Le concept juridique de l'urgence sanitaire: une protection contre les virus biologiques et…politiques

1 Le droit prend le relais de la médecine impuissante à juguler un virus

La vague des mesures drastiques de confinement prises à travers le monde dans le cadre de la lutte contre la pandémie mondiale de la COVID-19 s'explique en grande partie par l'impuissance de la médecine à nous en protéger immédiatement, en dépit des efforts héroïques déployés par le personnel médical et pharmaceutique. Si la médecine avait pu nous offrir un médicament pour soigner ou guérir les malades et un vaccin pour nous prémunir contre la maladie, nous aurions presque pu continuer à vaquer à nos occupations régulières, en adoptant de simples mesures de protection sanitaires comme le lavage régulier des mains et en nous saluant par courbette à la japonaise au lieu de nous serrer la pince. Mais la médecine était incapable de nous protéger de la maladie. Pire, les systèmes hospitaliers eux-mêmes ont vite montré leurs limites. Un vent de panique s'est répandu avec l'information qu'il faudrait peut-être procéder à un triage des malades pour déterminer qui mériterait un droit supérieur au ventilateur pour le maintenir en vie[1]. Serait-ce la faillite de nos régimes universels de soins si le spectre de la loi de la jungle peut pointer aussi subitement?

Devant cette impasse, nos sociétés n'ont eu d'autre choix que de recourir rapidement à un autre remède : celui offert par le droit, et plus précisément, un droit en temps d'urgence[2]. C'est ainsi qu'est entré en action un concept juridique

jusqu'alors quasi inconnu de la population, des élus et même des juristes : le droit de l'*urgence sanitaire.* Nous avons tous été à même de le constater, un concept qui ouvre grande la porte à des changements radicaux dans la gouverne de l'État et qui impose des bouleversements sans précédent dans le fonctionnement de la société. La mise en œuvre du mécanisme de l'urgence sanitaire a précipité la société québécoise dans un *confinement* inouï, dont on cherche maintenant la voie vers un *déconfinement* qui permettrait d'assurer encore la protection des populations. Si on a pu observer la puissance du concept de l'urgence sanitaire qui peut s'ingérer presque instantanément dans nos vies personnelles, sociales et économiques, c'est qu'il n'est, en droit, rien de moins qu'un « remède de cheval ». C'est pourquoi il importe de le manipuler avec grand soin pour que ses bienfaits demeurent supérieurs à ses méfaits et ne pas risquer d'achever le patient sous traitement.

Comme dans les autres pays de démocratie libérale où la déclaration de l'urgence sanitaire a placé les parlements en berne, une petite garde rapprochée formée du premier ministre et de ses ministres, conseillés par les responsables de la santé publique, a pris la direction de la crise sanitaire en décrétant des mesures de protection d'une ampleur totalement inédite[3]. Au Québec, les points de presse quotidiens du premier ministre François Legault, le plus souvent accompagné du directeur national de santé publique, Dr Horacio Arruda, et de la ministre de la Santé et des Services sociaux, madame Danielle McCann, est devenu un rituel quasi religieux de réconfort collectif où la population y puisait aussi ses instructions très précises et détaillées en vue de dompter la propagation du virus, jusqu'aux comportements personnels d'hygiène et de la courte liste des contacts autorisés.

L'étendue et la profondeur des ordonnances que peut adopter par décret l'appareil exécutif de l'État en situation d'urgence sanitaire atteint une ampleur qui remet en cause

tout ce que nous comptons de plus inaliénable, soudainement interdit, comme rendre visite à sa famille et ses amis, prendre l'air dans un parc ou continuer à gagner sa vie par son travail. La puissance du concept juridique de l'urgence sanitaire se mesure au caractère expéditif par lequel il peut mettre nos sociétés en arrêt et se saisir de la direction de l'État sans plus de formalités qu'un décret adopté derrière des portes closes par une poignée de ministres.

2 Le dangereux projet de loi 61

2.1 Un équilibre délicat menacé

Le 3 juin 2020, soit le jour où le gouvernement adoptait son 11e décret de renouvellement de 10 jours de l'état d'urgence sanitaire déclaré le 13 mars 2020, le gouvernement du Québec a déposé à l'Assemblée nationale le projet de loi 61 (*Loi visant la relance de l'économie du Québec et l'atténuation des conséquences de l'état d'urgence sanitaire déclaré le 13 mars 2020 en raison de la pandémie de la COVID-19*) sur lequel une pluie ininterrompue de critiques s'est abattue. Au motif de favoriser un plan de relance économique, l'urgence sanitaire est devenue la cause, l'objet et la justification du projet de loi qui s'est attiré les foudres des trois partis d'opposition au point où, fait rare dans les annales du parlementarisme québécois, les trois partis d'opposition ont unanimement, au dernier jour avant les vacances estivales, soit le 12 juin 2020, refusé d'adopter le principe du projet de loi (ce qu'on appelait auparavant, la 2e lecture)[4]. Une vive contestation populaire soutenue s'est aussi rapidement élevée, au point où certains chroniqueurs soutiennent qu'elle est la véritable cause du naufrage du projet de loi[5]. Le gouvernement promet de le ramener à l'automne, s'attendant à un climat de réception plus favorable. Espérons plutôt que la période estivale sera propice à la préparation d'une mouture plus éclairée.

Sans nous attarder ici aux autres critiques sévères adressées

à plusieurs dimensions du projet de loi, notamment concernant les marchés publics[6], l'environnement[7], l'aménagement du territoire[8] ou la concentration des pouvoirs[9], la méprise quant au concept de l'urgence sanitaire que révèle le projet de loi, mériterait une analyse détaillée qu'il est impossible de faire ici. Nous nous limiterons à relever deux dimensions du projet de loi qui nous semblent heurter de plein fouet le cœur même du concept de l'urgence sanitaire. Nous présenterons ensuite (section 3) ces caractéristiques incontournables du concept de l'urgence sanitaire.

2.2 Le dévoiement de la trame temporelle du concept de l'urgence sanitaire

L'article 31 du projet de loi propose de prolonger par voie législative l'état d'urgence déclaré en vertu de la *Loi sur la santé publique* (RLRQ, c. S-2.2) [ci-après LSP], pour une période indéterminée, jusqu'à ce que le gouvernement estime qu'il peut y mettre fin selon l'article 128 LSP. Cette approche soulève deux problèmes sérieux. D'abord, l'inscription législative du prolongement de l'état d'urgence sanitaire pose, à notre avis, un écueil inextricable. Qu'il soit indéterminé, comme dans le projet de loi initial, ou de quatre mois, à la faveur d'amendements déposés *in extremis* pour tenter d'amadouer les partis d'opposition[10], le projet de loi 61 bouleverse l'équilibre délicat instauré par la LSP. Une telle prolongation législative devrait dès lors se conjuguer au pouvoir inhérent de l'Assemblée nationale, qui peut notamment s'exprimer par simple motion pour y mettre fin. La difficulté d'une telle juxtaposition inédite et à échelons et mécanismes variables de pouvoirs de déclaration, de maintien et de terminaison de l'urgence sanitaire s'ajoute à l'enjeu d'une disposition de la loi peu soucieuse des limites rigoureuses et intrinsèques du temps *prêté* à l'exercice de pouvoirs exorbitants qui doit demeurer sous un pouvoir de rappel prompt et agile de l'Assemblée nationale.

Les motifs avancés par le gouvernement d'améliorer la «

prévisibilité » et la « flexibilité » de l'action gouvernementale administrative dans les mois à venir ont été rapidement dénoncés[11] et sont tout à fait inconciliables avec le concept de l'urgence sanitaire.

2.3 L'insoutenable élargissement du périmètre du concept de l'urgence sanitaire

Le projet de loi 61 crée de toutes pièces un tout nouveau pouvoir d'urgence exorbitant sur plusieurs fronts, notamment en environnement, en aménagement du territoire et dans le domaine des marchés publics. Ce nouveau pouvoir d'urgence disparate dépasse notre objet. Mais le projet de loi modifie en outre le pouvoir d'urgence sanitaire lui-même sur une autre dimension, tout en négligeant de se rappeler qu'il manipule un « remède de cheval », qui exige de strictes précautions dont on ne peut faire l'économie.

Relevons ici l'exemple le plus saisissant. L'article 36 du projet de loi étend de façon presque incompréhensible la portée des pouvoirs exceptionnels de la déclaration de l'état d'urgence sanitaire, que la LSP prend pourtant grand soin de toujours limiter aux mesures de protection de la santé de la population face à la menace grave, comme l'exige le concept. En effet, cet article 36 du projet de loi autoriserait le gouvernement à se prévaloir des pouvoirs exceptionnels de l'article 123 LSP, non plus seulement pour des fins de protection de la population, mais aussi pour prévenir ou atténuer toute conséquence découlant de la pandémie, c'est-à-dire à peu près tout état de fait survenant en cours d'urgence sanitaire qui apparaîtrait non souhaitable au gouvernement. L'exécutif de l'État s'autorise ainsi de modifier par simple décret toute disposition de toute loi (à l'exception de la loi 61 elle-même!).

L'équilibre délicat du concept de l'urgence sanitaire inscrit à la LSP avec la prudence que le droit constitutionnel impose est abruptement rompu et renversé, au nom de l'instauration de

mesures « innovantes » de gestion de l'État, comme a tenté de l'expliquer par la suite le parrain du projet de loi échoué et président du Conseil du trésor, M. Christian Dubé.

3 La définition juridique de l'urgence sanitaire

Il est donc opportun de prendre le temps de se pencher sur ce concept inscrit dans nos lois et que le Québec n'avait encore jamais eu l'occasion d'expérimenter, ce dont il faut se réjouir.

L'urgence sanitaire est prévue au Québec aux articles 118 à 122 de la *Loi sur la santé publique*. Six aspects fondamentaux du concept de l'urgence sanitaire encadrent strictement son exercice et doivent être soulignés :

1. Les circonstances essentielles à la déclaration de l'urgence sanitaire;
2. Des formalités réduites à leur strict minimum;
3. Une temporalité qui ne doit jamais dépasser ce qui est rigoureusement essentiel;
4. Le maintien en tout temps du pouvoir inhérent de l'Assemblée nationale;
5. Des pouvoirs exorbitants entre les mains de l'exécutif de l'État;
6. Des mesures rigoureusement ciblées sur la menace et la santé publique.

3.1 Les circonstances essentielles à la déclaration de l'urgence sanitaire

La loi prévoit deux conditions rigoureuses qui doivent être réunies. Il doit y avoir une menace[12] à la santé de la population qui est *grave*, réelle ou imminente[13]. En outre, la situation doit être telle qu'elle exige l'application *immédiate* de mesures exceptionnelles de protection (point 3.5). Si un seul de ces éléments manque à l'appel, le gouvernement ne dispose pas du pouvoir de déclarer (ou maintenir) l'état d'urgence sanitaire.

3.2 Des formalités réduites à leur strict minimum

La loi assouplit à un strict minimum les formalités de la déclaration de l'état d'urgence sanitaire, afin d'en faciliter sans délai la promulgation. Le pouvoir de déclaration est confié non pas à l'organe législatif mais bien à l'exécutif, et même à la ministre de la Santé et des Services sociaux qui peut agir seule, pour une période maximale de 48 heures, si le gouvernement ne peut se réunir en temps utile (article 119 al. 2 LSP). La déclaration se fait par simple décret qui entre en vigueur dès qu'il est exprimé, et avant même sa publication dans la *Gazette officielle du Québec*. Le gouvernement doit en outre diffuser immédiatement son contenu par les meilleurs moyens disponibles (article 121 LSP)[14].

3.3 Une temporalité qui ne doit jamais dépasser ce qui est rigoureusement essentiel

L'article 119 LSP prévoit que la déclaration de l'état d'urgence sanitaire ne peut jamais excéder une période de 10 jours; quoiqu'elle puisse être renouvelée. À chacun de ces renouvellements, le gouvernement doit s'assurer que sont encore présentes les trois conditions initiales nécessaires à la déclaration (3.1). La rigueur des limites temporelles de la déclaration (ou de son renouvellement) fait partie intégrante de la nature même du pouvoir de déclaration. La déclaration doit toujours énoncer sa durée d'application (article 120 LSP), confirmant la volonté claire du législateur de n'autoriser un tel état que pour la stricte période nécessaire. L'article 128 LSP énonce que le gouvernement peut mettre fin à l'état d'urgence sanitaire dès qu'il estime qu'il n'est plus nécessaire, où le verbe « peut » doit s'interpréter comme un devoir, en conformité avec le concept holistique voulant que l'urgence sanitaire ne doive prévaloir que pendant la période où elle est rigoureusement nécessaire.

En effet, la loi établit un encadrement temporel excessivement rigoureux en raison de l'ampleur exceptionnelle des pouvoirs

qu’elle procure (point 3.5). Ainsi, chacune des journées, chacune des heures d’urgence sanitaire doit rigoureusement se justifier, puisqu’elle fait basculer le fonctionnement régulier de l’État de droit et permet au gouvernement de s’emparer des pouvoirs intrinsèques de la chambre législative.

Pour reprendre l’idée énoncée par le Bâtonnier du Québec, Paul-Matthieu Grondin, lors de sa présentation devant la Commission parlementaire des Finances publiques le 10 juin dernier[15], la courte période ouverte à la déclaration de l’urgence sanitaire n’est pas un simple détail secondaire ou une bricole avec laquelle on peut jouer sans discernement. Cette courte période doit être sous haute surveillance et relève de la nature intrinsèque du concept même de l’urgence sanitaire.

3.4 Le maintien en tout temps du pouvoir inhérent de l’Assemblée nationale

La LSP prévoit que l’Assemblée nationale peut en tout temps désavouer une déclaration de l’état d’urgence sanitaire, non pas par législation, mais par un simple vote (article 122 LSP), ce qui indique que les pouvoirs accordés à l’exécutif pendant la déclaration d’urgence sanitaire lui sont très exceptionnellement prêtés puisqu’ils sont inhérents à l’Assemblée nationale qui doit dès lors disposer d’un pouvoir agile de surveillance et de terminaison de la déclaration d’urgence sanitaire. En effet, l’Assemblée nationale doit pouvoir en tout temps y mettre fin par simple motion, et ce, selon ses propres procédures.

La LSP (article 119) accorde néanmoins à l’Assemblée nationale le pouvoir d’accroître la flexibilité offerte au gouvernement en l’autorisant par simple motion à prolonger jusqu’à 30 jours les périodes de renouvellement, ce qui permet de tripler la ligne d’horizon dont bénéficie le gouvernement pour adopter les mesures de protection. Au moment des débats vigoureux sur le projet de loi 61, le gouvernement a insisté sur

l’importance d’ouvrir son horizon d’action. Pourquoi n’a-t-il pas profité de cette opportunité en présentant une motion comme l’y autorise la LSP? La réponse est sans doute enfouie dans le mystère de la gestation de ce projet de loi.

3.5 Des pouvoirs exorbitants entre les mains de l’exécutif de l’État

Une fois déclaré, l’état d’urgence sanitaire provoque un bouleversement radical de l’ordre juridique régulier afin de mettre en œuvre les mesures d’urgence jugées nécessaires à la protection de la santé de la population (article 123 LSP). La loi autorise le gouvernement ou la ministre de la Santé et des Services sociaux, lorsqu’habilitée par le gouvernement, à prendre toute mesure nécessaire à la protection de la santé de la population, et ce, malgré toute disposition contraire. Certains de ces pouvoirs sont énoncés expressément dans la loi, comme la fermeture des établissements d’enseignement ou de tout lieu de rassemblement, l’interdiction ou l’accès conditionnel à une partie du territoire, l’évacuation des personnes ou leur confinement, la construction de tout ouvrage à des fins sanitaires, l’engagement de dépenses ou la conclusion de contrats nécessaires. Mais la LSP va encore plus loin puisqu’elle autorise ce qui ne peut être prévu par la loi en permettant l’adoption de « toute autre mesure » qui serait jugée nécessaire pour protéger la santé de la population.

Le caractère exceptionnel et exorbitant de ces pouvoirs présente un double aspect qui explique pourquoi ils doivent être rigoureusement encadrés, malgré la grande flexibilité offerte au gouvernement. Ces pouvoirs sont d’abord susceptibles d’entrer en contradiction frontale avec les droits et libertés protégés par les chartes québécoise et canadienne, en limitant de façon draconienne la liberté de mouvement, le droit à la vie privée, la liberté de religion, la liberté de réunion pacifique, etc. La protection constitutionnelle de tous ces droits impose à la déclaration de l’urgence sanitaire et à chacune des mesures qu’elle peut

déclencher de s'en tenir soigneusement à un objectif réel et urgent auquel s'ajoute l'impératif de l'atteinte minimale aux droits fondamentaux protégés et de s'assurer que les avantages recherchés soient toujours supérieurs aux effets préjudiciables (le fameux test constitutionnel de *Oakes*[16]).

Deuxièmement, ce ne sont pas seulement les droits des individus qui sont remis en cause, mais la charpente même du fonctionnement de l'État. En effet, la déclaration d'urgence sanitaire déclenche un tsunami de l'ordre juridique régulier, puisque le gouvernement peut littéralement se placer au-dessus des lois et adopter par simple décret des mesures contraires à la loi (en plus des droits protégés par les chartes), comme le ferait un régime autoritaire étranger au nôtre. Un tel renversement radical de la hiérarchie des normes et du principe fondateur de l'État de droit ne peut se justifier que sous le plus strict respect des conditions rigoureuses prévues à la loi.

3.6 Des mesures rigoureusement ciblées sur la menace et la santé publique

Enfin, les mesures adoptées en vertu de l'article 123 (LSP) doivent rigoureusement être prises dans l'unique but de faire face à la *menace grave* déterminée à la déclaration de l'état d'urgence sanitaire (article 2 LSP et *in passim* LSP) et viser des actions de protection de la santé de la population, tel que définies par l'article 5 (LSP)[17].

4 Conclusion: le virus biologique ne doit pas se muter en virus…politique

Le coronavirus tient le Québec en haleine depuis le 13 mars dernier. Le concept de l'urgence sanitaire a permis au gouvernement du Québec de lancer rapidement des mesures importantes et salvatrices de protection de la population, avec toute la puissance et l'agilité qu'autorise la LSP. Le gouvernement du Québec a su se tirer d'affaire avec un succès qui lui fait honneur quant au maintien de la confiance de la

population qui l'a suivi méticuleusement sur les sentiers extrêmement périlleux d'un confinement.

Le projet de loi 61, déposé au moment où le Québec est engagé dans la période complexe et épineuse du déconfinement que commande la survie de la société, ébranle de façon inquiétante cette relation de confiance pourtant si essentielle. Malgré la crainte d'une deuxième vague, maintenant que le Québec peut avoir bon espoir que la menace engendrée par le virus biologique est en voie d'être domptée grâce au bon maniement du concept de l'urgence sanitaire, il faut éviter que le concept ne se mute en virus politique, impatient d'accaparer des pouvoirs qui ne sont pas les siens et ne doivent jamais l'être.

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* Marie-Claude Prémont est professeure titulaire à l'École nationale d'administration publique (ENAP). Marie-Eve Couture-Ménard est professeure agrégée à la Faculté de droit de l'Université de Sherbrooke. Les opinions exprimées dans ce texte n'engagent que leurs auteurs et ne sauraient refléter la position de l'ENAP.

[1] Marie-Eve Bouthillier et al., « Triage pour l'accès aux soins intensifs (adultes et pédiatriques) et l'allocation des ressources telles que les respirateurs en situation extrême de pandémie », pour le ministère de la Santé et des Services sociaux du Québec, 1er avril 2020, 37 p. Disponible en ligne :

http://www.cmq.org/pdf/coronavirus/msss-protocole-national-triage-soins-intensifs-pandemie-def.pdf.

[2] Marie-Eve Couture-Ménard, Marie-Claude Prémont, « L'équilibre vital entre droits individuels et intérêt collectif en temps de pandémie », Blogue À qui de droit, Faculté de droit, Université de Sherbrooke, 22 avril 2020. Disponible en ligne : https://blogueaquidedroit.ca/2020/04/22/lequilibre-vital-entre-droits-individuels-et-interet-collectif-en-temps-de-pandemie/; et sur Droit inc : https://www.droit-inc.com/article26802-Droits-individuels-et-interet-collectif-l-equilibre-vital-en-temps-de-pandemie.

[3] Depuis un angle différent, on peut aussi y voir une réaffirmation du rôle de l'État, comme le suggère notre collègue Nelson Michaud, « Le rôle réaffirmé de l'État », *Bulletin A+*, vol. 7, no 1, avril 2020. Disponible en ligne : http://enap.ca/ENAP/docs/L_Universite/Bulletin_A_plus/Special%20COVID-19/Role_Etat_NMichaud.pdf?utm_source=Openfield&utm_medium=email&utm_campaign=M728711.

[4] Mylène Crête, « Projet de loi 61 : le gouvernement Legault perd son pari », *Le Devoir*, 13 juin 2020. Disponible en ligne : https://www.ledevoir.com/politique/quebec/580755/relance-economique-francois-legault-perd-son-pari).

[5] Michel C. Auger, « Projet de loi 61 : la première grande défaite de la CAQ », Ici Radio-Canada, 13 juin 2020. Disponible en ligne : https://ici.radio-canada.ca/nouvelle/1711730/relance-economique-recul-defaite-caq-michel-c-auger.

[6] Comité public de suivi des recommandations de la Commission Charbonneau, « Mémoire portant sur le projet de loi 61 », s.d., 7 p. (présenté devant la Commission des Finances publiques le 10 juin 2020).

[7] Centre québécois du Droit de l'Environnement, « Consultation sur le projet de loi 61 », 9 juin 2020, 9 p. (présenté devant la Commission des Finances publiques le 10 juin 2020).

[8] Marie-Claude Prémont et Fanny Tremblay-Racicot, « Le projet de loi 61 : un financement public à l'étalement urbain », 9 juin 2020, LaConversation. Disponible en ligne : https://theconversation.com/le-projet-de-loi-61-un-financement-public-a-letalement-urbain-140224.

[9] Jean Leclair, « Projet de loi 61 : relance de l'économie et concentration du pouvoir ». *LaPresse*, 7 juin 2020.

[10] Et en s'inspirant de la recommandation du Protecteur du citoyen, « Mémoire présenté dans le cadre des consultations sur le projet de loi 61 », Commission des Finances publiques, 9 juin 2020, 10 p.

[11] Notamment par le Barreau du Québec : Barreau du Québec, « Projet de loi 61 », Mémoire à la Commission des Finances publiques, 9 juin 2020, 10 pages plus annexe; Maxime St-Hilaire, « Le projet de loi visant la relance est une dérive », Blogue À qui de droit, Faculté de droit, Université de Sherbrooke, 4 juin 2020. Disponible en ligne : https://blogueaquidedroit.ca/2020/06/04/le-projet-de-loi-visant-la-relance-de-leconomie-est-une-derive/.

[12] La menace doit prendre la forme d'un agent biologique, chimique ou physique susceptible de causer une épidémie (article 2, al. 2 LSP).

[13] Nous avons esquissé ailleurs la distinction importante que fait la LSP entre la menace ordinaire et la menace *grave*. Nous limitons ici notre propos à la menace *grave*. Couture-Ménard et Prémont, *supra* note 2.

[14] Le Québec rapporte toutes les « Mesures prises par décrets et arrêtés ministériels » en lien avec la COVID-19 sur

un site Web dédié à la situation de la COVID-19 à : https://www.quebec.ca/sante/problemes-de-sante/a-z/coronavirus-2019/situation-coronavirus-quebec/#c47907.

[15] Commission des finances publiques, 10 juin 2020 à : http://www.assnat.qc.ca/fr/video-audio/archives-parlementaires/travaux-commissions/AudioVideo-85371.html

[16] *R*. c. *Oakes*, [1986] 1 RCS 103.

[17] Les actions de santé publique doivent être faites dans le but de protéger, de maintenir ou d'améliorer l'état de santé et de bien-être de la population en général et ne peuvent viser des individus que dans la mesure où elles sont prises pour le bénéfice de la collectivité ou d'un groupe d'individus (article 5 LSP).

Emergencies and the Rule of Learning

The COVID-19 pandemic raises countless legal issues, many of which touch on the distinctions between normality/emergency and the importance of sustaining the commitment to the rule of law and constitutionality during times of crisis. Many excellent blog posts in this series have addressed different dimensions of these sets of issues. This commentary adds to this scholarly conversation by highlighting how the rule of law can and ought to contribute to learning during emergencies.

The role of the rule of law during emergencies is often assumed to be one of preservation. Law contains temporary,

exceptional emergency powers, thereby preserving 'normal,' non-emergency legal norms.[1] As we are currently experiencing, the freedom to exercise fundamental rights is curtailed in service of important, exceptional pandemic response measures. In reality, the distinction between exceptional emergency powers and ordinary everyday laws is tenuous (Burningham). But it is a distinction sustained by emergency management and public health legislation across Canada. The "on/off" switch of the state of emergency is a central mechanism in emergency law. The assumption is that, once the state of emergency ends, emergency powers cease to be in effect and we all go back to normal.

As a number of blog posts have canvassed, the preservationist role of the rule of law during emergencies is vital. Constant vigilance is required to prevent unlawful or at least dubious governmental overreaching during emergencies (Fluker) and to ensure that the exercise of fundamental freedoms is eventually restored when the pandemic is brought under control (Kinsinger and Bird; Griffiths).

But understanding the rule of law as only preserving the *status quo ante* is inadequate. That is because, in many cases, what is being preserved is itself woefully inadequate. As 2020 has reminded the entire country through #ShutdownCanada and Black Lives Matter, in addition to COVID-19, the rule of law in Canada is frayed and contested. The coercive powers of the state are disproportionately wielded against Black and Indigenous peoples through injunctions, policing, and incarceration. Spheres of state protection have shrunk through privatization and deregulation, leaving vulnerable populations exposed to life-threatening illness in workplaces and care homes. Canada might be "the Good" when compared to worst-case scenarios. But it is still a state in which, during non-emergency times, the rule of law regularly fails to protect those who are most vulnerable to state action and inaction.

Emergencies, sadly, are often what call sufficient attention

to these systemic failures such that institutional change becomes possible. Understood solely in preservationist terms, however, the rule of law can act as a barrier to needed change. In contrast, understanding the rule of law as the requirement of public justification[2] allows us to see how the rule of law can also be the rule of learning. That is, the rule of law can facilitate the evolution of constitutional norms so that they better respond to the lived experience of those oppressed or marginalized by the state and better reflect the ideals of constitutionalism articulated and defended by these communities.

The rule of law as the requirement of public justification facilitates this learning because, on this view, public officials must be able to provide defensible reasons in light of core constitutional principles, which protect the agency of those affected. Defensible reasons thus must be responsive to the agency of those affected. This view of the rule of law thus conceives of legal subjects (those subject to the law) as active participants in the interpretive process of defining and redefining legal and constitutional requirements.[3]

Legal scholars often assume that courts are the sole or most important sites for upholding the rule of law. Indeed, the Supreme Court of Canada has recently affirmed the important role of the courts in promoting a "culture of justification in administrative decision-making."[4] However, the historical record of courts in times of crisis demonstrates that judges frequently fail to demand such justification of the use of emergency powers.[5]

Relying on courts alone is insufficient to uphold the rule of law. Rather, a culture of justification requires an assemblage of "rule-of-law furniture."[6] David Dyzenhaus points to the Joint Committee on Human Rights (UK) as the type of creative institutional design that represents a normative commitment to uphold rights protection and the rule of law.[7] He writes: "[t]he more constitutional furniture there is in place, the

more judges and politicians will look hypocritical if they try to derail the rule-of-law project."[8]

Like home furnishings, different items of rule-of-law furniture have different strengths and functions. Where courts fall short in demanding robust justification – due to the scope of proceedings or expertise, for instance – other types of institutions can and should play a role in demanding public justification for the exercise of public power. In so demanding, public officials and the public learn from past crises and can hold state actors to account.

One primary mechanism for learning from emergencies is the public inquiry.[9] The Ontario SARS Commission, after SARS, yielded critical insight for preparing for a pandemic such as COVID-19.[10] Notably these insights included measures needed to ensure more robust rights protection for those most vulnerable to emergency response: e.g. anti-racism emergency plans and pre-prepared financial and structural supports for those under quarantine.[11] In other words, public inquiries are pieces of "constitutional furniture." Governed by public law and complementary to the known limits of the process and scope of judicial review, they use blended methods to understand and help reform systemic legal and policy issues.[12] Indeed the constitutional value of this kind of hybrid public institution is well understood in other jurisdictions.[13]

Unfortunately, provincial and territorial emergency legislation is sparsely furnished in this regard. Only Ontario and Quebec contain basic Ministerial reporting measures that require the executive to report on the emergency and its response to the legislature.[14] Provincial and territorial emergency and public health statutes contain minimal or no mandatory oversight provisions.[15] And no provincial or territorial emergency management legislation or public health emergency legislation requires independent *ex poste* analysis and critical reflection.[16] Canada's *Quarantine Act* also

lacks any requirements for ongoing oversight, reporting and/or inquiry.[17] This is a striking lack of formal accountability mechanisms for a global pandemic, which has precipitated the activation of emergency powers in every province and territory in the country.

This is not to suggest that public inquiries, or other examples of creative institutional design,[18] offer a simple solution to learning from a pandemic. A common refrain is that the report of a public inquiry will simply "sit on a shelf." Inquiries are also a well-known tactic used to forestall known and needed change.[19] But one plausible explanation for these flaws is that public inquiries, hybrid institutions, and other instances of institutional creativity are seen as misfits rather than necessary rule-of-law furniture in a constitutional order that seeks robust justification of the exercise of public power. One constructive step, then, would be to reform emergency laws to enshrine independent inquiries – or other forms of independent oversight and analysis – as a mandatory feature of emergency law along with specific requirements for public institutions to take up or respond to the recommendations that follow from these oversight mechanisms.

No amount of legislated text can inoculate us against a future pandemic.[20] But legislative reform can certainly better reflect a commitment to emergency governance under the rule of law. These changes can also better hold governments accountable to the rule of learning. Because we must learn – and change – if we are serious about minimizing the deeply unequal impacts of emergencies and the conditions that brought those impacts to the fore.

* Assistant Professor, Peter A. Allard School of Law at the University of British Columbia. Many thanks to Jaclyn Salter, Peter A. Allard School of Law JD 2021, for excellent research assistance on this blog.

[1] Karin Loevy, *Emergencies in Public Law* (Cambridge: Cambridge University Press, 2016).

[2] A theory of legality grounded in common law constitutionalism elaborated and defended by David Dyzenhaus (*The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006)) and many other scholars (e.g. Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (Or: From Theology to Secularization)", (2005) 55 UTLJ 629; Mary Liston, "Witnessing Arbitrariness: Roncarelli v Duplessis 50 Years On" (2010) 55 McGill LJ 689; Evan Fox-Decent, *Sovereignty's Promise* (Oxford: Oxford University Press, 2012); Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Oxford: Hart Publishing, 2016)).

[3] Familiar examples of this requirement of public justification are section 1 analyses under the Charter and reasonableness review.

[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para 2.

[5] E.g.: Dyzenhaus, *The Constitution of Law, supra* note 2*;* Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (Cambridge: Cambridge University Press, 2006).

[6] Dyzenhaus, *The Constitution of Law, supra* note 2*.*

[7] *Ibid* at 230.

[8] *Ibid* at 233.

[9] Canadian experts have already called for robust, independent inquiry into the vulnerability of care homes to COVID.

[10] The SARS Commission archive.

[11] Estair Van Wagner, "The practice of biosecurity in

Canada: public health legal preparedness and Toronto's SARS crisis" (2008) 40 *Environment and Planning* 1647.

[12] Peter Carver, "Getting the Story Out: Accountability and the Law of Public Inquiries" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond, 2013) 540.

[13] Trevor Buck, Richard Kirkham & Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Farnham: Ashgate Publishing, 2011) 26–28.

[14] See *Emergency Management and Civil Protection Act*, RSO 1990, c E.9, s 7.0.10(1) (Ont); *Civil Protection Act*, CQLR c S-2.3, s 98 (QC). Note that the reporting requirements in Ontario are carried over into the COVID-19 emergency legislation. See Bill 195, *An Act to enact the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, 1st Sess, 42nd Leg, Ontario, 2020, cl 13 (second reading 14 July 2020).

[15] Only Quebec and Nova Scotia have direct review requirements for public health emergencies: *Public Health Act*, CQLR c S-2.2, s 129 (QC); *Health Protection Act*, SNS 2004, c 4, s 6(1)(i) (NS). BC can order an inquiry into a matter of public health, but it is not required (*Public Health* Act, SBC 2008, c 28, s 86 (BC)). Most provinces have a requirement for a regular report from the chief medical officer of some kind (either annually, every 2 years, or every 5 years) (*Public Health Act*, RSA 2000, c P-37, s 7 (AB); *Public Health Act*, SNu 2016, c 13, s 44(6)(e)(NT); *The Public Health Act*, CCSM c P210, s 14(1)(MAN)) but only Newfoundland and Nunavut specifically require public health emergencies to be discussed in those: *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3, s 9(3)(j) (NFLD); Nunavut, *Public Health Act*, SNu 2016, c 13, s 43(b) (NT).

[16] As others have noted, Canada's *Emergencies Act* contains greater accountability mechanisms (ss 62-63) but it has not

been activated for the COVID-19 response.

[17] *Quarantine Act*, SC 2005, c 20. Noted in Dyzenhaus, Canada the Good?

[18] For some examples, see: Laverne Jacobs & Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes* (Farnham: Ashgate Publishing, 2013).

[19] Carver, *supra* note 12 at 546.

[20] Many necessary measures happen outside the bounds of legislation: See Da Silva and St Hilaire.

The Freedoms We Cannot Afford to Ignore During COVID-19

One of Canada's forgotten constitutional freedoms has quickly become one of the most restricted in the era of COVID-19. In the nearly four decades since the *Charter of Rights and Freedoms* arrived, Canadian courts have paid almost no attention to section 2(c), which guarantees freedom of peaceful assembly.

On some level, this is no surprise. Governments are generally disinclined to limit this freedom because, intuitively, it is difficult to justify prohibitions on peaceful assemblies.[1] All of this changed seemingly overnight due to an unprecedented global health crisis. One of the cornerstones of the fight against COVID-19 has been, from day one, severe

restrictions on in-person gatherings of nearly all shapes and sizes.

To date, the general consensus among lawyers and legal scholars has been that most of these drastic policies are constitutional. If a litigant were to argue that current bans on gatherings violate the *Charter*, our courts would likely conclude that these restrictions are a reasonable limit on freedom of peaceful assembly.[2] And according to opinion polls, a majority of Canadians have accepted that we must do what we can to protect vulnerable members of our society from infection, even if it means temporarily forgoing basic civil liberties.[3]

What's less certain, however, is how long governments will be justified in continuing to prohibit peaceful assemblies as we move into the next stage of our battle against COVID-19.[4] Provinces and territories have been easing some of the most restrictive measures in recent days, but we're still only beginning to understand what life is going to look like in the period between lockdown and whenever a viable treatment or vaccine is widely available.[5] If our pre-pandemic "normal" doesn't return until sometime next year, as many experts are projecting, we should expect an influx of litigation challenging workplace closures, border restrictions, bans on public events and long-term physical distancing measures as violations of the *Charter*.[6]

Religious gatherings are a clear example of the constitutional tightrope that governments are walking. Never before in modern Canadian history has the state shut down religious assemblies *en masse*. Though the situation varies from province to province, religious groups have until recently been largely absent from the public discourse as policymakers implement plans to reopen society, even though they are especially prone to the ongoing strain of these policies.

To their credit, a large number of churches, mosques,

synagogues and other places of worship have successfully transitioned to live-streamed virtual services since the start of the pandemic.[7] But physical gatherings are how these communities attend to the collective spiritual needs of their members. For certain faith traditions, physical presence is required in order to celebrate rites, sacraments, and ceremonies. In these cases, there is no substitute for being together in person.

Indeed, for religious groups, freedom of peaceful assembly is not the only *Charter* freedom that has felt the impact of COVID-19 restrictions. Freedom of religion is also at stake as a result. While religious freedom consists of far more than the act of communal worship, there is little doubt that worship itself – facilitated by peaceful assembly – is central to this constitutionally-guaranteed freedom. Necessary compromises during this pandemic have come at great personal cost to many people of faith as they live through significant limitations on two fundamental *Charter* freedoms.

In this regard, recent decisions by certain provinces permitting religious services to resume at limited capacities are encouraging. On June 12, for example, Ontario began allowing places of worship to have gatherings that don't exceed 30 per cent of a location's regular capacity.[8] In Alberta, "[t]here is no cap on capacity for places of worship, as long as there is a distance of at least 2 metres or appropriate barriers between members of different households … [or] cohort families", although congregational singing, as a high-risk activity, is discouraged.[9] Yet in Prince Edward Island, religious services are still limited to 15 people at a time, even though up to 50 people can gather in restaurants.[10] And it's far from certain when religious services will return to pre-pandemic "normal" – Nova Scotia's chief medical officer of health said recently that people should expect limitations of 50 to 100 people at services until a vaccine is found.[11]

The fact remains that, on the whole, policymakers have been slow to acknowledge the very real impact of the lockdown on religious communities.[12] While *Charter* claims are not simple matters of keeping score, many Canadians are still facing significant and simultaneous limits on their religious freedom and their freedom to peacefully assemble. This is a reality that we can't afford to ignore. Against this backdrop, as public health officials and politicians show an increasing willingness to tolerate larger public gatherings and demonstrations – a tolerance we have witnessed in the face of important protests against racial injustice – it will become difficult, if not impossible, to justify not extending similar allowances to religious groups.[13]

Many of these concerns likewise apply to other types of peaceful assemblies that have been affected by the pandemic. Activities which were staples of communal life mere months ago have now all but disappeared, and physical distancing is poised to persist as we enter the few months of warm weather for most of the country. It's looking more and more likely that we'll be asked to scale back – and in many cases completely sacrifice – much of what defines the summer season both socially and economically: outdoor exhibitions and cultural festivals, weddings and graduation ceremonies, and travel plans domestically and abroad.

Canada is in the middle of an unprecedented and unpredictable public health crisis, and certainty is a luxury we lack. There is no easy answer to how long we can or should expect our fellow citizens to accept restrictions on their fundamental freedoms. However, one thing is clear: while policymakers must carefully balance our responsibility to protect vulnerable populations against the need to allow peaceful assemblies to safely resume, this balance has to be evenly and fairly struck throughout society and across the country. Otherwise, governments face a growing risk that these policies will lose credibility – in the eyes of Canadians and their Constitution

alike.

This post originally appeared as an opinion piece on CBC News, and has been republished with the authors' permission.

* Kristopher Kinsinger is an Ontario lawyer and LLM candidate at McGill University. Brian Bird is a James and Daria Barry Postdoctoral Research Fellow in the James Madison Program in American Ideals and Institutions at Princeton University.

[1] Kristopher E.G. Kinsinger, "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter" (2020) 98 SCLR (2d) (forthcoming).

[2] Josh Dehaas, "Are bans on religious gatherings constitutional?" (13 April 2020), online: *Canadian Constitution Foundation* <https://theccf.ca/are-bans-on-religious-gatherings-constitutional/>.

[3] Laura Osman, "Most Canadians comfortable with pace of easing restrictions: poll" (5 May 2020), online: *CBC News* <https://www.cbc.ca/news/politics/canadians-comfortable-pace-easing-restrictions-1.5556555>; Brian Bird, "COVID-19 and Common Humanity" (11 May 2020), online: *Convivium* <http://www.convivium.ca/articles/covid-19-and-common-humanity/>.

[4] Sujit Choudhry, "COVID-19 & the Canadian Constitution" (16 April 2020), online: *Medium* <https://medium.com/@SujitChoudhry/covid-19-the-canadian-constitution-52221ef31dc3>.

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[6] Marieke Walsh and Ivan Semeniuk, “Trudeau warns of ‘new normal’ as Ottawa releases potential coronavirus scenarios” (9 April 2020), online: *The Globe and Mail* <https://www.theglobeandmail.com/politics/article-virus-modelling-estimates-11000-to-22000-canadian-deaths-if-physical/>; Tyler Dawson, “Legal groups eye suing government to roll back COVID-19 restrictions” (10 May 2020), online: *National Post* <https://nationalpost.com/news/canada/legal-groups-eye-suing-government-to-roll-back-covid-19-restrictions>.

[7] Garrett Barry, “Keeping the faithful: Technology has become pivotal for religious groups during COVID-19” (20 April 2020), online: *CBC News* <https://www.cbc.ca/news/canada/newfoundland-labrador/religious-services-online-mass-seder-service-1.5533069>.

[8] O Reg 276/20.

[9] Government of Alberta, “COVID-19 Information: Guidance for Places of Worship” (22 June 2020), online: *Government of Alberta* < https://open.alberta.ca/dataset/2be831dd-d83e-42da-b634-6bc6d5232d1a/resource/a6490934-bf3e-4e6d-9531-2822d6482f9f/download/covid-19-relaunch-guidance-places-of-worship-2020-0622.pdf>.

[10] Shane Ross, “Bishop wants more Islanders to be allowed in churches” (10 June 2020), online: *CBC News* < https://www.cbc.ca/news/canada/prince-edward-island/pei-bishop-covid19-church-limit-1.5606337>; Stu Neatby, “Why reopen restaurants but not churches? asks P.E.I. MLA” (9 June 2020), online: *The Chronicle Herald* <https://www.thechronicleherald.ca/news/canada/why-reopen-restaurants-but-not-churches-asks-pei-mla-460136/>.

[11] Mickey Conlon, “Top doctor says ‘normal’ church services could be a year or more away” (2 June 2020), online: *Grandin Media*

<https://grandinmedia.ca/top-doctor-says-normal-church-services-could-be-a-year-or-more-away/>.

[12] Jonathan Pinto, "Hundreds of Ontario churches ask premier to let them reopen" (13 May 2020), online: *CBC News* <https://www.cbc.ca/news/canada/windsor/hundreds-ontario-churches-ask-reopen-1.5566955>.

[13] *Stephanie Levitz*, "'Balance of competing interests': Trudeau defends attending protest amid COVID-19" (8 June 2020), online: *Global News* <https://globalnews.ca/news/7039712/trudeau-george-floyd-protest-covid/>.

COVID-19 and the Exercise of Legislative Power by the Executive

Legislation Commented On: *Regulations Act*, RSA 2000, c R-14 and Public Health Orders issued in relation to COVID-19

The COVID-19 pandemic has become a rare opportunity to study the widespread exercise of emergency lawmaking powers in Canada. Governments have enacted legal rules on matters such as social distancing, quarantine, economic controls, regulatory relief, employment standards, landlord-tenant, access to justice, and health care protocols. Commentators have warned that we must remain vigilant in ensuring these emergency measures do not offend the rule of law, and this

message is likely to intensify as more emergency measures are used to either further the current shutdown or control our emergence from it; for example, in relation to surveillance and privacy rights as Joel Reardon, Emily Laidlaw, and Greg Hagen recently noted here. These substantive concerns are amplified by the fact that most COVID-19 emergency powers are being exercised by the executive branch of government and its delegates, using legislative power delegated to them in public health or emergency statutes. Because it is unlikely that legislatures envisioned such an extensive use of these powers for a prolonged time period, shortcomings and gaps in the lawmaking process are becoming apparent. Hallmarks such as organization, clarity, predictability, consistency, transparency, and justification – which, in normal times, provide the executive with much of its legitimacy to govern – have been impaired or are missing altogether in the exercise of legal power to contain COVID-19. This post examines how Alberta ministers and the Chief Medical Officer of Health have been exercising emergency powers so far during the pandemic, and makes some pointed observations on the hallmarks of legitimate governance and the role of the *Regulations Act,* RSA 2000, c R-14, in this regard.

Legislative Process

Legislation enacted by the executive branch or its delegates is referred to as 'subordinate legislation' because it is made under the authority of a statute passed by the legislative branch. Subordinate legislation comes in many different forms, including regulations, orders, directives, resolutions, and bylaws. The label attached to subordinate legislation is not really that important. In order to be classified as subordinate legislation, the instrument must be enacted pursuant to a power granted in a statute and establish binding rules of general application. So far, nearly all emergency lawmaking by Alberta during the COVID-19 pandemic has been exercised using subordinate legislation (with the exception of

a few statutes enacted in early April, see here).

Subordinate legislation has the same the force of law as a statute, however the process by which each is enacted has crucially important distinctions. A statute has its beginnings as a bill tabled in the legislative assembly. The bill must pass through the legislative process, which includes three readings in the elected assembly before it can become law. A bill becomes a statute after it passes third reading and receives Royal Assent. In contrast, subordinate legislation does not pass through the legislative process in the elected assembly. Some jurisdictions have committees with elected members of the legislature who periodically review subordinate legislation after it is made by the executive branch, but there is no point-in-time scrutiny by the elected assembly of the enactment of subordinate legislation.

Another important distinction between statutes and subordinate legislation is transparency and publication. The legislative process is open to the public and all public statutes enacted by the Alberta Legislature are published by the Queen's Printer in accordance with the *Queen's Printer Act*, RSA 2000, c Q-2. In contrast, the process by which subordinate legislation is made is rarely transparent and open to the public. Municipal bylaw-making would be a common exception to this, and the *Municipal Government Act*, RSA 2000, c M-26 imposes transparency and publication measures on lawmaking by municipalities in Alberta. There is also no one particular forum where subordinate legislation is published. As some readers will know, in sectors with an administrative tribunal which has extensive rulemaking powers there will often be subordinate legislation enacted by cabinet or a responsible minister in the form of regulations published by the Queen's Printer, as well as subordinate legislation enacted by the tribunal in the form of rules, directives, and orders published on its website or elsewhere.

The upshot of this brief overview of the legislative process

is to emphasize that in the vast universe of delegated legislative authority, there are few rules to govern how these powers are exercised. This is not a new problem, and it was first acknowledged as such in the early to mid-1900s when democratic governments started to rely more heavily on subordinate legislation to make laws outside of their elected assemblies. This trend has continued unabated to the point where today the volume of rules enacted by subordinate legislation dwarfs that set out in statutes. In extreme instances today, a legislature will pass a statute which effectively delegates all rulemaking to the enactment of subordinate legislation by the executive at a later date (for a recent example in Alberta, see here and here). Or similarly, a statute will include a provision that empowers the executive to subsequently amend the statute with subordinate legislation later on. See section 141.6 of the *Municipal Government Act*, RSA 2000, c M-26 for an example of this so-called Henry VIII provision. The use of Henry VIII powers by the executive is inherently problematic in a democratic, responsible government and most certainly can only be viewed as legitimate in emergency times (see *Ontario Public School Boards' Assn. v Ontario (Attorney General)*, 1997 CanLII 12352 (ONSC) at paras 48 – 61). It can be difficult to generate much excitement over these issues in normal times, but they are definitely of more interest now that nearly all lawmaking during this pandemic is being done using subordinate legislation.

Regulations Act

Of the existing rules which govern the enactment of subordinate legislation, statutes such as Alberta's *Regulations Act* are the most prominent. The *Regulations Act* applies to subordinate legislation which falls within the definition of a "regulation" in section 1(1)(f) of the Act. This section defines a "regulation" to mean a regulation as defined in the *Interpretation Act*, RSA 2000, c I-8 that is of

a legislative nature. Section 1(1)(c) of the *Interpretation Act* defines a "regulation" as follows:

> (c) "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted
>
> > (i) in the execution of a power conferred by or under the authority of an Act, or
> > (ii) by or under the authority of the Lieutenant Governor in Council,
>
> but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

The key aspect of this definition is that the instrument in question must be enacted under the authority of a statute and the rules set out by the instrument must be "of a legislative nature", a phrase which is not defined in either the *Regulations Act* or the *Interpretation Act*. The test for whether an instrument is 'legislative' or not, is one which looks at substance over form. Canadian courts have established a number of factors which suggest an instrument is legislative: it was enacted pursuant to a power granted in statute; it contains provisions which set a general norm or standard to be followed; it uses language that demonstrates an intention to be mandatory; it is published or otherwise available to the public; and it creates sanctions for non-compliance with its provisions (see *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] 2 SCR 295, 2009 SCC 31 (CanLII) at paras 58 – 66).

Most, if not all, Canadian jurisdictions have their own version of the *Regulations Act* (federally it is the *Statutory Instruments Act*, RSC 1985, c S-22) which imposes requirements

that help to ensure there is at least some organization and transparency in executive lawmaking. These statutes were enacted decades ago specifically in response to the dramatic increase in the use of subordinate legislation in the early to mid-1900s. Comparatively speaking, I would say Alberta's *Regulations Act* is minimalist in its oversight mechanisms because the Act only requires a regulation to be filed with the Registrar of Regulations (section 2) and, with some exceptions, published in the Alberta Gazette Part II produced by the Alberta Queen's Printer (section 3). Some jurisdictions go much further than these requirements by legislating a substantive vetting process and a disallowance mechanism (e.g. see section 19.1 of the federal *Statutory Instruments Act* and the Standing Committee for the Scrutiny of Regulations). A regulation which is not filed in accordance with section 2 of Alberta's *Regulations Act* is not in force, and a regulation which is not published in accordance with section 3 is not enforceable against a person who has not had actual notice of it.

The scope of the *Regulations Act* is significantly limited because other enactments can exclude its application. As noted below, this is the case with respect to the ministerial orders which are being issued under section 52.1 of the *Public Health Act*, RSA 2000, c P-37 to address the COVID-19 pandemic. However, while ministerial orders are exempt from the filing and publication requirements of the *Regulations Act*, the orders issued by the Chief Medical Officer of Health under section 29(2.1) of the *Public Health Act* are subject to the *Regulations Act*. As discussed below, some of these orders are a "regulation" under the *Regulation Act* and there is some uncertainty as to whether they have been filed with the Registrar.

Chief Medical Officer of Health and Executive Orders

I have previously commented on some of the decisions issued by the Chief Medical Officer of Health (CMOH) under section

29(2.1) of the *Public Health Act*, RSA 2000, c P-37, as well as some cabinet and ministerial orders issued pursuant to section 52.1 of the *Public Health Act*. In these earlier posts (here, here, here, and here), I touched on some concerns with clarity, transparency, and justification in the exercise of these powers. However, a broader review of all the orders issued under the *Public Health Act* suggests to me that these concerns are growing into larger problems. This has given me a renewed appreciation for even the minimalist procedural requirements of the *Regulations Act* and the oversight administered by the legislature over the executive branch in normal times. What follows are some of my observations in this regard.

Ministerial orders and decisions issued by the CMOH relating to the COVID-19 pandemic emergency have been published on this 'official' open data webpage, and this webpage is very disorganized. However, there is now a more organized source of public health orders available at Alberta.ca here. This is a welcome addition because the open data webpage is difficult to navigate. While there is a filter function which allows a user to sort the orders, the assigned categories overlap and are misleading which diminishes the usefulness of this function. The list of orders on the Alberta.ca website set out here is far more helpful because it groups the orders separately under informative subheadings, and bundles together CMOH orders and related exemptions. For example, the CMOH has granted multiple exemptions here, here, here and here to the social distancing requirements in CMOH Order-07. As a comparison, see the chronological listing of ministerial orders issued in British Columbia in 2020 here and orders in council issued in 2020 here, both of which have a search function that enables users to narrow results to orders that include the term 'COVID'. And as an aside, it appears that British Columbia normally publishes all its ministerial orders, unlike in Alberta where the Queen's Printer states that it only publishes orders issued by a handful of ministries.

Section 52.1 of the *Public Health Act* provides Alberta ministers with the extraordinary power to suspend, modify, or effectively amend the application of any other legislation. Ministerial orders exercising these Henry VIII powers have been regularly added to the public health orders webpage without any notice, and are amending Alberta statutes with bald declarations of the public interest and scant justification. In addition to my earlier post about this issue with respect to routine environmental reporting, see more recently Ministerial Order 18.2020 (Labour and Immigration), Ministerial Order SA:009.2020 (Service Alberta) and Ministerial Order 23/20 (Transportation). The fact that only some of these ministerial orders may be published on the Queen's Printer website is astonishing, even more so given that these section 52.1 orders are exempt from the requirements of the *Regulations Act*.

In some cases, ministerial orders have been amended or exceptions have been carved out, without any apparent rationale or justification. For example, Ministerial Order 19/2020 issued on March 27 by the Minister of Environment and Parks closed public access to parks, recreation areas, and public land use zones in Alberta. The effect of this Order is described on the Alberta Parks website here. However, on March 30 the Minister rescinded Order 19/2020 and replaced it with Ministerial Order 20/2020 (Environment and Parks) which removed public land use zones from the closure with no explanation. As of the date of writing this post, the Alberta Parks website still doesn't reflect this amendment.

Ministerial Order 17/2020 was issued by the Minister of Environment and Parks to suspend routine environmental reporting and Ministerial Order 219/2020 was issued by the Minister of Energy to suspend certain energy reporting requirements, and the Alberta Energy Regulator (AER) subsequently announced 'clarifications' to the scope of these orders. Not only does this 'clarification' confirm that both

Ministers overreached in the exercise of their power to suspend the application of legislation, it also further complicates the disorganization problem noted above. The AER bulletin announcing these clarifications is published by the AER on its website, but is not linked to the listing of Orders 17/2020 and 219/2020 on the public health orders webpage or the Queen's Printer.

Legal rules which are disorganized or otherwise not easily located may not achieve their intended purpose and, at worst, may be unenforceable. However, in addition to organization and accessibility, it is also crucial that the rules can be understood. In an earlier post, I noted some concern with this in Ministerial Order 219/2020 which appears to confuse the role of the Minister and the Chief Medical Officer of Health. However, it is more alarming to see drafting of the kind set out in Ministerial Order 22.2020 made by the Minister of Labour and Immigration on April 10, and in particular paragraph 1:

> NOW THEREFORE, I, Jason Copping, Minister of Labour and Immigration responsible for the Labour Relations Code and Employment Standards Code, pursuant to section 52.1(2) of the Public Health Act, do hereby order that:
>
> 1. This order applies with respect to the employers at a health care facility described in Chief Medical Officer of Health Order 10-2020, issued under section 29 of the PHA ("CMOH Order 10"),
>
> a. work for more than one employer described in CMOH Order 10, or
> b. work at more than one worksite described in CMOH Order 10.

Clearly, even the simplest of drafting errors are being made in the rush to enact legal rules to address the COVID-19 pandemic, and there doesn't appear to be much of a review

process in certain departments.

No Publication in the Alberta Gazette

The Alberta Gazette is the official publication of the Government of Alberta, and the Alberta Gazette Part II publishes regulations filed with the Registrar of Regulations under the *Regulations Act*. Section 2 of the *Queen's Printer Act* requires that the Alberta Gazette be published at least twice per month. Many of the problems noted in this post would likely be cured with the rigour, scrutiny, and order imposed by publication in the Gazette. As an example of what I mean by this, have look at the public health orders published by Prince Edward Island in its Royal Gazette on April 18. Unfortunately, ministerial orders issued under section 52.1 of Alberta's *Public Health Act* are not required to be filed with the Registrar or published in the Gazette because section 52.83 of the Act exempts them from the *Regulations Act*.

The April 15 Alberta Gazette Part II includes only four pieces of subordinate legislation enacted in late March which are explicitly related to COVID-19: *Employment Standards (COVID-19 Leave) Regulation*, Alta Reg 29/2020; *Meeting Procedures (COVID-19 Suppression) Regulation*, Alta Reg 50/2020; *Procedures (Public Health) Amendment Regulation*, Alta Reg 51/2020; and *Late Payment Fees and Penalties Regulation*, Alta Reg 55/2020 . Three of these regulations are now available on the CanLII database, unlike most of the COVID-19 subordinate legislation posted on the public health orders webpage, on Alberta.ca here, or on the Queen's Printer website. This observation alone demonstrates that publication in the Gazette would significantly reduce the difficulty in obtaining an accurate read of the many statutes and regulations which have been modified or amended by ministerial orders during the pandemic.

As just one illustration of these difficulties, consider changes which have been made to residential tenancies

legislation in Alberta for COVID-19. On March 27 the Minister of Service Alberta issued Ministerial Order SA:003.2020 to enact the *Late Payment Fees and Penalties Regulation*, Alta Reg 55/2020. The Ministerial Order was made under authority granted by section 70(1)(j) of the *Residential Tenancies Act*, SA 2004, c R-17.1 and the *Late Payment Fees and Penalties Regulation* made by the Order was filed on March 30 and is published at page 192 of the April 15 volume of the Alberta Gazette Part II. The regulation prohibits a landlord from charging a penalty for non-payment or late payment of rent between April 1 and June 30. On March 27, the Minister of Service Alberta also issued Ministerial Order SA:004.2020 (Service Alberta) under section 52.1 of the *Public Health Act* modifying the application of section 24 of the *Mobile Home Sites Tenancies Act*, RSA 2000, c M-20 for the same purpose of prohibiting a landlord from charging late payment penalties. However, since the *Mobile Home Sites Tenancies Act* does not provide the Minister with regulation-making powers analogous to those provided by section 70 in the *Residential Tenancies Act*, the Minister needed to use powers under section 52.1 of the *Public Health Act* to grant the same relief by amending section 24 of the *Mobile Home Sites Tenancies Act*. As a result, only the regulatory amendment under the *Residential Tenancies Act* is published in the Gazette and has been picked up by CanLII (see here). Ministerial Order SA:004.2020 is not published on the Queen's Printer website (but it is published on Alberta.ca here), because the amendments made to section 24 were subsequently amended (codified) by the *Tenancies Statutes (Emergency Provisions) Amendment Act, 2020*, SA 2020, c 6 (posted on the Queen's Printer site here along with other 2020 statutes). The Minister of Service Alberta has issued a number of additional section 52.1 orders (as published on the public health orders webpage and at Alberta.ca here) which amend the *Residential Tenancies Act* but were not published in the Gazette because of section 52.83 of the *Public Health Act*, and are thus also not reflected on CanLII or the Queen's Printer.

As a final point, I note with curiosity and some concern that none of the CMOH orders issued before March 31 were published in the April 15 Alberta Gazette Part II. Some of these instruments would certainly be "regulations" as the term is defined in the *Regulations Act*: they have been issued under legislative authority (section 29(2.1) of the *Public Health Act*); they restrict liberties and impose duties generally; they are written in mandatory language; they have been conveyed to the public; and there are significant penalties for non-compliance. Unlike ministerial orders issued under section 52.1, the *Public Health Act* does not exempt CMOH orders from the *Regulations Act*. Likewise, section 17 of the *Regulations Act Regulation*, Alta Reg 288/1999 does not exempt CMOH orders from the application of the *Regulations Act*.

It seems likely to me that the Legislature did not intend section 29(2.1) CMOH orders to be of general application, and thus it was not contemplated that these orders would be "regulations" under the *Regulations Act*. However, the CMOH is clearly interpreting section 29(2.1) as authority to legislate. Some of these orders are clearly regulations, which, in some instances, include dubious exemption provisions that violate due process and the rule of law (see e.g. the declaration on page 5 of this exemption to CMOH Order-05 that an exemption from a public health order can be terminated or modified without notice and for any reason whatsoever).

CMOH orders which are "regulations" but have not yet been filed with the Registrar of Regulations under section 2 the *Regulations Act* are not in force. The absence of any CMOH orders in the April 15 Gazette strongly suggests these orders have not yet been filed. This is particularly so in light of the fact that other executive orders issued in March and published on the Queen's Printer have an endorsement to confirm filing – see e.g. here and this *Procedures (Public Health) Amendment Regulation*, Alta Reg 51/2020 regulation is published in April 15 Gazette.

If it is the case that CMOH orders which are regulations have not been filed with the Registrar, obviously they should be filed immediately. And in order to attempt to cure any invalidity arising as a result of this problem, the Minister of Health should exercise his new power to go back in time and retroactively amend the *Public Health Act* to exempt CMOH orders from the requirements of the *Regulations Act*. At an absolute minimum, I suggest that all executive orders issued by the Lieutenant-Governor-in-Council, individual ministers, or the CMOH, which constitute subordinate legislation addressing the COVID-19 pandemic, be published in the Alberta Gazette.

[*] Associate Professor, Faculty of Law, University of Calgary. This blog post is published with permission from *ABlawg.ca:* https://ablawg.ca/2020/04/22/covid-19-and-the-exercise-of-legislative-power-by-the-executive/.

Pandemic Preparedness and Responsiveness in Canada: Exploring the Case for an Intergovernmental Agreement

Canada’s lack of a coordinated response to the COVID-19 pandemic and the improvisatory nature of (at least many) individual provincial responses suggest that the Canadian approach to public health emergency preparedness and early

public health emergency responsiveness remains inadequate. The federal government primarily played an advisory, spending, and/or data collating role in its "early" (though some said "late" where it followed provincial initiatives) response to the crisis. Provinces took and continue to take various approaches, some of which (like restrictions on interprovincial movement) have questionable jurisdictional bases and human rights implications.

The reasons for the lack of coordination are likely political, not strictly constitutional. Greater coordination is constitutionally possible and, in fact, necessary to ensure that Canada is better prepared for future public health emergencies. A formal intergovernmental agreement (IGA) could be a promising tool for ensuring cooperation and addressing the "complex intergovernmental problem" (Paquet & Schertzer 2020) posed by genuine public health emergencies like COVID-19.

Some Conceptual Ground Clearing

When considering legal responses to potentially catastrophic events, like pandemics, it is important to recognize that 'emergencies' are not a 'natural kind' (Cutter et al. 2003). Insofar as 'emergency' has a stable meaning, it denotes a legal/political category. Legally, it most often refers to states of affairs with potentially severe consequences that require some sort of exigency (see e.g., Dyzenhaus 2006). Whether those consequences are realized – or, at least, the extent to which they are realized – is partly a function of prior government action. For a banal but crucially important example of this phenomenon, consider how building regulations can help mitigate the worst effects of 'natural disasters.' This reality is particularly clear with regard to pandemics: "[t]he infectious agents of communicable diseases have always been … with humankind … but the causes of pandemics are within humankind's ability to control" (Attaran & Chow 2011: 289). Yet it remains the case that legally-cognizable 'emergencies'

usually raise the possibility of exceptions from general legal rules to minimize the worst consequences (Dyzenhaus 2006; Stacey 2018; etc.).

International guidelines provide helpful frameworks for identifying genuine 'emergencies.' Yet Canadian decisions on what should qualify and on the implications of emergencies are often lacking. Existing guidance can be surprisingly opaque. All appearances of the 'Peace, Order, and good Government' power's 'emergency branch' notwithstanding, there is no unified constitutional emergency power in Canada. Indeed, while governments developed a framework for emergency management (MREM 2017) and Canadian constitutional scholars analyze emergencies, a comprehensive framework for or doctrinal theory of emergencies in Canadian constitutional law is lacking. This issue is particularly acute with respect to public health emergencies. Canadian jurisprudence on public health in general is minimal. It remains the case that, as Kumanan Wilson (2004) put it, "there is ambiguity over ultimate constitutional responsibility in several specific public health domains." Even in normal times, "effective intergovernmental cooperation is one of the most significant challenges facing public health" (Wilson 2004). It is thus unsurprising that existing emergencies jurisprudence is largely silent on *public health* emergencies. Many of the best works on Canadian constitutional and emergency management law focus on other emergencies, like national security emergencies (e.g., Forcese 2008) or environmental emergencies (Stacey 2018). Even if this remarkable scholarship provides a unified theory of emergencies, the lack of a unified *judicial* theory remains notable. Canadian courts have yet to provide a unified jurisprudential account of the role of emergencies in Canadian constitutional law.

Some Relevant Legal Powers, Obligations, and Problems

Given what *is* known about Canadian emergency law, the federal government could have coordinated a more unified approach to

preparing for and beginning to respond to the COVID-19 pandemic. ‘Emergencies’, ‘emergency prevention’, ‘emergency preparedness’, ‘emergency response’, ‘public health’, and ‘public health emergencies’ are not enumerated categories in Canada’s constitutional/federative division of powers in the *Constitution Act, 1867*. Each instead constitutes an area of ‘shared’ jurisdiction. The provinces maintain primary authority over public health within their territorial boundaries. But federal powers over issues of national concern, quarantine, criminal law, the census and statistics, international and extra-provincial transportation and movement, not to mention (at least national) emergencies, provide the federal government opportunities to pass federal legislation that allows preparation for and begin responding to pandemics (Attaran & Wilson 2007). The federal powers could be used to better coordinate some elements of public health emergency preparedness and responsiveness. The *Emergencies Act* is only the least controversial example of a power that could have been used to coordinate action. For instance, while the scope of these constitutional powers remains highly contested, some scholars believe that federal governments could pass ‘paramount’ laws that supersede many provincial rules on data collection or sharing (Attaran & Chow 2011: 306). If, in turn, federal powers are more limited, federal and provincial governments could better coordinate actions within the scope of their respective jurisdictions.

The lack of a coordinated response with respect to the use of constitutional powers raises questions about whether Canada can properly prepare and respond to emergencies. The lack of a coordinated or uniform response to the pandemic – which bears on the discharge of basic governmental duties to protect the national population and contribute to the protection of global populations – is particularly surprising given Canada’s earlier experiences with SARS. Canada was heavily criticized for its lack of preparation for the 2002-2004 outbreak (Auditor General of Canada 2008). Federal and provincial

governments thus passed new legislation, with the former creating the Public Health Agency of Canada. Governments also reached collaborative agreements. 'Framework agreements' on 'emergency management' (MREM 2017), 'pandemic influenza preparedness' (PPHN 2018a), and 'biological events' (2018b) responsiveness were the result of negotiation/collaboration. Related provincial emergency plans discuss ongoing cooperation with the federal government as a matter of course. The Ontario plan produced to meet general emergency preparedness obligations under its *Emergency Management and Civil Protection Act* is one example. These plans and agreements appeared promising and improved Canada's ability to prepare for and begin responding to COVID-19. But they did not sufficiently establish necessary levels of coordination. The lack of uniform testing, basic data collection problems, and mobility restrictions across Canada hardly exhaust recent coordination problems (see also Attaran 2020).

Pandemic management also generates international law obligations for the federal government under the World Health Organization (WHO)'s 2005 *International Health Regulations*, which necessitate coordination. The federal government alone is responsible for ensuring compliance with these obligations. The difficulties inherent in Canada's federal structure do not excuse it from non-compliance, but lack of coordination between federal and provincial governments can limit Canada's ability to meet its obligations (Attaran & Chow 2011). Canada addressed some concerns about a lack of information sharing coordination between it and the provinces, during pandemics with the 2014 *Multi-Lateral Information Sharing Agreement*, and accordingly received high marks in a recent public health emergency preparedness report (WHO 2019). Yet Canada's response to COVID-19 suggests that the standards in that report do not track what standards *should* be and the provinces still decide *how* to collect the data that they share in any case. Furthermore, even if information sharing was as coordinated and effective as one can reasonably expect, other

national standards are lacking. Note, for instance, the lack of uniform guidelines for how to self-assess COVID-19 risks and how to respond to the results of such self-assessment and the potential impact of different approaches thereto on the spread of COVID-19 (Olibris & Attaran 2020). Failure to coordinate these measures could theoretically limit fulfillment of some international obligations.

Prospects for an Intergovernmental Agreement on Public Health to Public Health Emergency Preparedness and Early Public Health Emergency Responsiveness

An IGA could be a promising tool for promoting or securing necessary cooperation. The IGA that we would like to explore would take the form of a single negotiated document in which at least the federal and provincial governments that provided detailed accounts of the agreed-upon responsibilities each government would take to prepare for future public health emergencies, the initial actions each level of government would take when a public emergency strikes, and acts that would be barred by such action. Such a document would not only consolidate existing agreements, minimizing the possibility that governments will ignore existing agreements to cooperate in a rush to improvisation. It would also go beyond previous agreements to provide more detailed guidance on the precise steps different government actors would take to prepare and begin responding to public health emergencies, thereby creating clear expectations of government action that would maximize the possibilities of proper coordination to address public health emergencies.

A formal IGA would be a desirable method for increasing federal action to prepare for and begin responding to public health emergencies. A stronger federal role in public health emergencies has been touted as a possible solution to public health emergency-related coordination problems (e.g., Attaran & Wilson 2007). We agree that the need for coordination could help justify a stronger federal role in public health

emergency management. Yet we believe that any increased federal role should complement, rather than supersede, provincial action and that a formal IGA could help ensure such complementarity. Any unilateral federal action would not only raise constitutional concerns but also would come with significant political popularity and national solidarity costs. This likely explains why the federal government has yet to invoke the *Emergencies Act* absent provincial requests to do so. It also makes it unlikely that federal governments will invoke their powers during future emergencies. Moreover, federal powers alone are insufficient for tackling a pandemic. We thus insist on the complementarity of provincial powers. A formal IGA could help ensure that federal action complements, rather than replaces, provincial action. It could also minimize the costs of taking necessary public health measures. After all, a federal government need not worry about provincial charges of 'overreach' where they act in conformity with standards provinces previously agreed were appropriate in public health emergency settings.

A detailed IGA that specifies what each level of government should do to prepare for and begin responding to public health emergencies and that explains how they will act together to balance public health, economic, human rights, Aboriginal and treaty rights, international law, and global obligations-based concerns would ensure greater coordination. An IGA cannot fully 'bind' parties. Accompanying implementing legislation would likely be necessary to secure its potential benefits. Canada's fundamentally dualist nature means that any agreement is always subject to threats of radical change. As a matter of constitutional law, government parties to IGAs retain rights to leave IGAs and repeal legislation implementing IGA agreements without securing the agreement of other parties. Long-term agreements will require long-term political acceptance of the necessity of the IGA and its terms. Yet some coordination of legislative and executive/administrative action is needed and there are political benefits to

formalizing them in a non-binding document. Outlining expectations in such a document should minimize the political costs of federal action, making it more likely that they will actually use their existing powers when it is appropriate for them to do so while simultaneously creating expectations that the federal government will not unduly 'overreach'. But an IGA could be valuable even if federal action were undesirable. An IGA that set expectations for *provincial* actors would help provinces predict how others will act, minimizing incentives to close borders due to worries that others will fail to act.

The IGA we envision is consistent with earlier proposals regarding a federal coordinating role (e.g., Attaran & Wilson 2007; Attaran & Chow 2011) but would address a wider variety of concerns than earlier proposals, which focused primarily on jurisdictional and public health implications. For instance, public health emergencies raise issues under the *Canadian Charter of Rights and Freedoms* and the *Rights of the Aboriginal Peoples of Canada*. Any IGA should therefore specify how governments will minimally infringe (or, where necessary and legally possible, suspend) relevant rights. Negotiators cannot set the terms for the manner in which they will infringe rights. After all, rights infringements are always subject to judicial review – unless, of course, the right in question has been suspended (St-Hilaire & Ménard 2020). But clear standards of action for respecting rights during pandemics should minimize infringements and help avoid rights-violating improvisations. Insofar as an IGA is able to secure these potential benefits, it should also minimize needless and costly court cases. For another example, an IGA that specifies how Canada will meet its international obligations could help minimize the chances that the federal government will be subject to international censure. Obligations under the *International Health Regulations* do not exhaust relevant considerations. For instance, as a member of the Venice Commission, Canada is obliged, if not formally obligated, to meet global normative standards (Venice Commission 2020). The

‘International Bill of Rights’ also creates clear international, if not domestic, obligations relevant to the topic at hand. Finally, beyond these legal concerns, public health problems cannot be totally severed from economic ones. Negotiated agreements on how to coordinate federal and provincial efforts could prove fruitful even in the likely event that future pandemics will raise unique concerns that require flexibility.

A full defense of the idea of an IGA obviously requires far more analysis, but the preceding at least provides a prima facie case for further exploring this possibility. Successfully negotiating a detailed IGA will, of course, be politically difficult. It is possible that a formal IGA capable of securing its potential benefits cannot result from negotiations in the real world. Difficulties with other agreements certainly present problems for the current proposal. Responding to the forgoing by suggesting that all actors simply need to meet their existing obligations and can do so better absent the formal constraints of an IGA certainly make sense given the costs of negotiation and the limits that the detailed IGA we envision could place on governmental ‘flexibility’, which many rightly view as essential to effective responses to ever-evolving events like pandemics. One could even suggest that the ‘framework agreements’ above provide all the detail one can expect in ‘flexible’ negotiated documents. Each of these concerns was reasonable pre-COVID-19 and any detailed discussion of a possible IGA should address them. Yet some tool for ensuring greater cooperation remains necessary. Previous agreements crafted to deal with issues of federal cooperation in the face of a pandemic unfortunately failed to secure adequate coordination in their greatest test case. There is reason to think that they should be combined, streamlined, and further developed into one enhanced IGA. Even a number of IGAs providing detailed descriptions of rights and responsibilities with respect to the topics above would improve coordination. Dividing negotiations into discrete

areas could have some benefits. Yet concerns that the terms of even existing Canadian agreements were insufficiently streamlined were already clear pre-2020 (WHO 2019). A more detailed IGA listing all relevant points of agreement *in one place* is likely needed.

Conclusion

While an IGA will be politically contentious and inevitably difficult to negotiate, then, a document that creates detailed expectations of coordinated action in a crisis remains desirable. Working "collaboratively to establish … [a] strategy that articulates" federal and provincial roles and responsibilities "[d]uring a public health response", as one recent agreement suggests (MREM 2017), is insufficient for public health emergency preparedness and early public health emergency responsiveness. A detailed strategy that weighs competing interests is needed *prior to* any future response. A formal IGA is at least worth considering as a tool for fulfilling this necessary role.

[*] Michael Da Silva is a Canadian Institutes of Health Research Banting Postdoctoral Fellow, Faculty of Law / Institute for Health and Social Policy, McGill University. Maxime St-Hilaire is an Associate Professor, Faculty of Law, University of Sherbrooke.

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The Absolute Limits of Canada’s Emergency Powers: The Unwritten Constitutional Principles Entrench Rights that Remain Non-Derogable in

Extremis

Since the launch of the Centre for Constitutional Studies' *Pandemic Powers and the Constitution* Blog, a number of thought-provoking posts have been penned by leading scholars in the areas of public law, health law, and constitutional law, including the contributions of Professors David Dyzenhaus, Paul Daly, Sujit Choudhry, Amy Swiffen, and Maxime St-Hilaire.

This post builds upon their observations about the constitutional limits of emergency powers implicit to the statutes that authorize them, the division of powers established by the *Constitution Act, 1867,* and the *Canadian Charter of Rights and Freedoms.* It presents the author's position that there is another important source of rights in Canada; it is in our constitution's grand entrance hall that Canadians should seek the principles that safeguard our most fundamental rights –regardless of the nature or scale of any future pandemic or public order emergency. Should these principles receive explicit recognition by the Canadian judiciary, this would also make it indisputable that Canada remains in compliance with its most rudimentary international obligations, namely those enumerated in Section 4.2 of the International Covenant on Civil and Political Rights (as interpreted by the Siracusa Principles on the Limitation and Derogation of Rights in the ICCPR, and General Comment 29 to the ICCPR of the United Nations Human Rights Committee).

As Dyzenhaus observed, the federal *Emergencies Act* contains a number of important safeguards.[1] First, it contains clear preconditions to its invocation. Most notably, this includes the requirement found in Section 8 (3) that any crisis it seeks to address "exceed the capacity or authority of a province to deal with it" before the cabinet can declare a public welfare emergency and issue emergency orders that

address it.[2] Additionally, the *Emergencies Act* also recognizes the substantive limits of the federal government's emergency powers: its Preamble notes that while the Act authorizes "special temporary measures that may not be appropriate in normal times . . . . the Governor in Council . . . must have regard to the *International Covenant on Civil and Political Rights,* particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency."[3]

Unfortunately, all of the copious emergency orders promulgated during the COVID-19 emergency were authorized by provincial emergency statutes –none of which recognize the existence of non-derogable rights, or the substantive limitations on these powers. Unlike the *Emergencies Act,* these provincial statutes frequently contain residual clauses that empower the Lieutenant Governor in Council to issue orders of a type not otherwise enumerated, as long as they are necessary to addressing the emergency.[4] Paradoxically, the procedural safeguards of the *Emergencies Act* shifted the locus for the authorization of emergency powers to provincial statutes that do not recognize the existence of non-derogable rights, or the requirement to respect them in every emergency, no matter how severe.

As Daly and Choudhry have both noted in their contributions to this blog, a number of provincial emergency orders promulgated under the authority of these statutes strain the limits of constitutionality, at best. The scope and effects of these powers also exacerbate the familiar problem of executive unaccountability during a crisis. As Swiffen observed in her post, the *Charter* is not well-suited to the task of protecting individual rights during an emergency, as there is a clear judicial tendency to accept the limitation of these rights for the sake of public health.[5] Indeed, in Ontario, courts have noted more than once (albeit in *obiter)* that even section 7 rights might be subject to limitation in this context.[6]

Additionally, provincial legislators are for the first time considering foreclosing *Charter* challenges to public health measures entirely, by invoking the notwithstanding clause.[7]

Conversely, lawsuits which allege that provincial emergency measures are *ultra vires* (such as the Canadian Civil Liberties Association's challenge to Newfoundland's infringement of interprovincial mobility rights)[8] preclude their justification as reasonable limitations on rights. That said, these federalism challenges might be a Pyrrhic victory for those seeking to protect fundamental (and non-derogable) rights from infringement in future emergencies, as any judicial determination that a measure is *ultra vires* one level of government suggests that it is *intra vires* the other. Unfortunately, it remains to be seen if the federal government and the courts would treat the Preamble of the *Emergencies Act* reference to the ICCPR's non-derogable rights as anything more than precatory; it is lamentably true that this Covenant is not self-executing, and therefore not a free-standing source of enforceable rights.[9]

The primeval question that any emergency puts to civil libertarians is this: Are there *any* fundamental legal rights that both the federal government and the provinces are bound to respect, despite the seriousness of the crisis? They must be sought outside of the *Charter,* owing to its provisions for limitation and derogation of rights (i.e., ss. 1 & 33), and must also be anterior to sections 91 and 92 of the *Constitution Act, 1867,* as they merely divide the heads of power that authorize emergency powers between Parliament and the provincial legislatures.

The signpost that points the way to the ultimate source of our most fundamental rights is the *Provincial Judges Reference*,[10] in which Chief Justice Lamer recognized that the Preamble to the *Constitution Act, 1867* had embedded the principle of judicial independence of the *Act of Settlement, 1701* into the Constitution, thereby creating a substantive

limit to both federal and provincial legislation. This principle undergirds the narrower *Charter* right to judicial independence (which, unlike the right protected by the unwritten constitutional principle, is also subject to both limitation and derogation).

Elsewhere, I have demonstrated at length how the Preamble's guarantee to Canada of a constitution similar in principle to that of the United Kingdom entrenched not only the principle of the *Act of Settlement* that protects an independent judiciary, but also the principles found in five other statutes, all of which were universally considered at the time of Confederation to be essential elements of the Constitution of the United Kingdom.[11] These statutes[12] memorialize the constitutional principles that protect the rights not to be extrajudicially killed, or subjected to emergency powers not authorized by statute, or tortured, or subjected to indefinite arbitrary detention, or punished for what is said during parliamentary proceedings, or subjected to cruel and unusual punishment or excessive bail.[13] This set of rights, which is broadly congruent with those found in Article 4.2 of the ICCPR, were entrenched precisely because they had been infringed during wars, insurrections, and emergencies.

After the COVID-19 pandemic, it will be easier to imagine measures being enacted during public welfare emergencies that would infringe even our most fundamental rights, particularly by authorizing indefinite arbitrary detention. If provincial legislation mandating an open ended shelter-in-place order were to be challenged in court, only the unwritten constitutional principle entrenched by the Preamble would unequivocally address the infringement of this right (which is recognized by international law to be non-derogable);[14] this principle is also the only source of that right which would continue to provide protection should a legislature invoked the notwithstanding clause to override the *Charter* right not to be subjected to arbitrary detention, as section 9 is

explicitly subject to section 33.

It should also be noted that it follows from the construction of the Preamble which I propose that the principles of the *Habeas Corpus Act, 1679* are also constitutionally entrenched and absolute. Accordingly, it would fulfill the requirement in international law that "the protection of rights explicitly recognized as non-derogable . . . must be secured by procedural guarantees".[15] (The untrammelled ability to petition for the great writ, which compels the government to provide a rational basis for continued detention, also serves to preclude involuntary disappearances during major public order emergencies. This protection is essential, as unacknowledged detentions all too frequently enable serious violations of other fundamental and non-derogable rights, such as the right not to be tortured.)

A definitive judicial enumeration of non-derogable Canadian constitutional rights that are beyond the reach of the notwithstanding clause might also mitigate the effects of the Schmittian paradox identified by St-Hilaire in his contribution. If this set of entrenched rights was made clear, governments might no longer fear the perception that the normalization of section 33 might lead to a lawless state of exception. A future in which Canada invoked the notwithstanding clause to deal with emergencies (and filed notices of derogation with the Secretary-General, as the ICCPR requires) might lead to more effective emergency measures, balanced by the explicit recognition that the government must continue to respect the rights recognized both domestically and internationally as non-derogable during every emergency, no matter serious.

The COVID-19 emergency highlights the urgency of locating a source within the Canadian constitutional order of enforceable and non-derogable rights of the type already universally recognized in international law. Judicial recognition of the unwritten constitutional principles embedded by the Preamble

of the *Constitution Act, 1867* is the most straightforward approach to that end.

*Associate Professor, Bora Laskin Faculty of Law, Lakehead University.

[1] David Dyzenhaus, *Canada The Good?* Pandemic Blog of the Centre for Constitutional Studies, University of Alberta (published April 27, 2020), available online at: https://ualawccsprod.srv.ualberta.ca/2020/04/canada-the-good/

[2] Emergencies Act, RSC 1985, c 22 (4th Supp).

[3] *Ibid.*

[4] See, e.g. *Emergency Management and Civil Protection Act (Ontario),* s. 7.0.2(4)(14) RSO 1990 c E.9.

[5] Amy Swiffen, *The One v. the Many: When Public Health Conflicts with Individual Rights,* Pandemic Blog, *Centre for Constitutional Studies* University of Alberta, published 14 May 2020, available online at: https://ualawccsprod.srv.ualberta.ca/2020/05/the-one-vs-the-many-when-public-health-conflicts-with-individual-rights/

[6] Canadian AIDS Society v Ontario, [1995] 25 OR (3d) 388, OJ No 2361 (Ct J (Gen Div)); *Toronto (City, Medical Officer of Health) v Deakin*, [2002] OJ No 2777, 115 ACWS (3d) 338 (Ct J (Gen Div)).

[7] A Bill is currently before the New Brunswick legislature that would invoke s. 33 to protect mandatory vaccinations from a *Charter* challenge. Jacques Poitras,"PC ministers spar over vaccination bill, but debate unexpectedly delayed" CBC News, 27 May 2020, available online at: https://www.cbc.ca/news/canada/new-brunswick/vaccination-bill-11-new-brunswick-cardy-anderson-mason-1.5586973

[8] Sean Fine, "Newfoundland faces court challenge to ban on non-essential travel from outside province", The Globe and

Mail, 20 May 2020, available online at: https://www.theglobeandmail.com/canada/article-newfoundland-faces-court-challenge-to-ban-on-non-essential-travel-from/

[9] Peter Rosenthal, "The New Emergencies Act: Four Times the War Measures Act", (1991) *Manitoba Law Journal* 563, 1991 CanLIIDocs 129.

[10] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [[1997] 3 S.C.R. 3.

[11] Ryan Alford, *Seven Absolute Rights*: *Recovering the Historical Foundations of Canada's Rule of Law* (McGill-Queens' University Press, 2020).

[12] Namely, *Confirmatio Cartarum 1297* (the statutory enactment of Magna Carta, as clarified and amplified by the Six Statutes of Due Process); the *Petition of Right, 1628,* the *Act Abolishing the Star Chamber, 1640*, the *Habeas Corpus Act, 1679,* the *Bill of Rights, 1689,* and the *Act of Settlement, 1701*.

[13] Ryan Alford, *Seven Absolute Rights*: *Recovering the Historical Foundations of Canada's Rule of Law* (McGill-Queens' University Press, 2020), 73-134.

[14] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, s. 70(b), Annex, UN Doc E/CN.4/1984/4 (1984)

[15] Human Rights Committee, General Comment 29, States of Emergency (article 4), s. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

"The New Normal": COVID-19 and the Temporary Nature of Emergencies

In the inaugural post for this series on Canadian law and the COVID-19 pandemic, David Dyzenhaus argued that the federal government should not invoke the federal *Emergencies Act*, but rather, Canadian responses to COVID-19 should continue to employ our usual constitutional and legal frameworks. Dyzenhaus identified four reasons to be cautious about employing the *Emergencies Act*. I agree with his post, and I want to highlight another consideration that should inform the debate around whether to employ emergency frameworks: namely, the likelihood that the threat of COVID-19 is a long-term reality or, in the words of our Chief Public Health Officer, Dr. Theresa Tam, "the new normal".[1] This blog post draws on scholarship from the security and anti-terrorism field to caution about operating outside the usual legal frameworks to deal with the pandemic. To be clear, I recognize that governments may need to employ exceptional measures to tackle the destructive spread of the virus. However, I suggest that these exceptional measures should be taken through usual constitutional and legal frameworks and we should resist changes to legal or constitutional norms, such as, for example, erosion of constitutional and Indigenous rights, employment of the notwithstanding clause, departures from federalism constraints, or violations of unwritten principles like the rule of law.

In the context of the state's response to terrorism, an ongoing debate centres around whether emergency powers are necessary to properly deal with the threat or whether terrorism can be sufficiently addressed within usual criminal frameworks. Invocation of exceptional measures is typically

justified on the basis that the ordinary system is not up to handling the threat and that, once the crisis passes, the usual state of affairs can and will return. However, some anti-terrorism scholars have argued that using emergency powers entails risks to ordinary legal frameworks. There's the real possibility that measures introduced as emergency ones may become permanent. This has certainly been the case for many anti-terrorism measures across the globe.[2] Invocation of emergency powers also relaxes social prohibitions against their use, facilitating use of greater powers in the future. Oren Gross & Fionnuala Ní Aoláin observe:

> What were deemed exceptional emergency actions in the past may now come to be regarded as normal, routine, and ordinary, in light of more recent and more dramatic emergency powers. As our understanding of normalcy shifts and expands to include measures, powers, and authorities that had previously been considered special, exceptional, and extraordinary yet necessary to deal with emergency, the boundaries of new exceptions are pushed further to include new and more expansive powers and authorities.[3]

Some scholars have questioned the premise underlying emergency powers, namely the notion that there is a tidy and clear-cut separation between "normalcy" and "emergency".[4] But urgent circumstances and the powers invoked to deal with them tend not to have clear end points. Emergency is less easily separated from normalcy than we might assume.[5]

The threat of violence from extremism differs, of course, from the threat of illness from a virus in several significant ways, but the lessons learned from the anti-terrorism field ought not be ignored completely. It seems increasingly likely that the threat presented by the novel coronavirus is not going to end anytime soon. An official at the WHO has warned that the virus may become "endemic", meaning it is ever-present in communities.[6] Herd immunity is far from an ideal solution: the number of people infected by the virus so far is

much lower than what is needed to achieve herd immunity (and that's leaving aside the number of people that will die with widespread infection, as well as uncertainties about the length of immunity).[7] A vaccine is thought to be necessary for us to return to our pre-pandemic lives, with 12-18 months often given as a timeline.[8] But that's a best-case scenario.[9] A more realistic time frame places vaccine development at several years.[10] For other diseases, five years to a decade is a normal time frame to develop a vaccine.[11]

If the crisis is no longer temporary, one of the justifications for employing emergency powers falls away. How our society looks in 12 months, in two years, and even further down the road, is uncertain. But it seems clear that the virus and its accompanying societal changes are not short-term and require us to think and act on the scale of years. Accordingly, we should keep in mind the real possibility that any laws or constitutional changes brought in to fight the virus are going to be with us for a long time. During a time of uncertainty and death, we are likely to let these changes slide with little objection (see the quick passage of anti-terrorism legislation across the western world after 9-11 as an example). As we live with these changes for a long time, the possibility of normalization increases. As much as we can deal with the situation under usual frameworks, we should strive to do that, and resist the upending of these frameworks when we may not have the time or political will to question those changes closely.

*Sarah Burningham, Assistant Professor, College of Law, University of Saskatchewan

[1] Peter Zimonjic, Rosemary Barton & Philip Ling, "Tam says the pandemic will bring a 'new normal' to workplaces, defends WHO's performance", CBC News (28 April 2020), online: https://www.cbc.ca/news/politics/tam-who-defend-new-normal-pandemic-covid-coronavirus-1.5548285.

[2] Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press 2006) at 176-79.

[3] Ibid at 228.

[4] See e.g. David Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald J Daniels, Kent Roach & Patrick Macklem, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press, 2001) 21 at 45.

[5] Dyzenhaus, ibid at 45-48; Gross & Ní Aoláin, supra note 2 at 171-73.

[6] "WHO emergencies chief says novel coronavirus may be here to stay", CBC News (14 May 2020), online: https://www.cbc.ca/news/world/who-novel-coronavirus-1.5569227.

[7] Kaleigh Rogers, Julia Wolfe & Laura Bronner, "Without A Vaccine, Herd Immunity Won't Save Us", FiveThirtyEight (13 May 2020), online: https://fivethirtyeight.com/features/without-a-vaccine-herd-immunity-wont-save-us/.

[8] Brian Platt, "'The new normal': Prepare for smaller COVID-19 outbreaks for months to come, Trudeau says", National Post (9 April 2020), online: https://nationalpost.com/news/the-new-normal-prepare-for-smaller-covid-19-outbreaks-for-months-to-come-trudeau-says.

[9] Shannon Palus, "It Will Probably Take Longer Than 12 to 18 Months to Get a Vaccine", Slate (1 May 2020), online: https://slate.com/technology/2020/05/vaccine-timeline-coronavirus.html; Rob Picheta, "What happens if a coronavirus vaccine is never developed? It has happened before", CNN (4 May 2020), online: https://www.cnn.com/2020/05/03/health/coronavirus-vaccine-never-developed-intl/index.html.

[10] Ibid.

[11] Ibid.

Indigenous Peoples and COVID-19: Protecting People, Protecting Rights

The past month has brought sweeping, unprecedented change as individuals, communities and nations around the world struggle to deal with the COVID-19 pandemic.

Efforts to contain the virus include significantly increased government powers and corresponding limits on civil liberties, as well as disruptions to individuals' ability to work, socialize and care for one another.

In Canada, Indigenous Peoples stand to be disproportionately affected by both COVID-19 and government measures intended to limit its spread. These impacts are a direct result of the historic and ongoing process of colonization. Below, we highlight some of the key issues raised by our clients and other Indigenous groups as the pandemic situation evolves.

Health & Culture

It is widely acknowledged that Indigenous Peoples are more likely than other Canadians to experience severe health outcomes as a result of COVID-19.

Indigenous communities have, on average, higher percentages of members with pre-existing health issues, families living in substandard and overcrowded housing, and lack of access to clean drinking water and adequate medical services.

These factors are exacerbated by the historic trauma of the introduction of infectious diseases to Indigenous communities by Europeans, and by the fact that Indigenous societies place a priority on respecting and learning from Elders, who in turn are particularly vulnerable to COVID-19.

Critically, the factors that contribute to Indigenous communities' susceptibility to COVID-19 are not new – they are well-known issues which exist as a consequence of decades of action, or inaction, on the part of the federal and provincial governments to ensure the health and wellbeing of Indigenous Peoples.

Indigenous Peoples are also uniquely affected by social distancing requirements intended to slow the spread of the virus.

Health professionals have issued warnings that communities should temporarily halt cultural activities such as sweat lodges in order to avoid transmitting the disease to Elders or other vulnerable members.

While necessary for health reasons, these directions run contrary to Indigenous Peoples' approach to relying on familial and community support in times of crisis, and make it more difficult for communities to maintain ties to their cultures and traditions. It also imposes new challenges for Indigenous Peoples seeking to exercise their own laws and maintain traditional governance systems.

Title & Rights

In response to the COVID-19 pandemic, many First Nations have closed their band offices, restricted access to their

communities and otherwise diverted resources to deal with pressing health concerns.

At the same time, First Nations are reporting that the Crown and proponents continue to send referrals for resource development projects in their territories. These ongoing operations increase the risk of the pandemic undermining Indigenous Peoples' efforts to safeguard their ancestral lands for the use and benefit of current and future generations.

Some provincial governments have issued interim guidelines for consultation which direct Crown decision-makers to take into account First Nations' ability to respond to referrals in light of the pandemic.

Overall, however, the Crown has yet to clarify how it will protect Indigenous Peoples' title and rights during the COVID-19 crisis, and in particular, whether it will continue to make decisions which could affect those rights at a time when First Nations cannot meaningfully participate in consultation.

More broadly, the Crown and industry should not use this time as an opportunity to advance projects on Indigenous lands in the absence of proper consultation. This is especially important given that many courts in Canada have limited or suspended hearings, resulting in potential delays in Indigenous Peoples' ability to challenge government decisions which affect their title and rights.

Resource Development & Work Camps

Indigenous Peoples have repeatedly raised concerns about risks associated with industrial development on their ancestral territories during the pandemic, including the risk that transient workers in remote industrial camps will spread the coronavirus to their communities.

The former Chief Medical Health Officer for Northern Health in

B.C. has likened the work camps to “land locked cruise ships” which, if not shut down, will become “COVID-19 incubators” which will place both workers and local communities at heightened risk.

The need for urgent action on this issue was highlighted last week, when a worker at LNG Canada’s planned export facility in Kitimat, the intended end-point for the Coastal GasLink pipeline, tested positive for COVID-19.

To date, the Crown has largely ignored Indigenous Peoples’ concerns about this issue. Instead, large-scale industrial projects have been designated as “essential services.” As a result, resource projects, including the contentious Coastal GasLink pipeline and Trans Mountain expansion project, are proceeding despite the recognized health risks posed to Indigenous communities.

Looking Ahead

Less than six weeks ago, national headlines were dominated by the dispute between Wet’suwet’en Hereditary Chiefs and the Coastal GasLink pipeline project. Indigenous organizations and legal professionals across Canada highlighted the significant underlying legal issues associated with the dispute, including the outstanding issue of who has the right to make decisions on lands subject to Indigenous title.

This dispute has not gone away, nor is it resolved. Indigenous Peoples remain committed to protecting their lands and their rights, regardless of the challenges posed by the pandemic.

Whatever the circumstances, the Crown remains obligated to act honourably towards Indigenous Peoples.

In the current situation, the Crown must take immediate steps to ensure proper, equitable access to health care for Indigenous communities.

Just as crucially, the Crown must ensure that industrial development does not proceed unchecked while First Nations scramble to protect their most vulnerable members from the potentially devastating impacts of COVID-19.

The Crown has a choice in how it addresses Indigenous issues in the face of the pandemic. Its response could replicate Canada's history of introducing disease and disregarding Indigenous concerns, or it could build a new path forward that supports Indigenous Peoples in a way that is responsive to and respectful of their specific priorities and issues, including the overriding importance of protecting their title, rights and ancestral lands.

Like the rest of Canada, Indigenous Peoples are being asked to make difficult sacrifices in the name of our collective health and wellbeing. They should not also be forced to choose between protecting their members' health and their continued ability to exercise their title and rights.

[*] Lawyer at First Peoples Law Corporation. *Kate completed her Master's of Law at the University of British Columbia. Her most recent academic essay, "Agreeing to Share: Treaty 3, History & the Courts," was published in the UBC Law Review.* This post is published with permission from First Peoples Law Corporation, https://www.firstpeopleslaw.com/index/articles/449.php.

Justice in Troubled Times:

Pandemic Disrupts the Right to be Tried Within a Reasonable Time

INTRODUCTION

On March 11, 2020, the World Health Organization declared SARS-CoV-2 (COVID-19) a pandemic. The world, and the administration of justice in Canada, changed dramatically within days.

As pertinent examples of the effects on the administration of justice: circuit courts closed; the public were excluded from court rooms; criminal and civil court matters were summarily adjourned far into the future, sometimes with warrants "held," although the accused were precluded from attending; trials were adjourned.

This list is not intended to be exhaustive but highlights the events that may cause breaches of section 11(b) of the *Charter of Rights and Freedoms*, which protects the rights of individuals to be tried within a reasonable time.

At the time of writing, this author knows of no case brought alleging delay caused in any part by the pandemic. This paper discusses the potential for such a case, and what courts and counsel may do to mitigate potential breaches of section 11(b).

PRESENT LEGAL FRAMEWORK

The administration of justice is still groaning from changes made to section 11(b) law with the release of the Supreme Court's decision in *R v Jordan*[1] and from further changes made by the same court in *R v KJM*,*[2]* and, to a lesser extent, *R v Cody*.[3]

Those keen on the administration of justice noted the fundamental shift of fault from the prior *Sharma/Morin* or *Morin/Askov* framework.[4] Formerly, any period of delay which was not caused by defence counsel, or waived by defence, was a period that worked in favour of an application that there had been a breach of section 11(b). Now, essentially, the only periods of delay which work in favour of the 11(b) application are those periods of time caused by the Crown.[5]

Perhaps fortuitously, the *Jordan* framework has a precise mechanism to deal with the pandemic as a cause of delay. Exceptional circumstances, a new concept to 11(b) law, and already applied generously in favour of State actors to the detriment of 11(b) complainants,[6] cannot be found to have caused a period of delay – provided the Crown has acted reasonably to mitigate. The majority in *Jordan* defined "exceptional circumstances" broadly and not exhaustively:

> Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon. …
>
> …It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(b) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.
>
> Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or

> the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.[7]

It may be therefore possible for someone whose section 11(b) rights have been aggrieved in the context of the pandemic to argue that some period of the pandemic delay weighs in favour of the application where: 1) the pandemic was foreseeable; 2) the Crown did not reasonably mitigate the period of delay; 3) the Court and/or Crown failed to give appropriate priority to disposition of the particular charges.

IS A PANDEMIC A FORESEEABLE EVENT?

An exceptional circumstance is one that is either “reasonably unforeseen or reasonably unavoidable.” While there is, in the circumstances of pandemic, room to argue that it should have been foreseen by authorities earlier than it was, it is highly unlikely that a court would find that a Crown, in and of itself, could have reasonably avoided a pandemic. I expect that, if challenged, an exceptional circumstance need only meet one of the conditions of “reasonably unforeseen or reasonably unavoidable.”

However, at the time of writing, arguments abound concerning the degree of responsibility of State actors for acting negligently or carelessly. It is impossible to predict how that public dialogue will end and whether remedy will be warranted for particular citizens, most notably prisoners or section 11(b) complainants.

REASONABLE MITIGATION

The scope and nature of duties of counsel and Crown to advance a delayed proceeding are outside the purpose of this paper. Consider, however, what is the role of the Crown? Suffice to say for the moment, from the above passage, that the Crown must mitigate delay from pandemic.

What may be the role of defence counsel? *Jordan*, as further elaborated by *KJM*, appears to place positive obligations on defence counsel where prior law, not over-ruled, did not.[8] From *R v Coulter*:

> Defence-caused delay is comprised of situations where the acts of the defence either directly [and solely] caused the delay or are shown to be a deliberate and calculated tactic employed to delay the trial. Frivolous applications and requests are the most straightforward examples of defence delay. … [Subject to a court's assessment of the legitimacy of a defence position], [w]here the court and the Crown are ready to proceed but the defence is not, the defence will have directly caused the delay.[9]

On a hotly contested point in *KJM*, the majority further directed in *obiter* that defence counsel need also act "proactively."[10]

So the Crown must mitigate. How?

This writer is aware that courts have, without submissions of counsel, summarily adjourned docket and trial matters due to the pandemic. Where the courtrooms were closed and the court parties appeared via electronic means, bench warrants may have been issued but held until a return date far in the future.

On the last point, where accused persons fail to attend court on the date far-fixed, will there be jurisdiction to release the warrant, or jurisdiction to order for a warrant held? Should the Crowns be directing service of fresh compelling documents in advance of the return date? Getting the cattle back in the gates after they have been left to pasture all summer could be a cumbersome – and delay causing – task.

Summary adjournments will create problems. *Jordan* still applies during pandemics in Canada. This means that the Crown, on every file at every appearance, has a standing duty to mitigate. Was there anything substantial that may have been

done on an adjourned file? Some courts are sentencing by video and over phone, for examples.

With respect to trials, they should not be adjourned summarily. The circumstances of every trial needs be examined to determine whether the trial should, and could, be held in accordance with published health guidelines. This approach was taken in Québec recently, where the court[11] firmly set out that trials of prisoners are to be expedited and the Crown burden to continue the prosecution was there not excused. Citing section 11(b) of the *Charter*, *inter alia*, the trial was ordered to continue, *albeit* with an Order for appropriate health and safety measures.

> FOR THESE REASONS, THE COURT:
>
> DISMISSES the request [by the Prosecution] to postpone the prosecution.
>
> DECLARES that this is an urgent matter.
>
> DECLARES that the trial will take place in Chibougamau with videoconference in Roberval (presence of the judge in the courtroom) and in a detention facility preferably in Roberval if transportation from Quebec City is possible given the health emergency context.
>
> DECLARES that various preventive health measures will be taken at trial.[12]

Note the presumption that the trial would proceed. The onus was on the Crown, if it believed otherwise, to persuade the Court that it should be adjourned. The procedure in this case should be held out as the standard approach to considering the merit of proceeding with or adjourning a scheduled trial. This position accords with the requirement set out in *Jordan* that the Crown has a duty to mitigate delay.

PRIORITIES POST-PANDEMIC

KJM was the Supreme Court's opportunity to clarify whether youth matters deserve special consideration in the *Jordan* framework.[13] In so doing, the Supreme Court accepted that "certain groups" of persons experience "heightened prejudice"[14] and therefore demand priority in the administration of justice:

> Second, [in response to the urging of the Supreme Court to set a different "presumptive ceiling for youth], *Jordan* established a uniform set of ceilings that apply irrespective of the varying degrees of prejudice experienced by different groups and individuals. Setting new ceilings based on the notion that certain groups – such as young persons – experience heightened prejudice as a result of delay would undermine this uniformity and lead to a multiplicity of ceilings, each varying with the unique level of prejudice experienced by the particular category or subcategory of persons in question. Young persons in custody, young persons out of custody, adults in custody, adults out of custody, persons whose custody status changes, persons with strict bail conditions, persons with minimal bail conditions, persons who experience heightened memory loss, and others could all lay claim to their own distinct ceiling….
>
> For these reasons, I would not alter the *Jordan* ceilings to apply differently to youth justice court proceedings. But that does not mean an accused's youthfulness has no role to play under the *Jordan* framework. …the enhanced need for timeliness in youth matters can and should be taken into account when determining whether delay falling *below* the presumptive ceiling is unreasonable…[15]
>
> …Jordan established *ceilings*, not *floors*…

"No" to different presumptive ceilings for different accuseds (or groups of accuseds). "Yes" to different non-presumptive floors; depending on the "circumstances" or "special concerns"

of a prejudicial nature[16] that are brought timely by defence to the court. That is *KJM* in the simplest terms.

It is submitted that defence counsel need to identify clients with "heightened prejudice" and promote the interests of those clients in accordance with *KJM*.[17] Resistance from the court or Crown to prioritization of a special case should be made a matter of record because, although the majority in *Jordan* predicted that the new framework would cause less litigation over fault for adjournment, matters of record are important facts of every *Jordan* application. And any matter could potentially bump up against *Jordan*…

* Owen Griffiths (B.A.1987, LLB 1996) has been practicing criminal law almost exclusively since 2008. He clerked at the Saskatchewan Court of Appeal and published articles in the areas of Aboriginal law and Criminal Law. He is keenly interested in the "administration of justice" directed by section 11(b) of the *Charter.* A common theme of his writing explores the jurisdictional relationships between State actors and members of the public, as those relationships are developed at law.

[1] 2016 SCC 27 [*Jordan*], to be read in conjunction with *R v Williamson*, 2016 SCC 28

[2] 2019 SCC 55 [*KJM*].

[3] 2017 SCC 31.

[4] *R v Sharma*, [1992] 1 SCR 814, 134 NR 368; *R v Morin*, [1992] 1 SCR 771, 134 NR 321; *R v Askov*, [1990] 2 SCR 1199, 74 DLR (4th) 355 [*Askov*].

[5] From *Jordan*, *supra* note 1 at para 90, if the Crown and the justice system take reasonable steps to respond to this concern of particular prejudice and do their part to ensure that the matter proceeds expeditiously, then "it is unlikely that the reasonable time requirements of the case will have

been markedly exceeded." These words have significant implication about the process, as do similar words from same decision that "a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary" (*ibid* at para 112). There is an argument to be made that application of *Jordan* in this way has deleterious effects on section 7 of the *Charter*, where there has not been careful examination of the scope of changes emanating from *Jordan*, see Owen Griffiths, "Jordan: A Policy Statement Concerning the Administration of Justice" [forthcoming].

[6] *KJM*, *supra* note 2 at paras 99–102; *Jordan*, *supra* note 1 at paras 81ff.

[7] *Jordan*, *supra* note 1 at paras 69–72 [emphasis in original].

[8] The Crown, more broadly defined as the State, is responsible for bringing accused persons to trial and for the provision of facilities and staff to see that accused persons are tried in a reasonable time, see *Askov*, *supra* note 4 at 1225, Cory J. The Nova Scotia Court of Appeal in *R v MacIntosh*, 2011 NSCA 111, stated that the burden is on the Crown to exercise diligence in bringing someone to trial, and that "inaction" by an accused is never relevant to examining the reasons for delay (*ibid* at para 69). This is due to the principle that there is no duty on the accused to bring himself to trial (*ibid* at paras 47–50). This law has not been expressly overruled.

[9] *R v Coulter*, 2016 ONCA 704 at para 44, referencing *Jordan*, *supra* note 1 at paras 63–64 [parenthetical statements added].

[10] See *KJM*, *supra* note 2 at para 220.

[11] *R c Raphaël-Fontaine*, 2020 QCCQ 1232 relying upon *R* c *Myers*, 2019 SCC 18 , para. 4 and *R* v *Hall*, [2002] 3 SCR 309, 2002 SCC 64 para. 47 to emphasize the cost of liberty and the

need for expedited trials of prisoners.

[12] *Ibid* at paras 24–28 [translated by author]. These reasons fully coincide with *KJM*, discussed below.

[13] Particularly whether for youth the 'threshold ceiling', where delay is deemed unreasonable, ought to be lower.

[14] There again is much to be said about a reference to "groups," where individuals are the 11(b) right holders, as well as the reference to "prejudice," a concept which *Jordan* tried to put to bed. Such discussion is beyond the scope of this paper.

[15] *KJM*, *supra* note 2 at para 65. Justice Karakatsanis added to the reasons of the small majority on this point (*ibid* at paras 217, 218): "…Indeed, given the legislatively mandated and greater need for timeliness in the youth criminal justice system, it necessarily follows that delay in a proceeding against a young accused will become "markedly longer than it reasonably should have [been]" sooner, perhaps significantly so, than it will in a proceeding against an adult. … Therefore, stays below the ceiling in the youth context will not be "rare" or limited to "clear cases". …

[16] *KJM*, *supra* note 2 at para 73. Note that the flavour of the special concern, from the example provided, is of "actual prejudice" – to use the pre-Jordan language.

[17] The ethics of promoting an earlier trial date of one client over another is a flagged topic of interest.

Additional Resources

Federalism & the COVID-19 Pandemic – A compendium of (re)sources

Peter Mackel Chair in Federalism, Faculty of Law, McGill University

Fédéralisme et pandémie de COVID-19 – Un compendium de (res)sources

Chaire Peter Mackel sur the fédéralisme, Faculté de droit, Université McGill