of the overall education system during the school closures and resulted in many children formally "enrolled" in the system suffering from high or extreme absenteeism – that is, existing "in-between" school and the third bucket.

For a more thorough discussion of the "third bucket kids" phenomenon, see Appendix 6, which references work conducted over the last three years by the Canada-based Worldwide Commission to Educate All Kids (Post-Pandemic). It should be noted that the exact numbers of children in this third bucket category are notoriously difficult to verify with precision, as they require individual school attendance records.

3. Long-term impacts on the human capital, wealth and well-being of Alberta and Canada.

As Dr. Studin observes: "Because the consequences of the school closures – including compromised learning and reduced socialization – were borne primarily and directly by youth, these will be felt well into the future by both Alberta and Canada, across all dimensions of society, economy and country."

71 Parisa Mahboubi, Amira Higazy, "Lives Put on Hold: The Impact of the COVID-19 Pandemic on Canada's Youth, C.D. Howe Institute, July 2022, https://www.cdhowe.org/sites/default/files/2022-07/Commentary_624_R4.pdf; https://www.unicef.org/press-releases/covid19-scale-education-loss-nearly-insurmountable-warns-unicef

72 While initial evaluations of the negative impacts of school closures have focused heavily on "learning losses," the Panel feels strongly that increased attention needs to be given to losses In social skills and social integration – both in the impaired in-school contexts and the online, at-home context – while recognizing that such socialization losses are much more difficult to measure and repair than formal learning losses.

73 The Centre for Social Justice, "Lost but not forgotten: the reality of severe absence in schools post-lockdown," January 2022, https://www.centreforsocialjustice.org.uk/library/lost-but-not-forgotten

Minimization of Negative Impacts on School Children Due to Health Protection Measures Adapted During a Pandemic

Appendix 6 contains considerable data (see Annex 2) on how other jurisdictions handled the matter of school children in the context of the COVID-19 pandemic, three of the most noteworthy[74] cases being the following:

- Sweden largely kept its schools open because its medical leadership made an early determination that COVID-19 did not have conspicuously negative health impacts on the youth (student) population, and that youth infection would also serve the general purpose of herd immunity in the overall society.
- Relatively short school closures occurred mostly in countries that had explicit constitutional or statutory commitments to education as a national (or jurisdictional) priority – e.g., Vietnam and Singapore. These countries, along with northeast Asian countries like China, Japan and South Korea, also had better "systems" understanding than Western countries.
- Most notable were the multi-layered, explicit protections for students and youth provided in the Germanic states, cantons and Länder, which is where modern Western compulsory education traditions started. While Canada and Alberta have nothing comparable, these states maintain:
  - Explicit constitutional protections for the right to school and for children.
  - Explicit articulation of the duty to attend school (Schulpflicht) accompanying that right.
  - Strong official processes and societal norms supporting and locking in the aforementioned Schulpflicht.

From the study of these and other cases, Dr. Studin recommends that Alberta's legislation be amended to far better prepare the province to protect its school children from future emergencies, while guarding against the harms of ill-advised school closures. These amendments would entail:

- Prohibiting all school closures except under the most exceptional circumstances – that is, making school closures as difficult and infrequent as possible, with such decision-making led by the head of government.
- Minimizing how long schools can be closed.
- Enshrining in law the duty of Alberta to educate all of its K-12 children (complementary to, if not over and above, the right to education).
- Strengthening the requirements related to compulsory attendance and the penalties for dereliction, including raising compulsory school age in Alberta to 17 years, which is when high school normally ends.
- Maximizing in-person at-school learning within the system, while recognizing a supportive role for online learning when advisable or necessary.
- Strengthening standards related to punctuality, behaviour and academic performance.
- Maximizing efforts and speed across the education system to make up for learning loss related to the 2020-2022 school closures.
- Finding and reintegrating all third-bucket students "lost" to education during the 2020-2022 school closures.

74 These cases are noteworthy because the approaches taken, and the results achieved, differ significantly from the approaches taken and results achieved in Canada and Alberta.

Strengthening Rights, Duties and Post-Pandemic Measures

The Panel concurs with many of the observations and suggestions summarized above and recommends the following to:

a) More strongly establish and enforce the rights of Alberta children to an education and to not be deprived thereof by measures adopted to cope with a public health or other emergency.

b) More strongly establish and enforce the duties of Alberta parents and the Alberta government to provide for the compulsory education of children to which their educational rights entitle them.

c) Address the need for a major post-pandemic undertaking in Alberta to repair, to the maximum extent possible, the identifiable short- and long-term harms caused by the 2020-2022 school closures.

d) Clarify the principles that should govern the treatment and schooling of children whenever a state of public emergency is declared in the future.

a) Strengthening the Rights of Children to an Education

The Panel observes that the *Education Act* as a whole is framed in terms of providing "access to educational programs" for Alberta's children. But there is a distinction to be made between a "right of access" to educational programs and the more foundational "right to education" itself. The Panel also observes that while the extensive preamble to the *Education Act* defines principles foundational to the Alberta education system, the entitlements of children to a caring educational environment, the obligations of parents and the commitments of the Government of Alberta to education, it does not clearly recognize as a fundamental right, the right of Alberta children to an education.[75]

The Panel therefore recommends:

5.2 That the Preamble of the *Education Act* be amended to include a clear reference to the entitlement of Alberta's children to education as a right.

5.3 That references in the *Education Act* to a "right of access" to educational programs be amended to read the "right to education."

5.4 That a specific clause be added to the *Education Act* declaring that every child in Alberta has the right to an education as provided by the act.

It should be noted that in Alberta, education as governed by the *Education Act* includes public, Francophone, separate and private schools, charter schools, as well as home education programs (home schooling) conducted in accordance with the standards prescribed by the *Education Act*.

b) Strengthening the Duties of Parents and the State to Provide for the Education of Children

Given the need to strengthen the duty of parents and the government to provide for the education of Alberta's children even during a state of public emergency, the Panel recommends:

5.5 That bills amending the *Education Act* and related statutes (such as the *Child First Act*) include preambles along the following lines, and that the assembly consider including similar wording in the preambles to the acts themselves:

- WHEREAS the education of Alberta's children and youth is central to the future prosperity and social well-being of the province, and,
- WHEREAS there exists a civilized adult duty and a duty on the part of the Province to educate all of Alberta's children,

75 A possible reason for this could be that the right to an education in Canada has largely been taken for granted. But it is "rights taken for granted" under normal circumstances that are most often threatened in exceptional circumstances, such as those created by a public emergency like the COVID-19 crisis.

5.6 That a short section be added to the *Education Act* entitled "Duty to Educate," and that it include three clauses along the following lines:

- That it is the duty of the Government of Alberta to ensure the existence and availability of an education[76] to Alberta's children, in accordance with the provisions of this act.
- That the Government of Alberta is expressly forbidden[77] to close physical access to in-school education, even during a declared state of public emergency, except under the most exceptional circumstances, and with an express public commitment to the date of reopening.
- That it is the duty of Alberta's children, and their parents, to comply with the provisions of this act, specifically those requiring the attendance and participation of Alberta's children in the educational programs authorized by the act.

To implement the above recommendation, the Panel recommends that the *Education Act* also be amended as follows:

5.7 That in order to strengthen the discharge of the above obligations of parents, an additional section be added declaring that "failure to discharge this obligation is an offence under the *Provincial Offences Procedures Act*."[78]

5.8 That parental rights with respect to the education of their children be recognized and include:

- The right to be advised of measures proposed by school authorities to protect the health of their children.
- The right to grant or withhold consent.

It should be noted that this right is further discussed in Chapter 6 of the Panel's report proposing amendments to the *Alberta Bill of Rights*. In seeking to recognize and strengthen parental rights, it was generally agreed by the Panel that the government should not impose or mandate medical interventions in the life of a child, without the express permission of the parent(s) or guardian(s) of the child, nor should the government make a child's access to schooling, healthcare or other public goods conditional on medical interventions for which the child's parent(s) or guardian(s) have not given express permission.

5.9 That the Government of Alberta make clear that it is committed to strengthening both in-school learning[79] and at-home learning,[80] and that nothing in its provisions for ensuring the continuation of in-school learning during a public emergency is to be misconstrued as diminishing the role and opportunity for at-home learning in accordance with provincial standards.

5.10 That during a declared state of public emergency, the provision of education to Alberta's school children be recognized and treated as an "essential service."[81]

c) Efforts to Repair School Closure Harms

The Panel fully appreciates that Alberta Education recognized that the school closures could result in significant learning losses, and that it would need to commit significant resources to repair those losses. It is the Panel's understanding those investments now total well over $100 million. They include:

- Up to $45 million to focus on literacy and numeracy, with special initial focus on Grades 1 to 3 (with school authorities having the flexibility to design catch-up programs and use funds according to their circumstances).
- $10 million to address Grade 1 pandemic-period complexities, including those related to foundational literacy.
- $20 million to address Grades 2-4 learning disruptions, including the hiring of additional staff and the purchase of new learning materials and resources.
- Up to $50 million for mental health support in schools, including some 60 mental health pilot projects across the K-12 student population to deal with student well-being post-pandemic.
- $20 million for specialized student assessments by speech language pathologists, physical therapists and psychologists.

76 Again note, that in Alberta, K-12 education includes public, Francophone, separate and private schools, charter schools, as well as home education programs (home schooling) conducted in accordance with the standards prescribed by the *Education Act*.

77 The Panel notes that this will require consequential amendments to the *Public Health Act* and the *Emergency Management Act* which currently have priority over the *Education Act* in the event of a public health emergency or an emergency as defined in those acts.

78 This act replaced the *Summary Convictions Act*. Section 7(1) states that a person convicted under its provisions "is liable to a fine of not more than $2,000 or to imprisonment for not more than six months or both."

79 It should be noted that the Government of Alberta does not itself deliver education programming – that is the legal role and duty of school boards.

80 The reference here to at-home learning refers to at-home learning in its broadest sense, which in Alberta includes many options that have an at home component - home education, notification only home education, online learning, outreach programs, print-based distance education programs, shared responsibility programs (see https://www.alberta.ca/education-guide-program-delivery-options).

81 Identifying education as an "essential service," even if such identification is confined to a period of declared public emergency, will have significant legal ramifications requiring further legal analysis given the impact on freedom of association and existing case law from the Supreme Court of Canada.

Post-pandemic efforts to repair the harm caused by school closures, in particular learning loss, will be guided largely by policy measures rather than legislative direction, and are therefore beyond the terms of reference of the Panel. However, after reviewing the subject, the Panel strongly suggests such policies consider the following:

- The Alberta government rejects prolonged mass school closures as a policy option, with perhaps the exception being a pandemic that directly and seriously threatens children.
- Alberta Education review Alberta attendance records for 2020-2022 to identify all students whose attendance was materially affected by the school closures.
- Alberta's school boards, with the encouragement and support of Alberta Education, make strenuous efforts to reintegrate into schooling, with minimal delay, all students who left or were ousted from education prematurely, and to make up for any and all learning loss incurred by these students as a result of school closures.
- The Alberta government quickly provide the resources, including financial, necessary to ensure the harms caused by the 2020-2022 school closures are repaired as fully as possible.

d) Treatment and Schooling of Children Under Future Emergency Conditions

In anticipation of future emergencies, the Province should specify what should be done to ensure minimal impact on children, schools, the educational rights of children, and the future well-being of the province because of educational harms.

While the following are policy and regulatory recommendations rather than legislative recommendations, the Panel strongly suggests:

- That the minister of Education be a full member of all cabinet committees related to emergencies to protect and advance the interests of Alberta's children and their education.
- That the deputy minister of Education be a full member of all deputy-minister committees related to emergencies to advance the interests of Alberta's children and their education.
- That all schools shall remain open and operational during the school year and may only close during a public emergency on the authority of the lieutenant governor in council (i.e., an order in council) with the concurrence of the minister of Education.
- That any order or regulation authorizing school closures specify as short a closure period as possible under the circumstances (such circumstances having to be extraordinary), and that such order or regulation be concomitant with a requirement to reopen as quickly as possible with a public commitment to a proposed reopening date.[82] This provision is to apply even if s. 52.1 of the *Public Health Act* or s. 18(1) of the *Emergency Management Act* is invoked.
- That during any school closure, Alberta' school boards, with the encouragement and support of Alberta Education, shall:
  - Ensure that students prevented from in-school learning shall have satisfactory access to virtual at-home learning for the entire period of the closure.
  - Communicate regularly with each student to inquire into his/her well-being during the closure.
  - Provide students and guardians with all necessary supplementary resources to sustain virtual, at-home learning, including but not limited to supplementary income, food and tutoring.
  - Ensure that students and guardians are aware of the date of the physical school reopening, apprised of the requirement to return to school immediately upon reopening, and provided with all necessary supplementary resources to return to school.

82 It will be suggested that in many instances it would be impossible for the government to predict a reopening date under emergency conditions. But the Panel feels it would be better for the government to propose and communicate a proposed reopening date and then change it if necessary with an explanation as to the reasons why, than to leave the prospect of reopening completely indefinite.

- That due attention be given to defining the working relationships, outside of strict statutory bounds, among Alberta Education, Alberta Health, other ministries, school boards, municipalities, families and other participants with respect to education in general and emergency-period school closures in particular.
- That in recognition of the fact that the present and future well-being of Alberta's children is a shared objective of their parents, their teachers, the school authorities and all other stakeholders in the education system, an organized consultation occur between the government and these interests respecting the best possible ways to respond to future public health emergencies affecting Alberta's children.

Concluding Comment

The well-being of the children of Alberta is of supreme importance to all Albertans and the future of the province. This chapter proposes measures to ensure the current and future well-being of Alberta's youth, especially during public emergencies.

The Panel has examined the impacts of school closures in response to COVID-19, their negative long-term implications, and the inadequacies of the legislative framework for authorizing and dealing with school closures. It recommends amendments and policies to more strongly establish and enforce the rights of Alberta children to an education and the duties of parents and the Alberta government to provide for the education of children, including during public emergencies. It also recommends measures to address the need for a major post-pandemic undertaking in Alberta to repair the harms caused by the 2020-2022 school closures, and for clarification of the principles that should govern the treatment and schooling of children whenever a public emergency arises.

CHAPTER 6
MANDATING IMPACT ASSESSMENTS

Based on the legislative precedent set by Alberta's *Environmental Protection and Enhancement Act*, this chapter recommends that impact assessments be mandated for all major emergency response measures. Three types are proposed: preliminary impact assessments, interim emergency impact assessments and post-emergency impact assessments.

CHAPTER 6
MANDATING IMPACT ASSESSMENTS

Introduction

The Government of Alberta took three types of actions in response to the COVID-19 crisis of 2020-2022, all of which affected large numbers of Albertans:

- Orders and regulations relating to vaccinations,[83] the wearing of masks, social distancing[84] and the reduction or closure of non-COVID-related health services[85] – medical directives that affected all Albertans.
- Orders and regulations mandating school closures and a shift from in-school to online at-home learning – educational mandates affecting around 40 per cent of Alberta's population.
- Orders and regulations that mandated lockdowns of major sectors of the economy, including measures that disrupted travel and trade flow – economic mandates again affecting many Albertans.

While the contraction of the Alberta economy during the COVID-19 crisis cannot be attributed solely[86] to the mandated lockdowns of major sectors of the economy, a preliminary analysis by the Regulatory Institute of Canada (RRI)[87] indicates:

- That in 2020, Alberta's GDP fell twice as much as the average of the four previous worst recessions in Alberta over the last 40 years.
- That when the lockdowns began on March 15, 2020, Alberta's unemployment rate had been (Feb 2020) 8.7 per cent but by May 2020, the unemployment rate nearly doubled reaching a 40+ year high of 15.5 per cent.
- By way of comparison, during the Great Depression of the 1930s, the national unemployment rate peaked at 19.3 per cent while the GDP plummeted by 15 per cent (June 1933). During the 2020 COVID-19 lockdown period, Alberta's unemployment peaked in May 2020 at 15.5 per cent while its GDP diminished by eight per cent. That is, half the fall in GDP and only four per cent less unemployment than during the Great Depression.
- While Alberta's GDP dropped significantly and its unemployment rate topped record levels during the COVID-19 crisis, it should be noted that the number of personal bankruptcies actually declined between 2017 and 2021. Possible explanations (requiring more detailed analysis) include reduced consumer spending, low interest rates, and the impact of assistance from the Canada Emergency Response Benefit (CERB) and CERB loans for small businesses at risk.

Impact Assessments

The Panel understands that throughout the COVID-19 crisis the Premier and cabinet received confidential policy briefings and reports that contained, among numerous items of importance, some assessments of the likely effects of proposed or adopted policies and actions. Meetings were held between government officials and businesses, associations and various interests affected by the COVID-19 response measures. These meetings provided informal feedback on the impacts of COVID-19 response measures. MLAs also received feedback from constituents and relayed that information to cabinet. Media coverage of the pandemic was constantly monitored, providing yet another source of feedback.

Several more structured assessments[88] of the impacts of the COVID-19 response measures – particularly those impacting seniors requiring long-term care – were also commissioned during the crisis. But to the best understanding of the Panel, no formal impact assessments of the type recommended in this chapter were conducted.

Because of the importance the Panel attaches to this subject, and to further its understanding of the impact assessment issue, the Panel engaged the services of Gerard Lucyshyn of the Regulatory Institute of Canada to prepare a memo exploring the subject further. The Panel has relied heavily on this memo in conducting its analysis and forming its recommendations. A copy of that memo is also included in Appendix 7.

83 Alberta had no legislation governing vaccinations and did not directly mandate them. Compliance with vaccination policies was secured by moral suasion and indirectly through businesses and public institutions by requiring persons wanting their goods and services to provide "proof of vaccination" in order to enter. See https://www.cbc.ca/radio/asithappens/alberta-restaurant-reopens-after-harassment-over-requiring-vaccine-passport-1.6186791 and https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3216452/

84 Social distancing in this context refers to limiting physical closeness and contact with other persons in order to avoid catching or transmitting the COVID-19 virus, including orders as to who could attend a private gathering, rules respecting places of worship, and restrictions-exemption provisions.

85 These included cancellation of "all elective surgery in Calgary, including some pediatric procedures and transplants, and up to 60 per cent of non-urgent operations in other regions as a rush of unvaccinated coronavirus patients overwhelms hospitals." See https://www.albertahealthservices.ca/news/releases/2021/Page16174.aspx

86 WTI oil prices (and gasoline prices) plummeted sharply in March of 2020. And while they returned to pre-pandemic levels by the summer of 2021, it took time for this recovery to positively impact the Alberta economy.

87 See Appendix 8 for an RRI memorandum, "Economic Impacts on Alberta from COVID-19 Lockdown Measures," September 3, 2023.

88 In January 2021, the consulting firm KPMG produced a report entitled, *Review of Alberta's COVID-19 Pandemic Response: March 1 to October 12, 2020 - Final Report to the Government of Alberta, January 2021*. It contained five main recommendations, including a recommendation that the government conduct a comprehensive review of its pandemic response once response measures were more fully implemented. In 2022, Alberta's Auditor General was commissioned to conduct an audit "to determine whether the Department of Health (Alberta Health) and Alberta Health Services (AHS) effectively actioned a pandemic and outbreak response to COVID-19 in publicly funded continuing care facilities."

Impact Assessments Recommended

The Panel agrees with a 2021 OECD statement that: "Evidence-based policy making is a well understood and accepted principle of good governance. However, any sort of government intervention, whether by policy, law, regulation, or any other type of rule may not always fully consider all the effects of such intervention at the time the intervention is being developed. All government intervention has costs and there may be situations where such costs outweigh the anticipated benefits and/or may create some unintended consequences that negatively impact citizens, business, and/or society as a whole."

While it is not the task of the Panel to pass judgment on the adequacy or inadequacy of any of the impact assessments that were or were not done, it is the judgment of the Panel that impact assessments are essential. They are needed, not only to provide the feedback needed to make mid-course adjustments to the emergency response measures initially adopted, but to hold government accountable[89] for the impacts of those measures.

In particular, it is the judgment of the Panel that in the future, impact assessments of a specific kind (defined later in this chapter) should be conducted for any major action or limitation mandated in response to a provincewide public emergency, especially those affecting large numbers of Albertans. The Panel therefore recommends:

6.1 That the Province adopt a specific policy to mandate impact assessments prior to, during and after the promulgation of orders and regulations in response to a declared provincewide public emergency.

The distinguishing characteristics of the three types of assessments are the point in time at which they are to be conducted and the thoroughness of the assessments.

Under emergency conditions, any assessment of a proposed response measure prior to implementation may be hampered by lack of time and information, but an incomplete assessment is better than none. Impact assessments during implementation would obviously be more thorough and would generate feedback essential to improving effectiveness. Impact assessments conducted after the emergency would be the most thorough and most conducive to ascertaining the lessons learned.

In this chapter, the Panel refers to these assessments as preliminary impact assessments, interim emergency impact assessments and post-emergency impact assessments.[90]

With respect to questions as to who should conduct these assessments and the scope of the analysis, it is recommended:

6.2 That the AEMA conduct preliminary impact assessments and interim emergency impact assessments with the co-operation of the relevant subject matter agencies or departments (e.g., Finance, when a principal impact is economic; Alberta Health, when a principal impact is health-related; Justice, when a principal impact is the limitation of rights and freedoms, etc.).

6.3 That the appropriate cabinet committee,[91] with the assistance of the Strategic Advisory Secretariat recommended in Chapter 2, ensure that the objective and scope of these impact assessments are sufficiently broad and comprehensive to consider all the major impacts of the response measures adopted, not just those on the sector where the crisis originated.[92]

Thus, it would be expected that all assessments consider, not only the positive and negative impacts of those measures on the health of the population in the event of a public health emergency, but also the impacts (often unintended) on personal, social and community relationships; education and children; the economy, including the jobs and incomes of those directly and indirectly affected; and the constitutionally guaranteed rights and freedoms of those impacted.

It should be noted that the provincial auditor general (AG), who is independent, is an option for conducting both interim and the post-emergency impact assessments. In fact, as previously noted, Alberta's AG was commissioned in 2022 to conduct an audit "to determine whether the Department of Health (Alberta Health) and Alberta Health Services (AHS) effectively actioned a pandemic and outbreak response to COVID-19 in publicly funded continuing care facilities."

89 Lara Khoury, Alana Klein, Marie-Eve Couture-Menard and Kathleen Hammond, "Governments' accountability for Canada's pandemic response," Journal of Public Health Policy, 2022, 43:222-233, https://doi.org/10.1057/s41271-022-00350-0. This study recommends that provincial and territorial legislatures need to add public accountability mechanisms to their public health legislation and that these mechanisms should include the following: periodic 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.

90 It should be noted that Mr. Lucyshyn in his memo on impact assessments uses the terms more frequently employed in the literature, namely, Ex Ante Impact Assessment, Post Implementation Review (PIR) and Ex Post Evaluation.

91 At the time of the COVID-19 crisis, this was the Emergency Management Cabinet Committee (EMCC) which was only in place for a limited period and no longer exists, although such a committee could be established again as needed.

92 As referenced elsewhere in this report, a "systems" perspective on the part of decision-makers and those commissioning impact assessments ensures that the impacts of measures adopted on all related systems are considered, not just those of one or two siloed sectors.

The AG's Report,[93] entitled "COVID-19 in Continuing Care Facilities" is also a good model of a post-crisis impact assessment in that its stated purpose was "to identify areas for improvement so that Alberta Health, AHS, and the entire continuing care sector are better prepared for future pandemics and can incorporate learnings from COVID-19 to other more common communicable disease outbreaks, such as seasonal influenza."

6.4 That consideration be given to amending the *Emergency Management Act* to establish a legal obligation on the part of the AEMA to ensure these impact assessments are conducted if policy is insufficient to guarantee them.

Transparency

Communications play an enormously important role during a public emergency. Thus, the Panel emphasizes the need for transparency with respect to the government's policies, orders and regulations, communicating not just the "what," but also the "who" and the "why" of them. Such transparency is essential to obtain the feedback necessary for government and decision-makers to correct mistakes of policy and administration.

The need for transparency extends to the mandated impact assessments recommended in this chapter. When an impact assessment is completed – whether preliminary, interim or post-emergency – it should be made available to the public in a fashion that is visible and clear.

Some might understandably feel that making the results of a preliminary impact assessment publicly available – given the tentativeness and uncertainty that surrounds it – may be unwise and only contribute to more uncertainty. On the other hand, it can also be argued that, carefully handled from a communications standpoint, transparency of a preliminary impact assessment can have a positive long-term effect, if:

- The presentation to the public of the initial response measures includes a frank disclosure of anticipated impacts, both positive and negative.
- Authorities state that the proposed response is the best that can be offered given the information available but may be subject to change.
- Authorities assure the public that changes to the response will be made based on feedback from the public and further impact assessments.

Thus, when those changes come, as they invariably must, rather than being surprised, the public has been prepared to expect them – the disclosure of preliminary impact assessments being an important part of that preparation.

Transparency and Confidentiality[94]

The Panel is convinced that "full disclosure" of the deliberations that produce the response measures to a public emergency is in the public interest. At the same time, it recognizes the necessity of maintaining the confidentiality of cabinet deliberations to ensure full and frank consideration of all the options available. The Panel is also conscious that the degree of transparency possible and advisable during a state of emergency will be to some degree conditional upon the nature of the emergency – full transparency being less advisable if the emergency is one of public order and national security than when the emergency does not require security precautions.

Precedents

Since environmental impact assessments are already required for certain economic activities, there is considerable experience performing and utilizing these assessments. The Panel refers to the following sections of the *Environmental Protection and Enhancement Act*:

- Section 47 empowers the minister to order an impact assessment:

  If the Minister is of the opinion that an environmental impact assessment report is necessary because of the nature of a proposed activity, the Minister may by order in writing direct the proponent to prepare and submit the report in accordance with this Division…

- Section 48(1) requires a proponent to prepare terms of reference:

  Where a proponent is required to prepare an environmental impact assessment report, the proponent shall prepare proposed terms of reference for the preparation of the report in accordance with requirements specified by the Director and shall submit the proposed terms of reference to the Director…

- Section 49 prescribes the content of an environmental impact assessment report:

93 Report of Alberta's Auditor General, "COVID-19 in Continuing Care Facilities," February 2023, https://www.oag.ab.ca

94 See discussion of cabinet confidentiality and full disclosure of relevant information in the context of the COVID-19 emergency in:

- Ingram v Alberta (Chief Medical Officer of Health), 2022 ABQB 311
- CM v Alberta, 2022 ABQB 462

> An environmental impact assessment report must be prepared in accordance with the final terms of reference issued by the Director under section 48(3) and shall include the following information unless the Director provides otherwise:

(What follows are 15 subsections prescribing information that must be included in the mandated environmental impact assessment.)

It should be noted that the Environmental Impact Assessments (EIAs) called for by this act are part of a regulatory environmental process, quite different from the processes for responding to a public emergency. They never pertain to emergency situations and never occur during an activity or after an activity is completed. The act is only cited here as an established precedent for legislating the conduct of impact assessments – legislation called for by the Panel to better equip the Province to manage public emergencies.

Three Types of Impact Assessments

The Panel recommends the three types of impact assessments described below and more thoroughly in the Lucyshyn memo attached as Appendix 7:

Preliminary Impact Assessments

This refers to an evaluation or analysis conducted before the implementation of a policy, regulation or specific emergency response measure. The objective is to predict the potential impacts, risks, costs and benefits (costs and benefits broadly defined) of different courses of action proposed. Available information is gathered, the data is weighed, "what if" questions are considered, and the outcomes and consequences are estimated.

In an emergency when time is of the essence, preliminary impact assessments, as noted, will be limited and speculative. But the requirement that they be conducted – however cursorily – at least guarantees that the question is asked: "What are the most likely impacts of implementing this proposed emergency response?"– a question to be answered to the best of the ability of the decision-makers and implementors, given the best information and time available to them.

For example, when considering social isolation measures during the COVID-19 crisis, a preliminary impact assessment using input from mental health experts would have indicated that social isolation increases the risk of domestic violence unless those distancing measures were accompanied by mitigative measures to reduce the negative impacts.

Interim Emergeny Impact Assessments

Such assessments are conducted after a response measure has been implemented. They determine whether the response is achieving its objectives, and they identify any unanticipated outcomes. Most importantly, decision-makers are provided with the information they need to modify and improve the emergency response. The requirement for such interim assessments can be directly embedded in the primary legislation.

With respect to Alberta's response to the COVID-19 crisis, an interim emergency impact assessment of the initial four-month closure of schools in 2020 – whether done formally or on an ad hoc basis – revealed that the negative impacts of learning loss and decreased socialization among school children outweighed the health protection benefits. Based on this feedback, school closures in the following year were much shorter.

Post-Emergency Impact Assessments

A post-emergency impact assessment is a summative evaluation conducted after the completion of crisis response measures and interventions. It considers past response measures through all stages of decision-making from formation to implementation. It can be based on predetermined variables of interest and/or by comparing the achieved change of status with the original status.

The objective is to evaluate policy objectives, impacts on the stakeholders and impacts on the public. It also facilitates accountability, and, most importantly, provides an opportunity to learn how to better respond to future public emergencies.

As observed at the beginning of this chapter, the three categories of actions taken by the Government of Alberta in coping with the COVID-19 crisis of 2020-2022, and which affected the largest numbers of Albertans, were:[95]

- Orders and regulations mandating vaccinations, the wearing of masks, social distancing, and the reduction or closure of non-COVID-related health services – medically directed mandates that affected the entire population of Alberta.

95 For samples of the following orders and regulations see Appendix 11.

- Orders and regulations mandating lockdowns of major sectors of the economy, further exasperated by the closure of interprovincial borders thus disrupting travel and trade flows – economic mandates again affecting many Albertans.
- Orders and regulations mandating school closures and a shift from in-school to online at-home learning – educational mandates affecting around 40 per cent of Albertans.

The Panel therefore recommends:

6.5 That an independent post-emergency impact assessment and audit be ordered by the Government of Alberta to identify and quantify (where possible and necessary) the health, social, economic and legal impacts of the above response measures and to better equip the Government of Alberta to respond to future public emergencies.

Concluding Observations

Governments across the country and around the world struggled to design and implement response measures in a race to mitigate the spread of COVID-19 and the death toll amongst their respective populations. One of the biggest challenges they faced, especially at the outset of the crisis, was the lack of detailed and reliable information about the virus and systems to track the effectiveness of containment measures.

Many administrations reduced their volume of non-COVID-19 legislation and reprioritized their legislative programs to ensure resources, orders and regulations were focused on the COVID-19 response. Fast-tracking policy decisions, regulations and legislation bypassed the ordinary procedures, thus leaving less time for scrutiny or evaluation. In future, it should be made clear that fast-tracking provisions should not preclude the preliminary and interim emergency impact assessments proposed by the Panel.

Much of the COVID-19 response regulation/legislation was intended to be temporary and many governments ensured this by integrating sunset clauses or expiry dates into their fast-tracked initiatives. But only a few governments have mandated that post-emergency impact assessments be performed to assess the effectiveness and overall costs of the regulations and legislation; even fewer have published or made public those results.

The Panel desires to ensure proportionality, accountability, transparency and overall good governance for regulatory/legislative responses to emergency situations, particularly to health emergencies like pandemics. Governments must not lose sight of the health, economic, social and legal impacts of their decisions while maintaining their focus on the reduction of mortality and transmission rates. During most emergency situations, government intervention, while well-intended, is much more likely to have greater and more far-reaching impacts than during normal times.

Traditional methodologies of impact assessment may not be suitable in emergency or time-sensitive circumstances when evidence is most often incomplete or uncertain and/or the information is rapidly evolving. During those times, concentrated effort should be made to conduct a simplified qualitative, preliminary impact assessment based on the known evidence (including the collective prior experience of government and society) – followed by periodic interim emergency assessments incorporating the latest information and experience, and a comprehensive post-emergency assessment to aid decision-makers and implementors to improve responses to future public emergencies.

The COVID-19 crisis placed government and its administrative structures under a great deal of pressure to rapidly adopt emergency response measures to cope with the crisis. The objectives of most of these measures focused on reducing transmission rates and death tolls and ensuring the sustainability of the healthcare system. Unfortunately, the response negatively impacted many systems of state and society. These impacts could be reduced in future public emergencies by mandating preliminary impact assessments, interim emergency impact assessments and comprehensive post-emergency impact assessments.

CHAPTER 7
PROTECTING RIGHTS AND FREEDOMS

In this chapter the Panel examines the limitations on the rights and freedoms of Albertans resulting from the COVID-19 response measures adopted by the Government of Alberta. Recommendations are then made to strengthen the protection of those rights and freedoms through amendments to the Alberta *Emergency Management Act*, the *Public Health Act*, the *Judicature Act*, the *Administrative Procedures and Jurisdiction Act*, but particularly through more than a dozen amendments to the *Alberta Bill of Rights*.

CHAPTER 7
PROTECTING RIGHTS AND FREEDOMS

Introduction

The *Canadian Charter of Rights and Freedoms*, the *Alberta Bill of Rights*, and related legislation such as the *Canadian Bill of Rights* and the *Alberta Human Rights Act* define and guarantee the rights and freedoms of Albertans, among which are:

- **Fundamental freedoms** defined in the *Canadian Charter of Rights and Freedoms* as freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.
- **Mobility and equality rights**, again defined in the *Canadian Charter of Rights and Freedoms* as including the right of every citizen to pursue a livelihood in any province, the right of every individual to equality before and under the law, and equal protection and benefit of law without discrimination.
- **Similar or additional rights and freedoms defined in the *Alberta Bill of Rights*** as the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; the right of the individual to equality before the law and the protection of the law; freedom of religion; freedom of speech; freedom of assembly and association; freedom of the press; and the right of parents to make informed decisions respecting the education of their children.

Related legislation provides rights that are additional or alternately stated, such as:

- **The *Canadian Bill of Rights***,[96] which predated the *Canadian Charter of Rights and Freedoms*, affirming the rights of Canadians to life, liberty, security of the person and enjoyment of property; the right not to be deprived thereof except by due process of law; the right of the individual to equality before the law and the protection of the law; freedom of religion; freedom of speech; freedom of assembly and association; and freedom of the press.
- **The *Alberta Human Rights Act*** which affirms that in Alberta it is recognized as a fundamental principle and as a matter of public policy that all persons are equal in dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.
- **The *Education Act*** which affirms a "right of access" to an educational program to every person who on September 1 in a year is six years of age or older and younger than 19 years, who is a resident of Alberta, and who has a parent who is a resident of Canada.

Rights and Freedoms and National Crises

Canada's laws offer significant protection to the rights and freedoms of Canadians under "normal" circumstances. It is not the intention of the Panel to ignore or denigrate the strengths of that protection under such circumstances. However, in the past, it has been "national crises" that have forced a re-examination of that protection and produced demands for further strengthening.

96 Note that the *Canadian Bill of Rights* applies to federal COVID-19 measures implemented in Alberta and could have been enforced by the Alberta Court of King's Bench, as the latter is a superior court of general jurisdiction under s. 96 of the *Constitutional Act 1867*.

For example, in October 1970 the Front de liberation du Quebec (FLQ), which had detonated over 200 bombs in the previous seven years to draw attention to its cause, kidnapped British diplomat James Cross and provincial cabinet minister Pierre Laporte. Laporte was subsequently killed. This "October Crisis" prompted then Prime Minister Pierre Trudeau to invoke the *War Measures Act*, the first time it had ever been used during peacetime. This measure limited civil liberties across the entire country, mobilized the military in support of civic authority, and granted the police far-reaching powers. It resulted in significant restrictions on the movements and activities of Quebeckers during the crisis, as well as the arrest and detention of some 500 persons who were denied due process under the law and the right of habeas corpus (the right to have a judge confirm that they had been lawfully detained).

After it was all over there was considerable criticism of the *War Measures Act* as a blunt instrument ill-suited to manage a domestic crisis. The act's regulations were replaced in November 1970 by the *Public Order (Temporary Measures) Act* which expired the next year. The *War Measures Act* itself was subsequently replaced in 1988 by the *Emergency Preparedness Act*, providing greater specificity on when and how emergency response measures could be used along with substantive oversight and accountability mechanisms. After the 9/11 crisis and mounting concerns about the possibility of future acts of terrorism, numerous changes were made to other national security legislation. Today, the principal federal statutes governing the national response to public emergencies include the *Emergencies Act* and the *Emergency Management Act*.

This is not the time and place to analyze the strengths and weaknesses of these initiatives.[97] They are only cited here to make the point that national crises understandably force a re-examination of the protection of rights and freedoms under crisis conditions. Thus, the COVID-19 crisis, as it impacted Albertans, demands such an examination, to which we now turn our attention.

The Limitation of Rights and Freedoms

The *Alberta Bill of Rights* contains no statutory provision for limiting the rights and freedoms of Albertans.[98] The federal *Charter of Rights and Freedoms*, however, does contain such a provision, namely, as stated in s. 1, that "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." In other words, governments in Canada can impose limits on the rights and freedoms of Canadians if they can demonstrate that such limitations are justifiable and reasonable in a free and democratic society.

There is no question that many of the measures adopted by the federal and Alberta governments in response to COVID-19 imposed severe limits on the guaranteed rights and freedoms of Albertans, and that, thus far, those limits have been ruled justifiable by court decisions. Vaccine mandates, or vaccine passports enforced in a manner akin to vaccine mandates, limited the freedom of conscience and belief of many, including those with conscientious or medically based objections. Social distancing mandates and COVID-19 related travel restrictions limited freedom of assembly and mobility rights. School closures limited the freedom of association and access to in-school educational programs for hundreds of thousands of children. Economic lockdown measures limited the mobility rights of workers and consumers, the rights "of every citizen to pursue the gaining of a livelihood," and the rights of business owners to use their properties as they saw fit to stay in business.

The insistence of governments at all levels, with the compliance of most traditional media, that there was only one acceptable narrative explaining and justifying the response to the COVID-19 crisis, thereby disregarding and censoring other narratives, violated freedom of thought, belief, opinion and expression in a variety of ways.

97 Many Albertans feel that invoking the federal *Emergencies Act* to deal with the Freedom Convoy involving many Alberta truckers was yet another case of overreach like that involved in invoking the *War Measures Act* years ago. But investigating and remedying such overreach is in the federal jurisdiction and beyond the terms of reference of this Panel.

98 Note, however, that the Ingram decision [2023 ABKB 453] did identify the *Alberta Bill of Rights* as having obvious, implicit legal limits. Also note the limit on right of access to educational programs established by s. 2 of the *Education Act*, which reads: "The exercise of any right or the receipt of any benefit under this Act is subject to the limitations that are reasonable in the circumstances under which the right is being exercised or the benefit is being received."

The Panel is charged by its terms of reference to recommend amendments to the legislation governing Alberta's response to the COVID-19 crisis. This required an examination of the legislation authorizing those orders and regulations that imposed limits on the rights and freedoms of Albertans guaranteed by other legislation including the *Constitution Act* and the *Alberta Bill of Rights*. This chapter looks at how to best protect the legally guaranteed rights and freedom of Albertans during a public emergency, particularly:

- How best to determine what limitations to rights and freedoms, if any, are truly justifiable and reasonable, under emergency circumstances in a free and democratic Alberta.
- How best to protect guaranteed rights and freedoms in emergency situations, while still protecting citizens from the harms related to the emergency.

To do so, the Panel relied heavily on the experience and expertise of two of its Panel members – the Honourable Jack Major, former justice of the Supreme Court of Canada and Mr. Michel Kelly-Gagnon, President Emeritus of the Montreal Economic Institute (which has long wrestled with these issues) – to provide advice.

The Panel also commissioned Mr. Kelly-Gagnon and his associates to prepare a paper on the protection of rights and freedoms during a public emergency, along with other solicited legal expertise, to develop this chapter.

The paper, A Path Towards the Improved Protection of Rights and Freedoms in the Context of Public Crises and Emergencies (MKG paper), is included as Appendix 9. The Panel wishes to thank Mr. Kelly-Gagnon for his substantial contributions and his colleague, Mr. Samuel Bachand, a Quebec-based expert in administrative law who also provided valuable advice.

The Panel wishes to make clear, however, that the observations, commentary and recommendations contained in this chapter are those of the Panel, for which it takes full responsibility.

How Alberta's Response to COVID-19 Infringed on Albertan's Rights and Freedoms

The MKG paper contains an extensive description of the impacts of the COVID-19 response measures adopted by Alberta, including infringements on:

> Freedom of religion, expression and peaceful assembly.
>
> The right to equal treatment under the law and to equal benefit of law.
>
> The rights of children to access education.
>
> Personal security and informed consent.
>
> Privacy and professional confidentiality.[99]
>
> The right of every citizen to pursue the gaining of a livelihood in any province.
>
> Enjoyment of property, including its use, and the right not to be deprived thereof except by due process of law.
>
> Non-discrimination provisions, noting that prohibitions in Alberta law against discrimination do not include prohibitions against discrimination based on medical status or history.

Provisions for Civil Recourse to Alleged State Infringements on Rights and Freedoms

As the MKG paper observes:

> Persons who believed that their rights and freedoms were unjustifiably and unreasonably infringed upon by the measures imposed by government in response to the COVID-19 crisis basically had two civil recourses available to them: 1) on an interim basis, seeking stays or injunctions against said measures, and 2) on the merits, seeking judicial review, i.e., asking the court to strike down the impugned COVID-19 measures on either legal (common law, statutory) bases or constitutional bases (charter or the federal-provincial division of powers).
>
> However, in reality the availability of such recourses during the COVID-19 crisis did not mean that court challenges would be met with any degree of success for those seeking relief from the courts for alleged infringements of their rights and freedoms.

99 Both protected under Alberta's *Freedom of Information Act* and *Protection of Privacy Act*, the *Personal Information Protection Act*, the *Health Information Act*, the *Employment Standards Code*, and the *Health Professions Act*.

In fact, quite the opposite happened. The COVID-19 case law in Alberta does not significantly depart from the COVID-19 case law in the rest of Canada: Courts denied provisional/interim remedies and dismissed permanent remedies either on technical grounds (mainly "mootness") or on the merits (based on the full evidence and arguments presented). In many cases the applicants for relief did not have the resources to adequately press their case and, in most cases, there was a presumption on the part of the courts that the governments were justified in responding as they had to the COVID-19 emergency – a presumption that the applicants could not overcome.

In 1986, the Supreme Court of Canada laid out what became known as the "Oakes test"[100] for determining whether the government's limitation of a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* was demonstrably justifiable and reasonable in a democratic society. According to the Oakes test, the limitation must be found in a "rule of law," i.e., the limitation must be based on some written provision in legislation or, in rare cases, on a power of common law. Secondly, the state must justify the limitation by demonstrating it is "pressing and substantial" and that the goal served is "proportionate," i.e., it minimally impairs the right or freedom at issue and does not causing deleterious (bad) effects that would outweigh the salutary (good) effects.

The requirement and application of the Oakes test does not alter the reasoned (a priori) presumption that the state is operating in the public interest. As the MKG paper points out, the tendency of judges has been, in the decades following the Oakes case, to apply the "proportionality" requirements more leniently. This makes the state's demonstration of justification correspondingly easier.

Strengthening the Protection of Rights and Freedoms in a Public Emergency

As observed in the MKG paper – an observation with which the Panel agrees – three of the main obstacles to providing greater protection to the basic rights and freedoms of Albertans during a declared public emergency are:

- The lack of a clear understanding and definition of a "public emergency" – its nature, depth and breadth.
- The complexity, slowness and expense of the judicial system.
- The current approach taken by the courts in balancing the protection of rights and freedoms with the attainment of other state objectives.

To remedy or at least reduce the magnitude of these three obstacles, the Panel proposes the following:

a) Clarify the legal definition of a public[101] emergency.

b) Increase the response capacity of government departments, agencies and the courts once a public emergency is called.

c) Streamline and balance administrative and court procedures to protect the rights and freedoms of citizens and protect them from harm.

d) Strengthen the protection of rights and freedoms in provincial legislation.

a) Clarifying the Definition of a Public Emergency

If the limitation of rights and freedoms of Albertans is to be justified on the grounds that a serious public emergency exists, then the definition of what exactly constitutes a public emergency is crucial and should be included in Alberta's *Emergency Management Act*. Likewise, a clear, updated definition of what exactly constitutes a public health emergency should be included in the *Public Health Act*.

100 31 R. v. Oakes, [1986] 1 SCR 103

101 While Alberta's current emergency legislation does not use the term "public" emergency, the Panel has employed that adjective throughout this report to reinforce the idea that the emergencies we are dealing with are serious emergencies of widespread impact affecting large numbers of Albertans. It is noted that Alberta's *Public Health Act* does use the term "public health emergency."

As observed in the MKG paper, it is in the public interest "to include in all of Alberta's 'emergency legislation' an objective definition of 'emergency' that would not depend upon a potentially far-fetched interpretation[102] or on a discretionary declaration of emergency made solely on the recommendation of government officials." Emergency legislation should require that truly dire circumstances exist before government can invoke exceptional powers. The Panel favours a wording expressed in objective[103] terms with a high threshold that could be reviewed on a correctness standard by an independent and impartial court of law.

The definitions included in current emergency legislation include:

- From s. 1 of Alberta's *Emergency Management Act*, "emergency" means an event that requires prompt co-ordination of action or special regulation of persons or property to protect the safety, health or welfare of people or to limit damage to property or the environment.
- From s. 1 of Alberta's *Emergency Management Act*, "disaster" means an event that results in serious harm to the safety, health or welfare of people or in widespread damage to property or the environment.
- From s. 3 of the federal *Emergencies Act*, a "national emergency" is an urgent and critical situation of a temporary nature that: (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada; and that cannot be effectively dealt with under any other law of Canada.

After due consideration, the Panel recommends:

7.1 That s. 1 of Alberta's *Emergency Management Act* be amended to define "emergency" as an urgent, temporary and critical situation that demonstrably, immediately and seriously threatens to cause, beyond a reasonable doubt, major and widespread increases in public displacements, disorder, injuries, deaths or destruction of property, or a fatal impairment in the ability of the Government or Legislature of Alberta to preserve the rule of law in the province.

7.2 That the focus of the debate in the Alberta legislature, when presented (as recommended in Chapter 2 of this report) with an order in council declaring a provincewide state of public emergency, be on whether or not the situation referenced in the order truly qualifies as a provincewide "emergency" as defined by the *Emergency Management Act*.

7.3 That, in recognition that each potential public emergency needs to be evaluated independently and on the grounds of its own distinctive characteristics, the Alberta *Emergency Management Act* be amended to state that "a reviewing court, tribunal or decision-maker owes no deference to any prior determination made with respect to the declaration of previous public emergencies by the Government or Legislature of Alberta, or by the Government or Parliament of Canada."

With respect to the determination and declaration of a public health emergency, it is noted that the current *Public Health Act* defines a public health emergency as "an occurrence or threat of an illness, a health condition, an epidemic or pandemic disease, a novel or highly infectious agent or biological toxin, or the presence of a chemical agent or radioactive material, that poses a significant risk to the public health requiring urgent attention."

After due consideration of the adequacy of this definition, the Panel recommends:

7.4 That s. 1(1) of the *Public Health Act* be amended to define a public health emergency as "an urgent, temporary and critical occurrence or threat of an illness, a health condition, an epidemic or pandemic disease, a novel or highly infectious agent or biological toxin, or the presence of a chemical agent or radioactive material, that objectively, demonstrably, immediately and seriously threatens to cause major and widespread increases in the incidence of disease, injuries, disabilities and deaths."

102 For an example, see: Footnote 21. https://publicorderemergencycommission.ca/final-report/

103 In this case, "objective" is defined in the MKG paper as "based on observable facts, in the opinion of any reasonable person." For a fuller discussion of the role of objectivity and subjectivity in public policy making, see: by Christopher Bruce (Professor Emeritus, Department of Economics, University of Calgary), "Why it is impossible for public policy making to rely entirely on science," *The Conversation*; June 13, 2023.

7.5 That, in recognition that each potential public health emergency needs to be evaluated independently and on the grounds of its own distinctive characteristics, the Alberta *Public Health Act* be amended to state that "a reviewing court, tribunal or decision-maker owes no deference to any prior determination made with respect to the declaration of previous public health emergencies by the Government or Legislature of Alberta or by the Government or Parliament of Canada."

It should also be noted that the above revised definitions of public emergencies refer to provincewide public emergencies – not to local emergencies unless they have the potential to become provincewide.

b) Provisions to Increase the Capacity of Government Departments, Agencies and Courts to Respond to Surges in Demand

The Panel believes there is a need to address the inevitable surges in demand, as well as the necessity of changes, for certain services in an emergency, not only on the part of administrative tribunals and courts, but also hospitals, schools, businesses and households, to mention only a few.

The declaration of a public emergency needs to be accompanied by provisions to immediately increase the capacity of institutions that bear the brunt of a surge in demand. These include an increase in the surge capacity of the health system if the emergency is a public health emergency, and an increase in the surge capacity of administrative tribunals and courts if the emergency involves widespread limitation of legally guaranteed rights and freedoms. The Panel therefore recommends:

7.6 That the order in council declaring a provincewide state of public emergency (to be submitted to the legislature for expeditious ratification as recommended in Chapter 2) be accompanied by an initial estimate of the resources required[104] to increase the capacity of the agencies, departments and programs expected to experience a significant surge in demand for their services.

In the case of human rights tribunals and courts, this might include the temporary provision of additional officers and judges and extending the hours of operations of courts and human rights tribunals.

c) Streamlining Administrative and Court Procedures for Protecting Rights and Freedoms While Also Protecting Citizens from Other Harms

As noted, a major obstacle to the protection of rights and freedoms, as well as protection from harms, during a public emergency is the complexity, slowness and expense of the judicial and administrative decision-making processes and procedures. The intent of the recommendations of this section is to expedite the operation of those processes and procedures and reduce the costs to citizens of participating in them.

As the MKG paper observes, the process for raising constitutional issues of rights and freedoms before Alberta's administrative tribunals and decision-makers is formal, complex and court-like. Moreover, nothing in Alberta's *Administrative Procedures and Jurisdiction Act* guarantees that a person's rights and freedoms need to be considered by the decision-maker, although in Canada that is a constitutional right. In fact, this act as currently worded severely restricts the jurisdiction of decision-makers to make determinations on constitutional questions of law.

In considering the issue of balance, the Panel wrestled with the following dilemma: At present, the burden of proving that the limitation on a citizen's right is unjust and unreasonable rests entirely on the citizen who must take the initiative and engage in costly and time-consuming legal action.

This strikes many Albertans as unfair. The Panel has been asked: "Why shouldn't it be the government that is first obligated to prove in a court of law that the limitation it intends to impose is justifiable and reasonable in a democratic society before it can be imposed?"

While Panel members sympathize with this desire to shift the initial responsibility for proving or disproving the justifiability and reasonableness of a limitation of rights and freedoms from the citizen to the state, the legal reality – established by the constitution – is that the state has the right to impose the limitation (s. 1 of the charter). In doing so the state is presumed by the courts to be acting justly, reasonably and in good faith unless and until it is proven otherwise. This "proving otherwise" is the responsibility of the citizen whose rights and freedoms have been affected by the limitation.

104 The assembly would only be asked to ratify the order in council; the estimate of resource requirements being given initially only as information and advance notice that legislation requisitioning additional resources will be forthcoming.

What can be done, however, is to amend both Alberta's *Judicature Act* and the *Administrative Procedures and Jurisdiction Act* to require the government, once a provincewide state of emergency has been declared, to present its case for limiting a right or freedom expeditiously – within a relatively short period of time – and to make it as easy as possible for the aggrieved citizen to quickly and cheaply secure an injunction staying or suspending the limitation until a final determination is made by the court.

To address the "streamlining and balancing" challenge facing administrative tribunals and courts, the Panel considered three measures thoroughly discussed in the MKG paper.

- Amendments to the *Judicature Act* to make clear that when citizens believe their rights and freedoms have been unjustly limited and have applied to the courts for relief, the state is required to promptly provide the courts with a documented prima facie (first impression) justification for the infringements within a short, specified period.
- Further amendments to the *Judicature Act* to impose a duty[105] on the courts, during a declared state of public emergency, to expeditiously consider and decide applications for injunctions, safeguards or stay orders for the protection of rights and freedoms. These amendments would make evidence for the emergency measures from the state more accessible and make obtaining interim and final remedies simpler, faster and more affordable.
- Amendments to the *Administrative Procedures and Jurisdiction Act* to direct administrative decision-makers[106] to consider constitutional rights and freedoms where applicable and to remove restrictions currently preventing such considerations.

The Panel agrees that there is a current assumption in law that the government acts in good faith, in accordance with the constitution and in the public interest. But unfortunately, there is growing public skepticism, reinforced by the COVID-19 experience, that rejects this assumption. A growing portion of the public believes that elected politicians put partisan and political interests ahead of the public interest and that in a public emergency they will be tempted to limit, without adequate justification, constitutionally guaranteed rights and freedoms on the grounds that the emergency automatically justifies such limitations.

After due deliberation the Panel recommends acknowledging this shift from the current assumption to a presumption that no infringement of constitutionally guaranteed rights and freedoms, during a declared state of public emergency, is to be regarded as justifiable and reasonable until first proven to be so in a court of law.

Various legislative means might be considered for achieving this shift in assumption, but one approach would be to amend s. 24 or the *Judicature Act* to provide that "Upon prima facie evidence, adduced by affidavit along with the originating process or application, of the infringement of a right or freedom protected under the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, the *Alberta Personal Property Bill of Rights*, the *Canadian Bill of Rights* or the Constitution of Canada, the Court shall issue a stay, injunction, order or any other remedy for the benefit of the applicant, to restore status quo ante pending final determination."

The Panel further recommends:

7.7 That s. 24 of the *Judicature Act* be amended to provide that: The applicant shall neither be ordered to post security as a precondition to the issuance of an interlocutory remedy, nor be liable in damages to the opposite party if unsuccessful on the merits, except where the court finds that the application was manifestly frivolous or vexatious, or otherwise constituted an abuse of process.

105 While it may be argued that the court already has such a duty and the powers to discharge it, the court does not have specific direction from the legislation to act immediately during a state of public emergency. The Panel believes that this specific direction should be provided. If it proves insufficient to prompt immediate action, the legislature might even consider imposing a time limit.

106 If some administrative decision-makers do not have the capacity or ability to make determinations about constitutional rights and freedoms, the emphasis should be on giving them that capacity and ability rather than waiving the requirement.

7.8 That to expedite the judicial adjudication of alleged infringements of rights and freedoms by emergency measures, the *Judicature Act* be amended to provide that any related stay, injunction, order or remedy shall be issued on the Xth day (say 60) after the filing of the notice of infringement, and judgment on the merits shall be issued within Y days (say 120) of the filing of the action.

7.9 That the *Judicature Act* be further amended to provide that: "If the applicant has adduced prima facie evidence of damage, the court shall not strike an originating process or application on the ground of mootness of the constitutional or quasi-constitutional issues raised in the notice."

7.10 That the *Judicature Act* be further amended to provide that, in cases where the applicant alleges an unjustifiable and unreasonable violation of the applicant's constitutional rights and freedoms, "No costs, including compensation for expert fees if any, may be awarded against the applicant unless the attorney general demonstrates that the notice was frivolous or vexatious, or otherwise constituted an abuse of process."

7.11 That the *Administrative Procedures and Jurisdiction Act* be amended to remove such restrictions as that imposed by s. 11, namely, that: "Notwithstanding any other enactment, a decision-maker[107] has no jurisdiction to determine a question of constitutional law unless a regulation made under s. 16[108] has conferred jurisdiction on that decision-maker to do so."

7.12 That the *Administrative Procedures and Jurisdiction Act* be amended to provide that: "Section 11 and regulations made under s. 16, during a declared state of public emergency, cannot limit the jurisdiction and duty of a decision-maker to balance the severity of any interference with fundamental rights and freedoms, or values, under the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, the *Alberta Personal Property Bill of Rights*, or the Constitution of Canada, with statutory objectives."

d) Providing Direction to the Courts to Protect Rights and Freedoms by Strengthening Provincial Rights Legislation

Why is it deemed necessary to provide clearer and more explicit direction to the courts to protect rights and freedoms during a declared state of public emergency? Because government responses to widespread public emergencies invariably involve measures that limit the exercise of rights and freedoms and impose strains on their protection much more so than under normal conditions. The protection of rights and freedoms therefore needs to be strengthened particularly during public emergencies.

As previously noted, there are inadequacies in the approach taken by the courts in balancing the protection of rights and freedoms with other state objectives. These inadequacies arise in part from deficiencies in the substance and content of legislation defining rights and freedoms. In Alberta's case, these are deficiencies in the provisions of the *Alberta Bill of Rights* and the *Alberta Human Rights Act*, brought to light in the public arena by the imposition of COVID-19 response measures.

It may and will be argued that the status quo with respect to Alberta's legislation protecting rights and freedoms is sufficient. That may be so under "normal" circumstances. But the "abnormal" circumstances of a public emergency, and the abnormal measures adopted by government to cope with it, can place abnormal strains on the exercise of rights and freedoms of citizens under those abnormal circumstances. Hence the need to strengthen the protection of those rights and freedoms, especially during public emergencies.

As discussed in the MKG paper, this strengthening can be achieved by the following:

- More strongly asserting the supremacy of the protection of rights and freedoms over other protections, ensuring that courts and decision-makers pay more than lip service to rights and freedoms and assign to them sufficient weight and value in adjudicating alleged infringements.

107 Section 10 (b) of the act defines "decision-maker" as an individual appointed or a body established by or under an Act of Alberta to decide matters in accordance with the authority given under that Act but does not include.... (judges and justices of the peace)."

108 Section 16 of the act says the lieutenant governor in council may make regulations: (a) designating decision-makers as having jurisdiction to determine questions of constitutional law; (b) respecting the questions of constitutional law that decision-makers designated under a regulation made under clause (a) have jurisdiction to determine; (c) respecting the referral of questions of constitutional law to the court; (d) respecting the form and contents of the notice under s. 12(1).

- Providing more explicit protection for:
  - Medical consent and the right to choose in medical matters.
  - Professional and academic freedom.
  - The rights of children to a K-12 education.
  - The rights of parents to be informed of, and to give or withhold consent on, proposed medical interventions in the lives of their children.[109]
  - The right of every citizen to pursue the gaining of a livelihood.
  - The right to the enjoyment and use of property.
- Providing more explicit protection against:
  - Invasion of the autonomy and bodily integrity of persons.
  - Prejudicial profiling by the state.
  - Discrimination based on medical status or history.
  - Invasive medical technologies.
  - Abusive takings and limitations on private property.

In considering the strengthening of rights, the Panel is conscious that in practice every right needs to be balanced with obligations on the part of the citizen to act responsibly and that the state also has an obligation to act responsibly in the discharge of its duty to protect rights and freedoms.

To make clear that the citizen has an obligation to act responsibly, the Panel recommends (as proposed by the MKG paper):

7.13 That two clauses be added to the *Alberta Bill of Rights*, under the heading "Fundamental duties and responsibilities," stating that:

- Every person is bound to exercise their rights and freedoms in accordance with the requirements of good faith.[110]
- No right or freedom protected by this bill of rights may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

That the state also has an obligation to respect and protect the rights and freedoms of citizens, even in a declared state of a public emergency, is addressed in the next section.

Strengthening the Supremacy of the Protection of Rights and Freedoms During Public Emergencies

Section 2 of the *Alberta Bill of Rights* states: "Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared."

To further strengthen the protection of rights and freedoms provided by this clause the Panel recommends:

7.14 Adding to s. 2 the words "including during a declared state of public emergency."

This "supremacy clause" is similar in intent to the supremacy clause (s. 52) in the *Canadian Charter of Rights and Freedoms* that declares that any law inconsistent with the charter is of no force or effect. However, such laws (both federal and provincial) are nonetheless presumed valid until a court judgment says otherwise, again giving the benefit of presumption to the state rather than the plaintiff.

The MKG paper contains several proposals for a redraft of the *Alberta Bill of Rights* that more firmly establishes the supremacy of the protection of the rights and freedoms it purportedly guarantees. Of these, the Panel specifically recommends that the act be amended to state:

7.15 That this bill of rights is integral to the Constitution of Alberta, which is the supreme law of Alberta, and any law that is inconsistent with the provisions of this bill of rights is, to the extent of the inconsistency, of no force or effect.

7.16 That a right or freedom set out in this bill of rights shall be presumed to be paramount and of superior importance to other objectives put forward by the Government or Legislature of Alberta.

109 While this right was not directly discussed in the MKG paper, it was later proposed and generally agreed by the Panel that the government should not impose or mandate medical interventions in the life of a child, even in emergencies, without the express permission of the parent(s) or guardian(s) of the child, nor should the government make a child's access to schooling, healthcare or other public goods conditional on medical interventions for which the child's parent(s) or guardian(s) have not given express permission (such permission or its absence following on consultations and information exchanges between the government and the parent(s) or guardian(s).

110 A considerable body of jurisprudence exists on the meaning of "good faith." In the *Emergency Management Act* [s. 1.1 (a)] a "good faith effort" is simply defined as "an honest effort, whether or not that effort is reasonable."

7.17 That this bill of rights guarantees the rights and freedoms set out in it, subject only to such limits prescribed by a rule of law, as can be demonstrably and manifestly justified in a free and democratic Alberta.[111]

The first right protected by the *Alberta Bill of Rights* is currently defined as "the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."

But as discussed in the MKG paper, this definition of the fundamental rights of the individual could be expanded (in response to the invasive nature of some of the COVID-19 protection measures) to include the right to personal autonomy and bodily integrity.

Thus, the Panel recommends:

7.18 That the list of fundamental rights of Albertans that are protected by the *Alberta Bill of Rights*, and which are described in part in s. 1(a), be expanded to include the right to personal autonomy and integrity.

Curiously enough, neither the preamble to the *Alberta Bill of Right*s nor the preamble to the *Alberta Human Rights Act* mention the fundamental importance to Albertans of the rule of law, adherence to which is especially important during emergencies and which the Panel is charged with improving through amendments to the laws of Alberta.

The Panel therefore recommends amending the first sentence in the preamble to the *Alberta Bill of Rights* as follows:

7.19 WHEREAS the free and democratic society existing in Alberta is founded on principles that acknowledge the supremacy of God and the rule of law, and on principles, fostered by tradition, that honour and respect human rights and fundamental freedoms and the dignity and worth of the human person.

The rights and freedoms guaranteed by law can also be better enforced. Thus, the Panel also recommends that the *Alberta Bill of Rights* be amended to provide that:

7.20 Anyone whose rights or freedoms, as guaranteed by this bill of rights, have been infringed or denied may apply to a court of competent jurisdiction to obtain a just and appropriate remedy, such as a stay, an injunction, a declaration, damages or punitive damages.

7.21 Any act of the Legislature of Alberta, or any decision made, or action taken under the authority thereof, that directly or indirectly withholds a benefit, or attaches punitive or seriously disadvantageous consequences to the exercise of a right or freedom set out in this bill of rights, shall be presumed to unjustifiably and unreasonably infringe upon said right or freedom until proven otherwise.

The Panel also notes that there are several features of the *Quebec Charter of Human Rights and Freedoms* worth incorporating into the *Alberta Bill of Right*s. The first is the provision of the Quebec charter that makes it binding on both the public and private sectors. The second is the wording of s. 1 of the charter – that "every human being has a right to life and to personal security, inviolability, and freedom" – which has received a favorable interpretation[112] by the Supreme Court conducive to strengthening the rights of citizens to receive timely healthcare under provincial and federal healthcare legislation. The Panel therefore recommends that:

7.22 The *Alberta Bill of Rights* be amended to provide that it binds the state and governs all those matters that come under the legislative authority of Alberta.

7.23 Wording similar to that of s. 1 of the *Quebec Charter of Human Rights and Freedoms* be incorporated into the *Alberta Bill of Rights*, in particular the reference to personal security and inviolability.

Explicit Guarantees of the Rights to Informed Medical Consent; Freedom of Choice with Respect to Medical Procedures; and Protection from Invasive Medical Technologies

Why provide such explicit guarantees? Because public health emergencies and the measures adopted to cope with them can strain the rights of citizens to informed medical consent, to freedom of choice in medical procedures, and to protection from invasive medical technologies. Hence the need to strengthen the protection of these rights, especially during times of public emergency.

Informed consent, as defined by the National Institutes of Health in the United States is the process in which a healthcare provider educates (informs) a patient about the risks, benefits and alternatives of a given procedure or intervention. The patient must be competent to make a voluntary decision about whether to undergo the procedure or intervention.

111 Note that given the historical, cultural and political distinctiveness of Alberta, court interpretations of what constitutes a "free and democratic Alberta" may rightfully and significantly differ from what constitutes a "free and democratic Canada" as referenced in s. 1 of the Canadian *Charter of Rights and Freedoms*.

112 Chaoulli v Quebec (AG) [2005] 1 S.C.R. 791, 2005 SCC 35.

The website of the Canadian Medical Protective Association (CMPA)[113] also provides a substantial discussion of informed consent, beginning with the dictionary definition of consent as "the voluntary agreement to or acquiescence in what another person proposes or desires; agreement as to a course of action." In the medical context and as the law on consent to medical treatment has evolved, the CMPA states it has become a basic accepted principle that "every human being of adult years and of sound mind has the right to determine what shall be done with his or her own body."

According to the Canadian Paediatric Society, the situation in Alberta[114] is as follows:

- The age of majority is 18 years. There is no stipulated age of consent for treatment.
- A patient under 18 years of age is presumed to be without capacity but may also be assessed and determined to be a 'mature minor' and be able to give consent to or refuse treatment.
- Any person who is at least 18 years of age and understands the nature and effect of a personal directive can make a personal directive and is presumed to understand its nature and possible effects.
- Substitute decision-makers must be over the age of majority.

The MKG paper elaborates further on informed consent and related subjects, and, after due consideration, the Panel recommends that the *Alberta Bill of Rights* be amended to guarantee:

7.24 That every Albertan is entitled to informed consent to medical, psychological or any other type of state-sanctioned care, unless they are a demonstrable danger to themselves or others.

7.25 The right of every Albertan to choose to receive, or not to receive, medical, psychological or any other type of medical care or treatment, unless they are a demonstrable danger to themselves or others.

7.26 The right of every Albertan not to be coerced, either directly or indirectly, into submitting to medical, psychological or any other type of care or treatment, except upon the order of a court of law of competent jurisdiction, on proof of immediate danger of serious injury or loss of life to another.

Providing Explicit Protection for Freedom of Expression, Academic Freedom and Professional Freedom

Why provide such explicit protection? Because measures adopted in response to major public emergencies in a free society invariably generate public debate and the expression of differences in public and expert opinion with respect to the measures adopted. In such circumstances, governments invariably feel pressured to restrict such debate, to censure or "cancel" divergent views, and to label anything contrary to the official narrative as "misinformation." Hence the need to strengthen, especially during times of public emergency, protection for freedom of expression, academic freedoms and professional freedom.

While the *Alberta Bill of Rights* guarantees freedom of speech, the MKG paper proposes to broaden this guarantee and to make it more specific by the following amendments, which the Panel recommends:

7.27 That the *Alberta Bill of Rights* be amended to guarantee freedom of expression as well as freedom of speech.

7.28 That the *Alberta Bill of Rights* be amended to define and guarantee academic freedom, i.e., "The right of every member of the higher education community to engage freely and without doctrinal, ideological or moral constraint, such as institutional censorship, in any activity through which that person contributes their knowledge, experience, and expertise."

7.29 That the *Alberta Bill of Rights* be amended to define and guarantee professional freedom, i.e., "The right of every regulated professional to engage without doctrinal, ideological or moral constraint, such as institutional censorship, in the exercise of their profession, and in free enquiry and public debate."

Providing Explicit Protection against Prejudicial Profiling by the State and Discrimination Based on Medical Status or History

Profiling, in the negative sense, involves the collection of data on the racial, sexual, religious, political, economic and other personal characteristics of individuals or groups and using that information to target such individuals or groups in a discriminatory manner.

113 https://www.cmpa-acpm.ca/en/advice-publications/handbooks/consent-a-guide-for-canadian-physicians

114 See *Personal Directives Act*, http://www.qp.alberta.ca/documents/Acts/p06.pdf (Page 6) and Alberta Health Services, Consent to Treatment/Procedures Minor/Mature Minors, https://www.albertahealthservices.ca/assets/info/hpsp/if-hpsp-phys-consent-summary-sheet-minors-mature-minors.pdf

Section 1 of the *Alberta Bill of Rights* declares that the human rights and fundamental freedoms protected by it are recognized and declared to exist in Alberta without discrimination – "without discrimination by reason of race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression."

But as discussed in the MKG paper, this protection against discrimination can and should (based on negative aspects of the COVID-19 experience) be expanded to include protection against discrimination based on opinion, disability and medical status or history.

Thus, the Panel recommends:

7.30 That the description of the discrimination against which Albertans are to be protected by the *Alberta Bill of Rights* and described in s. 1 of the act, be expanded to include protection against discrimination on the basis of opinion, disability and medical status or history.

7.31 That the *Alberta Bill of Rights* be amended to specifically prohibit profiling by expanding the right to privacy to include: "Without limiting the generality of the foregoing, the right to be free from the collection and use of personal information to assess certain characteristics of a natural person, in particular for the purpose of analyzing that person's work performance, economic situation, health, personal preferences, interests or behaviour."

Providing Explicit Protection of Economic Rights

The measures adopted by Canada's governments to cope with the COVID-19 pandemic were undertaken to protect millions of Canadians from the actual and anticipated health harms caused by the virus. The significance and magnitude of this accomplishment, while difficult to measure, is not to be denigrated nor minimized.

But the unintended harms to Canadians from the COVID-19 response measures – harms to health, personal, family and community relations, harms to the exercise of rights and freedoms, and economic harms – were also significant in severity and magnitude. And of these harms, the economic harms – damages to employment, incomes, businesses and supply chains as a result of social distancing mandates and economic lockdowns – while also difficult to measure may well have adversely affected more Canadians than the virus itself.

The protection of economic rights includes protection against limiting the rights of persons to pursue the gaining of a living as well as protection against limitations on the enjoyment and use of private property.

With respect to increasing the protection of the rights of Albertans to earn a living, this subject is dealt with in considerable detail in Chapter 8 of this report, including recommended amendments to the *Employment Standards Code*.

As a minimum, however, the Panel recommends:

7.32 That the *Alberta Bill of Rights* be amended to provide: the right of the individual not to be deprived of the means of earning a living, caring for their family or functioning in society.

With respect to property rights, both the *Canadian Bill of Rights* and the *Alberta Bill of Rights* contain provisions to partially protect the property rights of Canadians:

- While the charter is silent with respect to the protection of property rights, s. 1 (a) of the *Canadian Bill of Rights* affirms the right of the individual to "the enjoyment of property, and the right not to be deprived thereof except by due process of law."
- Likewise, property and civil rights being within the jurisdiction of the provinces (*Constitution Act*), s. 1 (a) of the *Alberta Bill of Rights* also affirms the right of the individual to "the enjoyment of property, and the right not to be deprived thereof except by due process of law."

What the property rights protection clauses of both these statutes lack – a deficiency painfully brought to light by the damages suffered by Canadian property owners due to the COVID-19 protection measures – is any provision for compensation for the damages suffered.

At one end of the spectrum of possible compensatory options is the current situation where the Crown is completely exempted[115] from any obligation to compensate Albertans for any limitations on their economic rights due to government-imposed emergency management measures such as economic lockdowns.

115 This is the effect of the *COVID-19 Related Measures Act*, enacted by the Alberta legislature during the COVID-19 crisis.

At the other end of the spectrum of possible compensatory options is that described in the MKG paper as follows: "Any taking or substantial limitation, by the State, of a property or economic right purportedly based on emergency, should be swiftly and completely compensated." This option could be pursued by amending the *Emergency Management Act* to provide:

- That the taking or substantial limitation of a person's proprietary, contractual or other economic rights, or the losses caused by any measure with similar effects, due to the implementation of this act or the regulations under a state of emergency, shall be compensated by the Crown, at fair market value, with interest at the legal rate, within 90 days.
- If any dispute arises concerning the amount of compensation payable under s. 19(3) or 24(1.1) of this act or the regulations, the matter shall be determined by arbitration, and the *Arbitration Act* applies.
- Upon prima facie proof of a taking or substantial limitation of a person's proprietary, contractual or other economic rights, or of losses caused by any measure with similar effects, the Crown shall pay the allegedly aggrieved party a non-refundable provision for the costs of litigation, including reasonable attorney and expert fees.

Another approach to strengthening property rights in Alberta, similar to that provided by the fifth amendment to the US constitution,[116] would involve amending the *Alberta Bill of Rights* to affirm the right of the individual to "the enjoyment of property,[117] and the right not to be deprived thereof except by due process of law and upon payment of just compensation."

The question of what constitutes "compensation at fair market value" or "just compensation" for limitations on the use and enjoyment of property under public emergency conditions, would ultimately need to be determined by the courts or through third-party arbitration if the legislature were to enact the amendments proposed above.

Neither exempting the Crown from paying compensation[118] for property damages resulting from government responses, nor exposing Alberta to crippling economic liabilities from the consequences of such responses would appear to be acceptable. But ascertaining an acceptable alternative is beyond the competence of this Panel to determine, and so the question is left as one for the legislature, the courts or third-party arbitrators to resolve.

In Conclusion

Widespread public emergencies may call for extraordinary measures – measures that may severely limit the fundamental rights and freedoms of Albertans. This chapter proposes that, if such extraordinary measures are employed, equally essential provisions must be provided in law and practice to protect and ensure the rights and freedoms of Albertans.

The Panel has examined the limitations on the rights and freedoms of Albertans resulting from the measures adopted by the governments to cope with the COVID-19 emergency. To strengthen the protection of those rights and freedoms in the event of future public emergencies, the Panel recommends amendments to the Alberta *Emergency Management Act*, the *Public Health Act*, the *Judicature Act*, the *Administrative Procedures and Jurisdiction Act*, and numerous amendments to the *Alberta Bill of Rights*.

116 The Fifth Amendment to the U.S. Constitution, passed in 1791, provides that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

117 The effectiveness of such a provision would be enhanced by providing a clear definition of property as a "bundle of rights" which makes the limitation of any of those rights – the right of use, the right to market, the right to earn a return, etc. – a limitation for which the owner of the property is entitled to compensation. Clarification of the "the use and enjoyment of property" along the same lines is also essential.

118 This is the effect of *COVID-19 Related Measures Act*, enacted by the Alberta legislature during the COVID-19 crisis.

CHAPTER 8
REVIEWING THE *EMPLOYMENT STANDARDS CODE* AND THE *HEALTH PROFESSIONS ACT*

This chapter proposes means of strengthening the rights and freedoms of employees and health professionals under public emergency conditions. This is achieved primarily via amendments to the *Employment Standards Code* as it relates to employee-employer relations and to the *Health Professions Act* governing relations between health professionals and their regulatory colleges.

CHAPTER 8
REVIEWING THE *EMPLOYMENT STANDARDS CODE* AND THE *HEALTH PROFESSIONS ACT*

Introduction

In its terms of reference, the Panel was asked to analyze the legislation that authorized the orders and regulations used to respond to the COVID-19 crisis, specifically the *Employment Standards Code* and the *Health Professions Act*.

The Premier asked the Panel to determine whether any special provisions are required to ensure that the rights and freedoms of employees, employers and health professionals are sufficiently respected and protected under public emergency conditions.

The *Employment Standards Code*

Alberta's *Employment Standards Code* (the code) is based on a "mutually effective relationship between employees and employers" and "fair and equitable" minimum standards for terms and conditions of employment.

Thus, the code establishes Alberta's minimum standards of employment in such areas as payment of wages, hours of work, overtime, vacation and holidays, leaves and termination of employment. It also establishes the processes[119] by which an employee can seek recourse if the standards have not been met.

The COVID-19 crisis and measures in response had a sudden and major impact on employee-employer relations. For example, impacts included lay-offs, social distancing, limiting employee cohorts, increased hygiene such as masking, changed work schedules, and disruption of teacher/school board relations, as well as the economic impact of forced business shutdowns and the economic decline in general.

All of these measures, undertaken for the sake of protecting the health of Albertans, including the health of employees and employers, also affected the exercise of various employee rights and freedoms. These included mobility rights and freedom of conscience and expression, where the convictions of employees on how best to personally respond to the COVID-19 crisis differed from those of their employer and the government.

What the Panel wanted to ascertain is whether existing legislation – such as the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, and employment legislation such as the code – adequately protects those rights and freedoms, especially during a declared state of public emergency, or whether applicable legislation should be amended to improve that protection.

Application of the *Employment Standards Code* During the COVID-19 Crisis

It is important to appreciate that the government fully realized that the measures it imposed to cope with COVID-19 would significantly impact workplace relationships. It therefore made several significant changes to the code to assist employees and employers to adapt to the circumstances. These changes included provisions for:

- Three new job-protected leaves, namely the COVID-19 leave; the extended COVID-19 personal and family responsibility leave; and the COVID-19 vaccination leave.
- Increased time for temporary layoffs.
- More flexibility in workplace scheduling.
- Less onerous group termination notice requirements.
- Streamlining processes for securing variances and exemptions from provisions of the code.

However, to secure compliance with public policies and employer-imposed orders mandating vaccinations, testing, social distancing, masking, and the use of personal protective equipment, many employers made continued employment or re-employment conditional upon compliance. In many cases, an employee's non-compliance resulted in unpaid leave, disciplinary suspensions or termination of employment.

Under these circumstances, many employees, often represented by their unions, protested that the coercive enforcement of such measures violated their rights[120] to privacy, personal autonomy and bodily integrity, as well as their rights and freedoms under the charter and provincial legislation such as the *Alberta Bill of Rights*.

119 Note that unionized employees cannot file complaints under the code, but they would need to file any grievances under their collective agreement.

120 See Sault Area Hospital and Ontario Nurses' Association (Vaccinate or Mask) (2015), 262 L.A.C. (4th) 1 (Hayes).

Appeals to the Charter and Provincial Bills of Rights

Since the COVID-19 pandemic began, courts, arbitrators and tribunals have adjudicated a number of issues pertaining to COVID-19 policies, but few decisions regarding the COVID-19 policies imposed by employers were considered through the lens of violations to the *Alberta Bill of Rights* or the *Candian Charter of Rights and Freedoms*. This is the case because the charter does not apply[121] to interactions between individuals and private businesses, and most of the employers that implemented COVID-19 policies were private businesses.

Similarly, while sections 2 and 3 of the *Alberta Bill of Rights* indicate that all acts of the Alberta legislature are not to abrogate, abridge or infringe on any of the rights or freedoms recognized in the *Alberta Bill of Rights*, the bill extends only to matters coming within the legislative authority of the legislature of Alberta.

Tribunals and arbitrators provided for by the code, the *Labour Relations Code*, and the courts to which their decisions were appealed, did not arrive at their judgments through the lens of the charter or the *Alberta Bill of Rights*. Rather, in the unionized context, arbitrators have applied a "balancing of interests" approach[122] to find that the employer interest in implementing, for example, a mandatory vaccination policy,[123] often outweighed the harm to the employees' interests in maintaining paid employment and autonomy over their medical treatment.[124]

When appeals cited the provisions of the *Alberta Bill of Rights* and/or the charter, most arbitrators have held that a "balancing of interests" approach continues to be appropriate and that, again for example, mandatory vaccination policies are not contrary to the protections these legislative and constitutional documents provide.

As a result of the above rationale, employer policies implemented in response to COVID-19 have largely been upheld as reasonable and enforceable by Canadian courts, arbitrators and tribunals, all of which have recognized the unprecedented nature of COVID-19 and the legal and moral obligations of employers to ensure workplace safety. And while the rights and freedoms of employees affected by these policies have been addressed by adjudicators, the reasonableness of employer policies has not generally turned on the protections set out in the *Alberta Bill of Rights* or the *Canadian Charter of Rights and Freedoms* since these legal protections have limited application to employment matters, especially in the private sector.

The Panel notes, however, the existence of numerous cases[125] in which the actions of employers in response to COVID-19 were appealed to arbitrators and courts. The unions and legal counsel doing so frequently argued that such actions violated the rights and freedoms of their employee clients supposedly guaranteed by the charter and/or provincial rights legislation.

Although, as noted, these legal protections have limited application to employment matters, especially in the private sector, these appellants likely believed that these legal protections and charter values (as well as the values of the *Alberta Bill of Rights*) should have greater application to and influence over employee-employer relations.

The focus of the Panel in this chapter – which is not on the applicability of the federal charter but on the applicability of the *Alberta Bill of Rights* in such circumstances – has therefore led the Panel to address the following question: Is it feasible and advisable to increase the protection of the rights and freedoms of employees by extending the application of the *Alberta Bill of Rights* to employee-employer relations in the non-governmental sector?

121 Notably, section 32 of the charter clarifies that it only applies to government action. The charter therefore does not apply to interactions between private individuals, businesses or other organizations.

122 The "balance of interests" approach to jurisprudence "is a judicial decision-making technique aimed at dealing with conflicts between two or more values, principles, legal interests, or policies... The adjudicator, in managing these conflicts, shall consider all the relevant circumstances of the case and weigh the underlying competing interests and values. The outcome may be twofold: in some cases, one interest or value completely outweighs the other, thereby only the prevailing one will be satisfied; in other cases, striking a fair balance leads to both the competing interests being protected to the greatest extent possible". Pasquale De Sena and Lorenzo Acconclamessa; Balancing Test; Max Plank Encyclopedia of International Procedural Law (MPEiPro), May, 2021. https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1257.013.1257/law-mpeipro-e1257

123 For example, in Unifor Local 973 v Coca-Cola Canada Bottling Limited, an Ontario arbitrator expressed reasoning that has been applied by other arbitrators as follows: "On the basis of the evidence before me and the submissions of the parties, I find that the Employer's mandatory vaccination Policy establishes a reasonable balance between an employee's interest to privacy and bodily integrity, and the Employer's interest in maintaining the health and safety of the workplace."

124 In labour and employment law there are of course many issues that involve competing interests. Common examples include competing interests between safety on the one hand and privacy or human rights on the other. A "balancing of interests" approach seeks to consider and weigh these interests and determine which interests should prevail based on the facts and circumstances of a given case. This approach is frequently used to determine whether a policy that affects employees is a reasonable exercise of management rights. As noted by the Supreme Court of Canada in Association of Justice Counsel v Canada (Attorney General), 2017 SCC 55: "Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees."

125 For example, see Electrical Safety Authority v Power Workers' Union, 2022 CanLII 343 (ON LA); Toronto District School Board v CUPE, Local 4400, 2022 CanLII 22110 (ON LA); CUPE, Local 1866 and WorkSafe New Brunswick (Smith), Re, 2023 CarswellNB 1; Revera Inc. (Brierwood Gardens et al) v CLAC, 2022 CanLII 28657 (ON LA); CKF Inc. v Teamsters, Local 213 (COVID Testing), Re, 2022 CarswellBC 198; BCGEU and BC Safety Authority (Dismissals for Not Having COVID-19 Vaccination), Re, 2023 CarswellBC 2331; Costa, Love, Badowich and Madekic v Seneca College of Applied Arts and Technology, 2022 ONSC 5111; Wilfred Laurier University v UFCW, 2022 CanLII 69168 (ON LA).

By "rights and freedoms of employees," we particularly mean:

- Freedom of thought and expression (s. 2 of the charter) including the right to express opinions on public policy at variance with those of the employer or the government.
- Freedom to move and gain a livelihood [s. 6 (2) of the charter].
- The right to equal benefit of law [s. 15 (1) of the charter], possibly infringed when government policies in a public emergency treat government employees more favorably than private sector employees.
- Freedom of speech, assembly and association as provided by sections 1 (d) and (e) of the *Alberta Bill of Rights*.
- The right to protection from discrimination in employment practices on the basis of religious beliefs or physical/mental disabilities as provided for by s. 7(1) of the *Alberta Human Rights Act*.[126]
- The right to protection from retaliation for complaints (s. 10 of the *Alberta Human Rights Act)*.
- The right to privacy, personal autonomy and bodily integrity claimed by individual employees and various unions on behalf of their members.

In considering the above question, the Panel notes:

- That the *Alberta Bill of Rights* does not have application to purely private relationships (e.g., contractual relationships). Like the charter, it serves to protect private actors against encroachment on freedom by the government. It was not intended to place obligations upon private actors or force them to do anything.
- That if it is desired to inject certain protections into private relationships like employment, the most appropriate way to do this is by adding these protections into the *Alberta Human Rights Act*, the *Employment Standards Code* or privacy legislation.
- That in doing so, it is important that any such protections be targeted because broadly worded protections[127] could be used to create many unintended and undesirable consequences, leading to abuse, skewed interpretations and unnecessary interference in the employment marketplace.

Beyond the applicability of the *Alberta Bill of Rights* and the charter, COVID-19 policies implemented by employers have generated litigation on a variety of issues. Many of these issues point to areas of potential concern where the rights and freedoms of individual employees could be strengthened in the future, if desired, with respect to:

- Discipline or termination for non-compliance with employer policies.
- Leaves of absence related to non-compliance with employer policies.
- Protecting against compelled vaccination.
- The requirement to pay for testing in order to work.
- Accommodation of employee concerns.
- Protection of conscience rights.
- Relaxation of privacy rights.

In considering COVID-19 response measures that affected employee-employer relations, and in considering amendments to employment legislation to better protect the rights and freedoms of employees during future public emergencies, the Panel is reminded of the following:

- That legislating in relation to emergencies is complicated by uncertainties, the dangers of being overly prescriptive, the need for flexibility, the diversity of interests affected, the cost implications of whatever is proposed, and the dangers of overburdening those responsible for compliance.
- That: "'Emergencies' have always been the pretext on which the safeguards of individual liberty have been eroded – and once they are suspended it is not difficult for anyone who has assumed such emergency powers to see to it that the emergency persists." – Friedrich von Hayek
- That recommendations pertaining to employee-employer relations during a public emergency should pertain to business operations above a certain size (as defined by numbers of employees) to spare small businesses the burden and expense of complying with additional regulations.

Upon consideration of all of the above on the current and potential applicability of rights legislation to employee-employer relations, the Panel therefore recommends:

126 Note that other statutes also protect against retaliation in different contexts. See *Employment Standards Code* s. 125; *Whistleblower Protection Act*, *Occupational Health and Safety Act*.

127 For example, if the intention were to protect against mandatory vaccination, which is understandable because that is a highly invasive measure, that protection could be achieved by narrow language. However, if the right was worded in a broad fashion, it might be used by some employees to argue they have the right not to work around unvaccinated employees because they claim it threatens their personal autonomy. A broadly worded protection might also lead to unanticipated and unwarranted work refusals by employees or unions on the basis that the exercise of various management rights interferes with the newly created employee right.

8.1 Amend the *Employment Standards Code* to strengthen the protection of the rights and freedoms of employees, especially during public emergencies,[128] and to do so as recommended hereafter.

Disallowing Permanent Dismissals for Non-compliance in a Public Emergency

Employees and employers in Alberta already have dispute resolution procedures for dealing with disciplinary decisions, including those involving termination for non-compliance with employer policies. Rather than strengthening the protection of employee rights and freedoms by establishing a blanket override of such disciplinary decisions, a more modest and workable approach – consistent with the government's approach to amending the code during the pandemic – would be to protect employees against permanent loss of employment for failure to comply with requirements that are supposed to be temporary measures related to an emergency by disallowing such permanent dismissals, granting extended but temporary and conditional leaves of absences to non-compliant employees for the duration of the emergency.

While there are pros and cons of taking this approach as well as certain conditions that would need to be defined if it were taken (e.g., specification of qualifications for leave, time/duration factors, and employee/employer obligations at the end of the leave), on balance the Panel believes the benefits of this approach outweigh the disbenefits and therefore recommends:

8.2 Amend the *Employment Standards Code* to disallow permanent dismissals of non-compliant employees during a temporary public emergency,[129] and to provide for the granting of extended but temporary and conditional leaves of absences to such non-compliant employees.

Protection of Employees from Compulsory Invasive Policies that Limit Rights

In response to COVID-19, employers in Alberta and across Canada adopted various policies and orders – such as mandatory vaccination, testing, masking and social distancing – that required compliance as a condition of employment or re-employment. These policies were intended to promote the safety of employees and the public, support government advice for handling COVID-19, reduce risk, avoid negative publicity, and prevent business closures that had been threatened and implemented. Employer motivation behind these policies was genuine and legitimate; however, many of these policies were implemented without consideration or concern for employees who were reluctant to comply for various reasons.

To eliminate these impacts by a prohibition of such measures to cope with a pandemic would be unacceptable from a public health perspective, but a more realistic and achievable objective of government policy could be to reduce the impact of such measures, particularly on the well-being of those who resist compliance for various rights-related reasons.

Such impact-reducing measures could include requiring employers to accommodate non-compliant employees by allowing remote work (where feasible) or finding alternatives that allow "safe work," while recognizing that such legislated protections would impose added burdens, obligations and potential liability upon employers.

Each of these measures has pros and cons, but a modest step in the right direction would be for the government to require pre-implementation impact assessments of the compulsory measures proposed – preliminary assessments, such as those proposed in Chapter 6,[130] of the likely impacts on both employers and employees, including the rights and freedoms of the latter. These impact assessments would provide the basis for devising impact-reducing measures. The Panel therefore recommends:

8.3 Amend[131] the *Employment Standards Code* to require preliminary assessments of the impacts on employers and employees of proposed mandatory orders to better equip government and employers to identify and implement temporary impact-reducing measures.

128 Note that in the case of public health emergencies s. 52.91 of the *Public Health Act* authorizes work absences for people who are ill with a pandemic disease or caring for family members; consideration would need to be given to the interplay of this provision and any proposed leave of absence in the code.

129 The intent here is to disallow permanent dismissals for reasons of non-compliance with public emergency measures adopted by employers during the period of a declared public emergency. Termination of employees would still be permissible, however, if there were other bona fide reasons for doing so.

130 See recommendation 6.2 of Chapter 6: Mandating Impact Assessments.

131 This amendment could conceivably specify by whom such preliminary impact assessments should be carried out, the presumption in this report being that, at a macro-level, they would be conducted by the Alberta Emergency Management Agency.

Health Testing[132] as a Condition of Employment

Courts and arbitrators have generally upheld COVID-19 testing policies as a reasonable exercise of employer management rights. Among other things, it was a less invasive alternative to mandatory vaccination.

Requiring health testing as a condition of employment, especially during a public health emergency, raises several issues, two being:

- Should employees be compensated for the time taken to be tested, either during or after work hours, or should they get tested on their own time?
- Should employees or employers be required to pay for the tests?

In assessing the pros and cons of various answers to the above, the Panel notes:

- That employees benefit as much or more than employers from mandated health testing.
- That both employers and employees already suffer economic losses from any prolonged public health emergency and if at all possible, should be spared the burden of financing health testing.

The Panel therefore recommends:

8.4 That the *Employment Standards Code* be amended to require that where health testing is mandated in response to a public health emergency involving a communicable disease, employees should be required to take the required health test(s) on unpaid time with the government bearing the costs of test kits, testing facilities and the testing process.

The *Health Professions Act*

Through the *Health Professions Act* (HPA), the Province delegates its constitutional authority to regulate health professionals to bodies referred to as colleges. The minister of Health is responsible for its administration.[133]

Unlike a number of other Canadian jurisdictions which have numerous statutes that regulate health professionals, Alberta's HPA is an umbrella legislation. All health providers belonging to health professions are regulated under this statute.[134] While it is not the only Alberta act that regulates aspects of health professional practice, it is the key Alberta statute that regulates health professionals and provides delegated authority to colleges. The HPA also authorizes colleges to enact and amend subordinate legislation in the form of bylaws, codes of ethics, and standards of practice. Unless the government intervenes, colleges have numerous powers and duties under the HPA that they carry out independently of government.

The Panel fully recognizes and appreciates the value of the services, guidance and advice rendered by the colleges during the COVID-19 crisis. Of particular interest to the Panel, however, are two questions:

1. Were the rights and freedoms of the members of professional colleges, as guaranteed by the charter and the *Alberta Bill of Rights*, adequately respected by the leadership of those colleges during the COVID-19 crisis, especially when the convictions of some members regarding the COVID-19 response measures may have differed from those of their college or the government?
2. Is there a need to strengthen the protection of the rights and freedoms of members of professional colleges, especially during public emergencies, and, if so, by what means could this best be achieved?

132 In Alberta, the various tests available for COVID-19 testing and the various procedures involved were thoroughly explained on the Alberta Health Services website.

133 In the event of an emergency declared under the *Emergency Management Act*, the minister of Public Safety and Emergency Services may take actions to co-ordinate efforts to address the emergency, including through the Alberta Emergency Management Agency. If a public health emergency is declared without a corresponding declaration under the *Emergency Management Act*, the minister of Health has specified powers and duties, along with cabinet, to address the public health emergency as set out in the *Public Health Act*.

134 The 29 colleges empowered by the act include: College of Acupuncturists of Alberta; Chiropractors; Combined Laboratory and X-Ray Technologists; Dental Assistants; Dental Hygienists; Dental Technologists; Dentists (dentists and specialists such as endodontists, oral and maxillofacial surgeons, etc.); Denturists; Hearing Aid Practitioners; Licensed Practical Nurses; Medical Laboratory Technologists; Medical Diagnostic and Therapeutic Technologists; Midwives; Naturopaths; Occupational Therapists; Opticians; Optometrists; Paramedics; Pharmacists and Pharmacy Technicians; Physiotherapists; Physicians, Surgeons, Osteopaths and Physician Assistants; Podiatrists; Psychologists; Registered Dieticians and Registered Nutritionists; Registered Nurses and Nurse Practitioners; Registered Psychiatric Nurses; Respiratory Therapists; Social Workers; and Speech-Language Pathologists and Audiologists.

With respect to the first of these questions:

- A search was conducted for decisions from hearing tribunals of colleges in Alberta respecting discipline of regulated members for unprofessional conduct directly related to COVID-19 and issues of expression in particular. One decision related to expression was located. A small number of decisions where alleged breaches of public health orders or standards of practice relating to COVID-19 were also reviewed.
- As a result, there was limited information on which to base an analysis of how hearing tribunals in Alberta considered the discipline of regulated members for failure to comply with orders or college-created regulation related to an alleged infringement of charter rights based on freedom of expression.
- Colleges tended towards the issuance of "guidance" on certain COVID-related issues, including advice to comply with public health orders, rather than making or amending standards of practice. The consultation process relating to the amendment or adoption of new standards of practice is more arduous than that required when issuing guidance.

With respect to the second question as to whether there are circumstances that call for a strengthening of the rights and freedoms of members of professional colleges, especially during public emergencies, a few ways were identified in which colleges could act beyond their jurisdiction or set the scene for potential infringement of the charter rights and freedoms of health professionals:

- A college may adopt subordinate legislation in a manner that gives rise to a concern that the government may deem significant enough to address. First, by enacting or adopting subordinate legislation which, on its face, falls outside of its legislative jurisdiction (i.e., there is no authority under the HPA to enact such subordinate legislation), and second, by enacting or adopting subordinate legislation that unjustifiably infringes its regulated members' charter rights or freedoms or those protected under the *Alberta Bill of Rights*.

For example: A standard of practice may be enacted by a professional college that completely prohibits a regulated member from providing their opinion on public health orders during a public health emergency – an infringement on the member's freedom of expression.

- Decisions may be made by colleges in the interpretation and application of the HPA or related legislation that could result in unjustifiable infringement of charter rights. For example, decisions of college tribunals regarding whether or not the conduct of a health professional is "unprofessional" as defined in the HPA, and whether a regulated member has complied with the code of ethics or standards of practice of the profession, also have the potential to infringe on the member's freedom of expression.

A number of cases[135] across the country were identified where members of regulated professional colleges alleged that their right to freedom of expression was limited or violated by their colleges. Without delving into the substance or validity of these allegations, their existence and numbers indicates a significant possibility of such limitations and violations occurring, and therefore the need to consider measures for strengthening the protection of the rights and freedoms of members of the health professions, especially under public health emergency conditions.

The Panel's Approach

The Panel wishes to affirm its belief that the professional colleges of Alberta under the jurisdiction of the *Health Professions Act* do their best to serve the public interest, and that they endevoured to do so under the stressful conditions created by the COVID-19 crisis. The Panel also believes that there is a need to strengthen the protection of the rights of the members of colleges to freedom of expression, especially during public health emergencies. In the Panel's judgment, this is best achieved, not through heavy handed intervention by the provincial government in the affairs of the colleges, but by initiatives taken by the colleges themselves, facilitated by some modest amendments to the HPA or subordinate legislation created by colleges under the HPA.

135 One of the most prominent of these cases is that involving a decision made by the Inquiries, Complaints and Reports Committee (ICRC) of the College of Psychologists of Ontario concerning statements made by Dr. Jordan Peterson. Dr. Peterson applied to Ontario's Superior Court of Justice for judicial review of the decision in Peterson v College of Psychologists of Ontario and has been quoted as saying he will appeal the decision of the Court that dismissed his application. For another significant non-COVID-related decision, see Strom v Saskatchewan Registered Nurses' Association, 2020 SKCA. COVID-related cases were also noted including the College of Registered Nurses of Saskatchewan's referral to a hearing respecting alleged professional misconduct of Leah McInnes (hearing held October 10-13, 2023 with decision pending) and the College of Physicians and Surgeons of Ontario's referral of Dr. Kulvinder Gill to its discipline tribunal on October 13, 2022 with allegations of disgraceful, dishonourable or unprofessional conduct and/or failure to maintain the standard of practice in the profession respecting communications on social media/online/digital platforms regarding the COVID-19 pandemic and related issues (allegations withdrawn by the College on September 12, 2023).

Thus, four of the following recommendations – 8.5, 8.6, 8.7 and 8.8 – encourage the colleges to take the initiative in achieving an appropriate balance between protecting the rights of members and protecting the health of Albertans. The Panel then puts forward Recommendation 8.9 which prescribes, via an amendment to the HPA, the principle recommended to guide the standard of review by a court of college decisions that are alleged to unjustifiably infringe on rights and freedoms protected by the charter and the *Alberta Bill of Rights*. Finally, the Panel puts forward two stronger measures – Recommendations 8.10 and 8.11 – to strengthen the protection of the rights of members of professional colleges to freedom of expression should the colleges decline to participate in implementing the measures proposed by 8.5 to 8.8 or should their implementation prove insufficient to provide the desired balance between the protection of member rights and the protection of public health.

8.5 Direct the colleges, by order in council or by amendment to the *Health Professions Act*, to make clear the meaning of such terms as "unprofessional conduct," preservation of the "integrity" of the profession, "harm" to the profession, and service to and protection of the "public interest," especially in how these terms are to be interpreted during a state of public emergency.

Section 3(1)(a) of the HPA empowers a professional college to "carry out activities and govern its regulated members in a manner that protects and services the public interest." But where in the policies of the colleges empowered by the HPA is there a clear interpretation of the "public interest" that is to be served and protected, or a procedure for ascertaining it in specific instances, or that addresses the public interest to be served and protected during a public health emergency?[136]

Section 1(1) (pp) of the HPA declares that "unprofessional conduct" on the part of a member of a college empowered by the HPA means one or more of some 20 identified actions or failures – from displaying a lack of knowledge or skill or judgment in the provision of professional services, to engaging in conduct that harms the integrity of the regulated profession. But there is nothing in this list that specifically defines as unprofessional conduct the public expression by a member of a viewpoint or position at variance with that of his or her college or the government of the day, and not every college has adopted standards of practice on such matters. And where in the bylaws or polices of the colleges empowered by the HPA is there a clear interpretation of the "integrity of the regulated profession" as it relates to these issues?

What the foregoing questions suggest is the need for clarification of such terms, including how they are to be interpreted during a state of public emergency, particularly respecting comments on matters of social policy.

Preferably this clarification should be done by the colleges themselves via amendments to their standards of practice, accompanied by clear communication of those changes to the public. Such clarification should especially define what these terms mean for professionals during a state of public emergency. For example, should it be the position of the colleges that public statements on matters of public policy by their members during a public health emergency, including those that may be at variance with the position of their college or the government, DO NOT constitute "unprofessional conduct," "harm to the profession," or a failure "to serve the public interest," unless proven to be so by a public hearing or tribunal convened by the college, with the decision/ruling appealable to the courts?[137]

If such clarifications are not forthcoming, the colleges could be directed to make them by order in council[138] or further amendments to the HPA.

8.6 Amend the *Health Professions Act* to require the "standard of practice" of all colleges empowered by the act to include "recognition and protection of the rights of members to freedom of expression," including on matters related to public health emergencies.

136 The Panel has been advised that these terms have been interpreted in decisions of tribunals and courts respecting a number of specific matters. However, they have not necessarily received sufficient consideration in the context of freedom of expression. Not all colleges have standards of practice on matters of expression and those that do may need to consider further the appropriate balance between relevant factors – particularly in cases where the expression relates to matters of public or social policy during a public health emergency where some of the supporting evidence is in flux.

137 Note that section 86 of the *Health Professions Act* provides for appeals to the council of a college, and section 90 of the *Health Professions Act* provides for appeals to the court of appeal of decisions/rulings of a college (which are appeals from decisions of hearing tribunals).

138 Within the *Health Professions Act*, certain provisions authorize the executive branch of government to step in and exercise the authority that the government has delegated to colleges. However, this authority may only be exercised if specified criteria are met. For example, under s. 135.1(1) of the HPA, the lieutenant governor in council may direct a council of a college to adopt standards of practice, make bylaws or regulations, or carry out any power or duty of a council in the matter directed.

Freedom of expression is recognized as a fundamental right in a free and democratic society by the *Canadian Charter of Rights and Freedoms* [s. 1(b)]. Likewise, the *Alberta Bill of Rights* [s. 2(d)] guarantees freedom of speech, and the *Alberta Human Rights Act* [s. 3(2)] recognizes "free expression of opinion on any subject" as a freedom to be protected from interference respecting publications or notices.

It is not unreasonable therefore to require the recognition and protection of such fundamental rights to be a specific element of the standards of practice of Alberta's professional colleges and that the safeguarding of such rights include their protection during times of public emergencies when the temptation to suppress them may be stronger than under non-crisis conditions.

Questions may be raised as to whether the standard of practice of professional colleges guaranteeing the freedom of expression of members should also establish justifiable limits[139] on the exercise of that freedom, and whether those limits should be self-imposed or imposed by the colleges.

As with all rights in a free and democratic society, it is imperative that they be exercised prudently and responsibly by those possessing them. Thus, recognition of a duty to do so on the part of members of Alberta's professional colleges might also be made an element of the standard of practice of such colleges to safeguard against abuses.

In other words, any new or amended standards of practice of colleges adopted to address matters of the expression by members of their views on public policy during a public emergency should make clear the fundamental principles on which those standards are based – the principles to be applied both in protecting freedom of expression and in setting justifiable limits.

8.7 Amend the HPA and require colleges to amend their bylaws to require:

- All regulated members of a college to have professional liability insurance in an amount sufficient to provide a regulated member with adequate coverage.[140]
- Colleges to ensure that members facing complaints with respect to the professionalism or appropriateness of their conduct – especially those where any disciplinary measures imposed may restrict their rights and freedoms under the charter or the *Alberta Bill of Rights* – are provided with sufficient resources[141] to enable them to participate fully and completely in the appeal and review processes to which they are subject.

Many regulated health professionals do not have sufficient insurance coverage or personal resources to properly respond if faced with a complaint to their college. This can lead to such regulated members making admissions of unprofessional conduct in instances where they ought not to and/or to agree to undertakings or consent to sanctions that are not reasonable.

While a college has the resources necessary to fully pursue an investigation and participate in any subsequent hearings and reviews, the member under investigation may not and thus may be severely disadvantaged in protecting their professional reputation or their rights and freedoms as a citizen.

The necessity of providing adequate access to justice for members of professional colleges – particularly where regulated members seek to have college-imposed limitations on their rights and freedoms considered by a court but are unable to finance their participation in the process – suggests the need for remedial action such as that proposed above.

8.8 Amend the *Health Professions Act* to prohibit colleges from publishing, in a notice on a college website, the name or other identifying information of a member regarding alleged misconduct until all related appeals and reviews have been completed.

139 A common issue across health professions is whether, to what extent, and how a health professional can comment in a public forum, particularly on matters not directly relating to health services provided to patients. Discussion of this issue raises the question: Should a common set of duties or standard of practice be enacted that imposes justifiable but not other limits on a health professional's freedom to enter into public discourse on matters of social policy, including those related to public health emergencies?

140 For example, coverage comparable to that of physician members of the Canadian Medical Protection Association (CMPA) for college proceedings (as well as civil litigation). Currently, the HPA fails to impose a positive duty on complaints directors of colleges to work towards early resolution of complaints as encouraged by the Alberta Court of Appeal in Jinnah v Alberta Dental Association and College, 2022 ABCA 336 [Jinnah]. Colleges also lack the ability to appropriately resolve some complaints as a result of section 55(2)(a.1), which requires consent from a complainant to resolve without referral to a hearing. The Alberta Court of Appeal in Jinnah noted that resolution of complaints without referral to a hearing is in the public interest in many instances. Hearings are the costliest way to resolve a complaint, in financial and other terms.

141 If there remains a concern that implementation of this recommendation unduly burdens colleges and their members with significantly higher costs, especially during a public emergency period, consideration might be given to requesting the government to cost share a portion (but only a portion) of the costs to a member of participating fully and completely in any appeal and review processes to which they may be subject.

When a member of a professional college is under investigation for unprofessional conduct and has been referred for a hearing, the current practice of some colleges in certain circumstances is for the college to publish on its website certain details related to the matter in the form of a notice on the college's website which includes the name of the member. The apparent rationale behind this practice is that the college has a duty to protect the public, and to be seen to be protecting the public, via maximum publication of information related to unproven allegations against regulated members.

Whatever the rationale behind this approach – perceived by some as implying guilt and requiring innocence to be proven – the negative publicity to which the members under investigation are subject can have devasting impacts on their ability to practice their profession and on their personal lives. In worst case scenarios, it can result in a loss of competent health professionals from the workforce and demoralize those that continue to practice, often with significant related debt accumulated or other severe negative impacts which are not at all proportionate to any error they may (or may not) have committed.

To remedy this potential for abuse, the colleges could be required to amend any of their bylaws, policies and procedures that require or support certain public disclosures through notices on college websites which go beyond the legislative intent of the HPA. But a more straightforward remedy would be to simply amend the HPA to prohibit the publication of notices by colleges of the names of regulated members under investigation or involved in disciplinary hearings, appeals and reviews until all such processes are completed.

Such amendments are not intended to and ought not to interfere with a college's authority to take steps it determines are necessary to protect the public during this period, such as the imposition of conditions on or the suspension of a member's practice permit when necessary, and the publication of such conditions on the public register. However, the publication of a notice on a website or corresponding press release is not a balanced measure to support both the openness of college disciplinary hearings and publication of sufficient information necessary to protect the public, with harm to the member that cannot be undone even after a successful appeal or other court application.

8.9 Amend the *Health Professions Act* to prescribe "correctness" as the standard of review by a court of college decisions that are alleged to unjustifiably infringe on rights and freedoms protected by the charter and the *Alberta Bill of Rights*.

Section 90 of the HPA specifically provides a member of a professional college who has been found guilty of unprofessional conduct by a college tribunal and has had that decision upheld on appeal to the college council – say, for example, for actions/statements that allegedly undermine the integrity of the profession or that are allegedly contrary to the public interest – with the right to appeal to the court of appeal "any finding, order or direction of the council." Additionally, members may apply to court for judicial review of certain decisions related to this disciplinary process.

But the standard of review used in judicial reviews of decisions by colleges, including those of their administrative tribunals, is most often one of "reasonableness" rather than "correctness," even for decisions relating to the infringement of rights guaranteed by the charter or the *Alberta Bill of Rights*. Under the "reasonableness" standard, the court shows deference to the decision-maker (i.e., the college) and the decision-maker's reasoning process,[142] whereas a "correctness" standard of review allows full substitution of the views of the reviewing court for that of the tribunal whose decision is challenged.

Thus, it may be argued that requiring the court to apply the "correctness standard" removes the bias in favour of the college inherent in the application of the reasonableness standard and provides a greater degree of fairness to the member.

8.10 Use the powers of the lieutenant governor in council to make or amend subordinate legislation of colleges to strengthen the rights and freedoms of their members, especially during a declared public emergency, ONLY IF implementation of the above amendments and measures proves insufficient to provide adequate protection.

142 For example, in the recent decision of Peterson v. College of Psychologists of Ontario, the court applied the reasonableness standard in reviewing a decision of the College of Psychologists of Ontario's Inquiries, Complaints and Reports Committee ("ICRC"). In doing so, it showed deference to the decision-maker, rather than substitute its own independent judgment for that of the committee.

Section 135.1 (1) of the *Health Professions Act* provides authority for the lieutenant governor in council to order a council of a college to adopt or amend standards of practice, to make bylaws or regulations, or to carry out any power or duty of a council under the HPA or a bylaw as set out in the order.

To exercise this authority, the minister must first consult with the college in question in accordance with s. 135.1 and the Consultation Regulation. The minister must begin the process by providing the president of the college with a written notice containing the prescribed information set out in s. 2 of the regulation and normally providing at least 30 days from the notice for the college to provide its input to the minister.

Section 3 of the regulation authorizes the minister to alter the consultation process if the minister considers it necessary to make a recommendation to the lieutenant governor in council on an expedited basis to address a matter of public interest.

Note that the government has the authority under the statute to be more proactive if it were to conclude that measures such as 8.5 to 8.9 were insufficient to secure better protection of the rights and freedoms of health professionals in Alberta, especially during a public health emergency; and in the event that a college made or adopted subordinate legislation, including standards of practice, that unjustifiably infringed the rights and freedoms of health professionals whether during an emergency or otherwise. Its authority under s. 135.1 could be used to impose a standard of practice that, in the government's opinion, is in the public interest and ought to be a standard of practice for all or a number of colleges.

8.11 Amend the *Alberta Bill of Rights* to provide an effective remedy in cases where freedom of expression is restricted by a provincial law or other decision of government or a public agency.

If the government also wished to further increase the protection of the rights and freedoms of health professionals and others, especially during a public emergency, by an explicit amendment to the *Alberta Bill of Rights*, it is suggested that the amendment could be worded as follows:

Alberta Bill of Rights Amendment Act

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Amends RSA 2000 c A-14

1 The Alberta Bill of Rights is amended by this Act.

2 Section 1(d) is amended by adding the following after "freedom of speech":

which, when expressed by an individual solely on a matter of public interest, may only be limited by the Government or a public agency thereof if

(i) the limitation is supported by clear and convincing evidence, published concurrently with the limitation, demonstrating that the speech will cause greater harm to the public than will the limitation, and

(ii) the limitation is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

3 Section 3(2) is amended by adding "or any decision or action of the Government or a public agency thereof, or" after "regulation made thereunder,".

British Columbia's *Health Professions and Occupations Act*

In reviewing Alberta's *Health Professions Act*, the attention of the Panel was directed to the approach of British Columbia. There the government has introduced and passed the *Health Professions and Occupations Act*[143] which received royal assent on November 24, 2022, but has not yet been proclaimed. Its aims include "expanding the regulation of health service providers" and "lowering the risk of harm to the public." It creates the position of a super-regulator – "the Office of the Superintendent of Health Profession and Occupation Oversight" – subject to the direction of the minister and with powers to address and resolve various issues respecting the regulation of health professionals in that province. In other words, it seeks to regulate the health professions with another, higher layer of regulation, subject to ministerial control, thus expecting to better address some of the same issues addressed in this chapter.

Upon due consideration of the above, the Panel is of the conviction that the creation of a super-regulator of the health professions, under the direction of a minister, would not be conducive to improving the capacity of Alberta to respond more effectively to future public health emergencies nor to increasing the protection of the rights and freedoms of health professionals under emergency conditions. To be clear therefore, the Panel does not believe that Alberta should follow the approach to revising its health professions legislation that is being taken in British Columbia.

Rather, the Panel is of the conviction that the primary responsibility for the regulation of the health professions should continue to rest with the colleges, and that their powers to discipline members for expressing their views on public issues and policies should only be circumscribed and curtailed if the exercise of such powers fails to adequately respect the rights of members to freedom of expression.

The ultimate intent of implementing the above recommendations is to provide maximum encouragement and freedom for health professionals to practice their professions as well as contribute without fear to public discourse on matters of public policy, especially during times of public emergency. Creation of such an environment could well increase the numbers of health professionals attracted to this province, thereby increasing the capacity of the healthcare system to serve Albertans during both non-crisis times and in times of public health emergencies.

143 This Bill is a massive piece of legislation, 275 pages long in 12 parts with 645 sections, and replaces the previous *Health Professions Act*.

CHAPTER 9

IMPROVING THE CAPACITY AND PERFORMANCE OF ALBERTA'S HEALTHCARE SYSTEM

The capacity of Alberta's healthcare system to meet "surges in demand" – such as those created by a provincewide health emergency – is dependent on the overall capacity of the system to meet the ever-increasing demands of Albertans for healthcare services under normal non-crisis conditions. This chapter proposes numerous "incremental measures" to improve the overall and surge capacity of the Alberta system – each consistent with the principle of universality and the provisions of the *Canada Health Act*.

CHAPTER 9
IMPROVING THE CAPACITY AND PERFORMANCE OF ALBERTA'S HEALTHCARE SYSTEM

Coping With Public Health Emergencies

In previous chapters the Panel has put forward numerous recommendations. These include those that will better equip the province to cope with any public emergency since history teaches us that the next emergency is unlikely to be just like the previous one.

In this chapter, however, the Panel's focus is on analysis and recommendations to strengthen the capacity of the province to cope successfully with public health emergencies. These include specific consideration of measures to strengthen the Alberta healthcare system as a whole, since the stronger and better equipped that system is to meet the ever-increasing healthcare needs of Albertans under normal non-crisis conditions, the better prepared it will be to cope with any surge in demand for healthcare services created by a public health emergency such the COVID-19 crisis.

The Need to Increase System Capacity

If wait times for Albertans to receive essential healthcare services were already increasing under normal non-crisis conditions prior to the COVID-19 crisis, despite Alberta traditionally spending more per capita on healthcare than most other provinces, then there is an evident need to increase the overall service capacity of the system. Doing so, as already mentioned, automatically increases the capacity of the system to respond effectively to surges in demand caused by a pandemic or any other health emergency.

To assist it in determining what changes in Alberta's healthcare policies and legislation would facilitate an increase in the service capacity of the system as a whole, the Panel solicited research and advice from the Montreal Economic Institute (MEI) whose researchers have done extensive work in this area.

Appendix 10 contains an MEI report, dated October 5, 2023, and entitled "Improving the Capacity and Performance of Alberta's Healthcare System." The Panel has relied extensively on this report in developing its analysis and recommendations for this chapter and wishes to especially thank, Michel Kelly-Gagnon, Daniel Dufort and Krystle Wittevrongel of MEI for their substantial contributions. At the same time, the Panel again wishes to make very clear that the observations, commentary and recommendations contained in this chapter are ultimately those of the Panel, for which it takes full responsibility.

According to the Canadian Association of Emergency Physicians (CAEP) as quoted in the MEI Report:

> The COVID-19 pandemic has rightly called into question the ability of Canadian emergency departments – and the healthcare system as a whole – to handle any potential large surge of patients presenting to our doors.

As is well known, Canadian healthcare is based on "the core principle of access according to need rather than ability to pay." Yet despite an explosion in real per capita spending since the 1990s, a lack of overall system capacity – caused largely by chronic shortages of up-to-date equipment, facilities, supplies, healthcare professionals and supportive healthcare staff – has resulted in ever lengthening wait times for access to family practices, medical clinics and hospitals, including the emergency and surgery services they ostensibly offer.

The MEI report provides instructive data on the percentage of certain scheduled surgeries completed within the acceptable wait times benchmarked by the Canadian Institute of Health Information (CIHI). For example:

> The percentage of hip replacement and knee replacement surgeries meeting the benchmark has decreased since 2018. The cancellation or postponement of scheduled surgeries like these to free capacity for the treatment and management of COVID-19 patients undeniably impacted wait times; however, it is evident this problem predates the pandemic. The percentage of surgeries meeting the pan-Canadian benchmark for these procedures was, at most, 75 per cent pre-COVID.
>
> In terms of general practitioner (GP) and specialist wait times, these have also increased considerably – the wait time from referral by a GP to consultation with a specialist increased by 173 per cent between 1993 and 2019 (from 3.7 weeks to 10.1). The wait time from the consultation with a specialist to the point at which the patient receives treatment has also increased drastically – from 5.6 weeks in 1993 to 10.8 weeks in 2019, a wait time 93 per cent longer.

As this section of the MEI report concludes – with tables to support it:

> When compared against other high-income OECD countries with universal healthcare systems, Canada constantly underperforms – especially with respect to those factors which govern wait times for essential healthcare services.

In other words, the challenge facing healthcare in Alberta going forward is that of expanding overall system capacity to meet current and future demands. By so doing the province will also be better equipped to meet surges in demands occasioned by healthcare emergencies such as the COVID-19 pandemic.

Surge Capacity

The bulk of this chapter deals with incremental measures to improve the capacity and performance of the Alberta healthcare system as a whole. But before proposing and discussing those measures, a brief word is in order concerning the "surge capacity" of the Alberta system, in particular its capacity to meet the surge in demand caused by the COVID-19 crisis.

As the MEI report points out, the surge capacity of a healthcare system can be measured in terms of its stocks of medical supplies, equipment, infrastructure and space required to treat patients, the existence of an adequately trained workforce (including, but not limited to, doctors, nurses, technicians and care assistants), and the leadership, policies and procedures required to effectively govern the system.[144]

Prior to the pandemic, Alberta's number of ICU hospital beds per capita was lower than that of other provinces, and during the first wave of COVID-19, Alberta's ICU bed capacity remained lower per capita than the Canadian average, as well as other comparable provinces. In fact, per 100,000, Alberta at the outset had 9.7 ICU beds, British Columbia had 10.5, Manitoba 11.2, Ontario 14.2 and the Canadian average was 13.5.[145]

According to AHS data,[146] ICU capacity fluctuated considerably during the COVID-19 crisis, rising from as low as 208 beds in early 2021 to over 318 in November 2021. There were always unoccupied beds throughout this period, but in order to increase and maintain ICU capacity AHS had to reduce capacity for surgeries and the provision of other services – the fear being that the Province might need to implement a draconian triaging policy if this were not done.

144 The reference to the necessity of appropriate "leadership, policies and procedures" is stressed elsewhere in the literature on capacity. For example: "To set and control (capacity) goals, requires methods for precise determination of capacity for different units. It is a misconception that capacity can be theoretically calculated only based on resources (facilities, equipment, staff). The capacity is also dependent on efficiency of the organisation (relevance of disaster plan) and of the competence of the staff (education and training). A well-organised unit with well-trained staff may have much higher capacity than a unit with more resources, but an insufficient plan and untrained staff. Therefore, defining of capacity requires practical tests." Montán, K.L., Örtenwall, P., Blimark, M. et al. "A method for detailed determination of hospital surge capacity: a prerequisite for optimal preparedness for mass-casualty incidents," Eur J Trauma Emerg Surg 49, 619–632 (2023), https://doi.org/10.1007/s00068-022-02081-z

145 This number is again at odds with what is reported elsewhere. Sean M. Bagshaw et al., "Association Between Pandemic Coronavirus Disease 2019 Public Health Measures and Reduction in Critical Care Utilization Across ICUs in Alberta, Canada," Critical Care Medicine, Vol. 50, No. 3, 2022, Supplementary Table 6. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8855764/

146 City of Edmonton, "Historical: COVID-19 in Alberta: Intensive Care Unit (ICU) bed and non-ICU bed capacity and utilization," May 28, 2022, https://data.edmonton.ca/Community-Services/Historical-COVID-19-in-Alberta-Intensive-Care-Unit/xzbw-4krt/data

As the MEI report also points out, the capacity to meet a surge in demand due to a pandemic requires much more than ICU capacity. In Alberta's case, the supply of certain necessary medical supplies such as ventilators was insufficient, and although additional purchases were made in 2019, Alberta was still left with an inadequate supply. The well-reported increase in the workload burden of doctors, nurses, healthcare administrators and other healthcare workers – many of whom reached the point of exhaustion during the COVID-19 crisis – was yet another indicator of a shortage of surge capacity on the human resources front.

According to the Canadian Association of Emergency Physicians (CAEP), during a pandemic the institutional and surge capacity target should be, at minimum, 20 per cent beyond the usual capacity of the healthcare system.

Applying the above definition and target for surge capacity to Alberta's systemic response to the COVID-19 crisis of 2020-2022, MEI's analysis shows that the province struggled significantly to achieve the capacity required to respond effectively to the surge in demand for health services caused by COVID-19. The Panel therefore concludes that insufficient system capacity prevented the province from responding more effectively to the COVID-19 crisis, and that this insufficiency must be rectified if the province is to be better equipped to respond more effectively to future public health emergencies. All the more reason to also consider and implement incremental changes to the system as a whole, so that adequate surge capacity exists when demanded by future health emergencies.

As pointed out by the MEI, in the absence of a standardized definition of surge capacity, a multitude of definitions exist from governments, academic institutions, and healthcare organizations in Canada and around the world. Surge capacity, however defined, also has multiple components, each of which can vary in different ways at different times. All of this makes the measurement and comparison of surge capacity difficult and raises legitimate questions about the validity and accuracy of whatever measures are used.

These ambiguities might be somewhat relieved if the Province were to commission an independent body to recommend definitions and measures of system and surge capacity most applicable to the Alberta healthcare system.

Toward Improvements in the Capacity and Performance of the Alberta Healthcare System

As emphasized in the introduction to this report, it is not the purpose or intention of the Panel to attach blame for the capacity challenges faced by Alberta's healthcare system during the COVID-19 crisis – least of all to the doctors, nurses, and other healthcare workers and administrators who did their utmost for months at a time to cope with an unprecedented healthcare emergency. Rather the purpose of the Panel, on instructions from the Premier, is to ascertain any lessons to be learned from that crisis and to improve the performance of Alberta's healthcare system going forward, not only during healthcare emergencies but on a continuing basis under normal non-crisis conditions.

Of assistance to the Panel in pursuing this purpose is a brief snapshot provided in the MEI report of the capacities of the healthcare systems of the United Kingdom (England), Sweden and the Netherlands to meet the surge in demand for their healthcare services as a result of COVID-19.[147] All are high-income countries with universal healthcare coverage similar to that of Canada/Alberta but were better able to meet the COVID-caused surge in demand for key healthcare services during the pandemic.[148]

Please note that in proposing measures to improve the overall capacity and performance of the Alberta healthcare system going forward, under both emergency conditions and non-crisis conditions, the Panel believes it would be best to proceed "incrementally" – i.e., that the proposed measures be implemented carefully and methodically in measured steps over time rather than sporadically or "all at once" which could further strain an already strained system. As MEI notes, incremental reform, by definition, is not radical or disruptive, and yet it still possesses the potential to have enormously beneficial impacts and to generate significant results.

147 It should be noted that many OECD countries use the concept of "resilience" to measure system and surge capacity, where resilience is defined as the ability of health systems not only to prepare for shocks, but also to minimize the negative consequences of such disruptions, recover as quickly as possible and adapt by learning lessons from the experience to become better performing and more prepared.

148 Elke Berger et al., "A country-level analysis comparing hospital capacity and utilization during the first COVID-19 wave across Europe," Health Policy, Vol. 126, Iss. 5, May 2022, p. 375; https://www.sciencedirect.com/science/article/pii/S0168851021002906. Bilal Akhter Mateen et al., "Hospital bed capacity and usage across secondary healthcare providers in England during the first wave of the COVID-19 pandemic: a descriptive analysis," BMJ Open, Vol. 11, 2021, p. 3. https://bmjopen.bmj.com/content/11/1/e042945

Please also note that each of the recommended measures that follow is compatible with the provisions of the *Canada Health Act*[149] and the objective of providing universal access to quality healthcare services for all Albertans regardless of the ability to pay. This is an objective distinctly superior to merely providing universal access to healthcare waiting lines which has too frequently become the experience of too many Albertans and Canadians in recent times.

Incremental Measures to Increase the Capacity and Performance of the Alberta Healthcare System Going Forward

The Health Quality Council of Alberta has developed a six-dimension matrix for measuring the quality of care offered by a healthcare system. These quality dimensions are acceptability, accessibility, appropriateness, effectiveness, efficiency and safety. For healthcare services to be appropriate, effective and safe, they need to be accessible in an efficient manner. As such, the recommendations made in this section focus on the dimensions of accessibility and efficiency.

In the period during which the Panel has been in operation (since January 2023) the Alberta government has already proceeded to implement, or made commitments to implement, over a dozen measures to improve the accessibility and effectiveness of the Alberta healthcare system. These measures, which the Panel commends, include the following:

- Delivering more surgeries in a timelier fashion by maximizing the use of all surgical facilities across the province and using chartered facilities as well.
- Improving EMS response times and shortening patient transfer times at emergency departments by using specialized non-emergency vehicles for interfacility transfers, as well as by empowering paramedics to provide on-site evaluation and treatment where medically appropriate.
- Improving healthcare for pregnant women through the use of midwives, thus reducing the pressure on obstetrics.
- Reducing long-term costs and improving outcomes by expanding mental health supports with focus on early intervention, diagnosis and treatment.
- Ensuring Albertans have access to recovery by building more therapeutic recovery communities with integrated care where they are needed (including with First Nations partnerships).
- Restoring decision-making authority to the local level, incentivizing regional innovation and competition to provide increased medical services and surgeries, and attracting healthcare professionals domestically and internationally. (Decentralized decision-making and resources are a common theme.)
- Leveraging all healthcare workers and utilizing alternative models of care.
- Supporting seniors to stay in their homes longer, with additional supports.
- Urging the federal government to use its authority under the *Income Tax Act* to establish health spending accounts providing non-taxable benefits that can be used to pay for eligible health and dental expenses.
- Improving continuing care for Albertans by proclaiming the Continuing Care Act to replace multiple acts with one piece of modern, streamlined legislation. The act will help Albertans understand how the continuing care system is governed by improving transparency and accountability.
- Ensuring Albertans are attached to a primary care provider and improving the primary care system through the Modernizing Alberta's Primary Health Care System (MAPS) initiative, which is to be released soon.
- Streamlining and expanding mental healthcare services.
- Recruiting more registered nurses and adding to Alberta's healthcare workforce.

149 There is often confusion in discussions of healthcare reform in Canada as to the extent of provincial jurisdiction over healthcare and what is allowed or disallowed by the *Canada Health Act*.

Additional Incremental Measures

To further incrementally enhance the capacity and performance of the Alberta healthcare system, the Panel recommends the following measures for consideration:

a) Implement activity-based funding for hospitals when and where applicable.

b) Expand the use of nurse practitioners (NPs).

c) Expand the use of licensed practical nurses (LPNs).

d) Streamline the administration of the Alberta healthcare system.

e) Reduce or eliminate barriers to labour mobility for healthcare workers.

f) Utilize pharmacists to their full scope of practice.

g) Expand capacity of the Alberta healthcare system to deal with mental health.

h) Expand and support the use of virtual medicine and telemedicine.

i) Explore options for attracting more healthcare providers into medical training, expanding Alberta's training capacity, and directing/incentivizing graduates to serve in the most needed areas.

j) Expand and improve the organization of home care services.

Each of these measures provides an alternative to the status quo. However, since no system change is perfect, each may have some downsides that require recognition, mitigation and/or compensation. But, in the judgement of the Panel, each of these alternatives plus mitigative/compensatory measures is superior to the status quo and is therefore recommended. With this framework in mind, the Panel reviewed each proposed measure (summarised briefly below) to arrive at the recommendations that conclude each of the following sections:

a) Implement Activity-based Funding for Hospitals

Inefficient hospital systems drain resources, breed inefficiency and constrain innovation. Currently, the most common hospital funding mechanism used across Canada and in Alberta is global (or historical) budgeting whereby a hospital receives a set amount of money, typically a yearly budget, based on the number of services that it is expected to provide.[150] The justification is that using planned activity, performance metrics and costs per activity allow AHS to have a consistent approach to budgeting.

Essentially, this form of financing views the patient as a cost for the facility, since the budget is established independently of the number of patients that the hospital treats in the current year.[151] This has the effect of reducing the incentive to improve access to services as each additional patient consumes more of the hospital's budget. While the Province may consider performance metrics, global budgeting typically exhibits performance and efficiency shortcomings since, with a fixed budget, the incentive to innovate and improve the efficiency of its administration is eliminated.[152]

As an alternative, activity-based funding (ABF) consists of reimbursement based on the current number of patients being treated at a standardized cost. Here, the funding follows the patient, and the patient can be seen as an opportunity rather than a cost. If a hospital has an excess number of patients compared to previous years, it automatically gets the funding to go with those patients. If it has fewer patients, say, because service is poor or waiting times are too long – this has a direct repercussion in the form of a lower budget.[153]

150 Including for wage and inflationary pressures. Data provided by the Province, August 22, 2023.

151 Maria Lily Shaw and Emmanuelle B. Faubert, "The Winning Conditions for Quebec's Mini-Hospitals," MEI, Research Paper, June 2023, p. 13, https://www.iedm.org/the-winning-conditions-for-quebecs-mini-hospitals/

152 Idem.

153 Peter St. Onge, "For A Strong and Resilient Post-COVID Health Care System: Reforms to Expand Surge Capacity," MEI, Research Paper, December 2020, p. 35, https://www.iedm.org/wp-content/uploads/2020/12/cahier0420_en.pdf

According to a recent MEI paper:

> Activity-based funding mechanisms thus encourage efficiency and innovation, but also cost control and accountability, since hospitals receive a fixed price per intervention, regardless of the actual amount spent to treat the patient. As a result, if a hospital can safely treat a patient at a lower cost than the set rate, the facility can generate a profit. On the other hand, the hospital will suffer a loss if it cannot provide the service at the determined rate, which will motivate it to become more efficient and encourage accountability.[154]

Many OECD countries with universal healthcare systems have adopted ABF in recent decades[155] including Sweden.[156] After its introduction, there was an increase in the quantity of services performed as well as increased productivity:

By one estimate, productivity increased by no less than 20 per cent in the first two years following the reform. The increased productivity was achieved through a reduction in average length of stay combined with faster patient turnover, and an increase in the number of operations, thereby reducing long wait lists. All of this was achieved without any evidence of patient selection, which is to say that physicians did not choose to treat only patients with mild medical issues.[157]

While no country has shifted completely to ABF, in making such a shift where applicable and at an appropriate pace, Alberta would be firmly aligning itself with international best practices.

Since no system shift is perfect, there are of course potential downsides that must be taken into consideration when implementing activity-based funding. For instance, critics of this funding model will be quick to point to evidence that it can increase system costs,[158] create incentives to "game the system" by tweaking diagnoses to increase payment,[159] or that "cherry-picking" or "cream-skimming" could result in hospitals catering to patients preferentially.[160] These unintended consequences cannot be ignored, and need to be mitigated as much as possible, for example, by the institution of checks and balances such as those employed in the numerous high-income OECD nations that have implemented activity-based funding.[161]

The Panel therefore recommends:

9.1 That Alberta realign its hospital funding in accordance with international best practices, transitioning where applicable from the current global or historical budgeting model to an activity-based funding model (ABF), thereby improving the efficiency of the Alberta healthcare system and stimulating innovation.

b) Expand the Use of Nurse Practitioners

An expanded role for nurse practitioners (NPs) can in part relieve shortages of physicians, especially during a provincewide public health emergency. During the pandemic, AHS explored expanding the use of NPs and midwives where physicians were unavailable[162] or severely strained.

154 Maria Lily Shaw and Emmanuelle B. Faubert, "The Winning Conditions for Quebec's Mini-Hospitals," MEI, Research Paper, June 2023, p. 13, https://www.iedm.org/the-winning-conditions-for-quebecs-mini-hospitals/

155 Clas Rehnberg, "The experience of the DRG-reimbursement system in the Stockholm County council," Applied Health Economics Sweden, March 27, 2012, p. 5, https://www.compcom.co.za/wp-content/uploads/2015/05/Mediclinic-Annexure-3-Stockholm-DRG-Research.pdf

156 Namely a diagnosis-related group scheme. Maria Lily Shaw, "Real Solutions for What Ails Canada's Health Care Systems," MEI, Research Paper, February 2022, pp. 19-21, https://www.iedm.org/real-solutions-for-what-ails-canadas-health-care-systems-lessons-from-sweden-and-the-united-kingdom/

157 Idem.

158 Rodrigo Moreno-Serra and Adam Wagstaff, "System-wide impacts of hospital payment reforms: evidence from Central and Eastern Europe and Central Asia," Policy Research Working Paper 4987, The World Bank Development Research Group, Human Development and Public Services Team, July 2009, pp. 35-37, □ (nida.ac.th)

159 Jonathon M. Ross, "Canadians should beware of Americans bearing 'activity-based funding'," Physicians for a National Health Program, August 1, 2013, https://pnhp.org/news/canadians-should-beware-of-americans-bearing-activity-based-funding/

160 Paolo Berta et al., "The effects of upcoding, cream skimming and readmissions on the Italian hospitals efficiency: A population-based investigation," Economic Modelling, Vol. 27, 2010, pp. 818-821, https://ideas.repec.org/a/eee/ecmode/v27y2010i4p812-821.html

161 For instance, when Sweden employed ABF, it did so using a diagnosis-related group (DRG) scheme to reimburse hospitals based on a patient classification system that standardizes the cost of treatment. DRG funding mechanisms thus encourage efficiency, but also cost containment, as hospitals receive a fixed price per procedure, regardless of how much they actually spend treating the patient. Maria Lily Shaw, op. cit., note 156, p. 19. https://www.iedm.org/real-solutions-for-what-ails-canadas-health-care-systems-lessons-from-sweden-and-the-united-kingdom/

162 Provided by Province.

According to AHS:

> Nurse Practitioners (NPs) are registered nurses (RNs) with graduate degrees and advanced knowledge and skills. They are trained to assess, diagnose, treat, order diagnostic tests, prescribe medications, make referrals to specialists and manage overall care. Nurse practitioners often work closely with physicians and other health professions as part of a team. Some NPs work independently and manage their own clinics.[163]

Research confirms that NPs improve access to high quality care at cost savings to the system.[164] According to the Canadian Nurses Association, "In Ontario, for example, a rigorous evaluation of the clinical nurse specialist/neonatal practitioner role demonstrated that these nurses provide safe, effective, economically efficient care that is accepted by parents of neonates and health provider colleagues."[165]

There is significant evidence suggesting that access to primary care can be improved through the expanded use of NPs in rural communities or communities with limited access to primary care.[166] In addition, the use of NPs there would cost less than physicians.

As previously noted, steps are already being taken to increase the numbers of NPs serving in Alberta and to improve their training. On a per capita basis the number of NPs in Alberta increased from 15.3 per 100,000 in 2020 to 17.9 per 100,000 in 2022.[167] This trajectory is positive, but funding models in Alberta are lacking and there are limited opportunities for NPs to practice independently within their communities.[168] This should be a priority, as should other measures to attract, train, retain and employ more NPs in Alberta.

It is especially worth noting that expanding the use and scope of work of NPs – which can be done more easily and quickly than expanding the supply of physicians and nurses – is particularly relevant to expanding the healthcare workforce available to meet the surge in health service demands caused by a pandemic or other public health emergencies.

Potential downsides to expanding the use of NPs pertain to structural and organizational barriers to deployment – namely that increased pay would threaten the financial security of GPs and family physicians who are required to pay higher salaries for NPs in their practice.[169] This suggests the need for a redistribution of the financial burden or providing provincial funding mechanisms similar to that of physician compensation. There are additional concerns that the increased use of NPs (to their full scope) threatens the job security of GPs/family physicians and whether NPs are "up to the job."[170] But these concerns can be moderated with proper communication during implementation, such as clearly communicating the education and training requirements (and scope of practice) for NPs.

The Panel therefore recommends:

9.2 That the use of NPs, the scope of services that they are permitted to provide, and the capacity for NP training be expanded to improve access to healthcare for Albertans and to lower system costs.

c) Expand the Use of Licensed Practical Nurses

As with respect to the need to expand the role of NPs, there is a similar need to expand the role of licensed practical nurses (LPNs).

According to AHS:

> Licensed practical nurses (also known as LPNs) are professional nurses who contribute to the assessment, planning, implementation and evaluation of patient care at AHS. Licensed practical nurses have the knowledge, skill, judgement and abilities to contribute to many types of patient care, including prevention, acute treatment and management, long term and palliative care.[171]

163 Alberta Health Services, "Nurse Practitioner," https://www.albertahealthservices.ca/info/page7903.aspx

164 "Cost-Effectiveness of the Nurse Practitioner Role (Fact Sheet), March 2002, consulted September 6, 2023, https://sites.ualberta.ca/~churchj/Pols%20321/Pols%20321%202009/Nurse%20Practitioners.pdf

165 Ibid.

166 Kathleen Bykowski, Tammy O'Rourke and Donna M. Wilson, "Insights gained from clarifying the role of NPs in rural Alberta primary care settings," Canadian Nurse, March 21, 2022, https://www.canadian-nurse.com/blogs/cn-content/2022/03/21/insights-gained-from-clarifying-the-role-of-nps-in

167 Author's calculations based on a review of the annual reports of the College of Registered Nurses of Alberta, 2019-2020, 2020-2021 and 2021-2022. In 2022 there were 812 NPs in Alberta, up from 793 in 2021 and 675 in 2020.

168 Nurse Practitioner Association of Alberta, NP Resources, "What you should know about funding models," consulted September 6, 2023, https://albertanps.com/members/np-resources/

169 Ali Wilson, David Pearson, and Alan Hassey, "Barriers to developing the nurse practitioner role in primary care – the GP perspective," Family Practice, Vol. 19, No. 6, pp. 643-644, 190641 (silverchair.com)

170 Ibid, pp. 642-643. 190641 (silverchair.com)

171 Alberta Health Services, "Licensed Practical Nurse," consulted September 21, 2023, https://www.albertahealthservices.ca/careers/page11730.aspx

LPNs have a defined scope of practice that includes a variety of healthcare settings and tasks, some of which overlap with that of RNs.[172] For instance, LPNs can take and record vital signs, collect various samples, dress wounds, monitor progress and report reactions to treatment, and educate and advocate for patients and families. They work collaboratively with patients, families and the healthcare team, including RNs, to provide high-quality treatment and care to Albertans.[173]

According to AHS:

Currently, there are many roles within AHS for licensed practical nurses and as the profession continues to grow new opportunities are created. Licensed practical nurses may pursue advanced training and practice in specialty nursing areas such as operating room, advanced orthopedics, dialysis and immunization.

The average salary for an RN in Alberta is $72,818 ($46.21 average hourly wage), and for an LPN, $48,364 ($30.17 hourly).[174] In 2021-2022 in Alberta, there were 38,775 registered nurses[175] and 18,750 LPNs.[176] According to public salary disclosures, 2.3 per cent of RNs and 0.1 per cent of LPNs earned more than the threshold amount of $141,183 in compensation as outlined in the *Public Sector Compensation Transparency Act*.[177]

Therefore, some of the tasks being undertaken by RNs can be taken up by LPNs at a lower cost to the system, freeing the RN to work at their increased scope of practice and take on more complex and critical care, along with leadership, for which they have been specifically trained.

According to the MacKinnon Report on Alberta's Finances (2019): "Ontario .... has reduced the cost of delivering services by fully utilizing the scope of practice of health professionals (scope of practice means the responsibilities that a professional's training equips them to undertake)."[178]

Again, it is worth emphasizing that expanding the use and scope of LPNs is particularly beneficial from the standpoint of expanding the ability of the healthcare workforce to meet the surge in the demand for health services caused by a pandemic and other public health emergencies.

Research shows that there are barriers to the full practice of nursing personnel, including LPNs. This is something that should be considered in implementation, alongside proper differentiation between nursing scopes of practice (expectations of practice based on education). For instance, the research also shows that common barriers affecting the ability of nursing staff to work to full scope of practice are heavy workloads, high patient acuity or severity, a lack of time, not working as a team and unclear role definitions.[179] While not all barriers are easily surmounted, many can be overcome during implementation, provided the means of doing so are evidence-based.

The Panel therefore recommends:

9.3 That the use of LPNs, as well as the scope of services they are permitted to provide, be expanded to reduce the burden on registered nurses, to improve access to healthcare for Albertans, and to lower system costs.

d) Streamline the Administration of Alberta's Healthcare System

Alberta's AHS spends on average $110 per capita[180] on healthcare administration – approximately 42 per cent less than the Canadian average of $192 per capita. While AHS spends less on administration than the Canadian average, it should be noted that there is much room for improvement. For example, Japan and Sweden spend $70 per capita and the United Kingdom spends $100 per capita on administration.[181] These countries also have healthcare systems that outperform Canada's and Alberta's (see Chapter 1). It is commonly understood that heightened spending on administration does not lead to better outcomes, rather, it directs resources away from frontline healthcare service providers.

172 Alberta Health Services, "Registered Nurse (RN)," consulted September 21, 2023. https://www.albertahealthservices.ca/careers/Page11733.aspx

173 Idem.

174 Government of Alberta, ALIS, Occupations in Alberta, "Registered Nurse," consulted September 21, 2023, https://alis.alberta.ca/occinfo/occupations-in-alberta/occupation-profiles/registered-nurse/ and "Licensed Practical Nurse," consulted September 21, 2023, https://alis.alberta.ca/occinfo/occupations-in-alberta/occupation-profiles/licensed-practical-nurse/

175 This includes 38,775 RNs and 812 NPs, 389 graduate nurses, 32 graduate NPs, and six certified graduate nurses, between October 1, 2021 and September 30, 2022. College & Association of Registered Nurses in Alberta, "Annual Report 2021 to 2022," 2022, p. 5, https://nurses.ab.ca/media/n5nbwydg/crna-2021-2022-annual-report-march-3-web.pdf

176 A noted 6.2 per cent increase in registration from the previous year. In addition, between 2019 and 2023 the number of LPNs in the province grew by 15.7 per cent. College of Licensed Practical Nurses of Alberta, "2021 Annual Report," 2022, p. 6, https://issuu.com/clpna/docs/2021_annual_report_id_58848_

177 There were 885 RNs and 22 LPNs who made over the threshold amount. Alberta Health Services, Compensation Disclosure, all compensation disclosure data, consulted September 21, 2023. https://www.albertahealthservices.ca/about/page13093.aspx

178 Blue Ribbon Panel on Alberta's Finances, "Report and recommendations," Government of Alberta Website, August 2019, p. 28, https://issuu.com/clpna/docs/2021_annual_report_id_58848_

179 Nelly D. Oelke et al., "Nursing Workforce Utilization: An Examination of Facilitators and Barriers on Scope of Practice," Nursing Research, Vol. 21, No. 1, 2008, pp. 63-65, NL_vol21_no1.indd (researchgate.net)

180 AHS administration expenditures per capita for 2019 ($121), 2020 ($107), 2021 ($111), 2022 ($103), average 2019-2022 ($110).

181 Peter G. Peterson Foundation, "How does the US healthcare system compare to other countries?" July 12, 2023, https://www.pgpf.org/blog/2023/07/how-does-the-us-healthcare-system-compare-to-other-countries

Various studies have pronounced Germany's healthcare system as one of the top ranked, and as described in the appendix to the MEI Report, its performance is certainly superior to Canada's in many ways (see Table A1). It manages to outperform with a fraction of the administrators. In fact, Canada has 10 times as many healthcare administrators as Germany, even though Germany has twice the population of Canada. In terms of ratios, Canada has one healthcare administrator for every 1,415 citizens, Germany, one for every 15,545.

Germany spends more on health per capita (see Table A1), yet Canada has 10 times the administrators. It follows, then, that more of that per capita spending is directed at administration instead of direct patient care.

The Panel therefore recommends:

9.4 That Alberta commit itself to streamlining the administration of the Alberta healthcare system, targeting a reduction of the ratio of administrative expenses to total healthcare expenses of X%[182] over the next five years in order to reduce overall system costs.

e) Reduce or Eliminate Barriers to Labour Mobility for Healthcare Workers

People move between countries and provinces for a wide range of reasons. In deciding whether to do so, they carefully consider the associated costs – including processing times and administrative and regulatory hurdles to exercising one's profession. These barriers are an added cost to migration. Easing the bureaucratic load in the accreditation process and the recognition of credentials is one way to increase the supply of medical professionals in the province.

In Alberta there are numerous regulated occupations that face barriers to labour mobility, many of which are important contributors to the healthcare system. For instance, Alberta holds exceptions to LPNs, medical radiation technologists, NPs, and advanced care paramedics.[183] This means that health workers from these professions from other provinces may be required to undergo additional testing, certification or assessment before they are able to practice in Alberta.

Such barriers also limit the mobilization and utilization of persons already living within the province. For example, in February of 2023, it was reported that there were hundreds of immigrants in Calgary alone with medical training and experience as physicians in their home countries who "aren't currently making use of those skills, often working menial jobs as they contend with what they describe as barriers in Canada's medical credentialing and licensing systems."[184] Estimates from 2014 were that almost 3,600 Canadians were studying medicine at schools abroad, including in the United Kingdom, Australia, Poland, the Caribbean and not where most hope eventually to practise – in Canada. "About three-quarters of them are unsuccessful applicants to Canadian medical schools."[185]

This is wasted potential, especially in a system with a physician shortage as palpable as that of Alberta's.

The Government of Alberta recently passed the *Labour Mobility Act* with the objective of streamlining the mobility of skilled Canadians across more than a hundred regulated occupations;[186] however, more should be done.

In Europe, the Netherlands and Sweden were able to effectively move health workers to health facilities or other geographic areas with greater need.[187] They also had cross-border and regional collaborations to alleviate pressures on the hospital system, whereby patients in Dutch ICU and non-ICU were transferred to hospitals in Germany with spare capacity.[188]

182 X% to be based on a review of the ratio of administrative expense to total healthcare expenditures in other countries that outperform Canada and Alberta by this measure.

183 Labour Mobility Working Group, "Exceptions by Jurisdiction," 2021, https://workersmobility.ca/exceptions-by-jurisdiction/

184 Jason Herring, "Foreign doctors in Calgary frustrated by barriers to work in Canada," Calgary Herald, February 14, 2023, https://calgaryherald.com/news/local-news/foreign-doctors-in-calgary-frustrated-by-barriers-to-work-in-canada

185 Barer ML, Evans RG, Hedden L., "False hope for Canadians who study medicine abroad," CMAJ, April 15, 2014, https://www.cmaj.ca/content/186/7/552.

186 Province of Alberta, *Labour Mobility Act*, April 6, 2023, consulted on August 15, 2023, https://kings-printer.alberta.ca/1266.cfm?page=L00P7.cfm&leg_type=Acts&isbncln=9780779842551

187 Juliane Winkelmann et. al., "European countries' responses in ensuring sufficient physical infrastructure and workforce capacity during the first COVID-19 wave," Health Policy, Vol. 126, Iss. 5, May 2022, pg. 368, https://www.sciencedirect.com/science/article/pii/S016885102100172X?casa_token=6PWn3KTl6I4AAAAA:jBu4p184EXdNA8ZtuwAa1QPM2J7F0xWwoJ-l_m3w4GWGIRRjxnn1JBngAOzldrlCl1ItKn749Ndp

188 Ibid, p. 365.

In Canada's federal system, both the federal and provincial governments have a role to pay in eliminating barriers to the movement of health professionals and workers across provincial boundaries, especially during a national public health emergency. While proposing initiatives to accomplish this is beyond the terms of reference and capabilities of the Panel, suffice it to say, again – more should be done.

Regarding Canadians studying abroad and international medical graduates, since 1993, the provincial ministries of health and the provincial colleges of physicians and surgeons have allowed Canadian universities to control the selection of medical students to continue into further training to practice as physicians in Canada. Therefore, it is the Canadian universities that block Canadians studying medicine abroad from coming home to continue their training, while Canada grapples with a physician shortage.

Again, at the risk of repetition, any measure that facilitates expansion of the healthcare workforce is particularly beneficial to meet surges in demand during public health emergencies. This includes reducing or eliminating barriers to labour mobility.

The Panel therefore recommends:

9.5 That internal, interprovincial and international barriers to labour mobility – in particular those limiting the mobility of healthcare workers and practitioners – be examined and systematically removed as appropriate to bolster the healthcare workforce and expand system capacity from a human resources perspective.

f) Utilize Pharmacists to Their Full Scope of Practice

Canada has more licensed pharmacists per capita than most OECD countries, and Alberta, in particular, has an ample supply of pharmacists whose scope of practice includes prescribing certain medications, ordering and interpreting lab tests, and administering vaccinations.[189]

The number of pharmacists in Alberta per capita is higher than ever before, and the number of pharmacies has also increased.[190] According to the Province, a workforce strategy during the pandemic was to optimize deployment of the full spectrum of healthcare professionals and to ensure that they worked to their full scope of practice. Pharmacists had an expanded scope of practice to relieve pressure on other areas of healthcare,[191] and this could be further expanded.

There are precedents for an increased role for pharmacists in primary care. In Alberta the first pharmacist-managed walk-in clinic and primary care clinic opened recently to provide care to those who are unable to access primary care.[192] Pharmacist-led clinics are expanding throughout Alberta and Canada, including Lethbridge and Fort Saskatchewan.

Pharmacists and physicians have different priorities in respect to patients, and the best use of existing resources is to focus on areas of expertise. For example, a physician's attention should be sought for conditions requiring a clinical diagnosis, whereas drug-related issues or concerns can be dealt with more easily by a pharmacist.[193] As drug-related problems account for more than 10 per cent of ER visits across the country, effective collaboration between physicians and pharmacists would reduce drug-related hospital visits.[194] And, as with expanding the numbers and scope of work of NPs and LNPs, expanding the scope of practice for pharmacists better equips Alberta to meet surges in demand.

189 Canadian Pharmacists Association, "Pharmacists Scope of Practice in Canada," January 2020, https://www.pharmacists.ca/cpha-ca/assets/File/cpha-on-the-issues/Scope%20of%20Practice%20in%20Canada_Jan2020.pdf

190 Brendan Coulter, "In small Alberta communities, the struggle to recruit pharmacists is real," CBC News, March 5, 2023, https://www.cbc.ca/news/canada/edmonton/in-small-alberta-communities-the-struggle-to-recruit-pharmacists-is-real-1.6763711

191 Alberta College of Pharmacy, "Alberta pharmacists adapt to respond to the COVID-19 pandemic," June 16, 2021, https://abpharmacy.ca/news/full-scale/alberta-pharmacists-adapt-respond-covid-19-pandemic/

192 Tsuyuki RT, Watson KE, "Taking primary care pharmacy to the next level," Can Pharm J (Ott), Feb. 15, 2023, https://journals.sagepub.com/doi/full/10.1177/17151635231153853

193 Eugene Y. H. Yeung, "Pharmacists Becoming Physicians: For Better or Worse?" Pharmacy, Vol. 6, No. 3, 2018, p. 3.

194 Cara Tannebaum and Ross T. Tsuyuki, "The expanding scope of pharmacists' practice: Implications for physicians," Canadian Medical Association Journal, Vol. 185, No. 14, October 2013, p. 1229. https://www.cmaj.ca/content/185/14/1228

Potential disadvantages of expanding the scope of practice for pharmacists include concerns over potential conflicts of interest. Since some pharmacists run their own pharmacies, there appears to be a financial conflict of interest in issuing a prescription for which the patient will then be billed in order to have it filled.[195] However, in Alberta, pharmacists are not paid[196] for writing or authorizing prescriptions.[197] But they do get paid for filling them. This is something that should be explained with implementation.

There are also concerns of patient privacy, given that not all pharmacies have the space available for proper private consultations prior to prescribing.[198] This, and other potential unintended consequences need to be addressed and mitigated, even if, in the judgment of the Panel, the advantages of expanding the scope of practice of pharmacists outweigh the disadvantages.

The Panel therefore recommends:

9.6 That the use of pharmacists – who are highly trained, skilled and capable – be expanded to increase front-line access to health services including pharmacist-led primary care clinics.

g) Expand Capacity of the Alberta Healthcare System to Deal with Mental Healthcare Needs

In reviews of the capacity of the healthcare system, emergency departments are shown to be a key. Emergency departments across the province are overfilled with patients awaiting a bed on a psychiatric unit. Up to 60 per cent of all admitted patients awaiting beds are psychiatric, and it often takes several days to weeks to gain access to a psychiatric hospital bed. Although this has been the case for many years, the level of "hallway medicine" (patients being cared for in hospital hallways) for people suffering from mental illness is unprecedented while psychiatric inpatient units are overcrowded and underfunded.

One of the most obvious results of a public health emergency like COVID-19 is an increased strain on the mental health of the population, especially our youth[199] – strains also seen as a result of the Fort McMurray[200] wildfires emergency. The CMHA's (Canadian Mental Health Association) Alberta poll found "44% of rural Albertans report that a lack of socialization throughout the pandemic has become a mental health challenge" and "42% of Albertans report isolation throughout the pandemic to be the top mental health concern for themselves and their community."[201] In addition:

New data from the non-profit Angus Reid Institute, in partnership with Cardus, finds a vast majority of Canadians are concerned with the mental healthcare resources available in the country (80 per cent) and the state of Canadians' mental health overall (81 per cent).

This concern is more elevated among those who sought care from the country's mental healthcare system in the past year. Overall, one-in-five (19 per cent) Canadians say they've looked for treatment for a mental health issue from a professional in the last 12 months. In that group, two-in-five say they've faced barriers to receive the treatment they wanted. These obstacles appear to be more of an issue for women (45 per cent of those who sought treatment say it was difficult to receive) and young Canadian adults aged 18-34 (51 per cent).[202]

One encouraging development in Alberta is the adoption of a recovery-oriented approach for addiction and mental health. A recovery-oriented system of care[203] is a co-ordinated network of personalized, community-based services for people at risk of or experiencing addiction and mental health challenges. It provides access to a full continuum of services and supports, from prevention and intervention to treatment and recovery.

195 Matt Gurney, "What are the risks and benefits of pharmacists prescribing?" TVO Today, July 17, 2023, https://www.tvo.org/article/what-are-the-risks-and-benefits-of-pharmacists-prescribing.

196 Ministerial Order 606/2022 sets out the framework for which pharmacists are paid by the GOA for a number of pharmacy services they perform, including payment for conducting an assessment that results in a prescription.

197 Alberta College of Pharmacy, "Are pharmacists paid for prescribing," consulted September 21, 2023.

198 See Footnote 195.

199 Brown MRG, Agyapong V, Greenshaw AJ, Cribben I, Brett-MacLean P, Drolet J, McDonald- Harker C, Omeje J, Mankowsi M, Noble S, Kitching DT, Silverstone PH, "Significant PTSD and Other Mental Health Effects Present 18 Months After the Fort McMurray Wildfire: Findings From 3,070 Grades 7-12 Students," Front Psychiatry, Aug. 30, 2019, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6728415/

200 Adu, M.K.; Eboreime, E.; Shalaby, R.; Sapara, A.; Agyapong, B.; Obuobi-Donkor, G.; Mao, W.; Owusu, E.; Oluwasina, F.; Pazderka, H.; et al, "Five Years after the Fort McMurray Wildfire: Prevalence and Correlates of Low Resilience," Behav. Sci. 2022, 12, 96, https://doi.org/10.3390/bs12040096

201 Survey results: "Understanding people's concerns about the mental health impacts of the COVID-19 pandemic," Collated by Katherine Cowan, on behalf of MQ: Transforming Mental Health and the Academy of Medical Sciences, April 2020. Available from: https://acmedsci.ac.uk/file-download/99436893

202 Angus Reid Institute, "Mental Health and MAID: Canadians who struggle to get help more likely to support expanding eligibility," September 28, 2023, https://angusreid.org/mental-health-care-access-maid-mental-illness/

203 A recovery-orientated system of care was initially described by SAMSHA (Substance Use and Mental Health Administration) and is endorsed by the CCSA (Canadian Centre for Substance Use and Addiction).

This Alberta model is informed by recommendations from the Mental Health and Addiction Advisory Council. Their final report, *Toward an Alberta Model of Wellness* provides a framework to help achieve the vision of building a system where every Albertan has the opportunity to pursue recovery and live a healthy and productive life.

Acknowledgement of the importance of a renewed effort to address the mental health situation in Alberta is reflected in:

- The Premier's mandate letter to the minister of Mental Health and Addiction identifying more than 20 initiatives to be pursued.[204]
- The Premier's mandate letter to the minister of Health which directs the minister to "Expand mental health supports with focus on early intervention, diagnosis, and treatment to reduce longer-term system costs and improve outcomes."[205]

However, as of yet, there is not strategy for the mental health crisis affecting Albertans and all Canadians.

The Panel therefore recommends:

9.7 That a mental health strategy be created and adopted focusing on the expansion of capacity of the Alberta healthcare system to recognize, prioritize and treat mental illness, working alongside the Alberta recovery-oriented system of care.

h) Expand Virtual Care and the Use of Telemedicine

Telemedicine "facilitates delivery of clinical care between two distinct geographic locations."[206] Telemedicine has proven benefits, including increasing access to care, especially for rural and remote populations, and decreasing costs both for the patient and for the system.[207] In addition, telemedicine "may facilitate safe delivery of care outside the emergency department for certain conditions or may be used as part of a pre-emergency department triage strategy."[208]

During the COVID-19 pandemic, its use increased and expanded. There was a shift to virtual visits. In some cases, home monitoring technology supported care for patients who might have otherwise required hospitalization.[209] In addition, there was increased usage in surgeries, such as orthopedic surgery. Ensuring that telemedicine and integrated technological solutions are in place could allow ICU physicians to advise non-ICU physicians in community hospitals or other hospitals lacking the adequate ICU workforce. This would help increase surge capacity.

Telemedicine usage is predicted to increase further still with the rise of interconnected health devices and high-speed connectivity, depending on permanent regulatory solutions.[210]

Of all the incremental measures proposed for rapidly increasing the capacity of the Alberta healthcare system to handle demand surges caused by a pandemic, expanding virtual care and telemedicine is one of the most important because of the ease and rapidity with which it can be expanded. The expansion of virtual care and the use of telemedicine also offers great promise in delivering healthcare to remote/rural areas, thereby reducing inequities in access to care.

As telemedicine grows and transcends provincial borders, interoperable digital health records that follow the patient become necessary.[211] The 2022 mandate letter to the minister of Health referenced the importance of assessing and addressing the inter-functionality of the 1,300 or more IT systems currently in use in Alberta.[212] This priority should be aligned with telemedicine.

204 Premier of Alberta, 2022 Mandate Letter: Minister of Mental Health and Addiction, November 14, 2022.

205 Idem. Premier of Alberta, 2022 Mandate Letter: Minister of Health, November 14, 2022. https://open.alberta.ca/dataset/71ebe02e-bda3-46f3-8ddd-6bf3a0d3d7ca/resource/80f58d18- bd94-45d9-9954-6df0fb8ae3c4/download/hlth-mandate-letter-health.pdf

206 Ali M. Omari et al., "Patient Satisfaction with Orthopedic Telemedicine Health Visits During the COVID-19 Pandemic," Telemedicine and E-Health, Vol. 28, No. 6, 2022. https://www.liebertpub.com/doi/pdf/10.1089/tmj.2021.0170

207 Astrid Buvik et al., "Cost-effectiveness of telemedicine in remote orthopedic consultations: Randomized controlled trial," Journal of Medical Internet Research, Vol. 21, No. 2, 2019; Juan C. Duchesne et al., "Impact of Telemedicine Upon Rural Trauma Care," Journal of Trauma and Acute Care Surgery, Vol. 64, No. 1, 2008. 2019, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6399572/#:~:text=of%20the%20results.-,Results,consultations%20exceeds%20151%20per%20year; Juan

208 David Gomez et al., "A population-based analysis of the impact of the COVI-19 pandemic on common abdominal and gynecological emergency department visits," Canadian Medical Association Journal, Vol. 913, No. 21, 2021. https://www.cmaj.ca/content/193/21/E753

209 Provided by the Province.

210 Carlo M. Contreras et al., "Telemedicine: Patient-Provider Clinical Engagement During the COVID-19 Pandemic and Beyond," Journal of Gastrointestinal Surgery, Vol. 24, 2020. https://link.springer.com/article/10.1007/s11605-020-04623-5

211 Maria Lily Shaw and Krystle Wittevrongel, "Improving Access to Health Data in Quebec," MEI, Economic Note, June 9, 2022, https://www.iedm.org/improving-access-to-health-data-in-quebec/

212 Premier of Alberta, 2022 Mandate Letter: Minister of Health, November 14, 2022. https://open.alberta.ca/dataset/71ebe02e-bda3-46f3-8ddd-6bf3a0d3d7ca/resource/80f58d18-bd94-45d9-9954-6df0fb8ae3c4/download/hlth-mandate-letter-health.pdf Note also the relevance to an expansion of virtual care and the use of telemedicine of the provinces of AHS's Connect Care system – a clinical information system that will house all AHS medical records, prescriptions and care history at AHS facilities. It is a system that empowers patients to interact with their healthcare information and allows healthcare providers to use the system to identify the decisions and approaches that best improve Albertans' lives.

Potential downsides to the expanded use of telemedicine – which need to be avoided, mitigated or compensated – include:

- Technical difficulties in implementation.
- Potential inequities of access.
- Potential misuse (e.g., excessive billing) by practitioners.
- Lack of financial incentives to practitioners to expand use.
- The potential for security breaches and increased risks to privacy.[213]
- The impersonal nature of online diagnosis and care provision.[214]
- The potential for abuse by those offering medical misinformation and unethical and fraudulent medical procedures and services.
- The need to retrain major portions of the healthcare workforce to take advantage of the benefits of telemedicine.[215]

Safeguards do exist for the above concerns, primarily through a robust regulatory system for virtual care and telemedicine. And according to a recent review, co-operation among the various components of the healthcare system is especially important if telemedicine is to be integrated with existing practices:

> Therefore, it is imperative for all sectors to work together to implement, execute and develop telemedicine to better serve the needs of patients. Governments need to tackle the legal aspects of telemedicine while hospitals and medical personnel need to work hand in hand to maximize the clinical use of telemedicine.[216]

The Panel therefore recommends:

9.8 That increased uptake of virtual care and telemedicine be encouraged – supported by a permanent regulatory regime to prevent abuses and provide appropriate incentives to providers and users – thereby reducing inequities in access to healthcare and further increasing public access to quality care.

i) Explore Options for Attracting and Training Healthcare Providers

The issue of providing professional medical training in Alberta was first addressed by the board of governors of the University of Alberta in 1913 when they decided to create a faculty of medicine. Today (2023), the University of Alberta faculty of medicine and dentistry is composed of 21 departments, two stand-alone divisions, nine research groups, and 24 research centers and institutes. Educational, clinical and research activities are conducted in 29 buildings on or near the University of Alberta north campus. The faculty of medicine and dentistry has more than 1,400 support staff and 2,760 tenure-track and clinical educators.

In 1961 the Royal Commission on Health Services (Hall Commission), chaired by Justice Emmett Hall, was charged with examining and making recommendations on the organization and funding of Canada's healthcare system. Among its recommendations was the call to create four new medical schools to train more doctors across Canada, one being in southern Alberta. The Government of Alberta approved plans for a medical school at the University of Calgary in 1966. The University of Calgary's faculty of medicine admitted its first students in 1970. In 2014 the school was renamed to Cumming School of Medicine after Geoffrey Cumming provided the largest single philanthropic gift ever received by the University of Calgary ($100 million dollars, which was subsequently matched by the Government of Alberta).

213 Shilpa N. Gajarawala and Jessica N. Pelkowsi, "Telehealth Benefits and Barriers," The Journal for Nurse Practitioners, Vol. 17, 2021, pp. 218-219, https://pubmed.ncbi.nlm.nih.gov/33106751/

214 Idem.

215 Lie Rebecca Yem Hwei and Gilbert Sterling Octavius, "Potential advantages and disadvantages of telemedicine: A literature review from the perspectives of patients, medical personnel, and hospitals," Journal of Community Empowerment for Health, Vol. 4, No. 2, 2021, p. 184, https://jcoemph.id/index.php/jcoemph/article/view/116

216 Ibid, p.185.

The University of Alberta's faculty of medicine and dentistry and the Cumming School of Medicine at the University of Calgary continue to be Alberta's only two medical schools. Combined the two had 347 available seats for the 2023 academic year. As only eight to 12 per cent of those who apply are accepted,[217] there is a sizeable number (between 2,500 and 4,000) of other candidates, who, provided they could meet the admission requirements, were not accepted.

Evidently, there is a need to expand Alberta's capacity to accept more applicants for professional medical training. This means not only expanding academic programs and facilities but also the capacity to provide clinical (hospital) training, including through residencies.[218] The Premier's 2022 and 2023 mandate letters to the minister(s) of Health called for an increase in the number of training seats for health professionals in Alberta. But to have an impact, the number of training seats increased would need to include both medical school admissions and residency (in-hospital training) positions.

In addition to the issue of how to expand Alberta's capacity to provide medical training, there is also the issue of how to direct/incentivize graduates to serve, at least for a time, in geographic regions (e.g., rural Alberta) or functional areas (e.g., family practice)[219] where the need for their medical expertise is most needed.

While properly addressing this issue is beyond the terms of reference and the capabilities of the Panel, our attention has been drawn to such mechanisms as return of service (ROS) agreements and alternative payment plans (APP) as options to be explored.

The Panel therefore recommends:

9.9 That the government explore various options for attracting potential healthcare providers into medical training, expanding Alberta's capacity to provide such training, and directing/incentivizing graduates to serve in the areas of most need. Such options include:

- Expanding the number and capacity of medical schools in Alberta, and facilities for providing clinical (hospital) training.
- Expediting the testing and licensing of medical practitioners trained in other jurisdictions.
- Encouraging greater use of alternative payment plans.[220]
- Using return of service agreements[221] to incentivize graduates to serve in areas of most need (e.g., family medicine, rural Alberta, mental health medicine).

j) Expand and Improve the Organization of Home Care Services

Home care in Alberta is a publicly funded service for patients living in a private residence or other setting, such as suites in a retirement residence. It promotes independence and supplements the care and support provided by families and community services.[222] The provision of hospital-level care in a patient's home has been a surge management strategy for many years in many countries. In 2021, the Province increased home care funding to open hospital beds for COVID-19 patients.

217 The University of Alberta has 182 seats available in the MD program for the 2023-2024 year, and the Cumming School of Medicine had 165 seats in 2023. The universities were consulted on September 13, 2023.

218 A medical residency is the period of training that aspiring doctors undergo after completing medical school in a field of their choice. The residency program happens in a hospital or a clinic and is designed to provide practical experience and technical skills required by trainees to become full-time doctors.

219 Global News, "AMA calls Alberta family doctor shortage and urgent crisis," July 6, 2023, https://globalnews.ca/video/9816587/ama-calls-alberta-family-doctor-shortage-an-urgent-crisis

220 See s. 3.1 of the Medical Benefits Regulation under the *Alberta Health Care Insurance Act*. Note that APPs are different methods of physician compensation for delivering specific program services other than the traditional fee-for-service model. Approximately 4,000 physicians in Alberta practice in various capacities under both clinical and academic APPs. See Blue Ribbon Panel on Alberta's Finances - Report and Recommendations - August 2019

221 Under Return of Service Agreements, Alberta would pay for the medical training of an increased number of applicants on the condition that they provide medical services for X years in geographic or functional areas of service as directed/incentivised by the agreement. This is the civilian equivalent of the Military Medical Training Program (MMTP) offered by the Canadian Armed forces whereby qualified recruits are paid to take medical training at an accredited university (the University of Alberta is one of them) in return for a commitment of X years of military service after graduation.

222 Alberta Health Services, "Home Care: Continuing Care," consulted September 21, 2023, https://www.albertahealthservices.ca/cc/page15488.aspx

Outside of surge management, the COVID-19 pandemic has increased the demand for alternative care models that can supply acute, inpatient-level care while easing the burden on traditional "brick and mortar" hospitals.[223] Acute care delivery at home can be a long-term strategy to allow patients more flexibility in the provision of equivalent or superior care, while also reducing the cost – an acute care bed can range anywhere from $800 to $2,000 per day, compared to about $200 for a home care bed, according to an estimate from British Columbia in 2015.[224]

Studies show that hospital-level care provided as a substitute for traditional acute inpatient care generates better or similar clinical outcomes,[225] as well as greater patient and caregiver satisfaction,[226] cost-savings,[227] and reduced healthcare utilization.[228]

The *Facility-Based Continuing Care Review Final Report* of May 2021 indicates that alongside more than 33,000 supportive living spaces and 15,000 long-term care spaces, there are 127,000 Albertans receiving home care each year.[229] The most recent provincial budget dedicates funding for the transformation of the continuing care system. It includes increasing the number of home care hours provided and the number of unique or individual clients served. In this transformation, alongside the coming into force of the recent Continuing Care Act which enables a person-centred, flexible, innovative system of care,[230] home care services should be further expanded.

The availability of home care services can be important in at least partially relieving acute care facilities of surges in demand during a public health emergency.

The Panel therefore recommends:

9.10 That home care services in Alberta be expanded, with particular attention to integration and co-ordination of home care with other components of the healthcare system, to reduce the pressure on acute care and long-term care services and facilities.

Recognizing and Addressing the Need for Structural Improvements to the Alberta Healthcare System

The stresses and strains on Alberta's healthcare system caused by the COVID-19 crisis have brought to light certain structural features that could be modified to improve the capabilities of the system to meet future healthcare needs, including those that surge during public health emergencies. Relevant observations and questions on this subject include the following:

- Alberta has only two major medical schools,[231] able to accept only a small fraction of the annual applications for such training. Is this a significantly limiting factor on the ability of the province to expand its professional healthcare workforce to meet future healthcare demands, including those occasioned by public health emergencies? If so, does this limitation need to be reviewed and rectified?
- The College of Physicians & Surgeons of Alberta (CPSA)[232] is Alberta's physician regulator and has the exclusive authority to licence and discipline medical practitioners in the province. Is the fact that this licensing authority can be used to limit the freedom of conscience and expression of medical practitioners during a state of public emergency a concern? If so, should the powers of the college to do so be reviewed and clarified – a question addressed more thoroughly in Chapter 8.

223 Pamela M. Saenger et al., "Cost of Home Hospitalization vs. Inpatient Hospitalization Inclusive of a 30-Day Post-Acute Period," Journal of the American Geriatrics Society, Vol. 70, No. 5, 2022, p. 2. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9307069/pdf/nihms-1820098.pdf

224 CBC News, "Free up acute care beds with seniors-specific funding say care providers, CBC News, September 30, 2015, www.cbc.ca/news/canada/british-columbia/free-up-acute-care-beds-with-seniors-specific-funding-say-care-providers-1.3251250#:~:text=Fontaine%20says%20the%20cost%20of,for%20a%20residential%2Dcare%20bed.

225 See Footnote 223.

226 See Footnote 223.

227 See Footnote 223.

228 See Footnote 223.

229 Government of Alberta, "Reviewing Alberta's continuing care system," consulted September 22, 2023, https://www.alberta.ca/reviewing-albertas-continuing-care-system

230 Expected to come into force in Spring 2024. Government of Alberta, "Transforming Continuing care," consulted September 22, 2023, https://www.alberta.ca/transforming-continuing-care

231 The University of Alberta's Faculty of Medicine and Dentistry and the Cumming School of Medicine at the University of Calgary which derive their powers from the *Post-Secondary Learning Act* and earlier legislation that it grandfathers.

232 The College derives its authority from the *Health Professions Act*, which also provides persons subject to an investigation by the College with the right to appeal any finding, order or direction of its council to the Alberta Court of Appeal.

- The *Alberta Health Care Insurance Act* limits the role of private insurers in the healthcare field to insuring services not covered by the Alberta Health Care Insurance Plan (AHCIP)[233] and prohibits insurers from entering into or maintaining self-insurance plans. Is the quasi-monopolistic position of the AHCIP a concern? If so, should it be reviewed and modified?

If in the judgment of the Premier, cabinet and legislature, the answer to any or all of the above questions is yes, then the Panel recommends:

9.11 That the Province consider instituting formal reviews[234] of the structures and processes of any or all of the above entities in order to expand or limit capacities as required, to reduce or eliminate quasi-monopolistic features where they exist, and to improve the capabilities of the Alberta healthcare system to meet future healthcare needs including those that surge during public health emergencies.

Alberta Health Services

Alberta Health Services (AHS), which provides a vast array of essential healthcare services to Albertans, is now the largest integrated healthcare system in Canada with its workforce of 120,000 and budget of $18 billion (over 70 per cent of the budget of Alberta Health). AHS evolved legislatively[235] through the consolidation of regional health authorities, and by ministerial orders that have expanded its functions over time. But its immense size, complexity and organizational structure could make it increasingly difficult for AHS to respond expeditiously to new or additional demands, such as those created by public health emergencies, and to implement innovative solutions to the many challenges facing the Alberta healthcare system. In addition, any restructuring or refocusing of AHS to meet future demands is complicated by the absence of a legislative foundation which clearly specifies its structure, powers, responsibilities and accountability.

The Panel therefor recommends:

9.12 That the Province consider drafting and enacting a stand-alone Alberta Health Services Act defining the structure, powers, responsibilities and accountability of AHS.

In making the above recommendation, the Panel does not mean to suggest in any way that those involved in the management and operations of the above entities are not doing their very best to provide exceptional service to Albertans, especially during the recent COVID-19 emergency. Thus, the Panel also recommends:

9.13 That one of the first steps in implementing either of Recommendations 9.11 or 9.12 should be to solicit suggestions from the current management and employees of these entities on how best to proceed, particularly to address structural issues which the COVID-19 crisis has brought to the fore.

Learning From Others: Proposal for a Colloquium on 21st Century Healthcare Best Practices

Alberta aspires to have the highest quality and most cost-effective healthcare system in Canada, one with an exceptional ability to respond quickly and effectively to public health emergencies. There is no reason this objective cannot be achieved. However, more needs to be learned from the healthcare systems of other countries that presently outperform Alberta and Canada on many fronts. To "learn from others" and to set the stage for further improving the capacity and performance of Alberta's healthcare system under emergency and non-emergency conditions, the Panel therefore recommends:

9.14 That a Colloquium On 21st Century Healthcare Best Practices be organized[236] and held in Edmonton in 2024.

233 The Alberta Health Care Insurance Plan, established under the *Alberta Health Care Insurance Act*, is the tax-funded health insurance plan for residents of the Province of Alberta.

234 While it is beyond the terms of reference and capabilities of the Panel to prescribe the form and substance of such reviews, the Panel recommends that their mandates respect and advance the following: full and complete maintenance of the universal insurance healthcare coverage currently provided to Albertans; full and complete compliance with the *Canada Health Act*; maximization of patient choice and a patient-centered care approach; the fostering of competition and innovation among Alberta's various healthcare providers; and consideration for adoption of "best practices" from the healthcare systems of other countries to further improve the Alberta healthcare system.

235 See the preamble to *Regional Health Authorities Act*.

236 If the government preferred, a subset of the Public Health Emergencies Governance Review Panel would be willing to organize the proposed colloquium, using the unused portion of the Panel's budget to finance it.

9.15 That the Government of Alberta be presented with reliable data comparing the performance of universal healthcare systems[237] across the world:

- Listing the principal criteria whereby the performance of universal healthcare systems can be measured and evaluated – criteria such as:
  - Healthcare spending as a share of GDP.
  - Availability of resources: Physicians Per 1,000, nurses per 1,000, somatic beds per 1,000, psychiatric beds per 1,000, long-term care beds per 1,000.
  - Availability of technology: MRI Per Million, CT Scanners Per Million, PET Scanners Per Million, gamma cameras per million, mammographs per million.
  - Use of resources: Doctor consultations per person, curative-care discharge rates per 100,000, MRI examinations per 1,000, CT examinations per 1,000.
  - Timely Access: Wait times for access to emergency care, to a family physician, to a specialist, to a hospital for specified treatments, etc.
  - Response to COVID-19: Indicators to be selected.
- Identifying the countries of the world having the highest performance rankings with respect to the above criteria, in particular those countries having performance ratings significantly higher than those of Canada/Alberta.

9.16 That the Government of Alberta choose whichever countries it prefers – from among those having healthcare systems that outperform the healthcare systems of Canada/Alberta – from which representatives would be invited to attend the proposed colloquium and describe/discuss:

- The distinctive features of their respective healthcare systems which give them better system performance at lower per capita costs than Canada/Alberta.
- The policy and legislative changes that enabled them to move from more traditional healthcare systems (or those similar to Canada's) to their improved systems today.

9.17 That the Premier, cabinet, leader of the opposition, other members of the legislature and senior healthcare professionals and administrators be invited to attend – without any pre-conditions or obligations to respond other than to observe and question – for the purpose of receiving and assessing presentations on the healthcare systems of the selected countries, all of which have achieved greater healthcare service capacity and improved performance at lower per capita cost than Canada and Alberta.

9.18 That maximum provision be made for attendance by the media, including opportunity for media to interview guest participants.

9.19 That maximum provision be made for members of the Alberta public to attend the colloquium virtually and to submit questions to expert participants.

The objective of this exercise would be:

- To learn from others whose healthcare systems outperform ours.
- To learn how those systems responded to the COVID-19 healthcare emergency.
- To enable the Government of Alberta to apply those lessons in order to provide Albertans with the highest quality, most cost-effective healthcare possible under both non-crisis and crisis conditions.

237 See for example: Fraser Institute, "Comparing Performance of Universal Health Countries," Nov. 10, 2022, http://www.fraserinstitute.org/studies/comparing-performance-of-universal-health-care-countries-2022.

CHAPTER 10
CONCLUDING OBSERVATIONS

This report and its appendices contain dozens of observations and recommendations on a dozen different aspects of responding to a public emergency, based on the experience of COVID-19 over 2020-2022. While the Panel believes all are deserving of consideration, the Panel also feels it would be most helpful to the public, the legislature and the government to conclude this report with a summary of priorities.

CHAPTER 10
CONCLUDING OBSERVATIONS

Most Important Conclusions/Recommendation Per Chapter

- Strengthen, through legislative amendments and budgetary provisions, the Alberta Emergency Management Agency (AEMA) – whose members are specifically trained in emergency management – to make it the lead government agency for co-ordinating the response of the Alberta government to any and all future provincewide public emergencies. (Chapter 2)
- Appoint a Senior Science Officer, with multidisciplinary training and experience, to the AEMA, responsible for developing and maintaining a broadly based Inventory of Scientific Advice and Scientific Advisors that can be drawn upon in the event of public emergencies. (Chapter 3)
- Increase the effectiveness and accountability of the Alberta regulatory framework by increasing its evidence-based decision-making capacity, transparency, consistency, fairness, and self-correctability via feedback. (Chapter 4)
- Reject provincewide school closures as a policy option in responding to a provincewide public emergency, except in the most exceptional of circumstances and only then for the shortest possible period of time. (Chapter 5)
- Mandate by legislation the conduct of impact assessments prior to, during and after promulgation of orders and regulations for adoption in response to a declared provincewide public emergency. (Chapter 6)
- Recognize that public emergencies generate additional and exceptional pressures on governments to limit the exercise of rights and freedoms, and thus amend the *Alberta Bill of Rights* to specifically strengthen the protection of rights and freedoms under such circumstances. (Chapter 7)
- Increase the protection of the rights and freedoms of workers and healthcare professionals, during public emergencies, in particular their freedom of expression, through amendments to Alberta's *Employment Standards Cod*e and *Health Professions Act*. (Chapter 8)
- Increase the overall capacity of the Alberta healthcare system, thereby increasing its capacity to meet surges in demand caused by public health emergencies, through the incremental measures proposed, while respecting the principle of universality and the provisions of the *Canada Health Act*. (Chapter 9)
- On the belief that Alberta can always learn from others, invite representatives from countries having healthcare systems that outperform Canada/Alberta to a Colloquium on 21st Century Healthcare Best Practices to identify the policies, legislation and features of their systems responsible for superior performance. (Chapter 9)
- The recommendations of this report are based on the general consensus of Panel members as to how best to prepare Alberta to cope with future public emergencies. But "preparing for future public emergencies" is an evolving process, subject to unforeseen factors and considerations. Therefore, alternative perspectives and narratives on how to best cope with future emergencies should also be welcomed, appreciated and examined.

CHAPTER 11
SUMMARY OF RECOMMENDATIONS

CHAPTER 11
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Chapter 2: Leading the Response to Emergencies

General Recommendations

2.1 Ensure that it is the elected officials accountable to Albertans and the assembly (the Premier, cabinet and key ministers) who have the ultimate authority and responsibility:

- To make decisions on the emergency response measures adopted, accounting for key values, priorities and trade-offs.
- To approve or disapprove of any and all emergency response measures proposed by officials.
- To create and sustain a "culture of cooperation" among responsible agencies and departments.
- To incorporate regular feedback from the public and all relevant sources of expertise to update evidence-informed decision-making, correct mistakes and improve the management of any given emergency.

2.2 Focus the authority and responsibility of the AEMA,[238] by and upon direction from cabinet or the appropriate cabinet committee, on:

- Developing emergency response plans, both prior to and during an emergency.
- Co-ordinating and managing the emergency response once a state of public emergency is declared by elected officials, including conducting a cost-benefit/harms-benefit review which should be made public.

2.3 Focus the authority and responsibility of the subject-matter agency or department, by and upon direction from cabinet or the appropriate cabinet committee, on:

- Proposing measures to respond to the emergency, based on its specialized knowledge and expertise.
- Enforcing/implementing emergency measures that are within its jurisdiction and approved by elected officials.

2.5 That a small strategic advisory secretariat, reporting directly to the Premier, be established for the purposes of:

- Advising the Premier on the strategic aspects of emergency management issues and operations.
- Keeping a watching brief on emerging and future emergencies of all types, provincially, nationally and internationally.
- Challenging conventional wisdom and providing strategic advice on other issues, as requested by the Premier.

2.6 That in the event of a provincewide public emergency, cabinet direct and authorize the AEMA to co-ordinate the overall response to the emergency; and it direct and authorize the subject matter department/agency (Alberta Health in the case of a public health emergency) to contribute its specialized knowledge and expertise to the development and implementation of response measures within its particular area of jurisdiction.

2.10 That the AEMA be directed to develop and maintain a general plan for responding to and recovering from public emergencies, regardless of their nature, and that the plan must include measures:

- To clearly communicate the plan's existence and its content to Albertans.
- To address the need for co-ordination with other provinces in the event of a regional emergency, and with the federal government and federal emergency agencies in the event of a national or international emergency.

Recommended Amendments to the *Alberta Emergency Management Act*

2.4 That both Alberta's *Emergency Management Act* and the *Public Health Act* be amended to require that a motion to confirm an order in council declaring a provincewide state of public emergency be immediately submitted to the assembly for debate and a vote within X days after the tabling of the motion.

2.7 That the *Emergency Management Act* be amended to require that any orders or regulations promulgated by the AEMA be subject, prior to implementation, to approval by elected officials, in particular the Premier and cabinet.

2.8 That the *Emergency Management Act*, s. 3.1 of which establishes the AEMA, be further amended to clarify and strengthen the capacity of the agency, subject to cabinet direction, to co-ordinate and manage the response to public emergencies.

2.9 That a preamble, along the following lines, be provided to the bill amending the *Emergency Management Act*, identifying the objectives and reasons for the amendments and the act itself:

WHEREAS serious or unforeseeable public emergencies may exceptionally require the rapid adoption of temporary measures in furtherance of the government's obligation to protect the safety, health and property of Albertans, and,

238 The Alberta Emergency Management Agency

WHEREAS the government must be vested with sufficient powers to develop plans for coping with public emergencies, to respond rapidly and effectively to such emergencies, and to organize the recovery from such emergencies, and,

WHEREAS these powers should be vested in an emergency management agency capable of exercising them quickly and effectively under public emergency conditions with due regard to the costs and benefits of alternative courses of action, and,

WHEREAS even in a declared state of emergency, the government and the management agency have the paramount obligation to protect the rights and freedoms to which Albertans are entitled under the common law, the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, and the *Canadian Charter of Rights and Freedoms* (*Constitution Act, 1982*), and,

WHEREAS any emergency measures adopted must be appropriately tailored so as not to impair, beyond reasonable and justifiable limits, the civil rights of Albertans; the personal, family, community, and social relations of Albertans; and the performance of the Alberta economy,

THEREFORE, HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Recommended Amendment to the *Public Health Act*

2.11 That the *Public Health Act* be amended to require that any orders or regulations promulgated by the CMOH[239] during a public health emergency be subject to prior approval by elected officials, in particular, the Premier and cabinet, after receiving the advice of the CMOH.

Chapter 3: Bringing Science to Bear on Public Policy

General Recommendations

3.1 That in a public emergency, elected officials clearly communicate the societal values and objectives that inform their decisions. For example, protection of the vulnerable, priority to the most needy (the triaging principle), minimization of collateral harms, preservation of rights and freedoms, and others.

3.3 That a clear and conscious decision be made by elected officials as to the scope of the scientific advice to be sought and that this decision not be left entirely to the subject-matter agency or department, given that it may have a narrower perspective than that actually required.

3.4 That whatever scientific advisory committees, advisors and contractors are assembled to support the response be broadly based, multidisciplinary in nature, and appropriately balanced from both inside and outside government.

3.5 That evidence-informed decision-making consider non-scientific evidence as well.

3.6. That elected officials, the AEMA and the subject-matter ministry should be open to considering and investigating alternative scientific narratives and hypotheses, even at the risk of acknowledging some uncertainty as to which scientific narratives are most relevant to the emergency at hand.

3.7 That both the AEMA and the subject-matter agencies or departments involved in responding to a declared public emergency be mandated to seek out and use multiple sources of scientific knowledge and expertise in fashioning their responses to the emergency at hand.

3.8 That a frank acknowledgment of uncertainties should accompany communication of the values and priorities on which the emergency response is based, as well as communication of the science informing the policies. These uncertainties open the door to understandable changes in priorities and responses as more becomes known about the emergency.

Recommended Amendments to the Alberta *Emergency Management Act*

3.9 That the *Emergency Management Act* be amended to require the minister to appoint a Senior Science Officer to the AEMA.

3.10 That the *Emergency Management Act* be amended to charge the Senior Science Officer with establishing and maintaining an Inventory of Scientific Advice and Advisors that can be drawn upon in the event of a public emergency, according to the recommendation of the Senior Science Officer.

Recommended Amendment to the *Public Health Act*

3.2 That consideration should be given to the inclusion of preambles and/or purpose clauses of enabling statutes, such as the *Public Health Act* and others, declaring the intent of the statute and the principles on which it is based.

239 Chief Medical Officer of Health

Chapter 4: Analyzing and Improving the Regulatory Framework

General Recommendations

4.4 That the duties of those governing the regulatory response to a public emergency include an obligation to ensure that the regulatory framework possesses certain essential characteristics and qualifications (described in this chapter) required for the system to be effective, so that establishing accountability involves assessing the extent to which the framework exhibits those features.

4.6 That upon the declaration by the cabinet of a public emergency, it be the duty/obligation of the subject-matter ministers and their agents "to act expeditiously, transparently, fairly and in conformity with legislation protecting basic rights and freedoms."

Recommended Amendments to the Alberta *Emergency Management Act*

4.1 That the Alberta *Emergency Management Act* be amended to include a provision requiring the responsible minster to ensure that all orders and regulations pertaining to the management of a public emergency are adequately communicated, on a timely basis and in an appropriate form, to the general public and especially to those directly affected by said orders and regulations.

4.3 That statutes such as the *Emergency Management Act* be amended to obligate ministers or agencies to disclose plans, decisions and regulations via publication and other means and to invite public input and feedback through appropriate mechanisms for receiving it.

4.5 That the *Emergency Management Act* be amended to provide that, upon the declaration by the cabinet of a public emergency, it is the duty/obligation of the minister and the agency to act expeditiously, transparently, fairly and in conformity with legislation protecting basic rights and freedoms.

4.7 That the *Emergency Management Act* be amended to state that, once a provincewide public emergency has been declared, the AEMA shall provide strategic policy direction and leadership to the government and its emergency partners and shall be the co-ordinating agency for the duration of the provincewide public emergency. In addition, the act should be amended to state that the AEMA shall develop, implement, manage and maintain the Alberta emergency management system.

4.8 That the *Emergency Management Act* be reviewed with the intention of determining which sections defining the minister's responsibilities should say "the minister shall" – making the discharge of the minister's responsibilities under that section mandatory – and which sections should say "the minister may" – making the discharge of the minister's responsibilities under that section discretionary.

Recommended Amendment to the *Alberta Bill of Rights*

4.2 That major amendments be made, especially to the *Alberta Bill of Rights*, to significantly strengthen the protection of the rights and freedoms of Albertans under both emergency and non-emergency conditions – in particular the amendments proposed in Chapter 7 of this report.

Chapter 5: Educational Rights, Duties and School Closures

General Recommendations

5.1 That such investigations be conducted, not for the purpose of second-guessing the decisions made or attaching blame for identified negative consequences, but for the purpose of ascertaining the lessons learned so that the province is better equipped to handle future provincewide public emergencies.[240]

5.8 That parental rights with respect to the education of their children be recognized and include:

- The right to be advised of measures proposed by school authorities to protect the health of their children.
- The right to grant or withhold consent.

5.9 That the Government of Alberta make clear that it is committed to strengthening both in-school learning and at-home learning, and that nothing in its provisions for ensuring the continuation of in-school learning during a public emergency is to be misconstrued as diminishing the role and opportunity for at-home learning in accordance with provincial standards.

5.10 That during a declared state of public emergency, the provision of education to Alberta's school children be recognized and treated as an "essential service."

240 The Panel is recommending a thorough investigation into the three most important and far-reaching decisions made in Alberta in response to the COVID-19 crisis – the government decision to mandate mass vaccinations, masking and social distancing; the decision to close economic activities; and the decision to close schools.

Recommended Amendments to the *Education Act*

5.2 That the Preamble of the *Education Act* be amended to include a clear reference to the entitlement of Alberta's children to education as a right.

5.3 That references in the *Education Act* to a "right of access" to educational programs be amended to read the "right to education."

5.4 That a specific clause be added to the *Education Act* declaring that every child in Alberta has the right to an education as provided by the act.

5.5 That bills amending the *Education Act* and related statutes (such as the *Child First Act*) include preambles along the following lines, and that the assembly consider including similar wording in the preambles to the acts themselves:

- Whereas the education of Alberta's children and youth is central to the future prosperity and social well-being of the province, and,
- Whereas there exists a civilized adult duty and a duty on the part of the Province to educate all of Alberta's children,

5.6 That a short section be added to the *Education Act* entitled "Duty to Educate," and that it include three clauses along the following lines:

- That it is the duty of the Government of Alberta to ensure the existence and availability of an education to Alberta's children, in accordance with the provisions of this act.
- That the Government of Alberta is expressly forbidden to close physical access to in-school education, even during a declared state of public emergency, except under the most exceptional circumstances, and with an express public commitment to the date of reopening.
- That it is the duty of Alberta's children, and their parents, to comply with the provisions of this act, specifically those requiring the attendance and participation of Alberta's children in the educational programs authorized by the act.

5.7 That in order to strengthen the discharge of the above obligations of parents, an additional section (to the *Education Act*) be added declaring that "failure to discharge this obligation is an offence under the *Provincial Offences Procedures Act*."

Chapter 6: Mandating Impact Assessments

General Recommendations

6.1 That the Province adopt a specific policy to mandate impact assessments prior to, during and after the promulgation of orders and regulations in response to a declared provincewide public emergency.

6.2 That the AEMA conduct preliminary impact assessments and interim emergency impact assessments with the co-operation of the relevant subject matter agencies or departments (e.g., Finance, when a principal impact is economic; Alberta Health, when a principal impact is health-related; Justice, when a principal impact is the limitation of rights and freedoms, etc.).

6.3 That the appropriate cabinet committee, with the assistance of the Strategic Advisory Secretariat recommended in Chapter 2, ensure that the objective and scope of these impact assessments are sufficiently broad and comprehensive to consider all the major impacts of the response measures adopted, not just those on the sector where the crisis originated.

6.5 That an independent post-emergency impact assessment and audit be ordered by the Government of Alberta to identify and quantify (where possible and necessary) the health, social, economic and legal impacts of the above response measures and to better equip the Government of Alberta to respond to future public emergencies.

Recommended Amendment to the *Emergency Management Act*

6.4 That consideration be given to amending the *Emergency Management Act* to establish a legal obligation on the part of the AEMA to ensure these impact assessments are conducted if policy is insufficient to guarantee them.

Chapter 7: Protecting Rights and Freedoms

General Recommendations

7.2 That the focus of the debate in the Alberta legislature, when presented (as recommended in Chapter 2 of this report) with an order in council declaring a provincewide state of public emergency, be on whether or not the situation referenced in the order truly qualifies as a provincewide "emergency" as defined by the *Emergency Management Act*.

7.6 That the order in council declaring a provincewide state of public emergency (to be submitted to the legislature for expeditious ratification as recommended in Chapter 2) be accompanied by an initial estimate of the resources required to increase the capacity of the agencies, departments and programs expected to experience a significant surge in demand for their services.

Recommended Amendments to the *Alberta Bill of Rights*

7.13 That two clauses be added to the *Alberta Bill of Rights*, under the heading "Fundamental duties and responsibilities," stating that:

- Every person is bound to exercise their rights and freedoms in accordance with the requirements of good faith.
- No right or freedom protected by this bill of rights may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

7.14 Adding to s. 2 the words "including during a declared state of public emergency."

7.15 That this bill of rights is integral to the Constitution of Alberta, which is the supreme law of Alberta, and any law that is inconsistent with the provisions of this bill of rights is, to the extent of the inconsistency, of no force or effect.

7.16 That a right or freedom set out in this bill of rights shall be presumed to be paramount and of superior importance to other objectives put forward by the Government or Legislature of Alberta.

7.17 That this bill of rights guarantees the rights and freedoms set out in it, subject only to such limits prescribed by a rule of law, as can be demonstrably and manifestly justified in a free and democratic Alberta.

7.18 That the list of fundamental rights of Albertans that are protected by the *Alberta Bill of Rights*, and which are described in part in s. 1(a), be expanded to include the right to personal autonomy and integrity.

7.19 WHEREAS the free and democratic society existing in Alberta is founded on principles that acknowledge the supremacy of God and the rule of law; and on principles, fostered by tradition, that honour and respect human rights and fundamental freedoms and the dignity and worth of the human person. (Recommended amendment to the first sentence in the preamble to the *Alberta Bill of Rights*.)

The rights and freedoms guaranteed by law can also be better enforced. Thus, the Panel also recommends that the *Alberta Bill of Rights* be amended to provide that:

7.20 Anyone whose rights or freedoms, as guaranteed by this bill of rights, have been infringed or denied may apply to a court of competent jurisdiction to obtain a just and appropriate remedy, such as a stay, an injunction, a declaration, damages or punitive damages.

7.21 Any act of the Legislature of Alberta, or any decision made, or action taken under the authority thereof, that directly or indirectly withholds a benefit, or attaches punitive or seriously disadvantageous consequences to the exercise of a right or freedom set out in this bill of rights, shall be presumed to unjustifiably and unreasonably infringe upon said right or freedom until proven otherwise.

7.22 The *Alberta Bill of Rights* be amended to provide that it binds the state and governs all those matters that come under the legislative authority of Alberta.

7.23 Wording similar to that of s. 1 of the Quebec *Charter of Human Rights and Freedoms* be incorporated into the *Alberta Bill of Rights*, in particular the reference to personal security and inviolability.

The MKG paper elaborates further on informed consent and related subjects, and, after due consideration, the Panel recommends that the *Alberta Bill of Rights* be amended to guarantee:

7.24 That every Albertan is entitled to informed consent to medical, psychological or any other type of state-sanctioned care, unless they are a demonstrable danger to themselves or others.

7.25 The right of every Albertan to choose to receive, or not to receive, medical, psychological or any other type of medical care or treatment, unless they are a demonstrable danger to themselves or others.

7.26 The right of every Albertan not to be coerced, either directly or indirectly, into submitting to medical, psychological or any other type of care or treatment, except upon the order of a court of law of competent jurisdiction, on proof of immediate danger of serious injury or loss of life to another

7.27 That the *Alberta Bill of Rights* be amended to guarantee freedom of expression as well as freedom of speech.

7.28 That the *Alberta Bill of Rights* be amended to define and guarantee academic freedom, i.e., "The right of every member of the higher education community to engage freely and without doctrinal, ideological or moral constraint, such as institutional censorship, in any activity through which that person contributes their knowledge, experience, and expertise."

7.29 That the *Alberta Bill of Rights* be amended to define and guarantee professional freedom, i.e., "The right of every regulated professional to engage without doctrinal, ideological or moral constraint, such as institutional censorship, in the exercise of their profession, and in free enquiry and public debate."

7.30 That the description of the discrimination against which Albertans are to be protected by the *Alberta Bill of Rights* and described in s. 1 of the act, be expanded to include protection against discrimination on the basis of opinion, disability and medical status or history.

7.31 That the *Alberta Bill of Rights* be amended to specifically prohibit profiling by expanding the right to privacy to include: "Without limiting the generality of the foregoing, the right to be free from the collection and use of personal information to assess certain characteristics of a natural person, in particular for the purpose of analyzing that person's work performance, economic situation, health, personal preferences, interests or behaviour."

7.32 That the *Alberta Bill of Rights* be amended to provide: the right of the individual not to be deprived of the means of earning a living, caring for their family or functioning in society.

Recommended Amendments to the *Judicature Act*

7.7 That s. 24 of the *Judicature Act* be amended to provide that: The applicant shall neither be ordered to post security as a precondition to the issuance of an interlocutory remedy, nor be liable in damages to the opposite party if unsuccessful on the merits, except where the court finds that the application was manifestly frivolous or vexatious, or otherwise constituted an abuse of process.

7.8 That to expedite the judicial adjudication of alleged infringements of rights and freedoms by emergency measures, the *Judicature Act* be amended to provide that any related stay, injunction, order or remedy shall be issued on the Xth day (say 60) after the filing of the notice of infringement, and judgment on the merits shall be issued within Y days (say 120) of the filing of the action.

7.9 That the *Judicature Act* be further amended to provide that: "If the applicant has adduced prima facie evidence of damage, the court shall not strike an originating process or application on the ground of mootness of the constitutional or quasi-constitutional issues raised in the notice."

7.10 That the *Judicature Act* be further amended to provide that, in cases where the applicant alleges an unjustifiable and unreasonable violation of the applicant's constitutional rights and freedoms, "No costs, including compensation for expert fees if any, may be awarded against the applicant unless the attorney general demonstrates that the notice was frivolous or vexatious, or otherwise constituted an abuse of process."

Recommended Amendments to the *Emergency Management Act*

7.1 That s. 1 of Alberta's *Emergency Management Act* be amended to define "emergency" as an urgent, temporary and critical situation that demonstrably, immediately and seriously threatens to cause, beyond a reasonable doubt, major and widespread increases in public displacements, disorder, injuries, deaths or destruction of property, or a fatal impairment in the ability of the Government or Legislature of Alberta to preserve the rule of law in the province.

7.3 That, in recognition that each potential public emergency needs to be evaluated independently and on the grounds of its own distinctive characteristics, the Alberta *Emergency Management Act* be amended to state that "a reviewing court, tribunal or decision-maker owes no deference to any prior determination made with respect to the declaration of previous public emergencies by the Government or Legislature of Alberta, or by the Government or Parliament of Canada."

Recommended Amendments to the *Public Health Act*

7.4 That s. 1(1) of the *Public Health Act* be amended to define a public health emergency as "an urgent, temporary and critical occurrence or threat of an illness, a health condition, an epidemic or pandemic disease, a novel or highly infectious agent or biological toxin, or the presence of a chemical agent or radioactive material, that objectively, demonstrably, immediately and seriously threatens to cause major and widespread increases in the incidence of disease, injuries, disabilities and deaths."

7.5 That, in recognition that each potential public health emergency needs to be evaluated independently and on the grounds of its own distinctive characteristics, the Alberta *Public Health Act* be amended to state that "a reviewing court, tribunal or decision-maker owes no deference to any prior determination made with respect to the declaration of previous public health emergencies by the Government or Legislature of Alberta or by the Government or Parliament of Canada."

Recommended Amendments to the *Administrative Procedures and Jurisdiction Act*

7.11 That the *Administrative Procedures and Jurisdiction Act* be amended to remove such restrictions as that imposed by s. 11, namely, that: "Notwithstanding any other enactment, a decision-maker has no jurisdiction to determine a question of constitutional law unless a regulation made under s. 16 has conferred jurisdiction on that decision-maker to do so."

7.12 That the *Administrative Procedures and Jurisdiction Act* be amended to provide that: "Section 11 and regulations made under s. 16, during a declared state of public emergency, cannot limit the jurisdiction and duty of a decision-maker to balance the severity of any interference with fundamental rights and freedoms, or values, under the *Alberta Bill of Rights*, the *Alberta Human Rights Act*, the *Alberta Personal Property Bill of Rights*, or the Constitution of Canada, with statutory objectives.

Chapter 8: Reviewing the *Employment Standards Code* and the *Health Professions Act*

Recommended Amendments to the *Employment Standards Code*

8.1 Amend the *Employment Standards Code* to strengthen the protection of the rights and freedoms of employees, especially during public emergencies, and to do so as recommended hereafter.

8.2 Amend the *Employment Standards Code* to disallow permanent dismissals of non-compliant employees during a temporary public emergency, and to provide for the granting of extended but temporary and conditional leaves of absences to such non-compliant employees.

8.3 Amend the *Employment Standards Code* to require preliminary assessments of the impacts on employers and employees of proposed mandatory orders to better equip government and employers to identify and implement temporary impact-reducing measures.

8.4 That the *Employment Standards Code* be amended to require that where health testing is mandated in response to a public health emergency involving a communicable disease, employees should be required to take the required health test(s) on unpaid time with the government bearing the costs of test kits, testing facilities and the testing process.

Recommended Amendments to the *Health Professions Act*

8.5 Direct the colleges, by order in council or by amendment to the *Health Professions Act*, to make clear the meaning of such terms as "unprofessional conduct," preservation of the "integrity" of the profession, "harm" to the profession, and service to and protection of the "public interest," especially in how these terms are to be interpreted during a state of public emergency.

8.6 Amend the *Health Professions Act* to require the "standard of practice" of all colleges empowered by the act to include "recognition and protection of the rights of members to freedom of expression," including on matters related to public health emergencies.

8.7 Amend the HPA and require colleges to amend their bylaws to require:

- All regulated members of a college to have professional liability insurance in an amount sufficient to provide a regulated member with adequate coverage.
- Colleges to ensure that members facing complaints with respect to the professionalism or appropriateness of their conduct – especially those where any disciplinary measures imposed may restrict their rights and freedoms under the charter or the *Alberta Bill of Rights* – are provided with sufficient resources to enable them to participate fully and completely in the appeal and review processes to which they are subject.

8.8 Amend the *Health Professions Act* to prohibit colleges from publishing, in a notice on a college website, the name or other identifying information of a member regarding alleged misconduct until all related appeals and reviews have been completed.

8.9 Amend the *Health Professions Act* to prescribe "correctness" as the standard of review by a court of college decisions that are alleged to unjustifiably infringe on rights and freedoms protected by the charter and the *Alberta Bill of Rights*.

General Recommendation

8.10 Use the powers of the lieutenant governor in council to make or amend subordinate legislation of colleges to strengthen the rights and freedoms of their members, especially during a declared public emergency, ONLY IF implementation of the above amendments and measures proves insufficient to provide adequate protection.

Recommended Amendment to the *Alberta Bill of Rights*

8.11 Amend the *Alberta Bill of Rights* to provide an effective remedy in cases where freedom of expression is restricted by a provincial law or other decision of government or a public agency.

Chapter 9: Improving the Capacity and Performance of the Alberta Healthcare System

Recommendations re: Incremental Measures to Expand/ Improve the System

9.1 That Alberta realign its hospital funding in accordance with international best practices, transitioning where applicable from the current global or historical budgeting model to an activity-based funding model (ABF), thereby improving the efficiency of the Alberta healthcare system and stimulating innovation.

9.2 That the use of NPs,[241] the scope of services that they are permitted to provide, and the capacity for NP training be expanded to improve access to healthcare for Albertans and to lower system costs.

9.3 That the use of LPNs,[242] as well as the scope of services they are permitted to provide, be expanded to reduce the burden on registered nurses, to improve access to healthcare for Albertans, and to lower system costs.

9.4 That Alberta commit itself to streamlining the administration of the Alberta healthcare system, targeting a reduction of the ratio of administrative expenses to total healthcare expenses of X% over the next five years in order to reduce overall system costs.

9.5 That internal, interprovincial and international barriers to labour mobility – in particular those limiting the mobility of healthcare workers and practitioners – be examined and systematically removed as appropriate to bolster the healthcare workforce and expand system capacity from a human resources perspective.

9.6 That the use of pharmacists – who are highly trained, skilled and capable – be expanded to increase front-line access to health services including pharmacist-led primary care clinics.

9.7 That a mental health strategy be created and adopted focusing on the expansion of capacity of the Alberta healthcare system to recognize, prioritize and treat mental illness, working alongside the Alberta recovery-oriented system of care.

241 Nurse Practitioners.

242 Licensed Practical Nurses.

9.8 That increased uptake of virtual care and telemedicine be encouraged – supported by a permanent regulatory regime to prevent abuses and provide appropriate incentives to providers and users – thereby reducing inequities in access to healthcare and further increasing public access to quality care.

9.9 That the government explore various options for attracting potential healthcare providers into medical training, expanding Alberta's capacity to provide such training, and directing/incentivizing graduates to serve in the areas of most need. Such options include:

- Expanding the number and capacity of medical schools in Alberta, and facilities for providing clinical (hospital) training.
- Expediting the testing and licensing of medical practitioners trained in other jurisdictions.
- Encouraging greater use of alternative payment plans.
- Using return of service agreements to incentivize graduates to serve in areas of most need (e.g., family medicine, rural Alberta, mental health medicine).

9.10 That home care services in Alberta be expanded, with particular attention to integration and co-ordination of home care with other components of the healthcare system, to reduce the pressure on acute care and long-term care services and facilities.

Recommendations re: Macro Measures to Expand/Improve the System

9.11 That the Province consider instituting formal reviews of the structures and processes of any or all of the above entities[243] in order to expand or limit capacities as required, to reduce or eliminate quasi-monopolistic features where they exist, and to improve the capabilities of the Alberta healthcare system to meet future healthcare needs including those that surge during public health emergencies.

9.12 That the Province consider drafting and enacting a stand-alone Alberta Health Services Act defining the structure, powers, responsibilities and accountability of AHS.

9.13 That one of the first steps in implementing either of Recommendations 9.11 or 9.12 should be to solicit suggestions from the current management and employees of these entities on how best to proceed, particularly to address structural issues which the COVID-19 crisis has brought to the fore.

9.14 That a Colloquium On 21st Century Healthcare Best Practices be organized and held in Edmonton in 2024.

9.15 That the Government of Alberta be presented with reliable data comparing the performance of universal healthcare systems across the world:

- Listing the principal criteria whereby the performance of universal healthcare systems can be measured and evaluated – criteria such as:
  - Healthcare spending as a share of GDP.
  - Availability of resources: Physicians Per 1,000, nurses per 1,000, somatic beds per 1,000, psychiatric beds per 1,000, long-term care beds per 1,000.
  - Availability of Technology: MRI Per Million, CT Scanners Per Million, PET Scanners Per Million, gamma cameras per million, mammographs per million.
  - Use of resources: Doctor consultations per person, curative-care discharge rates per 100,000, MRI examinations per 1,000, CT examinations per 1,000.
  - Timely Access: Wait times for access to emergency care, to a family physician, to a specialist, to a hospital for specified treatments, etc.
  - Response to COVID-19: Indicators to be selected.
- Identifying the countries of the world having the highest performance rankings with respect to the above criteria, in particular those countries having performance ratings significantly higher than those of Canada/Alberta.

243 The entities being Alberta's medical schools, the College of Physicians and Surgeons, and the Alberta Health Care Insurance Plan.

9.16 That the Government of Alberta choose whichever countries it prefers – from among those having healthcare systems that outperform the healthcare systems of Canada/Alberta – from which representatives would be invited to attend the proposed colloquium and describe/discuss:

- The distinctive features of their respective healthcare systems which give them better system performance at lower per capita costs than Canada/Alberta.
- The policy and legislative changes that enabled them to move from more traditional healthcare systems (or those similar to Canada's) to their improved systems today.

9.17 That the Premier, cabinet, leader of the opposition, other members of the legislature and senior healthcare professionals and administrators be invited to attend – without any pre-conditions or obligations to respond other than to observe and question – for the purpose of receiving and assessing presentations on the healthcare systems of the selected countries, all of which have achieved greater healthcare service capacity and improved performance at lower per capita cost than Canada and Alberta.

9.18 That maximum provision be made for attendance by the media, including opportunity for media to interview guest participants.

9.19 That maximum provision be made for members of the Alberta public to attend the colloquium virtually and to submit questions to expert participants.