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.

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