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Anticipatory Obedience and Essential Infrastructure at the Alberta-US Border

By: Shaun Fluker

Legislation commented on: [Order in Council 008/2025](#) (January 29, 2025) amending the *Critical Infrastructure Defence Regulation*, [Alta Reg 169/2021](#)

The authoritarian and isolationist Trump administration has profoundly altered global relations. Democratic institutions are under attack in the United States, and it seems that the grand post-WWII global project called liberal democracy finally ran out of steam on November 5, 2024. If a new world order is emerging, Canada is on the front line. This is an uncomfortable position for us, not only because our socio-economic systems are so deeply integrated with the United States, but also because the world is watching how America's closest ally responds to the chaos. The stakes are exceedingly high. Here in Alberta, the UCP cabinet initially responded to the Trump administration with what Timothy Synder calls 'anticipatory obedience' in his must-read book [On Tyranny](#). Show a bully what they can extract from you, and they will take it. Plenty has been written about the Premier's visit to Mar-a-Lago and Alberta's initial reluctance to align with 'Team Canada', my focus here is on something that has not garnered as much attention: the Lieutenant Governor in Council designating all land within two kilometres of the US border as 'essential infrastructure'. It is truly shocking how quickly the UCP cabinet gave away Alberta's portion of the world's [longest undefended border](#), and created a quasi-military area now referred to as the [red zone](#).

How did we get here? On November 25, 2024, the then President-elect announced on social media that the United States would impose a 25% tariff on all goods entering the country from Canada on January 20, 2025, unless Canada strengthened its border security to address the movement of fentanyl and migrants from Canada into the United States (see [Donald Trump threatens 25% tariff on products from Canada, Mexico](#)). The threat led to a first ministers meeting in Canada, and several days later the Prime Minister and the federal Public Safety Minister [met with Trump](#) in a bizarre dinner setting at Mar-a-Lago. It was reported that this meeting left Canadian officials with an understanding that the President-elect's primary border concern was eliminating the flow of [fentanyl](#) into the United States. Obvious problems with this position include that the United States can do whatever it feels is necessary [within its own borders](#) to address fentanyl, relatively small amounts of fentanyl actually cross into the United States from Canada (CBC news has [reported](#) US customs data that shows 19.5kg of fentanyl passed into the US from Canada over the past year), and the tariffs would contravene the continental free trade agreement [CUSMA](#). Nonetheless, Canadian officials promised to enhance border security and appoint a fentanyl border czar in the hopes of alleviating the tariff threat. As it turned out, the tariffs were not imposed on January 20, 2025, and it is doubtful that border security concerns were ever the basis for the Trump tariff threats. The President has since changed his stance of tariffs many times, in what CBC news calls ["the funhouse maze of Trump trade threats"](#). Most recently, tariffs on Canadian products and

energy were imposed on March 4, and a day later a 30 day exemption was granted to [US automakers](#), and then on March 6 the general tariffs were [partially suspended](#) until April 2. It all seems like tragic comedy.

The UCP government has been somewhat of an outlier on a Canadian response to the Trump administration and has been adamant that the US concerns with fentanyl and border security are legitimate. Alberta issued a [media release](#) on January 30, 2025 announcing measures the province would be taking as “swift and unequivocal action to secure the shared Alberta-US border”. The provincial Minister of Public Safety and Emergency Services said Alberta would establish a new border patrol team with armed sheriffs, drug patrol dogs, and surveillance drones. Alberta also requested, and received, the use of a military [black hawk helicopter](#) to bolster surveillance for illegal border activities. See [Life in the red zone](#) for a detailed account of how these enforcement activities are impacting border communities.

Let me repeat what I wrote in the introduction: It is truly shocking how quickly the UCP government gave away Alberta’s portion of the world’s [longest undefended border](#). This sacrifice – apparently for nothing since the tariffs were imposed (and then paused) anyways – is especially evident in what the Minister of Justice and Attorney General Mick Amery announced on January 30:

“As part of these efforts, Alberta has designated a two-kilometre-deep border zone north of the entire Alberta - US border as essential infrastructure to help protect public safety and Alberta’s economic prosperity.”

What does this designation of a 2-kilometre band along the 298 kilometres of Alberta-US border as ‘essential infrastructure’ mean for Albertans? To answer this question, we must look to the *Critical Infrastructure Defence Act*, [SA 2020, c C-32.7](#).

The *Critical Infrastructure Defence Act* was enacted by Alberta in 2020, in response to railway blockades and protests held against the construction of the coastal gaslink pipeline on [Wet’suwet’en territory](#). The Act prohibits a person from wilfully entering onto, obstructing, or destroying anything designated as ‘essential infrastructure’ under the Act or by regulation, unless that person has a lawful justification. The scope of ‘essential infrastructure’ and prohibited activities is so broad and open-ended that the legislation could be used to sanction any social or communal gathering or demonstration – even by a single person. And the sanctions are significant: a minimum of \$1000 and the possibility of imprisonment. But what is perhaps most problematic is that section 4 of the Act empowers peace officers to arrest anyone without a warrant. Think of that power in the context of a “two-kilometre-deep border zone north of the entire Alberta - US border”, as described by the Minister of Justice. This is the stuff of authoritarian dictatorships.

ABlawg has followed the saga of the *Critical Infrastructure Act* closely since the legislation was enacted in 2020. In [Protests Matter: A Charter Critique of Alberta’s Bill 1](#), my colleagues Jennifer Koshan, Jonnette Watson-Hamilton, and (now Justice) Lisa Silver, described the Act’s very broad application to restrict social protest demonstrations and they argued these restrictions are a violation of several Charter rights that cannot be justified in a society that values democratic participation. They also made the important observation that existing provincial legislation that

prohibits trespassing already accomplished much of the Act's stated (if dubious) purposes. Alexandra Heine and Kelly Twa followed up with [Bill 1: Criminalizing Protests and Encroaching on Aboriginal and Treaty Rights](#), arguing the Act is constitutionally suspect because it essentially duplicates federal criminal law powers in relation to prohibiting interference or obstruction of property. Both of these posts reference the debates in the Legislative Assembly when the Bill was moving through the legislative process, including the concern raised that section 5 in the Act gives the Lieutenant Governor in Council too much discretion to extend the reach of the Act by making regulations that prescribe "buildings, structures, devices or other things as being essential infrastructure" (see [Alberta Hansard March 2, 2020](#) at 96). Some five years later, this concern has proven to be valid.

Order in Council 008/2025 relies on section 5 of the Act to add the following section 1 to the *Critical Infrastructure Defence Regulation*:

Essential Infrastructure

- 1 All land in Alberta within 2 km of the United States border is prescribed as essential infrastructure for the purposes of section 1(1)(a)(xxi) of the Act.

In order for this designation of land as 'essential infrastructure' to be a valid exercise of regulation-making power, the Lieutenant Governor in Council must find authority for this regulation in section 5 of the Act: "The Lieutenant Governor in Council may make regulations prescribing buildings, structures, devices or other things as being essential infrastructure." I think we can quickly dismiss the possibility of land being a 'building', 'structure' or a 'device', which leaves only one possibility: land must be interpreted as an 'other thing' in order for this regulation to be a lawful exercise of delegated legislative authority by the UCP cabinet.

Those familiar with principles of statutory interpretation will recognize this as territory for an application of the [ejusdem generis](#) doctrine. The doctrine holds that a general word or phrase which is preceded by a list of specific words or phrases, is to be interpreted as being of the same kind as those specific words or phrases. Otherwise, a literal reading of a general word or phrase might be too expansive in relation to the purpose of the enactment or defeat the reason for listing any specific words in the list. To borrow on what the Supreme Court of Canada noted in *Nanaimo (City) v Rascal Trucking Ltd.*, [2000 SCC 13 \(CanLII\)](#), a leading authority on the application of ejusdem generis, it would not be reasonable to interpret reference to 'other things' as meaning that the Lieutenant Governor in Council may designate anything as essential infrastructure (*Rascal Trucking* at paras 21, 22). According to this doctrine, section 5 of the Act should be read as: The Lieutenant Governor in Council may make regulations prescribing buildings, structures, devices or other things *of the same kind* as being essential infrastructure (emphasis is mine).

The crux of the interpretive exercise in an application of ejusdem generis is to decipher the common genus of the specific words that precede the general word or phrase. In this case, the question is: What is the common genus of the words 'buildings', 'structures', and

‘devices’? I would suggest each of these words references something built, constructed, or manufactured. None of which would include land.

An application of *eiusdem generis* to interpret section 5 of the Act would support the argument that the Lieutenant Governor in Council does not have legal authority to designate land as ‘essential infrastructure’. This argument is further supported by a contextual reading of section 1(2) of the Act, which states: “The land on which essential infrastructure is located, and any land used in connection with the essential infrastructure, is deemed to be part of the essential infrastructure.” If ‘land’ is ‘essential infrastructure’, then section 1(2) makes no sense: The land on which land is located, and any land used in connection with the land, is deemed be part of the land.

It is unfortunate that the Alberta Court of Appeal struck a constitutional challenge to the *Critical Infrastructure Defence Act* in *Alberta Union of Provincial Employees v Her Majesty the Queen (Alberta)*, [2021 ABCA 416 \(CanLII\)](#) on the basis of no public interest standing—a decision critiqued in [Frost on the Constitutional Windshield: Challenge to Critical Infrastructure Defence Act Struck by Alberta Court of Appeal](#). That was a missed opportunity to judicially review a statute that has properly been described as a [chill on democratic participation](#). It is also a statute that surely lost all legitimacy when the Alberta government did not use powers under the Act to dismantle the Coutts blockade of a major transportation corridor in 2022. Perhaps the *Critical Infrastructure Defence Act* will finally meet its demise in the ‘red zone’.

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