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Alberta Adds Health Care Facilities to the Scope of Anti-Protest Legislation

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Legislation Commented On: *Critical Infrastructure Defence Regulation*, [AR 169/2021](#)

On September 29, 2021, and on the basis of authority granted under section 5 of the *Critical Infrastructure Defence Act*, [SA 2020, c C-32.7](#), the Lieutenant Governor in Council issued Order in Council [265/2021](#) to enact the *Critical Infrastructure Defence Regulation*. This Regulation adds prescribed health care facilities – including hospitals – to the list of essential infrastructure covered by the *Critical Infrastructure Defence Act*, which thereby applies the prohibitions in the Act to those facilities. The Premier [announced](#) this new regulatory measure on September 28 as a response to anti-vaccine protests held recently at health care facilities. The timing of this announcement and the subsequent enactment of the Regulation was ideal for using it as a discussion item with 1Ls in Law 403 – Legislation – to illustrate how regulations are enacted and come into force. This short comment is intended to share that analysis with ABlawg readers.

The *Critical Infrastructure Defence Act* is a controversial enactment, to say the least. In [Protests Matter: A Charter Critique of Alberta's Bill 1](#), my colleagues – Professors Watson Hamilton, Koshan, and Silver – explained and critiqued the overreach of the Act in relation to its prohibitions against peaceful social protest demonstrations (Susan on the Soapbox also provided critical commentary [here](#)). In particular, sections 2(1) and 3 of the Act make it an offence for a person to wilfully enter any prescribed essential infrastructure, or the lands it is located on, without lawful right, justification or excuse.

In [Bill 1: Criminalizing Protests and Encroaching on Aboriginal and Treaty Rights](#), Alexandra Heine and Kelly Twa examined whether the Act intrudes into federal jurisdiction contrary to the federal-provincial division of powers set out in the *Constitution Act, 1867*, [30 & 31 Vict, c 3](#) and also whether the Act infringes the rights of Indigenous peoples affirmed by section 35 of the *Constitution Act, 1982*, [Schedule B to the Canada Act 1982 \(UK\), 1982, c 11](#). The validity of the legislation is currently the subject of a judicial review application, an application that has survived a motion to strike by the Government of Alberta. The Court of Queen's Bench dismissed Alberta's motion in *Alberta Union of Public Employees v Her Majesty the Queen (Alberta)*, [2021 ABQB 371 \(CanLII\)](#). See [Critical Infrastructure Defence Act Charter Challenge Survives Alberta Government's Motion to Strike](#) for some commentary on this decision.

I observe with significant interest how the tone of the Premier's announcement this week differed from that when the *Critical Infrastructure Defence Act* was first introduced back in the spring of 2020. When the Act was first introduced to the Legislative Assembly as a bill, its purpose was to impose strong prohibitive measures against “radicals” who lawlessly trespass: see excerpts of Hansard set out in *Protests Matter: A Charter Critique of Alberta's Bill 1*. Now we are told by the

Premier that the Act has a much narrower purpose of simply ensuring that essential infrastructure – which now includes hospitals – can perform their function without interference; no characterization of these protestors as “radicals” who disregard the law and no suggestion is made that all forms of social protest will be prohibited at these places. This is an encouraging sign that perhaps the Executive (the Premier and cabinet ministers) recognize the appropriate limits of such legislation.

Now back to the matter at hand – the process of enacting regulations. While lawmaking by way of making regulations (and other forms of subordinate legislation) allows the Executive to be nimble, it is also a very non-transparent and closed process. This is highly problematic from a rule of law and democratic governance perspective when a regulation – such as the *Critical Infrastructure Defence Regulation* – effectively delineates the scope of application for a statute that may be used to silence social protest demonstrations using the force of law.

As it stands, the only transparency measures which are generally applicable to the enactment of regulations by the Executive are those measures set out in the *Regulations Act*, [RSA 2000, c R-14](#), and these amount to very little. Section 2 requires every regulation (as defined in the Act) to be filed with the Registrar of Regulations, and a regulation that is not filed is not in force. This is why it is important to see the Registrar’s stamp on Order in Council 265/2021, which confirms the *Critical Infrastructure Defence Regulation* was filed on September 29.

Filing with the Registrar does not, however, ensure the legislation is available to the public and knowable. Section 3 of the *Regulations Act* strives to accomplish this by requiring the Registrar to publish the filed regulation in Part 2 of the [Alberta Gazette](#). The Gazette is normally published twice per calendar month on the [Queen's Printer](#) website – as per section 2 of the *Queen's Printer Act*, [RSA 2000, c Q-2](#) and the *Queen's Printer Regulations*, [Alta Reg 44/1970](#). That being said, the Gazette is an obscure publication and hardly makes a regulation knowable.

Nonetheless, publication of a regulation in the Gazette is crucial – particularly in the case of a regulation which will only be effective at achieving its purpose if the threat of sanction is real – because section 3(5) of the *Regulations Act* provides that a regulation which is not published is not enforceable. Section 3 reads as follows:

- 3(1) Subject to subsections (2) and (3), the registrar shall, within one month of the filing of the regulation, publish the regulation in The Alberta Gazette.
- (2) The Minister may, by order, extend the time for publication of a regulation, and if the regulation is subsequently published a copy of the order or a notice of the order shall be published with the regulation.
- (3) If a regulation, in the opinion of the Lieutenant Governor in Council,
 - (a) has been available in printed form to all persons who are likely to be interested in it, and

(b) is of a length that renders its publication in The Alberta Gazette unnecessary or undesirable,

the Lieutenant Governor in Council may, by order, dispense with the publication of it and the regulation on filing is as valid against all persons as if it had been published.

(4) When, by order of the Minister or of the Lieutenant Governor in Council, the time for publication of a regulation is extended or its publication is dispensed with, the registrar shall publish the order or a notice of the order in The Alberta Gazette within one month after the making of it.

(5) Unless expressly provided to the contrary in another Act, and subject to subsection (3), a regulation that is not published is not valid as against a person who has not had actual notice of it.

While section 3 does provide for a limited exception to the publication requirement, the exception in subsection (3) will rarely apply, and the giving of “actual notice” to persons (e.g., personal service of the regulation) will almost never be achievable.

The immediate effect of section 3 of the *Regulations Act* in relation to the *Critical Infrastructure Defence Regulation* is that the enforcement measures in the *Critical Infrastructure Defence Act* would not apply to protests at hospitals and the other prescribed health care facilities until the Regulation is published in the Gazette. This would be the reason why a [special volume](#) of Part 2 of the Gazette was published on September 29 (outside of the normal schedule set out in section 2 of the *Queen's Printer Regulations*).

So, it is now unlawful in Alberta to wilfully enter a hospital or other health care facility set out in the *Critical Infrastructure Defence Regulation*, as well as the land upon which these buildings are situated, without lawful right, justification or excuse. Yes, unbelievably that is the legal rule established by section 2 of the *Critical Infrastructure Defence Act*, together with this Regulation, and those who contravene it will commit an offence and be subject to punishment. What constitutes a “lawful right, justification, or excuse,” you ask? Good question. The Act fails to give any specifics on these defences.

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