Part Two: COVID-19 & the Canadian Constitution

Part 2 of 2

In Part 1 of his Blog Post, Professor Choudhry explores the constitutional issues arising from lock downs (such as freedoms of religion, expression, assembly and association, equality rights, and rights to life, liberty and security of the person), contact tracing via cellphone data (privacy rights) and resource allocation decisions in hospitals for end-of-life care (equality rights, and disability discrimination claims for example). ***Read Part 1***

In Part 2 of his Blog Post, he explores the federal-provincial division of powers with respect to public health (including interprovincial transport and the Emergencies Act) and the delegation of legislative powers by Parliament and provincial legislatures to the executive. Read Part 2 of Professor Choudhry's Post below.

4. **Federal-provincial division of powers**

- ***Public health***: The COVID-19 pandemic has brought to the fore the complicated relationship between federal and provincial jurisdiction over public health. On the one hand, the provinces have historically been viewed as having primary responsibility for creating public health institutions and laying down public health norms. The front-line response to COVID-19, such as closing down non-essential businesses, government offices and schools, and sharply restricting the use of public property, has been led by local and provincial public health authorities. But on the other hand, the COVID-19 pandemic originated outside Canada, is global in scope, and requires a coordinated, comprehensive international response. Moreover, an infectious disease outbreak in one province affects all the others, because of inter-provincial mobility — COVID-19 does not respect provincial borders. The international and interprovincial dimensions of public health can only be addressed by the federal government.

Intergovernmental cooperation has been central to the response to COVID-19 (for example, with respect to international procurement). However, this cooperation has not been taking place in accordance with Canada-wide public health norms about surveillance, outbreak investigations, and outbreak management, because there are no such Canada-wide public health norms at present.

In its report, *Learning from SARS: Renewal of Public Health in Canada (2003)*, the National

Advisory Committee on SARS and Public Health recommended the adoption of Canada-wide public health norms through the creation of a new legislative services agency, the Canadian Agency for Public Health. That agency would have flowed earmarked federal funds to front-line local and provincial/territorial public health agencies, in exchange for compliance with Canada-wide public health norms developed through negotiations among federal/provincial/territorial public health professionals. While Parliament adopted legislation to create the Public Health Agency of Canada, the Agency was never given this mandate.

At this stage of the crisis, federal/provincial/territorial cooperation may be working sufficiently well that this underlying structural issue need not be addressed at present. However, it is worth considering two options for creating Canada-wide public health norms.

- ***Emergencies Act***: The COVID-19 pandemic meets the definition of a "public welfare emergency" under s. 5 of the federal *Emergencies Act*. Pursuant to s. 8(1), the Governor-in-Council could issue regulations setting out Canada-wide public health norms that would bind health care institutions and professionals. However, the *Emergencies Act*suffers from three main shortcomings: (a) declarations of public welfare emergencies expire at the end of 90 days unless they are continued by a positive vote of both houses of Parliament; (b) orders and regulations under s. 8(1) must be "temporary" and cannot create public health norms that outlast the emergency, which is meant to eventually come to an end; and (c) Canada-wide public health norms would be seen as a federal takeover of provincial and territorial public health systems, which could give rise to intergovernmental tensions and create difficulties of implementation, especially if there are no accompanying federal transfers to provincial and territorial authorities. In addition, unilateral actions might run afoul of s. 8(3)(a), which provides that the G-in-C's power shall not be exercised or performed to "unduly impair the ability of any province to make measures, under an Act of the legislature of the province, for dealing with an emergency in the province" and "with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed".
- **New federal legislation**: The federal government could propose legislation that vests the Public Health Agency of Canada with the power to establish Canada-wide public health norms, and which would be based on the following principles: (a) the legislation would apply in a province unless the Agency were to determine that the provincial public health

norms were substantially similar to Canada-wide public health norms (the "backstop"); and (b) the federal government would provide earmarked funding to provinces to ensure the effective implementation of Canada-wide public health norms, whether the backstop applies or not. "Backstops" are currently in use in the *Greenhouse Gas Pollution Pricing Act*, PIPEDA, the *Tobacco and Vaping Products Act*, and the *Canadian Environmental Protection Act*. The backstop, coupled with funding, provides provincial and territorial public health authorities with the incentive to comply with Canada-wide public health norms, and with the legal room and financial capacity to innovate and adapt those norms to specific local circumstances. In ideal circumstances, the backstop would not apply in any provincial or territorial jurisdiction.

The constitutional basis for federal backstop legislation would be the Peace, Order and Good Government (POGG) power, which can be exercised in cases of "provincial inability". In *Reference re Securities Act*, the Supreme Court interpreted the idea of provincial inability to encompass federal jurisdiction over "systemic risks". In the economic context, the Court defined systemic risks as "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfill their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system". It reasoned that "by definition, such risks can be evasive of provincial boundaries and usual methods of control". The concept of systemic risk should encompass federal authority to manage global pandemics, as a systemic health risk is characterized by chain reactions and domino effects which do not respect national or provincial borders.

- ***International and interprovincial travel***: International and interprovincial transportation fall under federal jurisdiction. Canada has imposed new border controls, including an interim order under the Aeronautics Actthat air carriers screen Canadian citizens trying to board flights back to Canada and not board those who have suspected signs or symptoms of COVID-19. It has been argued that this policy may be unconstitutional under the *Charter*. Section 6(1) of the *Charter* guarantees the right of every Canadian to enter Canada. A constitutional challenge would turn on whether the federal government has chosen the approach that infringes rights only to the extent necessary — the approach taken may create both false positives (if individuals do not have COVID-19 but are prevented from boarding) and false negatives (if asymptomatic COVID-19 individuals are allowed to board).

Interprovincial travel restrictions also raise potential constitutional issues. A number of

provinces are reported to have set up border checkpoints — for example, along the Nova Scotia-New Brunswick border and on the Alexandra Bridge in Gatineau. Provincial governments are reportedly stopping vehicles, requesting identification, asking travelers about the purpose of their visit, and enforcing a ban against "non-essential" travel. If this is in fact occurring, it raises three constitutional issues. First, under s. 6(2) of the *Charter*, Canadians and permanent residents have the right to economic mobility — that is "to move to and take up residence in any province" and "to pursue the gaining of a livelihood in any province." This right would encompass the inter-provincial provision of a service. However, it does not extend to strictly social travel — for example, to visit an ailing family member. Second, travel for non-economic purposes is arguably protected by s. 7 of the *Charter*, which protects the right to liberty. Third, interprovincial transportation falls under federal jurisdiction, under s. 92(10)(a) of the *Constitution Act, 1867*, which entails that a province "must not prevent or restrict interprovincial traffic", as the Privy Council held in *Attorney-General (Ontario) v. Winner*.

1. **Legislatures and Executives**

Finally, let's turn to the relationship between legislatures and executives. COVID-19 has led executives around the world to propose legislation to delegate legislative powers to them, on the basis that the crisis is so fast-moving that the traditional legislative process cannot keep pace with it. Canada is no exception.

- **Federal:**The first legislative response to COVID-19 was Bill C-13, *An Act respecting certain measures in response to COVID-19*. A draft version of Bill C-13 contained a provision that would have authorized Parliament to change taxes without parliamentary approval until the end of 2021. This portion of Bill C-13 was dropped, in the face of the objections of opposition parties. An interesting question is whether the delegation of tax authority would have been constitutional. Under s. 53 of the *Constitution Act, 1867*, only Parliament — not the federal government — can impose taxes. However, the Supreme Court held in *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)* that the legislature can delegate its power to set taxes to the executive through "express and unambiguous language" in a statute. If the omitted portion of Bill C-13 met this condition, it would have probably been constitutional.
- **Alberta**: Alberta's Bill C-10, the *Public Health Emergency Powers Amendment Act, 2020*, might go one step further. It purports to grant ministers the power, upon the declaration of a public health emergency, to "specify or set out provisions that apply in addition to, or instead of, any provision of an enactment" — that is, the power to amend any legislation, without recourse to the legislative process. The legal question

is whether such amendments are limited in duration to the public health emergency itself, or whether they are permanent. If they are permanent, Bill C-10 contains what is known as a "Henry VIII clause", so named because Henry VIII preferred to legislate through executive proclamation rather than by Parliament. Over a century ago, the Supreme Court ruled that Henry VIII clauses were constitutional, in Re Gray. However that decision was handed down during armed conflict — not a pandemic during peacetime. The constitutionality of Henry VIII clauses during peacetime has been subject to debateand in my view is an open question.

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The COVID-19 pandemic has already thrown up myriad constitutional issues. More will likely emerge in the weeks and months to come. As we craft public policy responses to COVID-19, we will need to be increasingly attentive to the constitutional questions they raise.

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