



October 14, 2020

Hon. Doug Downey  
Attorney General  
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RE: Emergency Management Regulation By Stealth

Dear Attorney General,

I am writing with respect to the disclosure of new COVID regulations and Orders-in-Council (“OIC”), arising from various statutes, under various Ministries, in a timely and consistent manner. As the Law Officer to Cabinet, and pursuant to your statutory duties (*Ministry of the Attorney General Act*, RSO 1990, c M.17, ss 2, 5), this matter rests squarely within the jurisdiction of the Attorney General.

As you know well, emergency management of COVID in Canada is currently decentralized under our division of powers. As such, during the pandemic, most Canadians must conduct themselves in accordance with frequently changing communications from local public health officers, Premiers, Mayors, and provincial/territorial Cabinet Ministers. Whether a podium announcement carries lawful authority, as opposed to being a request or guidance, is often unclear to the public, and to us at CCLA. Sometimes the only way to find out is to check the law itself, which is supposed to be publicly accessible, pursuant to the process and legitimacy values of the rule of law.

Effective at 12:01 a.m. today, October 10<sup>th</sup>, some new legal restrictions are said to come into effect, limiting people’s liberty and freedom in Toronto, Ottawa, and Peel. Others come into effect on October 13<sup>th</sup>. None of these restrictions are authorized by an order or regulation yet published by the Executive Council or otherwise, to the best of our knowledge. In the absence of any law available to the public, it cannot be said that the Premier or any Cabinet Minister speaks with lawful authority when they announce new restrictions, like those put into place for the

Thanksgiving weekend. The legitimacy and accuracy of the Ontario Premier's public pronouncements are undermined without transparency of the law.

We cannot know the law if it's unknown. If this was problematic last spring, it is unacceptable today for there to be no clear system of disclosing new laws authorizing new rules that literally affect our day-to-day conduct. Even if there is a lag of 24-72 hours (the optimistic delay for Ontario), the failure to immediately disclose orders upon which the provincial government bases its public pronouncements risks governing COVID by stealth.

Governing by stealth is unconstitutional and destabilizes our democracy. It is in those early minutes, hours and days that journalists and law enforcement form judgements about the new rules. In turn, the public has to figure out how to conduct themselves in accordance with the law. But how can the public follow the law if it's nowhere to be found?

The Province's main web portal offers links to a limited number of possible items, all of which are of great importance. However, nowhere on that site is there any link to any portal disclosing the laws making any of the new measures on that website legitimate. If the Province has time to put together the media kit, it has time to include reference to new regulations and orders in council authenticating the substance of the latest Government announcement.

A number of Provinces routinely attach the relevant public health OIC or regulation authorizing a new emergency management order.<sup>1</sup> The federal Minister of Justice has a central online repository of all Government of Canada legislation, regulations and orders passed in response to COVID: <https://www.justice.gc.ca/eng/csjsjc/covid.html>. By contrast, Ontario does neither. There is little to no legal transparency, for an indeterminate time, after (one can only presume) a new law has been promulgated. This is the definition of regulating by stealth -- not out of malice, but through inadvertence and negligence inconsistent with the rule of law.

We recognize that a transparent justice system is of importance to your Ministry. Just last August, you announced that criminal and civil court cases in the Superior Court of Justice were now accessible online, for the first time in our history. A publicly accessible justice system, and the rule of law, further require that you are the Cabinet Minister responsible for the transparency of COVID legal changes. This is clearly set out in your governing statute.

Arguably Ontario should be publishing such regulations *prior* to their final approval.<sup>2</sup> In any event, we submit that the legitimacy and enforceability of any new OIC or regulation turns on its

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<sup>1</sup> Notwithstanding the Ontario government's decision to operate outside of the previously established legislative framework for emergency management under the EMCPA, your government is clearly engaged in emergency management, but this is for another day.

<sup>2</sup> I.e., there is no reason that orders, once drafted, cannot be publicly released, just as the legislative assembly publishes bills at their various stages of development. At least during COVID, we all know what might be coming,

clarity, transparency, and predictability. None of those values are present when a new law (wrongly) goes into effect prior to its public disclosure.

The rule of law demands predictability and transparency. As the Supreme Court of Canada ruled in *Sauvé v. Canada*, 2002 SCC 68: “‘The rule of law’ means literally what it says . . . . It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.” However, as one scholar puts it, “when the law is not known, it cannot be properly followed, understood, or challenged as to its constitutionality,” just as the rule of law rejects the “failure of congruence between the rules as announced and their actual administration.” Joseph Raz states simply that the law should be “open and adequately publicized” because people “must be able to find out what it is.”<sup>3</sup>

CCLA therefore asks when and how you will fulfill your obligations as Attorney General to make COVID-related OICs and regulations available to the public either before or upon being announced to the public. Establishing a single portal akin to the federal site through the Ministry of Justice, along with an enforceable policy and practice to publicize new promulgations, would go a long way to ending the best kept secret during COVID: just what is this new Ontario law that we the people are to follow?

Sincerely,



Michael Bryant  
Executive Director & General Counsel

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by way of legal changes, because typically the Premier warns that if a particular trend does not change, a new rule will follow. Why not publish a draft of that new rule immediately?

<sup>3</sup> Richard Albert, “Constitutional Amendment by Stealth,” (2015) 60:4 *McGill Law Journal* 673.