

July 10, 2020

Some Comments on Bill 24, the *COVID-19 Pandemic Response Statutes Amendment Act, 2020*

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Lawmaking by the Alberta government in response to COVID-19 has been somewhat disorganized and very non-transparent. As well, Alberta seems to be the only Canadian jurisdiction which seized on the public health emergency as an opportunity to double-down on [Henry VIII](#) lawmaking by the Executive. These are troubling observations in a political system where the legitimacy of governance is based upon an open, accountable, and predictable legislative process. The need to act swiftly and flatten the curve of COVID-19 certainly justified some deviation from the lawmaking norm in a representative democracy, but Alberta has relied extra heavily on executive and delegated legislative authority in its COVID-19 lawmaking. Accordingly, it would have been reasonable to expect the Legislature to restore some normalcy to lawmaking when the state of public emergency ended in Alberta on June 15.

On June 18, the Minister of Health introduced Bill 24, the *COVID-19 Pandemic Response Statutes Amendment Act, 2020* into the Legislature, and most of the Act came into force on June 26 with royal assent. As the Legislature's first comprehensive post-emergency response to COVID-19, as opposed to subject-specific legislation or the lawmaking thus far enacted by the Executive and its delegates, it is disappointing to observe how little this statute offers. However, on its [first reading](#) the Minister of Health did at least promise a forthcoming comprehensive review of the *Public Health Act*, [RSA 2000, c P-37](#), and Bill 24 requires this to commence no later than August 1.

To begin with, it would be helpful to have a framework through which to assess the form and structure of Alberta's COVID-19 lawmaking. Elements of such a framework would include the following:

- **What is the enabling statute?** Alberta has implemented powers under the *Public Health Act*. The alternative for the province was to invoke the *Emergency Management Act*, [RSA 2000, c E-6.8](#).
- **Who exercises delegated authority?** This could include the Lieutenant Governor in Council, individual Ministers, or other officials who receive delegated authority from the Executive. In Alberta, the public health orders have been issued by the Chief Medical Officer of Health (CMOH) under section 29 of the *Public Health Act*, and individual Ministers have also exercised extensive legislative authority to address COVID-19 within the scope of their respective departments.

- **What authority is delegated?** In Alberta, the CMOH has relied on a catch-all provision in section 29(2.1)(b) of the *Public Health Act* to “. . . take whatever other steps are, in the medical officer of health’s opinion, necessary in order to lessen the impact of the public health emergency.” The CMOH has been forced to rely on this general provision because her other powers under the *Public Health Act* are more directed at imposing duties on specific individuals or groups to contain a communicable disease. Ministers have been exercising their power to amend legislation by issuing orders under section 52.1 of the *Public Health Act*.
- **What conditions, pre-requisites, and processes attach to the exercise of legislative power?** In Alberta, the CMOH is required to form an opinion on the need for public health orders, but her powers are not specifically connected to the declaration of a public health emergency. Conversely, the Henry VIII powers granted to Ministers under the *Public Health Act* to amend legislation are connected to the declaration of a public health emergency and the exercise of these powers must be in the public interest.
- **What transparency and political accountability mechanisms are in place to check the exercise of delegated authority?** The process followed in the exercise of executive powers by Alberta ministers and the CMOH is not open to public scrutiny, there are no explicit consultation requirements, and justification obligations are scant. Ministerial orders issued under the *Public Health Act* are exempt from the *Regulations Act*, [RSA 2000, c R-14](#). The CMOH orders appear to simply disregard the requirements of the *Regulations Act*, despite clearly falling within the scope of those requirements in that statute. Public health and ministerial orders on COVID-19 have been published and organized by subject matter at Alberta.ca [here](#), but very little has been published in the [Alberta Gazette Part II](#). The CMOH has granted exemptions from the requirements in public health orders to a lengthy list of specified persons and groups, however the process and criteria applied in granting these exemptions remains shrouded in secrecy. There is no ex post facto review into the exercise of these executive and delegated powers.

In previous ABlawg posts ([here](#), [here](#), and [here](#)) I have explored in more detail some elements of this framework. As we emerge from the initial COVID-19 emergency and face the prospect of subsequent waves of the disease, it would be prudent to take a moment and assess the framework for governance provided by the *Public Health Act* for addressing a public health emergency. Should we face a second wave, Alberta lawmakers will not have the excuse of surprise to govern as they did from March to June.

It is insightful to observe how other jurisdictions have structured their COVID-19 legal powers going forward. For example, the Parliament of New Zealand has now enacted the [COVID 19 Public Health Response Act 2020](#), which delegates specific powers to address COVID-19 related concerns (s 11). The Act prescribes the form and publication requirements for public health orders (s 14) and provides for the disallowance of those orders by the legislative assembly (s 16). The Act also referentially incorporates public health orders applicable to COVID-19 previously issued under general public health legislation (Schedule 1). I have chosen to mention this New Zealand statute because it addresses many of the governance concerns related to the exercise of delegated power to address COVID-19 under Alberta’s *Public Health Act*.

Bill 24 gives little confidence that the upcoming ‘comprehensive’ review of the *Public Health Act* will result in anything more than a bit of tweaking. To begin with, there is some low-hanging fruit which Bill 24 could easily have picked, but did not. There are no provisions in Bill 24 which backtrack on the powers added by the *Public Health (Emergency Powers) Amendment Act*, [SA 2020, c 5](#) to section 52.1 of the *Public Health Act*, which gave Alberta Ministers the extraordinary authority to retroactively legislate without any notice or publication in the [Alberta Gazette Part II](#). The large number of Ministerial orders exercising these Henry VIII powers during the initial COVID-19 emergency phase are listed at Alberta.ca [here](#). The failure of Bill 24 to do or say anything in this regard is particularly noteworthy in light of [statements](#) by Premier Kenney made in late April that demonstrate the government was aware of concerns related to these powers.

Instead, Bill 24 grants even more legislative power to Ministers responsible for the *Child Care Licensing Act*, [SA 2007, c C-10.5](#) (s 2, Bill 24) and the *Safety Codes Act*, [RSA 2000, c S-1](#) (s 13, Bill 24), as well as in relation to executive powers applicable to travellers (s 12(5) to 12(8), Bill 24). Bill 24 also extends the duration of additional ministerial powers beyond the declaration of a public health emergency (e.g. s 8 in relation to the *Labour Relations Code*, [RSA 2000, c L-1](#)).

Bill 24 also fails to remedy the non-compliance of CMOH orders with the filing and publication requirements in the *Regulations Act*, or even exempt these orders from that statute. The only provision in Bill 24 which relates to this is perhaps the new regulation-making power for the Minister of Health to carry out the intent of a CMOH order (Bill 24, s 12(10)). If there was any doubt as to whether CMOH orders are legislative enactments subject to the *Regulations Act*, that doubt is erased by the fact that many provisions in Bill 24 cease to be in force in conjunction with the lapsing of specified CMOH orders in relation to matters such as self-quarantine requirements.

Section 12(11) of Bill 24 does add section 76 to the *Public Health Act*, which mandates a review of the statute and report to the Legislature. Hopefully this review will lead to more of an overhaul on the form and structure of lawmaking under the *Public Health Act* as we prepare for the long haul living with COVID-19, but the content of Bill 24 does not invoke much confidence in this regard.

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