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Regulating Covid-19 From the Criminal Law Perspective

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The focus of this post is criminal law. This is a bold statement considering we are, with this COVID-19 crisis, currently deeply within the regulatory world. There is so much to unpack in the area of regulation and COVID-19 that to focus on one area is dissatisfying. There are, however, many of my colleagues both here in Alberta and across the country discussing various aspects of the regulatory “new normal”. Specifically, I suggest a look at [ABlawg](#) where there are a number of COVID-19 related posts from colleagues writing in their areas of expertise such as statutory interpretation and law-making, health, human rights, environmental and energy law. Many of these areas overlap with the criminal law perspective but I will try to keep this post anchored in more classical criminal law concerns. This will require a discussion of regulatory offences, specifically those arising in the time of COVID-19, which enforce a regulatory scheme through the criminal sanction. By using criminal law concepts to enforce the regulatory scheme, these regulatory offences are subject to those criminal law legal principles which describe, define and confine offences. In this discussion, I will look at the general precepts of regulatory offences, how this form of liability connects to traditional criminal law concepts and then apply our knowledge to a COVID-19 measure involving social or physical distancing. This application will be done through a survey of that measure across Canada to identify the ways in which we are responding in the context of regulation. This survey will provide the basis for some preliminary recommendations based on lessons learned through the review of these regulatory, and in some instances, non-regulatory measures.

Finding the Connection Between Regulatory Offences and Criminal Offences

It’s revealing that in defining a regulatory offence, the case authorities do so by comparing and contrasting it with a crime. This approach discloses an important truism; that the two different types of enforcement mechanisms are intertwined and each type of mechanism can only be explained by understanding the precepts of the other. Despite this connection, there are differences between the two areas. Justice Dickson in *R v Sault Ste Marie*, [\[1978\] 2 SCR 1299](#) at pages 1302 to 1303, described regulatory matters in “substance of a civil nature” and lying more in the “branch of administrative law” thereby limiting the relevancy of criminal law principles. Although this sentiment is from the late 1970s, it is still relevant today. Case authority has continually treated regulatory matters as lying within the civil side of the law in terms of the fault requirement and in constitutional terms, as I will discuss later. Moreover, regulatory offences tend to be directed toward legitimate activities, not conduct that is “inherently wrongful” (see *R v Wholesale Travel Group Inc*, [\[1991\] 3 SCR 154](#), Justice Cory at p 216) like crimes. For regulatory offences, the emphasis is in the ability to control legitimate activities that require special care and the creation of standards of behaviour. In this sense, regulation creates rules to live by, rules that are “essential for our protection and well-being” from “cradle to grave” (*Wholesale Travel* at p 221).

But regulation is not just for the individual, it is also for the common good and a socio-political tool used to implement public policy objectives. When viewed through the social good lens, our individual backs may get up; government interference in our daily lives while we go about our daily business is paternalistic and often an unwelcome interference. There has been much ink spilled over the benefits of regulation, whether behaviours can be shaped by it and how it can be best implemented to provide the desired outcome (see e.g. Cass Sunstein and his approach to [regulatory “nudges”](#)).

We do not generally feel the same angst about criminal law. We typically want our state authorities to protect us from murder and mayhem, with the caveat that they do so with the minimum level of intrusiveness needed to provide that protection. But the line between regulation and criminal law is not so starkly drawn. Justice Cory in *Wholesale Travel* chided us to remember that “as social values change, the degree of moral blameworthiness attaching to certain conduct may change as well” (at p 220). Regulatory misbehaviour may not be as morally blameworthy as criminal behaviour but the relationship between regulation and criminal law is not static. The range of conduct under each area moves and shifts according to societal mores and needs.

Perhaps this connection between regulation and criminal law started at the beginning of our collective history as a nation. The [Constitution Act 1867](#) creates the division of powers, found under ss 91 and 92, which outline the exclusive powers of parliament and the provincial legislatures, respectively. Section 91(27) gives the federal government the power to create criminal law and criminal procedures. Section 92(15) gives the provincial government the exclusive power to use criminal sanctions to enforce a valid provincial law, such as property and civil rights in the province (see s 92(13)). There are other powers that touch upon the administration and maintenance of the criminal justice system but for regulatory offence purposes these sections provide the authority to create provincial laws enforced through a criminal-like framework. The provinces by creating legislation are using the tools of criminal law but they are not creating criminal law. Provincial legislatures can use the criminal sanction to enforce provincial laws, as long as they stay within their area of interest as determined by the *Constitution Act 1867* and the myriad of division of power case authorities. This sounds simpler than it is in practice. Often, it is not so clear under which area the province is legislating. To make matters even more obtuse, there are many areas of interest that overlap between the federal government and provincial legislative powers.

Health is one area where there is this constitutional overlap, which when considered logically, makes perfect sense. Canada, as one nation, has a national interest in the health of its citizens. The obvious example of this is the federal *Quarantine Act*, [SC 2005, c 20](#). Of course, “quarantine” is found under the federal head of power pursuant to s 91(11) of the *Constitution Act, 1867*. The *Quarantine Act* was updated in 2005 after the SARS outbreak. When COVID-19 became a concern, the *Act* was easily amended to include COVID-19 in the Schedule of communicable diseases. The preamble to this *Act* gets right to the point; the *Act* is “to prevent the introduction and spread of communicable diseases.” Note the word “introduction,” which relates to the main focus of the *Act* on border control, a federal concern. On the other hand, the provinces also have a deep interest in the health and safety of their provincial residents as expressed by s 92(16) of the *Constitution Act 1867*, from “matters of a merely local or private nature.” (See *Schneider v The*

Queen, [\[1982\] 2 SCR 112](#)) Communicable diseases are regulated through provincial legislation on public health such as the Alberta *Public Health Act*, [RSA 2000, c P-37](#), which is the main source of many of the COVID-19 legislative efforts in this province.

So, if the provincial regulatory efforts are not criminal law then the connection between regulatory offences and criminal offences must be the provincial ability to use the criminal sanction to enforce provincial laws. Even though the provinces are not creating criminal law top down so to speak, meaning they are not creating a crime and then attaching a sanction to it, the provinces are engaging criminal law principles by using the criminal sanction. Although the criminal sanction does not apply until an accused person is convicted, its mere potentiality triggers discourse beyond the punishment and sentencing context. This is why case authority looks at regulatory offences through the criminal law lens and why a discussion of one area requires a discussion of the other.

The first important decision on regulation versus crime is the seminal case of *R v Sault Ste Marie*, cited above. Although this decision is pre-*Charter*, its influence is undeniable. In this case, Justice Dickson marks out many fundamental criminal law principles. Yet, this is a case which factually lies squarely within the regulatory arena. The City of Sault Ste Marie was charged with polluting waters, a provincial offence. The main issue was the characterization of the regulatory or public welfare offence. The character of the offence mattered as it would define the kinds of defences available to the City in defending the charge. To determine this, Justice Dickson reached into both the criminal law and regulatory law context to create a “half-way” house form of regulatory liability, called strict liability. This form of regulatory offence bridged the gap between criminal and regulatory by creating negligence-based liability, which provided defences to the defendant in a regulatory manner yet retained the administrative efficiencies needed to promote and enforce public welfare violations.

This was a welcome addition to the regulatory arsenal as previously the choice was a stark one. On one end of the spectrum was the public welfare offence of absolute liability where the fault element was absent to allow for efficient enforcement of the regulatory law. At the other end was the regulatory offence qua criminal offence that required proof of subjective liability that mirrored a traditional criminal offence. Such proof was difficult in the public welfare forum as it required proof of knowledge, intention or recklessness of the defendant, an almost impossible requirement for corporate offenders or in this case, a City. Strict liability struck the right balance.

But *Sault Ste Marie* did not just open the regulatory door to a different form of enforcement, it also laid the foundation for *Charter* application to regulatory offences. Justice Dickson, by delineating the fault element as lying between crimes and regulatory offences, and by describing the purpose and objective of regulatory enforcement, set the stage for future discussions in cases such as *Re BC Motor Vehicle Act*, [\[1985\] 2 SCR 486](#) and *Wholesale Travel*. Those early *Charter* cases extended *Sault Ste Marie* from the regulatory perspective and, together with *Vaillancourt*, [\[1987\] 2 SCR 636](#) and *Martineau*, [\[1990\] 2 SCR 633](#) from the true crime field, constitutionally set strict liability as the minimum form of fault required by the *Charter* for regulatory offences where the punishment included a loss of liberty. Fault and sanction were required to be fully aligned and proportionate to one another in their effect. These decisions resulted in the principle that absolute liability offences could not be enforced through a loss of liberty such as imprisonment. Many provinces re-thought their regulatory enforcement as a result, creating fine-only offences in an

effort to retain the ease of conviction with absolute liability offences. In *Levis (City) v Tetreault*, [2006] 1 SCR 420, Justice Lebel remarked on the rarity of absolute liability offences, calling that form of liability the exception rather than the rule due to the presumption for strict liability (at para 17). Yet many absolute liability offences can be found in regulatory schemes. Although absolute liability and strict liability have been clarified over the past few decades, the issues of which kind of liability a specific regulatory violation requires is an open one and indeed one of the first arguments to be made in court in a regulatory prosecution.

The reality is that with the explosion of regulatory measures to contain COVID-19, these basic issues of fault and sanction are even more important. Some provinces have enforced COVID-19 measures through a fine only regime, while others have added imprisonment as a potential sanction (to be discussed below). This results in similar measures through differing enforcement mechanisms resulting in different proof requirements. There could, however, be an argument that even those measures enforced through imprisonment are absolute liability offences where fault is not required. This would be based on a s 1 *Charter* argument presaged in *Re BC Motor Vehicle Act*, where by Justice Lamer said:

Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like. (at para 85, emphasis added)

Knowing the fault element is therefore important for prosecuting regulatory offences in terms of proof requirements and for defending such offences in terms of the kinds of defences available, which depend on the form of liability. For instance, absolute liability offences have no fault element and therefore the prosecutor need only prove the prohibited act or *actus reus* beyond a reasonable doubt for conviction. The only defences available are whether the act was voluntary, capacity defences and, if applicable, arguably the defences of excuses (necessity and duress) and justifications (self-defence and defence of property). If strict liability, the defendant has more options based on proof, on a balance of probabilities, that they were acting with due diligence or took all reasonable steps to comply or that they were operating under an honest and reasonable mistake of fact. The importance of having these negligence-based defences is profound as the application of those defences can provide protection against convicting the morally innocent of an offence. This is not the same for absolute liability offences, which convict despite a person's best efforts to comply. In the harshness of the absolute liability world, even the reasonable person is convicted and punished. It is this "revulsion against punishment of the morally innocent" (*Sault Ste Marie* at p 1310), which conflicts with the objectives of regulation that serve to promote and maintain high standards of public health and safety. This "field of conflicting values" (*Sault Ste Marie* at p 1310) becomes even more rarified when engaged by those public health and safety measures, which have dire consequences if not scrupulously enforced such as in the COVID-19

situation. In those dire circumstances, it seems that the more imperative the enforcement measures are to fulfill the regulatory objectives, the more crucial it is that we recognize those conflicting fundamental values at risk of being disregarded, such as the concern for punishing the morally innocent.

This concern about punishing the morally innocent also flows from the principle of legality (See e.g. *R v Lohnes*, [1992] 1 SCR 167 and *R v Levkovic*, [2013] 2 SCR 204). This concept enshrines restraint as a guiding criminal law principle. It provides a statutory [SWOT analysis](#) that holds our lawmakers accountable to their citizens. This principle requires that citizens receive fair notice of those behaviours considered contrary to the law, which in turn serves to limit state enforcement. It is tied to concepts of statutory interpretation and reviews the offence as described to determine its justiciability by considering whether the entirety of the offence is void for vagueness or drawn overly broadly. The *Charter* too has a role to play if a section does not fulfil this principle. Again, although we are in the regulatory sphere, this concept of fair play and restraint is an important theme in regulatory offences as well.

Regulating COVID-19 By Staying 2-Metres Apart

Now that I have discussed the general legal context, let's keep these principles in mind as we look at regulating COVID-19. There are a number of such measures implemented across Canada through provincial and territorial legislation. The provinces and territories initiated these measures by declaring a public health emergency allowing each jurisdiction to issue public health orders and emergency management orders tailored to the measure to be implemented. Although the measures in each jurisdiction appear similar, many differ in the details. Additionally, not all of the COVID-19 measures are enforced through the regulatory scheme. Some provinces and territories have opted for advising their residents to follow certain public health measures, rather than requiring statutory compliance. Of course, it is only through statutory rules that enforcement through the criminal sanction can occur. Which approach is more effective is an excellent question that requires further study beyond the scope of this post. Another question that remains to be answered is which approach is more balanced in view of the "field of conflicting values" concept where enforcement through punishment to protect society is a means to an end. Again, understanding the impact of these two approaches, statutory or advisory, may help answer these vitally important questions.

For purposes of this article, I decided to look at one common COVID-19 measure found across Canada; social distancing or physical distancing (the [Yukon government calls this "safe spacing and physical distancing"](#)), which requires individuals to be 2 metres part from one another. I also chose this measure because it is, in my view, the measure that is most open to interpretation and therefore does bring into the conversation the general issues I discussed earlier. My initial thought was this measure would be the most difficult to enforce as it relies on a specific absolute measurement that is not readily ascertainable. We may have an idea of what 2 metres looks like but without verification, we cannot really be sure. This poses a problem for both those who are trying to fulfill the requirement and those enforcing it. In prosecuting someone for such a violation, proof must be of the actions as described in the rule, it cannot be based on approximations.

Of course, in this time of COVID-19, we are in the world of approximations; many of the governmental websites describe the distancing requirement as 2 metres or 6 feet. Those of us who are conversant in metric and in Imperial units know that metres and feet do not so easily translate to whole numbers. In fact, 2 metres is 6.56168 feet. Someone could be in violation of an order to stay 2 metres away if they followed Imperial units of measurement. To assist in discerning the required distance, many jurisdictions offer visuals on how to fulfill the 2-metre rule. In Alberta, the [length is described on the government website](#) as “about the length of a hockey stick.” In Newfoundland, the government offers a [physical distancing animation video on YouTube](#) urging everyone to keep 6 feet apart. British Columbia prefers to compare the distance to the [length of a queen-sized bed](#), which I found most difficult to visualize. The federal government offers the more staid [two arm lengths apart](#) description. Yukon is the most creative when it comes to visual prompts, offering “[1 caribou apart](#),” “[2 huskies apart](#),” “[8 sourdough loaves apart](#)” physical distance visuals. I highly recommend viewing these posters – a sense of humour where warranted is definitely welcome in the highly-charged age of COVID-19! The Northwest Territories explanation of the distance includes a [fantastic meme](#) that shows the exponential growth of the number of people infected by one person.

Visuals aside, as I indicated above, a person charged with an offence arising from a violation of this distancing rule would be held to the statutory rule as specifically described in the legislation. This raises proof issues of that particular regulatory offence in terms of both the prohibited act or *actus reus* component and the fault element or *mens rea* component, if not an absolute liability offence. Violation of the rule would then be enforced through the offences and penalty section of each statute. In terms of the *actus reus* component, the prosecutor would need to prove beyond a reasonable doubt, that the defendant was not 2 metres distance away from another or not at least 2-metres away, whichever way the rule is articulated. As discussed, this indeed would be difficult to establish unless it was an obvious breach of that distance. We may not know how far we are from one another at long distances but at very short distances, we can safely infer that we are not complying with the rule. It seems, therefore, that this kind of regulatory offence could only be enforced in clearly egregious violations. But that, in the criminal law world, is not good enough. We cannot rely on discretionary enforcement to make a law without violating the principle of legality.

As discussed earlier, in creating absolute liability offences, provincial lawmakers must limit the sanction to fine only. However, it is still arguable even where an offence is enforced through fine only whether it requires strict liability rather than absolute. Strict liability is the presumptive form and to be rebutted there must be clear parliamentary intention for a different form of liability. The same principle applies to those regulatory offences that, like criminal offences, can require a subjective form of liability. Those regulatory offences would require intent through the words used in the section, such as “knowingly” or “intentionally” or “for the purpose”. They would also attract the severest penalties, involving potentially lengthy jail sentences.

The purpose of this discussion is to show that the question of *mens rea* for these regulatory distancing offences would depend on the regulatory scheme being used, with special emphasis on the penalty and on the presumption for strict liability. Strict liability offences would be consistent with many of the principles already discussed – they provide a defence for those who we would not consider morally blameworthy as they either could not avoid committing the offence or they

were working under a reasonable factual misapprehension. On the other hand, absolute liability would be efficient by not requiring proof other than the conduct, but would capture those who we may not consider blameworthy in the circumstances, such as when no person could have avoided committing the offence.

There is a final defence possible for any kind of regulatory offence, be it strict, subjective or absolute, and that is the limited mistake of law defence known as officially induced error (see *Levis (City) v Tetreault*, [2006] 1 SCR 420). This defence results in a stay of proceedings rather than an acquittal as the focus of the defence is on the abuse of process occasioned by incorrect information given by a relevant government official, which is then acted and relied upon by the defendant. Without getting into the niceties of the defence, an officially induced error may amount to a defence given the appropriate circumstances when it comes to being 2 metres apart.

Returning to the regulatory schemes across Canada, what struck me was the differences in regulating, or not regulating, this simple, yet hard to describe, concept of social distancing. First, I will make some general remarks about my experience surveying these measures before I discuss the specifics of each province and territory. For some jurisdictions, it was incredibly frustrating to even confirm whether the jurisdiction was regulating social distancing. Often, the public health orders that created the rule were difficult to find. Usually, the government website would discuss social distancing, relay the 2-metre distance, but not clearly indicate whether this was an enforced rule or merely a recommended best practice. Additionally, social distancing was often discussed with another common regulatory rule on limiting mass gatherings. For instance, mass gatherings of a certain size would be prohibited but the gatherings below the limit would be permissible if the participants complied with the social distancing rule of 2-metres apart. This relationship, although understandable, tended to obscure the true definition of social distancing, resulting in inconsistent media messaging. For example, I found an [article](#) from BC that conflates these two measures, making it seem that distancing was a rule, when it was really the mass gathering limit that was the enforceable activity in that province.

There are some provinces and territories who do provide clear links to relevant legal information. [Nunavut](#) lists hyperlinked public health orders directly on the general COVID-19 information webpage. The [Yukon's](#) website lists a link for “orders and recommendations.” [Newfoundland](#) also clearly presents a link on their COVID-19 website to “public health orders.”

Conversely, PEI webpages were more difficult to navigate. For instance, the webpage for [COVID-19 Advice for Individuals and Families](#) headlined “practice social distancing” outlining the mass gathering restriction of groups of no more than 5 people and an admonishment to “make sure you understand what social distancing means.” The phrase “social distancing” [hyperlinks to a webpage](#) on the concept. It discusses the “recommendations for social distancing” of staying at least 2 metres or 6 feet apart. It seemed on this basis that the 2-metres was a recommended practice. To confirm this, there is also a webpage on [Covid-19 enforcement](#) that gives a further hyperlink to “Covid-19 enforcement.” It also gives a link for a Public Health Order for self-isolation but no other Orders. Taking the hyperlink to another [Covid-19 enforcement](#) site, finds a webpage news release on the provincial measures from March 23, which did not detail all of the measures but did indicate the penalty for non-compliance as “including” fines of \$1000 for a first offence, \$2000 for a second offence and \$10,000 for a third offence. The [Public Health Order hyperlink](#) offered only three

choices with the only possible relevant Order entitled “[Public Health Order for Covid-19 Isolation](#).” This [Order](#), although more detailed than Orders from other provinces as having an actual definition section similar to legislation, did mention keeping 2 metres away but was directed towards those businesses permitted to stay open where the owners or managers were required to “take every reasonable step to ensure minimal interaction of people within two metres of each other” (see s 12 of the Order). The Order, under s 16, also speaks to mass gatherings but no connection between the 5-person limit and social distancing. The upshot is that social distancing is a recommended practice in PEI unless you are running a business and even then, it appears there is a due diligence defence written into the rule. As an aside, failure to comply with the Order is an offence under s 66 of the *Public Health Act*, [RSPEI 1988, c P-30.1](#), which outlines the fines as per the government webpage referenced above, except it also indicates that a third offence or more is not only subject to a \$10,000 fine but also to a term of imprisonment not exceeding six months. In the time of COVID-19, getting direct, clear and easily accessible information takes patience.

After an entire day of searching, I was able to trace, with one exception, whether a province or territory had a social distance regulatory rule to stay 2 metres apart, either generally or connected to businesses (such as take out establishments) or [connected](#) to the mass gathering rule. British Columbia is the exception. The BC [government website](#) discusses “practicing” of physical distancing. I could not find an Order regulating this requirement for all individuals ([except for businesses such as take out](#)) despite the media report from [March 25](#) that “Social, or physical, distancing is a provincial public health order — not a suggestion — telling British Columbians to stay at least two metres away from others and avoid crowds of 50 people or more to slow the spread of the coronavirus.” I note that the BC government also tweeted on March 22 that “[social distancing is an order – staying 2 metres apart outside home.](#)”

I also checked the City of Vancouver website to see if they had legislated in this area. In Ontario for instance, there is no physical distancing legislation provincially but the City of Toronto, through their by-law powers, did implement such distancing outside in public places. I found this comment on the [City of Vancouver website](#): “Keep 2 m apart from others if you must leave your home. The Province has the authority to give fines and penalties for not keeping physical distance out in public, not the City of Vancouver. We are [encouraging compliance using public education.](#)” Again, much of the confusion is from the use of the term “physical distancing” as a general basket of conduct which includes limiting mass gatherings and staying out of closed parks and recreation areas, rather than using the term to mean staying 2-metres apart. However, in the BC case, it appears, based on what I could find and not find online, that there is an actual informational conflict.

Finally, to make my point on the importance of consistent messaging, I turn to my home province of Alberta, where the [government website](#) advises that “all Albertans should practice physical distancing to help limit the spread of COVID-19 and reduce the risk of getting sick.” The webpage calls physical distancing a “practice” but also references “mandatory restrictions on gatherings” with a [hyperlink](#). That webpage indicates that “People gathered in groups of fewer than 15 people must maintain a distance of 2 metres from one another. Gatherings must occur in a space that allows for [mandated physical distancing](#) (at least 2 metres between attendees).” The hyperlink for the phrase “mandated physical distancing” goes back to that first webpage in which distancing is labelled a “practice.” It is in the public health order, specifically [CMOH Order 07-2020](#), where

there are rules on gatherings indoors or outdoors of less than 15 people, which require staying a “minimum of 2 metres distance from one another,” unless from the same household. (See also Shaun Fluker’s post discussing the difficulty of finding COVID-19 related orders and rules in Alberta, [here](#)).

Difficulties in discerning where the line is drawn between regulation and recommendation becomes even more important when a rule is statutory because of the categorization of the offence as strict, absolute, or subjective liability. Although the presumption is for strict liability and for the availability of some defences based on the reasonable person standard, many of the COVID-19 measures do impose penalties of a fine only, suggesting absolute liability offences. Additionally, is that caveat I referenced earlier from Justice Lamer in *Re BC Motor Vehicle Act* that the prohibition against absolute liability being enforced by a loss of liberty may be subject to extraordinary emergency powers such as in an epidemic situation. According to Lamer J, such a violation of s 7 may be saved under s 1. There may be arguments presented by the government that even when the offence attracts jail, it is an absolute liability offence, with no fault element and no reasonable care defences available. The provinces and territories where the potential sanction is jail upon violating social distancing orders are: Newfoundland (see the [Public Health Protection and Promotion Act](#), although in terms of physical distancing, it appears to be a practice, not a rule – see s 7 of this [Order](#)); PEI (as earlier indicated it has jail for the third or subsequent offence under the [Public Health Act](#)); Nova Scotia (see the [Health Protection Act](#) under s 71); [Yukon; Nunavut; Northwest Territories](#); and in certain circumstances, incarceration is also available under British Columbia’s [Public Health Act](#), SBC 2008, c 28 (at ss 99 and 108).

New Brunswick enforces physical distancing requirements by way of fine but a recent charge for a violation of this rule exemplifies the problem with regulating something as ephemeral as a length between two people. Keith Gagnon, according to [a media report](#), received a ticket for violating the rule as a result of driving in a vehicle with a friend he did not live with. They were on their way to the car wash. According to Gagnon, he “never knew about that law” and intends to mount a defence against the charge.

When I originally reviewed New Brunswick Orders regarding physical distancing, the mandatory order, which was then under s 18, prohibited everyone from “knowingly” approaching within 2 metres of any person, except those with whom they reside, including in a vehicle. The section also excuses those who come within 2 metres “inadvertently or despite their best efforts to avoid contact.” A first offender would face a fine only sanction (Part 2 of the [Provincial Offences Procedure Act](#) as a category F offence), but on a second conviction should the judge be “satisfied” that no other sentence than jail would deter the person from repeating the offence, a jail term of up to 90 days could be imposed (see s 63(2)). Considering the presumption for strict liability, the word “knowingly” used in the Order, the excuse permitted under the Order, and the penalty, it is likely a strict liability offence (although the word “knowingly” does suggest subjective liability). The difficulty is that Mr. Gagnon’s statement suggests an ignorance of the law situation, which would not provide a defence unless officially induced error (even then it would not amount to an acquittal but a stay of proceedings). We have little to go on with just a media report.

Notably, since I looked at the relevant New Brunswick Order, less than a week ago, the [Mandatory Order](#) was changed as of April 24 in response to progress in “[flattening the curve](#).”

Now the Order, under s 20, reads much differently by providing an exception to the rule where persons from one household mutually agree to be in closer proximity to another household and, in the case of vehicles, if the person is in compliance with measures issued by the Chief Medical Officer of Health relating to vehicles. Although this change will not assist Mr. Gagnon considering he was charged on the basis of the Order in place at the time of his charge, it does highlight the changeable nature of these rules, which, as discussed previously, conflicts with criminal law principle of legality.

Preliminary Recommendations for the Future

By focusing this discussion on one measure, social or physical distancing, and looking at it through the lens of criminal law, we can identify a number of issues arising from the regulatory response to COVID-19. Before listing these key take-aways, we must keep in mind that behind the law there is a much larger discussion engaging social, political, economic and public interest spheres. COVID-19 is a pressing societal problem, which requires unprecedented governmental response. Because time is of the essence, governments have implemented measures very quickly without thorough discussion and feedback. What works and what doesn't work from a public health perspective shifts and changes as evidence-based research and data is explored. This means the information, the advice, and the rules that are being implemented are not perfect legally or socially but they are all that we have between us and the potential dire consequences of the virus. My purpose in this post is not to call out governments for regulatory and informational faults but to provide guidelines for the future. We do not want this circumstance to occur again but learning from this event will ensure we will be ready for whatever curve ball the world sends us in the future.

Recognizing that every province and territory is using different regulatory frameworks for legislating COVID-19 rules, it would be useful to have a national legislative committee, whose membership is from across the provinces and territories, to work on drafting appropriate measures. Again, it is a compressed time period and these are Orders issued very quickly for maximum results. However even if this committee acted as a repository for these measures, a think tank to review them, and then provide reasoned but timely advice, the principle of legality together with our need to protect each other would be advanced together rather in opposition to one another. This committee could create general guidelines for the provinces and territories relating to the most effective measures that minimally interfere with the legal principles arising from the case authorities I have discussed above.

Every province and territory has their own specific approach to responding to COVID-19. Although understandable as each jurisdiction is unique and requires a response tailored to their residents and geography, some co-ordination across Canada on how each jurisdiction messages the measures, defines the impugned activities and regulates or doesn't regulate these activities would be helpful for the citizen who wants to comply. It would also greatly assist those people who live in one province but work in another. Again, although I am reticent to recommend another committee, this working committee could assist in consistent messaging with general suggestions on information sharing. This particular recommendation parallels [Amnesty International's call for a similar oversight committee](#) to review COVID-19 measures for human rights compliance.

Finally, the power of education cannot be underestimated. We have an opportunity in this dire situation to show how the justice system can work in non-traditional ways through public education, including assisting people to navigate through the myriad rules and recommendations. Criminal law knowledge and expertise can offer insights into the regulation of COVID-19. It can also help those marginalized people in our justice system, such as the homeless, who have little to no access to this information and are effectively denied access to justice.

Regulating COVID-19 as seen through the criminal law lens exposes the strengths and weaknesses of our justice system. It is hard in a time of crisis not to be heavy-handed in our legal approach when public health and safety is paramount. Yet it is equally important to anchor our approach to our fundamental values as expressed in fundamental legal principles. By complying with these principles, we will help Canadians comply with COVID-19 measures which may help save lives.

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