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
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> > (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:
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> 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.

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