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## **COVID-19 and Retroactive Law-Making in the *Public Health (Emergency Powers) Amendment Act* (Alberta)**

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**Legislation Commented On:** *Public Health (Emergency Powers) Amendment Act*, [SA 2020 c 5](#)

On April 2, Alberta amended provisions governing emergency powers under the *Public Health Act*, [RSA 2000, c P-37](#). This post discusses amendments made to section 52.1, and also comments on their retroactive effect. I've previously commented [here](#) and [here](#) on the exercise of these emergency powers to address COVID-19.

Section 3 of the *Public Health (Emergency Powers) Amendment Act*, [SA 2020 c 5](#) amends section 52.1 of the *Public Health Act* by repealing subsection (2) and replacing it with the following:

Section 52.1(2) is repealed and the following is substituted:

(2) On the making of an order under subsection (1) and for up to 60 days following the lapsing of that order, a person referred to in subsection (3) may by order, without consultation,

- (a) suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions that person may prescribe, or
- (b) specify or set out provisions that apply in addition to, or instead of, any provision of an enactment,

if the person is satisfied that doing so is in the public interest.

This amendment makes two changes to section 52.1(2). The first change is the addition of clause (b) to expand the scope of power exercisable in ministerial orders. I've [previously](#) questioned the *vires* of some existing section 52.1 ministerial orders because they effectively amended legislation under the more limited power of a “suspension or modification of application.” Presumably the Legislature intends clause (b) will resolve this problem, although I do wonder how long it took drafters to come up with language that is synonymous with “amend” without actually saying it.

The second change is more subtle than the first, and relates to how the phrase “public interest” is used in section 52.1. Previously a minister had to be of the opinion that the application or operation of a particular enactment was not in the public interest, whereas

now a minister must be satisfied the suspension, modification, or amendment is in the public interest. On its face this change eases the justificatory burden on a minister, who is now alleviated from having to establish, or at least assert, a negative as a precondition to exercising this extraordinary power.

Section 3 of the *Public Health (Emergency Powers) Amendment Act* also amends section 52.1 of the *Public Health Act* by adding the following new subsections (2.1) – (2.4):

(2.1) An order made under subsection (2) may be made retroactive to a date not earlier than the date on which a state of public health emergency was declared under subsection (1).

(2.2) An order made under subsection (2) may not

- (a) impose or increase any tax or impost,
- (b) appropriate any part of the public revenue or any tax or impost, or
- (c) create a new offence with retroactive effect.

(2.3) Every order made under subsection (2) on or after March 17, 2020 and before the coming into force of this subsection that is purported to apply retroactively to a date not earlier than March 17, 2020 is deemed to have been validly made.

(2.4) Where there is a conflict or inconsistency between an order made under subsection (2) and a provision of the enactment to which the order relates, the order prevails to the extent of the conflict or inconsistency.

These new subsections grant retroactive lawmaking power to ministers, subject to the limitation set out in subsection (2.2). Subsection (2.3) is particularly noteworthy in that it appears to be curing invalidity in existing ministerial orders issued in relation to COVID-19 prior to the enactment of these amendments.

Similarly, section 11 of the *Public Health (Emergency Powers) Amendment Act* declares valid the *Procedures (Public Health) Amendment Regulation*, Alta Reg 51/2020 made by Order in Council [100/2020](#) on March 27. This is an amendment to the *Procedures Regulation*, [Alta Reg 63/2017](#) which, as I [previously](#) noted, enables the use of a violation ticket for offences related to contravening an order made by the Chief Medical Officer (e.g. the order on social distancing set out in CMOH Order-07) and sets the specified penalty payable for an individual at \$1000.

Section 11 goes further, however, and states:

(2) Everything done under or in reliance of the *Procedures (Public Health) Amendment Regulation* (AR 51/2020) is validated and declared for all purposes to have been validly done.

(3) The *Procedures (Public Health) Amendment Regulation* (AR 51/2020) is not subject to and is deemed not to have been subject to section 3(5) of the *Regulations Act* and on filing is as valid against all persons as if it had been published.

Section 3(5) of the *Regulations Act*, [RSA 2000, c R-14](#) states: “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.” The effect of section 11(3) of the *Public Health (Emergency Powers) Amendment Act* is that the *Procedures (Public Health) Amendment Regulation* purports to be enforceable against a person even though the regulation has not been published in the Alberta Gazette and that person has no knowledge of the regulation. And while section 3(1) of the *Regulations Act* requires that all regulations be published in the Alberta Gazette within one month of being filed, the Minister of Justice included the *Regulations Act* in a list of statutes whose operation, all or in part, is not in the public interest during COVID-19 in Ministerial Order [27/2020](#), and thus seems to have relieved the Registrar of Regulations of having to publish regulations until June.

What to make of all this? Well for one thing, the exercise of emergency powers under the *Public Health Act* has not been as transparent as it should be (I still talk to people who do not realize social distancing is a law), has been unnecessarily confusing, and in some instances is lacking proper justification. And it doesn’t enhance general deterrence when violation tickets for social distancing are issued and then [withdrawn](#) because rules are not clear on what is allowed and what is not under these orders. Amendments in the *Public Health (Emergency Powers) Amendment Act* now add retroactivity into the mix. Going forward, not only does section 52.1 of the *Public Health Act* allow for the exercise of unilateral executive power to amend legislation, but it can go back in time to do so. The changes made by the *Procedures (Public Health) Amendment Regulation* purport to be enforceable against persons as of March 27, even though on that date this regulation was not actually enforceable because it had not been published.

There is plenty of confusion in the literature and caselaw on how to identify a retroactive law, and the term ‘retroactive’ is unfortunately commonly used when it shouldn’t be. The basic premise of retroactivity is this: A retroactive law both looks to the past and acts in the past. The latter portion of this premise is key to identifying a retroactive law. Many enactments look to the past but only change the law as it applies to existing and ongoing factual situations. For example, the [Canada Emergency Wage Subsidy](#) assistance made available by the federal government to businesses affected by the COVID-19 economic shutdown is described as ‘retroactive’ to March 15. However, the subsidy is ‘retrospective’ rather than retroactive because this measure is not changing the law in the past, but wage benefits will be paid this month and onwards based on factual circumstances determined as of March 15. Indeed, very few enactments are truly retroactive. *Sullivan on the Construction of Statutes* (6<sup>th</sup> ed) describes retroactivity as follows:

§25.8 The retroactive application of legislation is a direct assault on the principle of adequate notice. Although it is not possible for a legislature to really change the past, when it enacts retroactive legislation it fictitiously deems the past to have been different from what it was. In actual fact, when X made a decision to act or not act in a particular way, the law said one thing.

Sometime later, when it is impossible for X to do anything about his or her decision, the law is deemed to have said a different thing. This undermines X's agency. At best retroactive law makes it impossible for people to know whether they are complying with the law; at worst it imposes negative consequences on them for attempting to do so.

The problems with retroactive laws are obvious from a fairness and legitimacy perspective, so how are these problems mitigated in our legal system? The common law employs a strong presumption against retroactivity; when interpreting legislation, the courts presume it does not apply retroactively and place an onus on the legislature to rebut this presumption by explicitly stating an intention to legislate retroactively. The classic statement of this presumption in Canadian law is in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1975 CanLII 4 \(SCC\)](#), [1977] 1 SCR 271 at 279 (however even the Supreme Court unfortunately uses the term 'retrospective' rather than retroactive).

This is why section 52.1(2.1) states that emergency orders can be retroactive, and this is also why section 12 of the *Public Health (Emergency Powers) Amendment Act* states that amendments to section 52.1 of the *Public Health Act* have effect on March 17, 2020. The *Public Health (Emergency Powers) Amendment Act* purports to be retroactive law which validates executive orders which themselves purport to be retroactive. This is confusing governance at the worst possible time, to say the least.

Retroactive lawmaking is like getting into Dr. Brown's [DeLorean](#) and travelling back in time to change the past, and then returning to present day. The Alberta legislature has done just this by going back to March 17 when cabinet declared a public health emergency and changing the law governing the exercise of emergency powers under the *Public Health Act*. Measures such as this which stretch the rule of law to its breaking point must be used sparingly, clearly articulated, and thoroughly justified, if these powers are to be seen as legitimate.

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