

JUSTIFIED OUTBREAK: BRINGING TOGETHER LAW, PUBLIC HEALTH, AND ETHICS  
DURING AN INFECTIOUS DISEASE EMERGENCY

by

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## DEDICATION

To the fallen, and to those they left behind.

## TABLE OF CONTENTS

LIST OF TABLES.....	v
ABSTRACT.....	vi
LIST OF ABBREVIATIONS USED.....	vii
ACKNOWLEDGEMENTS .....	viii
CHAPTER 1    INTRODUCTION.....	1
1.1    Infectious Disease Emergencies .....	1
1.2    Renewal.....	7
1.3    Legal Preparedness .....	11
1.4    The Problem: To a Hammer, Everything Looks Like a Nail.....	13
1.5    The Problem Continued: Making Decisions.....	19
1.6    Powers, Values, and Coercion .....	21
1.7    Desired End State.....	24
1.8    Scope.....	31
1.9    Structure.....	33
CHAPTER 2    CONSTITUTIONAL PROVISIONS AND PRINCIPLES .....	35
2.1    Legal Authority.....	35
2.2    Division of Powers.....	36
2.3    Historical Challenges to Authority .....	39
2.4    Underlying Constitutional Principles.....	40
2.5    Constitutionally Entrenched Rights .....	53
CHAPTER 3    PUBLIC HEALTH, LAW, AND ETHICS.....	64
3.1    Public Health and Public Health Law .....	64
3.1.1 Public Health.....	65
3.1.2 Public Health Law .....	69
3.1.3 Public Health Legal Preparedness.....	73
3.1.4 “Soft-Law” .....	74
3.2    Public Health Law and Ethics.....	78
3.2.1 Ethics Informing Law .....	78
3.2.2 Introducing Public Health Ethics .....	81
3.2.3 First Example: Descriptive Ethics .....	82
3.2.4 Second Example: Relational Feminism .....	85

3.3	Summary and Discussion.....	93
<b>CHAPTER 4</b>	<b>HARD LAW .....</b>	<b>95</b>
4.1	Statutory Frameworks.....	95
4.2	Statutory Content – The Scale of Powers .....	101
4.3	Compliance .....	113
4.4	Table of Legislation .....	115
<b>CHAPTER 5</b>	<b>PROPOSED REFORM .....</b>	<b>119</b>
5.1	Sample Draft Legislative Text.....	119
5.2	Improved Legal Preparedness.....	121
5.3	Transparency and Accountability .....	122
5.4	Efficiency and Effectiveness.....	128
5.5	More Meaningful Judicial Review, Respect for Rights, and Enriched Constitutional Discourse .....	132
<b>CHAPTER 6</b>	<b>MORE MEANINGFUL JUDICIAL REVIEW AND ENRICHED CONSTITUTIONAL DISCOURSE .....</b>	<b>135</b>
6.1	Introduction.....	135
6.2	A Brief Note on Procedural Fairness .....	138
6.3	Judicial Review .....	140
6.4	The Dialogue Metaphor .....	148
6.5	Chapter Six Conclusion .....	159
<b>CHAPTER 7</b>	<b>CONCLUSION.....</b>	<b>161</b>
	<b>BIBLIOGRAPHY.....</b>	<b>163</b>

## LIST OF TABLES

Table 1	Table of Legislation.....	115
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## ABSTRACT

Infectious diseases have recently found renewed significance in Canadian scholarship, with a corresponding increased interest in Canada's overall preparedness, including legal preparedness, to combat infectious disease emergencies.

Nearly every Canadian province has emergency legislation containing a "basket clause" – a provision which, for the duration of an emergency, authorizes a decision maker to take 'all necessary measures' to defeat it. Public health legal preparedness scholarship has not yet examined what criteria the decision maker must consider before deciding to deploy measures that could seriously impact the rights of individuals, including those under the *Canadian Charter of Rights and Freedoms*.

This thesis proposes that decision makers ought to have legislative guidance on how to use these special powers. The incorporation of public health, ethics, and legal principles into reformed legislation could provide for increased accountability, transparency, efficiency and effectiveness, while allowing for more focused judicial review.

## **LIST OF ABBREVIATIONS USED**

AIDS	Acquired Immune Deficiency Syndrome
F/P/T	Federal/ Provincial/ Territorial
H1N1	Influenza A Virus Subtype H1N1
H5N1	Influenza A Virus Subtype H5N1
HIV	Human Immunodeficiency Virus
SARS	Severe Acute Respiratory Syndrome
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
WHO	World Health Organization

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Any errors or omissions that remain below are mine, and mine alone.

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## CHAPTER 1 INTRODUCTION

### 1.1 INFECTIOUS DISEASE EMERGENCIES

Over the past fifteen years, infectious diseases have found renewed significance in Canadian legal discourse. Shortly after the terrorist attacks on the United States of September 11<sup>th</sup>, 2001, Anthrax-laced envelopes were sent through the mail from Trenton, New Jersey, to three news network stations and the offices of two Senators. Despite the fact that the United States Hart Senate Office Building and the House of Representatives were briefly closed, and that government staffers were given prophylaxis, twenty-two individuals were infected through either inhalation or coetaneous exposure. Five people died.<sup>1</sup>

A few short years later, in 2003, the world experienced the emergence of Severe Acute Respiratory Syndrome, or SARS. This disease, originating in China, found secondary outbreak centers in the Canadian cities of Toronto and Vancouver. The outbreak led to 438 reported infections in Canada, with 44 deaths.<sup>2</sup> At the height of the outbreak, on 26 March 2003, Ontario declared a state of emergency under its *Emergency Management Act* and began implementing special measures.<sup>3</sup> SARS provoked much more action in Canada than the 2001 Anthrax scare in the United States. It prompted

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<sup>1</sup> Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint*, 2d ed (Berkeley: University of California Press, 2008); Centers for Disease Control and Prevention, “Update: Investigation of Bioterrorism-Related Anthrax and Adverse Events from Antimicrobial Prophylaxis” in (2001) 50 Morbidity and Mortality Weekly Report 973, online: <<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5044a1.htm>>.

<sup>2</sup> Government of Canada, National Advisory Committee on SARS and Public Health, *Learning From SARS: Renewal of Public Health in Canada* (Ottawa, Health Canada, 2003) (Chair: Dr. David Naylor, Dean of Medicine, University of Toronto) [the Naylor Report].

<sup>3</sup> Naylor Report, *ibid*, at 28.

several inquiries into the affair: a federal advisory committee,<sup>4</sup> a senate committee report,<sup>5</sup> a provincial commission,<sup>6</sup> as well as the striking of an expert panel.<sup>7</sup> The events of SARS and the reports that followed, as well as the prominent media attention they received, encouraged noticeable change in Canada's public health regime: organizational, clinical, and legal.

Almost on cue, the 2009 H1N1/ swine flu pandemic then mobilized Canada's newly formed, and ostensibly reinvigorated, public health infrastructure. The spread of the disease was truly global, and was classified by the World Health Organization (WHO) as a phase 6 pandemic.<sup>8</sup> In Canada, between 12 April 2009 and 3 April 2010, there were over 33,000 laboratory confirmed cases of the H1N1 flu, resulting in 8678 hospitalizations, 1473 intensive care admissions, and 428 deaths.<sup>9</sup> The vast majority of

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<sup>4</sup> *Ibid.*

<sup>5</sup> Canada, Standing Senate Committee on Social Affairs, Science and Technology, *Reforming Health Protection and Promotion in Canada: Time to Act* (Ottawa, November 2003) (Chair: Senator Michael Kirby).

<sup>6</sup> Ontario, SARS Commission, *Spring of Fear, Final Report* (Toronto: Ministry of Health and Long Term Care, December 2006) (Commissioner: Justice Archie Campbell, Ontario Superior Court of Justice) [the Campbell Commission, Final Report]. Contained within the report were its two initial, interim reports: Interim Report: SARS and Public Health in Ontario (Toronto: Ministry of Health and Long Term Care, 15 April 2004) [Campbell Commission, First Interim Report]; and Second Interim Report: SARS and Public Health Legislation (Toronto: Ministry of Health and Long Term Care, 5 April 2005) [Campbell Commission, Second Interim Report].

<sup>7</sup> Ontario, Expert Panel on SARS and Infectious Disease Control, *For the Public's Health: Initial Report* (Toronto: Ministry of Health and Long Term Care, 2003 (Chair: Dr. David Walker). [the Walker Report]

<sup>8</sup> Phase 6 is, according to the WHO: "the pandemic phase, is characterized by community level outbreaks in at least one other country in a different WHO region in addition to the criteria defined in Phase 5. Designation of this phase will indicate that a global pandemic is under way", online : <<http://www.who.int/influenza/preparedness/pandemic/h5n1phase/en/>>.

<sup>9</sup> Public Health Agency of Canada, "Flu Watch: March 28 to April 3, 2010", (9 April 2010), online: <[http://www.phac-aspc.gc.ca/fluwatch/09-10/w13\\_10/index-eng.php](http://www.phac-aspc.gc.ca/fluwatch/09-10/w13_10/index-eng.php)>.

these infections occurred in five months, between August and December 2009.<sup>10</sup> While these numbers seem high in comparison to SARS (at over seventy times the infection rate and nearly ten times the death rate), the disease differed in that it was at least identifiable and a vaccine was made available. It also did not end up being as deadly as originally feared.<sup>11</sup> In the words of the director general of the WHO: “This pandemic has turned out to be much more fortunate than what we feared a little over a year ago. This time around, we have been aided by pure good luck. The virus did not mutate during the pandemic to a more lethal form.”<sup>12</sup>

Unlike during SARS, no states of emergency were declared in Canada during the 2009 pandemic. Had H1N1, a disease to which almost no one had a pre-existing resistance or immunity, been a more aggressive virus, then the federal and provincial governments may very well have felt compelled to institute more drastic, including emergency, measures.

In 2015, a devastating Ebola outbreak emerged in West Africa.<sup>13</sup> Today, the number of globally confirmed cases of Middle East Respiratory syndrome, or MERS,

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<sup>10</sup> Public Health Agency of Canada, “Flu Watch: December 20, 2009 to January 2, 2010”, (8 January 2010), online: <[http://www.phac-aspc.gc.ca/fluwatch/09-10/w51-52\\_09/index-eng.php](http://www.phac-aspc.gc.ca/fluwatch/09-10/w51-52_09/index-eng.php)>.

<sup>11</sup> During the H1N1 pandemic, Ontario actually suffered fewer deaths than it normally endures due to seasonal flu: Ontario, Chief Medical Officer of Health, *The H1N1 Pandemic: How Ontario Fared* (Toronto: Ministry of Health and Long Term Care, June 2010) at 10.

<sup>12</sup> World Health Organization, “H1N1 in Post-Pandemic Period: Director-General’s Opening Statements at Virtual Press Conference” (10 August 2010), online: <[http://www.who.int/mediacentre/news/statements/2010/h1n1\\_vpc\\_20100810/en/index.html](http://www.who.int/mediacentre/news/statements/2010/h1n1_vpc_20100810/en/index.html)>.

<sup>13</sup> For a critical analysis of how emergency powers were used in response to the outbreaks, see: James G Hodge, Jr, et al, “Global Emergency Legal Responses to the 2014 Ebola Outbreak” (2014) *JL Med & Ethics* 595.

continues to climb,<sup>14</sup> and the Zika virus has surfaced as a new source of regional, if not yet global, anxiety.<sup>15</sup>

The showcasing of these relatively recent infectious disease “highlights” is not meant to portray them as anomalies within the general trend in disease emergence of the last thirty years. Quite the contrary is so. The report from the federal National Advisory Committee on SARS and Public Health (the “Naylor Report”)<sup>16</sup> noted that infectious disease emergence has, in fact, been constant:

SARS is only the most recent example of emerging infectious diseases – diseases that are newly identified, or that have existed previously but are increasing in incidence or geographic range. Since 1973, more than 30 previously unknown diseases associated with viruses and bacteria have emerged. Examples include: Ebola virus (1977); Legionnaire’s disease (1977); *E. coli* 0157:H7 – associated hemolytic uremic syndrome (1982); HIV/AIDS (1983); Hepatitis C (1989); variant Creutzfeldt-Jakob disease (1996); and H5N1 Influenza A or avian flu (1997). West Nile virus infection is an example of a disease that has increased in geographic range. As well, some known infectious diseases, such as tuberculosis, have re-emerged in vulnerable populations.<sup>17</sup>

Despite the fact that the emergence of infectious diseases is not now, nor had been, an exceptional occurrence, the SARS events triggered an unprecedented call for public health investigation and reform - reform that was to a certain extent tested during the H1N1 pandemic. Undoubtedly, this was at least in part due to the wide media coverage of the SARS events, which garnered global attention and put Toronto, Canada’s biggest city in its biggest province, under the microscope; on April 23<sup>rd</sup>, 2003, the World

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<sup>14</sup> World Health Organization, *Middle East respiratory syndrome coronavirus (MERS-CoV)*, online: <<http://www.who.int/emergencies/mers-cov/en/>>.

<sup>15</sup> World Health Organization, *Microcephaly/Zika virus*, online: <<http://www.who.int/emergencies/zika-virus/en/>>.

<sup>16</sup> *Supra*, note 2.

<sup>17</sup> Naylor Report, *supra*, note 2, at 2.

Health Organization placed a travel advisory on Toronto, advising against all but the most essential travel.<sup>18</sup> Ontario and Toronto suffered serious economic losses during SARS.<sup>19</sup> The losses, both pecuniary and non-pecuniary, were extensive, and were characterized by the Naylor report as follows:

As a disease outbreak, SARS was relatively small. Nonetheless, the disease killed 44 Canadians, and caused illness in a few hundred more. The response to the outbreak paralyzed a major segment of Ontario's health care system for weeks, and saw more than 25, 000 residents of the Greater Toronto Area placed in quarantine. Psychological effects of SARS on health care workers, patients, and families are still being assessed, but the economic shocks have already been felt. Estimates based on volumes of business compared to usual seasonal activities suggest that tourism sustained a \$350 million loss, airport activity reduction cost \$220 million, and non-tourism retail sales were down by \$380 million. It seems entirely possible that the direct and indirect costs of SARS could reach \$2 billion.<sup>20</sup>

While media attention, human hardship, and economic losses would each seem to justify the after-the-fact attention SARS received in Canada, that attention may also owe something to the fact that, as one American scholar has put it, SARS “in some respects returned us to the late 19th-century Ellis Island days; its cause and mode of transmission were initially unknown, there was no diagnostic test; there was no vaccine; and there was no effective treatment.”<sup>21</sup> In simpler terms, SARS was frightening.

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<sup>18</sup> Naylor Report, *supra*, note 2, at 37.

<sup>19</sup> Ontario, The SARS Commission, First Interim Report: SARS and Public Health in Ontario (Toronto: Ministry of Health and Long Term Care, 15 April 2004) (Commissioner: Justice Archie Campbell, Ontario Superior Court of Justice) [Campbell Commission: First Interim Report].

<sup>20</sup> Naylor Report, *supra* note 2, at 211.

<sup>21</sup> George J Annas, *Worst Case Bioethics: Death, Disaster, and Public Health* (Oxford: University Press, 2010) at 221.

Finally, SARS likely garnered such extensive after-the-fact inquiry because it exposed Ontario's (and Canada's<sup>22</sup>) lack of preparedness to deal with an infectious disease emergency:

SARS showed that Ontario's public health system is broken and needs to be fixed. Despite the extraordinary efforts of many dedicated individuals and the strength of many local public health units, the overall system proved woefully inadequate. SARS showed Ontario's central public health system to be unprepared, fragmented, poorly led, uncoordinated, inadequately resourced, professionally impoverished, and generally incapable of discharging its mandate.<sup>23</sup>

Even though Ontario's public health system suffered from numerous, identified shortcomings, SARS was eventually contained and the crisis ended. Perhaps fittingly, it was old-fashioned 19<sup>th</sup>-century public health measures that were effective in combating SARS, as recognized in the Naylor Report:

SARS has been contained, at least temporarily – not by the genomic revolution, not by advanced pharmaceuticals, but by old-fashioned public health measures like hand washing, infection control procedures, isolation of cases, and tracing and quarantine of contacts.

What the SARS outbreak showed, perhaps more than anything else, is the power of public health. The best current evidence is that without effective public health measures, SARS would have eventually sickened millions of people on this shrinking planet, causing not hundreds of deaths, but countless thousands. The next outbreak, however, may be even more insidious than SARS.<sup>24</sup>

While these old-fashioned measures were successful in combating the outbreak (and so ought to be viewed positively), it should not be forgotten that public health measures (especially emergency measures) such as isolation and contact quarantine, mandatory treatment, compulsory vaccination, and others, have at the same time

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<sup>22</sup> Naylor Report, *supra* note 2 at 211.

<sup>23</sup> Campbell Commission, First Interim Report, *supra* note 6, at 25.

<sup>24</sup> Naylor Report, *supra* note 2, at 42.

enormous potential to interfere with individual autonomy, bodily integrity, and other civil liberties. They also have the potential to place disproportionate burdens upon disadvantaged groups in society. Like a stick of dynamite, they are very effective and, when used appropriately, can indeed be very safe. But they are anything but benign.

This thesis is set within this context of infectious disease emergence and outbreak, and contemporary public health renewal in Canada.

## 1.2 RENEWAL

The various SARS inquiries, panels, and commissions generated reports containing recommendations for the renewal of public health in Canada, as well as improved emergency preparedness and response. There was also a spike in interest from the academic community. Substantial commentary emerged, which dealt with both the general significance and applicability of public health<sup>25</sup> (and public health law)<sup>26</sup> as a discipline and approach. This scholarship took its place alongside further research and opinions dealing with more specific clinical and ethical issues, for example: emergency triage;<sup>27</sup> health care workers safety, ethical duties and responsibilities;<sup>28</sup> ethics in

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<sup>25</sup> e.g. Lawrence O Gostin & James G Hodge Jr, guest eds, “Symposium on Global Health, Law, Ethics and Policy” (2007) 35:4 *JL Med & Ethics* 519; MJ Selgelid, “Pandethics” (2009) 123 *Public Health* 255; George P Smith II, “Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage” (2009) 18 *Annals Health L* 1.

<sup>26</sup> Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint*, 2<sup>d</sup> ed (Berkeley: University of California Press, 2008); Christopher Reynolds, *Public Health Law and Regulation* (Sydney: Federation Press, 2004); Bailey, Tracey M, Timothy Caulfield & Nola M Ries, eds. *Public Health Law and Policy in Canada*, 2d ed. (Markham: LexisNexis, 2008).

<sup>27</sup> e.g. James Downar & Dori Seccareccia, “Palliating a Pandemic: ‘All Patients Must be Cared For’” (2010) 39:2 *Journal of Pain and Symptom Management* 291; Nathan Emmerich, “Anti-theory in Action? Planning for Pandemics, Triage and ICU or: How Not to Bite a Bullet” (2011) 14 *Med Health Care and Philos* 91; Smith, *supra* note 25;

planning;<sup>29</sup> pre-existing group disadvantage;<sup>30</sup> the coercion of individuals<sup>31</sup> and the emergency provision of scarce resources.<sup>32</sup> By a healthy margin, scholarly commentary concerned with the experiences, decisions, ethics, duties, and rights of health care professionals dominated the discourse.

The prevalence of writing concerned with the predicaments faced by health care workers is neither surprising nor inappropriate: they are the people who will be relied upon to execute any emergency plan. They are also the individuals who are put at the greatest risk. During SARS, health care workers accounted for a large portion of the infected and fatalities. Nurses infected during the SARS outbreak launched a legal action

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Jeffrey Kirby, “Enhancing the Fairness of Pandemic Critical Care Triage” (2010) 36 *Journal of Medical Ethics* 758.

<sup>28</sup> e.g. Wendy Austin, “Ethics in a Time of Contagion: A Relational Perspective” (2008) 40:4 *CJNR* 10; Tracey M. Bailey et al. “A Duty to Treat During a Pandemic: The Time for Talk is Now” (2008) 8:8 *American Journal of Bioethics* 29; Cara R Davies & Randi Zlotnik Shaul, “Physicians’ Legal Duty of Care and Legal Right to Refuse to Work During a Pandemic” (2010) 182:2 *CMAJ* 167; Margarita E Pena, Charlene B Irvin & Robert B Takla, “Ethical Considerations For Emergency Care Providers During Pandemic Influenza – Ready or Not...” (2009) 24:2 *Prehospital and Disaster Medicine* 115; James C Thomas, Pia DM MacDonald & Emily Wenink, “Ethical Decision Making in a Crisis: A Case Study of Ethics in Public Health Emergencies (2009) 15(2) *Journal of Public Health Management Practice* E16.

<sup>29</sup> e.g. Nancy Berlinger and Jacob Moses, “Pandemic Flu Planning in the Community: What Can Clinical Ethicists Bring to the Public Health Table?” (2008) 17 *Cambridge Quarterly of Healthcare Ethics* 468.

<sup>30</sup> e.g. Connal Lee, Wendy A Rogers & Annette Braunack-Mayer, “Social Justice and Pandemic Influenza Planning: The Role of Communication Strategies” (2008) 1:3 *Public Health Ethics* 223.

<sup>31</sup> e.g. Jacob Chapman, “Doomsday: A Look at the Ethical Issues Behind the Government’s Coercive Powers in Response to a Public Health Nightmare” (2008) 9 *Journal of Law & Social Challenges* 24; Rev Clayton L Thomason, “It’s a Small World After All: Global Health and the Ethical Lessons of SARS” (2004) 12 *Mich St J Int’l L* 315; Sara Mahmoud-Davis, “Balancing Public Health and Individual Choice: a Proposal for a Federal Emergency Vaccination Law” (2010) 20 *Health Matrix* 219.

<sup>32</sup> e.g. Carolina Alfieri, *Proposal of an Ethics-Based Framework for Prioritization of Scarce Resources During an Influenza Pandemic* (MSc Thesis, McGill University Department of Experimental Medicine, 2005) [unpublished].



in negligence against the Ontario government: *Abarquez v Ontario*.<sup>33</sup> The case was dismissed however when the Ontario Court of Appeal ruled that the government did not owe a private law duty of care to individual healthcare workers, but rather a public law duty to the population at large.<sup>34</sup> The decision is especially noteworthy considering that the laws of many Canadian jurisdictions authorize the conscription of unwilling healthcare workers as an emergency measure. This case discloses a prominent theme in public health, public health law, and emergency preparedness scholarly discourse: the inherent tension between the best health interests of the population at large (or: “the public”) and the liberties (and health) of individuals or smaller groups.

While the SARS litigation was high profile, private law is not the dominant sphere where law and public health converge during and after emergencies: public law is. The SARS Commissions specifically identified many points of legislation and public law mechanisms that required improvements in order to better combat future infectious disease outbreaks, including, amongst others:

- Inter-jurisdiction cooperation and coordination (needed to manage constitutional division of powers),<sup>35</sup>
- Improved access to enforcement orders;<sup>36</sup>

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<sup>33</sup> 2009 ONCA 374, 95 OR (3d) 414. *Abarquez* was heard alongside four other similar cases, all of which failed: *Williams v Canada (Attorney General)*, 2009 ONCA 378, 95 OR (3d) 401, leave to appeal to the SCC refused [2009] SCCA No 298 (QL); [*Williams*] *Larosa v Ontario*, 2009 ONCA 373, 95 OR (3d) 764; and *Jamal v Scarborough Hospital*, 2009 ONCA 376, 95 OR (3d) 760. See also: *Eliopoulos v Ontario (Minister of Health and Long Term Care)* (2006), 82 OR (3d) 321 (CA), [2006] OJ No 4400 (QL), leave to appeal to the SCC refused [2006] SCCA No 514 (QL) [*Eliopoulos*].

<sup>34</sup> *Abarquez, ibid*, at para 20, relying on *Williams, ibid*, at para 31, which itself relied on *Eliopoulos, ibid*, at paras 19-20. The complaint in *Abarquez* also contained a *Charter* damages claim, which was dismissed at paras 49-52.

<sup>35</sup> Naylor Report, *supra* note 2, at 164.

<sup>36</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 274.

- Improved inter-jurisdictional reporting requirements under revised or clarified privacy rules;<sup>37</sup>
- Independence and visibility of the Chief Medical Officers of Health;<sup>38</sup>
- Creation of explicit statutory authority for extraordinary emergency measures;<sup>39</sup>

From a legal scholarship standpoint, nowhere was legal structure so critical to achieving public health ends as in the subjects of health information, privacy, reporting, and sharing.<sup>40</sup> This is especially so in the international context, where information sharing on a global scale becomes critical to detecting and preventing, or mitigating, a coming pandemic.<sup>41</sup> But this thesis is mostly concerned with the last area for reform: the creation of explicit statutory authority for necessary, extraordinary measures during an infectious disease emergency. When it is truly needed, this authority is critical. As the SARS Commission recognized:

[P]ublic health emergencies will arise despite the greatest vigilance of public health authorities and the most vigorous exercise of their daily powers.

The quintessential public health emergency is an outbreak of infectious disease that overwhelms the capacity of the public health system. The most serious predictable public health emergency is pandemic influenza which would overwhelm not only the public health and hospital and medical systems but also the other systems that keep the province going. Pandemic influenza exemplifies the need for strong emergency powers.

[...]

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<sup>37</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 175 – 210; 213 – 229.

<sup>38</sup> *Ibid*, at 252.

<sup>39</sup> *Ibid*, at 304.

<sup>40</sup> See for example: Elaine Gibson, “Public Health Information Privacy and Confidentiality”, chapter 4 in Tracey M Bailey, Timothy Caulfield & Nola M Ries, eds, *Public Health Law and Policy in Canada* (Markham: LexisNexis, 2005).

<sup>41</sup> Canada is a party to the World Health Organization and has signed on to the *The International Health Regulations (2005)* 2<sup>d</sup> Ed. (World Health Organization, 2008).

Although Ontario got through SARS without any special emergency powers, the prospect of pandemic influenza brings home the need for such powers. Even if all the emergency measures taken during SARS were explicitly enshrined in emergency legislation, those measures would be hopelessly inadequate in the face of a much larger infectious attack such as pandemic influenza.

[...]

The prospect of pandemic influenza or indeed any outbreak more serious even than SARS requires the enactment of emergency powers stronger than those available during SARS and available now.<sup>42</sup>

This thesis will argue that legislative amendments can be used to do even more.

The law can do more than grant explicit authority for emergency measures; it can improve the very use of that authority towards achieving public health ends.

### **1.3 LEGAL PREPAREDNESS**

The call from the various SARS commissions and committees for reform of emergency legislation fits within a branch of commentary and scholarship that has come to be known as “Legal Preparedness”.<sup>43</sup> This field, a subset of public health emergency preparedness, has entered into the prevailing public health scholarly commentary relatively recently. Thérèse Murphy and Noel Whitty have provided a useful definition:

[A] term that requires some explanation is ‘public health emergency legal preparedness’. Stated shortly, this is all about having the right laws in place and then using them in the right way in a time of public health emergency. In other words, it is about both legal preparedness for, and response to, public health emergencies – it is both proactive and reactive. More generally, it can be said to be both an essential part of both public and global public health

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<sup>42</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 345, 348.

<sup>43</sup> Indeed, the Campbell Commission recommended that “Legal preparedness be an integral component of all public health emergency plans,” Second Interim Report, *supra* note 6, at 294.

security, and a subset of public health emergency preparedness.<sup>44</sup>

B. Kamoie et al. have defined the concept as “attainment of benchmarks within a public health system”,<sup>45</sup> and A.D. Moulton et al. have similarly defined it as the “attainment by a public health system... of legal benchmarks essential to the preparedness of the public health system”. They further added that legal preparedness is a contribution that the law makes towards the specified ends of the discipline of public health.<sup>46</sup> These benchmarks are usually thought of in the ‘public health’ sense, taking the law as a means to a particular public health end. In this author’s view, legal preparedness can be thought of as an ongoing process,<sup>47</sup> adaptable to changes in society and in the natural environment, that attempts to improve the law so that we can better prevent, and if necessary respond to, future public health emergencies.

In the context of public health emergencies, legal preparedness literature has quite rapidly found itself enveloped by concern for national and international security. Given the association infectious diseases like Anthrax have with biological warfare and terrorism, this drift in the literature makes sense. However, it is not without its critics,<sup>48</sup> and caution must be taken to not associate infectious disease legal preparedness too closely with the preparations necessary to deal with other kinds of emergencies. In this thesis, public health emergency preparedness is not taken up as principally a national

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<sup>44</sup> Thérèse Murphy & Noel Whitty, “Is Human Rights Prepared? Risk, Rights, and Public Health Emergencies” (2009) 17 Med Law Rev 219.

<sup>45</sup> B Kamoie et al, “Assessing Law and Legal Authorities for Public Health Emergency Legal Preparedness” (2008) 36 (Spec Supp) J L Med & Ethics 23, at 23.

<sup>46</sup> AD Moulton et al “What is Public Health Legal Preparedness?” (2003) 31:4 J L Med & Ethics 672, at 674.

<sup>47</sup> This is similar to the approach implicitly taken by Robert M Pestronk, “Emergency Legal Preparedness” (2008) 36 (Spec Supp) JL Med & Ethics 47.

<sup>48</sup> e.g. Murphy, *supra* note 44.

security issue, but rather primarily as a public health issue. It is acknowledged that this is a point open to debate. However, the central proposal of this thesis, namely that the legislature ought to provide guidance to decision makers, could just as easily be adopted under a national security approach to the same facts.

#### **1.4 THE PROBLEM: TO A HAMMER, EVERYTHING LOOKS LIKE A NAIL**

This thesis concerns one aspect of public health emergency legal preparedness that has, to date, largely been overlooked in the literature: the decision-making process undertaken by decision makers when choosing whether or not to deploy extraordinary measures. It is argued that the law can do more than simply provide statutory authority for extraordinary emergency measures. The decision maker should be able to turn to his or her empowering legislation for more than a bare statement of authority. He or she could find legal guidance on how he or she ought to go about deciding.

The extent to which the legislature ought to grant extraordinary powers to the executive in times of emergency is not itself a new question. The Campbell commission, in recommending that explicit legislative authority be granted post-SARS, was alive to the benefits and drawbacks of various approaches. It noted two main models of emergency powers – the first, in essence, relies upon enumerated powers specific to a certain kind of emergency, and relies largely upon authorities already existing in other statutes, either explicitly or implicitly. The second model relies upon the legislature granting broad, sweeping authority to the executive during the emergency, even to the point of permission to override existing laws.<sup>49</sup>

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<sup>49</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 332-333.

The Commission debated the merits of each model in its Second Interim Report. In so doing, it noted that (at the time) Ontario had the weakest emergency legislation in the country – even in the post-*Charter*<sup>50</sup> era, every other province had enacted the “general” model of emergency legislation.<sup>51</sup> The Campbell Commission, recognizing that the Ontario Legislature already had a Bill before it adopting the general model, recommended for increased legislation in this area to ensure that decision makers were not inhibited by legal uncertainty. However, it also recommended that the Bill be subjected to thorough review by Ontario’s Attorney General to ensure constitutional compliance.<sup>52</sup> Bill 138 eventually made major amendments to the *Emergency Management and Civil Protection Act*,<sup>53</sup> including the granting of broad emergency powers, highlighted below, in the form of what will be referred to as a “basket clause”:

#### **Emergency orders**

(4) In accordance with subsection (2) and subject to the limitations in subsection (3), the Lieutenant Governor in Council may make orders in respect of the following:

1. Implementing any emergency plans formulated under section 3, 6, 8 or 8.1.
2. Regulating or prohibiting travel or movement to, from or within any specified area.
3. Evacuating individuals and animals and removing personal property from any specified area and making arrangements for the adequate care and protection of individuals and property.
4. Establishing facilities for the care, welfare, safety and shelter of individuals, including emergency shelters and hospitals.

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<sup>50</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the *Charter*].

<sup>51</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 336.

<sup>52</sup> *Ibid* at 354.

<sup>53</sup> RSO 1990, c E-9.

5. Closing any place, whether public or private, including any business, office, school, hospital or other establishment or institution.
6. To prevent, respond to or alleviate the effects of the emergency, constructing works, restoring necessary facilities and appropriating, using, destroying, removing or disposing of property.
7. Collecting, transporting, storing, processing and disposing of any type of waste.
8. Authorizing facilities, including electrical generating facilities, to operate as is necessary to respond to or alleviate the effects of the emergency.
9. Using any necessary goods, services and resources within any part of Ontario, distributing, and making available necessary goods, services and resources and establishing centres for their distribution.
10. Procuring necessary goods, services and resources.
11. Fixing prices for necessary goods, services and resources and prohibiting charging unconscionable prices in respect of necessary goods, services and resources.
12. Authorizing, but not requiring, any person, or any person of a class of persons, to render services of a type that that person, or a person of that class, is reasonably qualified to provide.
13. Subject to subsection (7), requiring that any person collect, use or disclose information that in the opinion of the Lieutenant Governor in Council may be necessary in order to prevent, respond to or alleviate the effects of the emergency.
14. Consistent with the powers authorized in this subsection, taking such other actions or implementing such other measures as the Lieutenant Governor in Council considers necessary in order to prevent, respond to or alleviate the effects of the emergency.<sup>54</sup>

[Emphasis added]

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<sup>54</sup> *Ibid*, s. 7.0.1(4). Note the self-limiting phrase ‘consistent with the powers authorized in this subsection’. There are other examples of this kind of ‘weaker’ guidance in the Acts of other provinces, some of which will be highlighted in in chapter four, along with their significance.

The Commission had it right: the above provision is typical of the legislation found throughout Canada, which tends to enumerate specific powers but grants much broader authorities either by leaving the list open (an “implicit” basket clause) or, as is the case above, by explicitly granting the authority to take whatever action may be required in order to meet the emergency.<sup>55</sup>As will be discussed below, it is arguable whether such broad grants of power are truly in accordance with the Rule of Law at all.<sup>56</sup> But assuming that they are, and even assuming the powers are always exercised within the discretion granted by the legislation and in accordance with the principles of statutory interpretation, surely the broad authority must still be subject to some higher level of scrutiny. In other words, if the Rule of Law is to prevail, the otherwise lawful discretion cannot truly be unfettered.

By the time the Commission released its final report the Bill had become law. The Commission expressed trepidation at the existence of such power, and reiterated its call to have the law examined, making the following comments:

It is understandable that the government in its desire to get the emergency legislation into place before the next disaster did not pause to address and to answer in detail the flaws referred to in the Commission’s April 2005 report, flaws which are serious but easily remedied. The government has taken no public position in respect of the detailed flaws noted by the Commission. It is not as if the

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<sup>55</sup>A complete table of the legislation throughout Canada, who the decision maker is, and what vehicle is employed to grant them emergency authority, is located below at the end of chapter four.

<sup>56</sup> See for example the discussions in David Dyzenhaus, “Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?” (2006) 27 *Cardozo L Rev* 2005; David Dyzenhaus, “Introduction: Legality in a Time of Emergency” (2008) 24 *Windsor Review of Legal and Social Issues* 1; and David Dyzenhaus, “The Puzzle of Martial Law” (2009) 59 *UTLJ* 1. In Canada, states of emergency are likely within the rule of law due to the persistent supervision of the judiciary under the constitution, but this does not mean that the empowering legislation ought not to be improved to encourage proactive constitutional compliance.



unimplemented recommendations have been considered and rejected for publicly stated reasons. The unimplemented recommendations have simply not been addressed publicly...

The problem is not with the good intentions of those who will administer and exercise the emergency powers. The problem is that these awesome powers represent a profound change in our legal structure and raise issues that need to be addressed further in this statute that so fundamentally alters our system of government by law. Extraordinary powers like those in the *Emergency Management and Civil Protection Act* are inherently dangerous and require now the sober second thought and detailed legal clause-by-clause review and publicly stated justification which they did not explicitly receive before.

Ontario's emergency legislation brings to mind what President Lyndon Johnson said about the potential danger of all laws:

You do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered.

The Commission recommends the review and amendment of the emergency legislation in accordance with the unimplemented recommendations in Chapter 11 of the Commission's April 2005 second interim report.<sup>57</sup>

Notably, the Commission did not call for the legislation to be scrapped, nor for the basket clause to be eliminated. It called for examination for potential improvements. In a passage that we will return to later in this thesis, the Commission noted:

Emergency powers are inherently dangerous. They carry the twin dangers of overreaction and underreaction.

The first danger is overreaction. Every emergency power, once conferred, "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." To a hammer, everything looks like a nail. To some emergency managers, every problem may look like an opportunity to invoke emergency powers.

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<sup>57</sup> Campbell Commission, Final Report, *supra* note 6, Volume II, Chapter 9, "Recommendations", at 1187-1188.

The second danger is underreaction. In the face of a deadly new disease with an uncertain incubation period, ambiguous symptoms, no diagnostic tests, uncertainty as to its infectiveness and mechanisms of transmission, and no idea where in the province it may be simmering, decisive action may be necessary that turns out in hindsight to have been excessive.

The central task of emergency legislation is to guard against overreaction by providing safeguards and to guard against underreaction by avoiding legal restrictions that prevent the application of the precautionary principle.

There are no pure public health emergencies. Although pandemic influenza might start as a public health emergency, it would rapidly snowball into a general emergency. And big general emergencies that arise outside the field of public health usually have a public health component.<sup>58</sup>

It is this problem which this thesis seeks to address – how to improve the law to be better prepared to meet an infectious disease emergency, particularly by guarding against the spectres of overreaction and underreaction. These emergency-power-granting legislative provisions form the nucleus of this thesis and its proposal for law reform.

Further, it is an objective of this thesis to make these provisions more clearly constitutionally compliant. Written as they are, they are at the very least vulnerable to constitutional challenges, if not on the face of the legislation then in how they are applied.

The Campbell Commission noted this risk, and highlighted the consequences:

Ontario's emergency legislation will probably be challenged in court at some time. It will be a major blow to the integrity of the legislation should a court strike down as unconstitutional any part of the statute or any emergency order made under the statute. It is essential to ensure in advance, so much as possible, that the legislation conforms with the *Canadian Charter of Rights and Freedoms*.<sup>59</sup>

This is precisely what the law reform proposed in this thesis is meant to do.

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<sup>58</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 9-10.

<sup>59</sup> Campbell Commission, Second Interim Report, *supra* 6, at 12.

## 1.5 THE PROBLEM CONTINUED: MAKING DECISIONS

It is easy to forget when discussing the high-stakes questions concerning infectious disease emergencies that will be raised should the extraordinary legislative powers ever be activated, that it will be a human being (or a group of them) who will have to decide if, when, and how to use these powers. Likewise, it is easy to overlook that the government decision maker, in the real world, is not apt to be alone, but rather supported by advisors.

Prominent among them (and the most pertinent for this thesis's purposes) will be the legal advisor. Her job will not be easy. Even relatively straightforward legal activities, such as enforcing an order, can become more complex during an emergency. In the words of the Campbell Commission:

Legal counsel for public health units faced a daunting task during SARS. When seeking judicial authority to enforce an order, they had to navigate a confusing maze of overlapping and uncertain judicial powers and procedures when speedy enforcement was vital to the containment of SARS. As one lawyer involved in the response to SARS told the Commission:

It is quite a challenge to be in a middle of an emergency with the kind of huge range of legal issues coming up and you have to figure out what the legal requirements are and how to get what needs to be done, done in the face of those issues and still keeping everyone within the law.<sup>60</sup>

Legal preparedness as a discipline includes a component that encourages legal professionals to be pre-equipped to deal with the practical matters that will become time-sensitive during the emergency. One can for example pre-prepare precedents, pre-map the emergency court system, and pre-research a quick-reference table for legal authorities. But this thesis is more concerned with the provision of advice to the decision

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<sup>60</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 289.

maker on whether or not particular extraordinary measures can legally be deployed on a given set of facts. This kind of advice during SARs was hard to come by, mostly due to the confusing enforcement regime:

One lawyer told the Commission that their ability during SARS give clear legal advice was at times hampered by weaknesses in the enforcement portions the Act:

During SARS, I would often say when asked if we could do something, ‘you can try it, but if we are challenged we may be on shaky legal grounds and the courts will be in a very difficult position.’<sup>61</sup>

Such advice can hardly be considered helpful, yet in the circumstances, it was doubtless the best the lawyer could do. In response to this phenomenon, the Campbell Commission concluded:

Public health officials and the lawyers who advise them require not only the clear authority to act in the face of public health risks, they require also a simple, rational, effective and fair set of procedures to enforce compliance and to provide legal remedies for those who challenge orders made against them. Delays in legal enforcement may cost lives. Delays in legal remedies may put individual liberty at risk. The above recommendations are necessary to secure effective access to enforcement and to remedies.<sup>62</sup>

[Emphasis added]

This thesis proposes law reform in the same vein and towards the same objective, but concerning a process that has up to now been largely ignored in the literature. During an emergency, Canada deserves good, lawful decisions, made in a timely manner. The legislature can give direction that will enable decision makers, assisted by their legal advisors, to do just that.

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<sup>61</sup> *Ibid*, at 7.

<sup>62</sup> *Ibid*, at 294.

## 1.6 POWERS, VALUES, AND COERCION

Coercion is at the center of the individual/ public tension within public health. Nola Ries has noted that during the global SARS outbreak coercive public health measures, especially quarantine, were used very aggressively in China and Singapore. She has also pointed out that, while Canada's quarantines were almost universally voluntary, a large portion of them may actually have been unnecessary.<sup>63</sup> George Annas has been extremely critical of the handling of the SARS crisis and the use of coercive measures in both the United States and China, and has pointed out that Canada's response, though more tempered, was still questionable on several occasions.<sup>64</sup>

At the same time, the Campbell Commission noted that the level of cooperation from Canadian residents during the emergency was quite remarkable, and was being studied as such by researchers.<sup>65</sup> This point goes to the inherent limitations of law, both as a tool and as an enabler, for public health. As the Campbell Commission noted:

Laws are only the last resort. Legal procedures are useless without overwhelming public cooperation of the kind demonstrated in SARS. While it is important to strengthen the legal machinery available to public health officials, it is even more important to strengthen the things that encourage public cooperation.<sup>66</sup>

While law may empower decision makers to use coercion to achieve their objectives, over-reliance on these measures can discourage cooperation, resulting in diminishing returns as reliance on legal coercion begets more legal coercion. This means

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<sup>63</sup> Nola M Ries, "Public Health Law and Ethics: Lessons from SARS and Quarantine" (2004) 13:1 Health L Rev 3.

<sup>64</sup> Annas, *supra* note 21 at 223. Annas also seems to especially disapprove of the attitude expressed by Ontario's then Minister of Health, who, when told some people in Toronto were not completing their ten-day quarantines, was quoted as replying "I don't know if people will like this, but we can chain them to a bed if that's what it takes".

<sup>65</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 251.

<sup>66</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 251.

that any legislative reform should attempt to do more than just authorize powers and provide for coercion. It should be crafted in such a manner that it will increase public confidence and cooperation. The powers themselves, the Commissions noted, would improve legal preparedness. Presumably this is with a view to improving post-emergency public health outcomes. Building in to the legislation provisions designed to encourage confidence, cooperation, and compliance could accomplish the same goals.

Within the public health discipline, it makes sense that professional decisions are made by experts. They are the people best prepared for assessing the risks and determining the appropriate measures. Weighing their professional judgment against the applicable professional code of ethics, they will be well equipped for making a decision. Law's role, in this paradigm, is to enhance preparation by creating the structure that enables this process, and grants the powers to decide, implement, and enforce compliance if necessary.

This account might be effective. But it glosses over the inevitable legal “balancing” that occurs when the public good come into conflict, or even potential conflict, with constitutionally entrenched individual civil liberties. Even if a measure is judged as scientifically the “best” measure, and is acceptable according to the standards of public health as a discipline, this still does not mean, from a legal perspective, that it ought to be deployed.

In this vein, this thesis taps into a paradigm of “decisional” legal preparedness that is similar to what Tracey M. Bailey et al. called for in their 2008 article “A Duty to Treat During a Pandemic: The Time for Talk is Now”. Arguing that health care professional codes of ethics ought to be debated and prepared before, and not during, a

pandemic in order to determine what professional governing bodies would demand of their members during a crisis, the authors concluded:

For it is vital to know where we stand on this issue *as a society*, both to plan for a future pandemic, but also to *assess* the society in which we are living. Will we discover it is based on the values of the common good? Or the preservation of autonomy in times of crisis, possibly at the expense of our neighbors? Either way, it is a discussion that must be carried on. To remain silent is, indeed, an unethical option for those that would call themselves members of a profession.<sup>67</sup>

[Emphasis added]

At its heart, this thesis is posing just such an analysis from a legal perspective. Much the same way as Bailey et al. called for health care professionals, reflecting upon the society in which they live, to determine how they are going to act during a public health emergency, it is advised that Canada, through elected legislatures, can and should guide statutory decision makers on how they want emergency powers exercised. Specifically, this legislative guidance should be in the form of principles that must be taken into account – principles that would find their origin in public health, public health law, and ethics, alongside constitutional and administrative law.

This thesis is not, however, advising that efforts to produce legislative guidance ought to displace similar efforts to enhance professional codes of ethics, nor is it suggested that efforts towards this law reform must take place at the expense of developing and improving ethical frameworks. To the contrary, each will benefit the other. Ethical guidance to emergency actors can actually inform and enrich our proposed law reform, making it more attuned to the needs of public health. This is particularly easy if the ethical guidelines have already been informed by, or perhaps even integrated with, underlying Canadian constitutional principles and *Charter* values. But not all public

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<sup>67</sup> Bailey, *supra*, note 28, at 31.

health ethical systems are so amenable to incorporating Canadian constitutional values. In fact, some call for a radical redirecting of ethical analyses away from the perceived constitutional priority allocated to the protection of individual rights. Such a rigorously fashioned, professional ethical framework may answer precisely the questions posed by Bailey et al. But even though it may have been so fashioned by, and according to, the experts, it will not necessarily be according to law. If such a framework were to be referenced by a decision maker without adherence to the law, the choices made could quickly run outside of legal authority no matter how ethical they were.

The law can do more for infectious disease emergencies than simply authorizing professionals to issue orders in accordance with their own expertise and their profession's ethical code. Law can be used as a bridge, joining the fundamental values of public health, ethics, and the law into one democratic expression.<sup>68</sup> If we use legislation, in addition to ethics, to articulate the principles to be considered in emergencies and so answer the challenge given by Bailey et al, then we may also succeed in changing the very focus of emergency legal preparedness. That is to say, it may help us to stop asking ourselves "in an emergency, what are we going to do?" and encourage us to instead ask, "In an emergency, what kind of a people do we want to be?"

## **1.7 DESIRED END STATE**

It was stated above that public health emergency legal preparedness research is in general conducted with a view to improving the law so that we can better prevent, and if necessary respond to, future public health emergencies. Ultimately, the reforms proposed in this thesis concerning the use of emergency powers are in support of two principle

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<sup>68</sup> Or diverse democratic expressions, given that Canada is a federal state.



outcomes: first, better decisions; and second, more meaningful judicial review. The two outcomes are not isolated from each other. There are three interconnected lines of argument which demonstrate how the proposed legislative reform will accomplish these objectives.

The first line is increased transparency and accountability. Transparency is a fundamental value that cuts across public health, public health law, public health ethics, and Canadian constitutional and administrative law. Though admittedly some legislation can be difficult to navigate (even for legal professionals), statutes and regulations have the advantage of being fundamentally ‘public’. Unlike professional ethical frameworks, they are created through publicly elected and accountable representatives, often involving public (rather than professional or expert) consultation. They are enacted through parliamentary procedure, including debates whose transcripts are publically obtainable. The finished products are relatively easy to access for the public and the press, particularly in the Internet age. Going further, the legislation itself can be used to enhance the transparency once the powers it creates are exercised by requiring the publication of reasons for the decision made or actions taken with the powers.

Concerning accountability, having legislative guidance on the values and principles which must be protected in deciding how to use emergency powers will greatly enhance the utility and meaningfulness of judicial review. If crafted as proposed, the legislation would have integrated the values of public health, ethics, underlying Canadian constitutional principles and *Charter* values, as well as judicial precedents. In the context of an infectious disease emergency, the stakes are going to be extremely high; the role of the judge will be correspondingly daunting. Equipped with the legislature’s expression of

constitutional meaning even during an emergency, judicial review for the constitutionality of the statute itself will be more meaningful, and productive, than it would be if a court were faced with a constitutional challenge to a statute conferring broad discretionary authority. At the same time, substantive review of the decision itself would be far more transparent to all parties. Again, the legislature having “spoken first” regarding what principles the administrative decision maker must consider, judicial review would be much more focused regardless of the standard of review.

Through the proposed law reform, the decision maker will be statutorily bound to consider legislative factors and to publish reasons for decisions. He or she will be accountable for those decisions: first, through meaningful judicial review informed by that statute and considering those reasons; and second, to the concerned population, who will be able to judge the decision maker’s actions against his or her articulated justification.

This enhanced transparency and accountability should encourage greater public trust, cooperation, and participation. This is the first and most obvious way the reformed legislation could improve efficiency and effectiveness. Public trust is absolutely critical to achieving our desired end state of responding to, and eliminating, the emergency. The purposes of any extraordinary measures will be significantly frustrated if there is a general lack of public cooperation, and no amount of coercive force can ever equal the positive effect to be gained from public acceptance.

But binding the decision maker by statute to take account public health values and ethics as they consider what extraordinary measures to deploy should not only lead to more transparent decisions – it should lead to better ones. By using legislation to

explicitly bring public health values and ethics into the *legal* discussion, the legislature could re-orient the administrative decision making-process away from the classic dichotomy between individual and the populations as a whole, and towards a richer discussion taking full account of the state's public law duty to the population as a whole. The law, then, could serve to improve the technical quality of the decisions taken by the decision-maker, while at the same time making the public health bases for those decisions transparent to those affected. Having been given the force of law by the democratically elected legislature, those principles may also come to have greater legitimacy in the eyes of the population.

Efficiency will also be improved in another important way. If we provide emergency decision makers with a more detailed statutory framework, they will more efficiently be able to discharge their legal mandate without concern for ambient legal ramifications. A corollary to this is that legal advisors will be better equipped to discharge their own mandate alongside ethical, scientific, and other professional advisors, underlying constitutional issues and *Charter* values having already been raised and examined (even if not judicially resolved) during the legislative process. Decision makers will therefore *personally* be able to more swiftly, and confidently, make their decisions and express to the public the precise legal justification and authority they relied upon for deploying the measure, instead of relying upon a nebulous authority to do "anything necessary" or take "any necessary actions" to meet the emergency.

The third line is concrete respect for rights, focused and more meaningful, judicial review and an enriched constitutional discourse, benefits that are admittedly more abstract than the others. As the decision maker swiftly renders his or her decision

according to law, there are probably going to be affected individuals displeased with the decision. The proposed legislative reform would support more meaningful judicial review. But more than that, the unique circumstance of an infectious disease emergency provides us with a rare opportunity to enrich the Canadian constitutional discourse by bringing public health and ethics openly into the discussion. Here, the “dialogue metaphor” of Canadian constitutional scholarship<sup>69</sup> can be invoked. If our “free and democratic society” is to defeat the emergency, then the state will have to apply public health and public health ethical principles and practices as it combats the spread of the disease. These principles and practices may or may not call for actions that accord with those expected by constitutional precedents.

Though aggrieved individuals can always ask a court to ‘speak’ an opinion on ‘what the rights mean,’ in the context of an infectious disease emergency, it is actually the legislature that must ‘speak first’ if the expression is to be of any use at all. It is the legislature that is best equipped to consider the principles and practices of public health and ethics, and to integrate them, through legislation, into Canada’s constitutional discourse in the specific context of emergencies. In particular, the legislature is well positioned to find the commonalities that permeate public health, ethics, and the law, and take advantage of those commonalities to craft constitutionally sound legislative guidance. One value that public health, multiple ethical systems, and the constitution appear to hold in common is the priority given to the protection of vulnerable minorities. It is this principle that holds the greatest promise for bridging public health, ethics, and

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<sup>69</sup> First coined in Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75. See also: (2007) 45 Osgoode Hall LJ, a special edition of that law journal dedicated to the metaphor and its significance in Canadian law.

the law in a constitutionally sensitive manner. But more imaginatively, the legislature can go even further and take steps to incorporate values into the legislation that have not yet been given constitutional standing by the courts. For example, we will see below in chapter three that social justice is a core value of public health and public health law, and is of central importance across multiple ethical models. Legislation could bring social justice considerations into the legal decision-making process in a way that, so far, the courts have in general been reluctant to do.<sup>70</sup>

The legislature is also privileged in that it can proactively carry out this balancing and bridging *right now*, before an emergency arises. Emergency legislation is an anomaly; legislatures have granted remarkable power to the executive with equally impressive discretion. In the face of a constitutional challenge to a decision made under any piece of emergency legislation as it currently stands (and assuming the legislation itself survived), the court might provide guidance to the decision maker on how she ought to go about making future decisions such that they could pass constitutional muster. But were we to rely exclusively on the courts to consider and balance the legal rights at stake during the emergency, by necessity we would receive the decision too late: too late for

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<sup>70</sup> See: Jamie Cameron, “Positive Obligations Under Sections 15 and 7 of the *Charter*: a comment on *Gosselin v Quebec*” (2003) 20:2 Sup Ct L Rev 65; Emmett Macfarlane, “Positive Rights”, *CBA National* (April-May 2013) online: <[http://www.nationalmagazine.ca/Articles/April\\_-\\_May\\_2013/Positive\\_rights.aspx](http://www.nationalmagazine.ca/Articles/April_-_May_2013/Positive_rights.aspx)>. For some examples of how the Supreme Court has been reluctant to interpret *Charter* rights as ‘positive’ see: *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 and *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657. Note that there are cases where it is at least arguable that the Supreme Court did interpret *Charter* rights in a ‘positive’ manner. See for example: *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Vriend v Alberta*, [1998] 1 SCR 493; *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

the individual, the public, and for the decision maker. It is therefore also necessary for the legislature to “speak first” as a matter of practical reality given the dire nature of infectious disease emergencies and the seriousness of the rights at stake. Once the emergency is over, if the state has unjustifiably violated the constitutional or other legal rights of individuals or groups, it will be too late to begin discussing what the law is or should be. *Ex post*, lawyers may be content to be provided with precedential guidance from the courts about what a “correct” or “reasonable” decision would have looked like in the circumstances, but no *ex post* remedy, not even those available under the *Charter*, will probably be satisfactory to individuals or groups affected by an unlawful or unreasonable decision made in the absence of legal guidance. On the other hand, if the state fails to protect the public because of ultimately unjustified concerns about violating rights, the consequences could be just as dire.

In summary, infectious disease emergencies have recently found renewed salience in Canadian legal scholarship. One theme in this literature is emergency legal preparedness. Because the emergency powers available to emergency decision makers are exceptionally robust, they embody the public health tension between the public good and individual civil liberties. However, to date there has been little attention paid in the literature to the administrative decision to deploy extraordinary measures. In order to improve transparency and accountability, efficiency and effectiveness, and to provide for more meaningful judicial review (resulting in concrete respect for rights in an enriched constitutional discourse) for these decisions, legislation ought to be established articulating specific principles to be considered by administrative decision makers when they are deciding whether or not to deploy extraordinary emergency measures.

## 1.8 SCOPE

In its Second Interim Report, the Campbell Commission succinctly noted that the best infectious disease emergency measure is a robust day-to-day public health system:

The first goal of public health emergency management is to stop emergencies before they start by preventing the spread of disease. If a small outbreak is prevented or contained, draconian legal powers available to fight a full-blown emergency will not be needed.

Legal Powers themselves are false hopes in times of public crisis. Preparedness and prevention backed by enhanced daily public health powers are the best protection against public health emergencies.<sup>71</sup>

In a similar vein, Nuala Kenny et al., speaking from a relational-feminist approach, have cautioned against over-focus upon emergency preparedness in the wake of SARS and H1N1 at the expense of other, constantly prevailing public health concerns.<sup>72</sup>

However, these authors probably ought not to be taken to mean that emergency preparedness, including legal preparedness, should be ignored. Nor should they be taken to mean that where a gap has been identified in the prevailing literature concerning emergencies, it ought not to be addressed. While this thesis is limited to the emergency context, dealing with the substance of legal preparedness is not the same creature as focusing upon the stockpiling of antivirals to the exclusion of clean water initiatives in aboriginal communities. The underlying principles which will be fleshed out have the potential to become very relevant to future non-emergency public health legal scholarship and to administrative decision-making in public health more broadly.

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<sup>71</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 9.

<sup>72</sup> Nuala P Kenny, Susan B Sherwin and Françoise E Baylis, “Re-visioning Public Health Ethics: A Relational Perspective” (2010) 101:1 Can J Public Health 9 at 9.

There are many different kinds of public health emergencies: Hurricane Katrina, just as much as SARS, has the potential to fit within the public health paradigm as well as trigger the deployment of special emergency measures. In choosing to limit the inquiry to the context of infectious diseases, this thesis demonstrates agreement with the Campbell Commission's characterization, noted above, of infectious disease outbreaks that overwhelm the standing acute care and public health systems as the "quintessential" public health emergency. This is not simply due to their contemporary salience (though that is indeed an immediate attractor). Rather, infectious disease emergency law provides an opportune place to make the argument that legislated guidance ought to exist as a part of the emergency decision-making process. The individual and group legal rights at issue are most obvious during such an event, and also exist alongside the exceptionally high stakes that can logically justify their transgression. Because of this, they also provide a most convenient opportunity for building a bridge between public health, ethics, and the law.

The bulk of the analysis in this thesis assumes a state of emergency, or public health emergency as the case may require, has already been legitimately declared<sup>73</sup> and the special powers are available to the relevant decision maker. Admittedly, the question surrounding what state of affairs would actually justify such a legal declaration is highly relevant to this area of scholarship. However, it is a separate line of inquiry, and is beyond the intended scope of this thesis.

Lastly, it may become evident to the reader that this thesis is written from the perspective of a practitioner. The goal of the proposed legislative reform is

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<sup>73</sup> What factors ought to be considered in declaring the emergency itself is not a subject of this analysis.



correspondingly a very practical one, which is: if and when the next infectious disease emergency arises, then the real-life experiences of several actors – including the decision makers, their advisors, and the public - will be improved in a concrete way.

## **1.9 STRUCTURE**

This thesis is divided into seven chapters. In the next chapter, we will consider Canada's constitutional legal framework, its underlying constitutional principles, and the import of *Charter* rights and values, and consider them in relation to public health in general and infectious disease emergencies specifically. In chapter three, we will explore the definition, purposes, and scope of public health and public health law with a view to both understanding the literature, as well as incorporating their core values into our proposed legislative reform. We will also discuss two prominent public health ethical systems: descriptive ethics and relational feminist ethics, as examples in order to consider whether ethical models, on their own, could be used to achieve our stated objectives. Chapter three goes on to consider: if ethical models cannot achieve our objectives on their own, to what extent could they be integrated into and enrich legislative reform? Chapter four will explore Canada's complex statutory regime concerning infectious diseases. This regime essentially involves three separate species of statutes: public health laws; public health emergency laws; and general public welfare emergency laws. Examples will be given of some of these statutory provisions as they currently stand, with emphasis on the truly remarkable legal powers that are bestowed upon various decision makers in times of emergency. In chapter five, the proposed solution will be provided in the form of draft legislation. That chapter will then restate the expected benefits of increased transparency and accountability, efficiency and effectiveness, and briefly the

benefit of increased concrete respect for rights, more meaningful judicial review, and an enriched constitutional discourse. In chapter six, we will discuss the jurisprudential basis for judicial review of administrative action in Canada, and attempt to predict how the proposed legislation would fit into the current regime. Chapter six will also apply the dialogue metaphor of Canadian constitutional scholarship in order to more fully explain how legislative reform in pursuit of better infectious disease emergency legal preparedness could provide an opportunity to realize some of the initial promise the metaphor had for a constitutional-enhancing dialogue between courts and legislatures. Chapter seven contains some brief concluding remarks.

## CHAPTER 2      CONSTITUTIONAL PROVISIONS AND PRINCIPLES

### 2.1      LEGAL AUTHORITY

This thesis is focused on government (i.e. administrative) decision makers, and what will guide them as they decide whether or not extraordinary measures are required in order to confront an infectious disease emergency, and, if so, when or how to deploy them. It is for this reason the second chapter is concerned with fundamental law.

By what right does this person decide during the emergency, and under what authority may they direct such interference with people's liberty? If, for example, an international airport is to be closed, restricting the freedom and commerce of many individuals and businesses, there had better be a good answer to this question. The answer is: the person decides and directs under the authority of law. It is the law that gives this person their jurisdiction, their *vires*. It is a fundamental principle of Canadian law that a public official must be able to trace their authority back to a legal source.<sup>74</sup> Correspondingly, the official cannot exercise authority beyond that grant.<sup>75</sup> In this chapter, we will examine the law that underlies our emergency decision maker's source of authority. Later on in chapter four, we will build upon this foundation by providing the reader with a general overview of the current state of the legislation, the extraordinary character and pervasiveness of basket clauses, as well the availability of some lesser known enforcement measures.

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<sup>74</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 71; *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para 10 [*Provincial Judges Reference*].

<sup>75</sup> *Roncarelli v Duplessis*, [1959] SCR 121.

## 2.2 DIVISION OF POWERS

Canada is a federal state with a division of powers between the federal parliament and the provincial legislatures.<sup>76</sup> Health care systems, including public health, are shared between the two levels, though acute healthcare is considered mostly within the legislative authority of the provinces.

Sections 91 and 92 of the 1867 Canadian Constitution list the areas of legislative competence, or *vires*, applicable to each level of government. The constitutional language of section 92 tends to situate public health laws within the domains of the provinces:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:

[...]

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

[...]

13. Property and Civil Rights in the Province

[...]

16. Generally all Matters of a merely local or private Nature in the Province.<sup>77</sup>

Section 91, however, grants powers to the federal Parliament that might be applicable to an infectious disease emergency:

### **Powers of the Parliament**

Legislative Authority of Parliament of Canada

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<sup>76</sup> *Constitution Act, 1867* (UK), 30&31 Vict c 3, reprinted in RSC 1985, App II, No 5.

<sup>77</sup> *Ibid*, s 92.

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

2. The Regulation of Trade and Commerce.

[...]

7. Militia, Military and Naval Service, and Defence.

[...]

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

[...]

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

[...]

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.<sup>78</sup>

One of the earliest legal disputes concerning this division of powers between the federal and provincial governments actually arose out of an infectious disease outbreak.

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<sup>78</sup> *Constitution Act, 1867*, *supra* note 76, s 91.

In the 1886 case *Rinfret v Pope*,<sup>79</sup> a five-judge panel of the Quebec Court of Queen's Bench (Appeal Side) ruled 4:1 that laws relating to disease epidemics were strictly within provincial jurisdiction. However, a long dissent from Cross J. advocated for a federal Parliament which could:

...take appropriate measures to prevent or mitigate an epidemic, endemic or contagious disease, with which the Dominion, or any part of it, was threatened, nor could it be objected that in the carrying out of such general purpose, their measures descended in a minute detail or preventive remedies.<sup>80</sup>

Cross J.'s dissent did not gain much traction concerning outbreaks confined to a single province, but the federal Parliament is certainly responsible for legislating in order to discharge Canada's international obligations with regards to infectious disease surveillance, notification, and control. It can also exert authority in the event of an inter-provincial infectious disease outbreak, or, in the extreme case, an intra-provincial outbreak that rises to the level of a national emergency.<sup>81</sup> In today's age of high population density and rapid transportation, there is real potential for an infectious disease outbreak to rise to this level.

Many infectious disease outbreaks, even those rising to the level of emergencies, will of course be localized within one province, or even one locality. As in *Rinfret v Pope*, such occasions would fall within the jurisdiction of the provincial legislatures.<sup>82</sup>

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<sup>79</sup> (1886) 12 QLR 303 (Q.B. (Appeal Side)).

<sup>80</sup> *Ibid*, at 314.

<sup>81</sup> *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

<sup>82</sup> See also: *Schneider v The Queen*, [1982] 2 SCR 112, at 137; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134; and see generally Nola M. Ries, "Legal Foundations of Public Health in Canada" Chapter 1 in Tracey M Bailey, Timothy Caulfield & Nola M Ries, eds. *Public Health Law and Policy in Canada*, (Markham: LexisNexis, 2005); Barbara von Tigerstrom, "Public Health" Chapter 12 in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds. *Canadian*

### 2.3 HISTORICAL CHALLENGES TO AUTHORITY

The provincial/ federal jurisdiction question was not the only challenge made to the authorities concerning infectious diseases in the 19<sup>th</sup> century. In the 1892 case of *Re: George Bowack*,<sup>83</sup> the applicant was detained upon his arrival in Vancouver, BC due to his suspected exposure to smallpox across the straits in Victoria. He applied for, but was denied, an initial writ of *habeas corpus*, but was successful upon a second attempt five days later. The second judge interpreted the local bylaws in effect at the time, and decided that public health officials had limited powers under the law to detain. As described in Peter Johnson's, *Quarantined: Life and Death at William Head Station, 1879-1959*:

The City of Vancouver bylaw stated “The Medical Officer shall have power to stop, detain, and examine every person coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the City. But [Justice] Walkem revealed that Bowack had been detained *without* examination. What was the point of an examination “when it is impossible to discover whether a person has the disease until it actually had broken out... and that takes 14 days to incubate.” If that were the case, [Justice] Walkem asserted, only *patients* with the disease could be examined. Bowack was not a patient, and therefore Vancouver had acted beyond the limitations of its own bylaw. The Justice ordered Bowack's immediate release and gave him costs associated with his detention.<sup>84</sup>

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*Health Law and Policy*, 3<sup>rd</sup> ed (Markham: LexisNexis, 2007). Amir Attaran and Kumanan Wilson have challenged this view, and have called for federal jurisdiction over all infectious disease emergencies in “A Legal and Epidemiological Justification for Federal Authority in Public Health Emergencies” (2007) 52 McGill LJ 381.

<sup>83</sup> (1892) 2 BCR 216 (SC).

<sup>84</sup> Peter Johnson, *Quarantined: Life and Death at William Head Station, 1879-1959* (Toronto: Heritage House, 2013) at 71. This case is a small piece of a much larger story in Victoria and Vancouver regarding public health officials coming in to conflict with the courts, which is more fully recounted in Johnson's work. Perhaps of interest, in the case *R v Dyck*, 2005 CanLII 47771 (ON SC), 203 CCC (3d) 365, Hambly J. seems to cite the case for the opposite proposition, highlighting instead the failure of Mr. Bowack's first writ.

So we see, well before 1982 and the introduction of the *Charter*, the courts were prepared to enforce, based purely upon the doctrine of *vires*, restrictions upon what an administrative decision maker could do, even when attempting to halt the spread of infectious diseases. While public health professionals may scoff at the judge’s dismissal of a valid public health tool, i.e. quarantine, as not appropriate because Mr. Bowack was not yet sick (that is, after all, the point), the judge’s ruling was not based upon the efficacy of the measure – it was based on whether or not the measure was authorized by law.<sup>85</sup>

## 2.4 UNDERLYING CONSTITUTIONAL PRINCIPLES

*Bowack* of course turned on its own facts. But facts are not alone in informing judicial interpretation of a statute,<sup>86</sup> or in assessing the reasonableness of a decision. Underlying constitutional principles run throughout all Canadian law, as does the impact of Canada’s constitutionally enacted bill of rights, the *Canadian Charter of Rights and Freedoms*.<sup>87</sup>

Even at its enacting, Canada’s constitution encompassed more than the delineation of legislative authority. It included then, as now, traditions, conventions, and

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<sup>85</sup> There have been other historical legal challenges the decisions of public health officials, on various grounds. For example, in *Jack v Cranston*, [1928] OJ No 201 (SC(AD)) (QL), a man’s business was closed down because his son had small pox. A notice to that affect was posted on the premises, causing him further economic harm. He sued the MOH, alleging malice (which of course was outside of lawful authority), and won at trial. The appeal division reversed, finding no evidence that the MOH acted other than in good faith, and was actually under a lawful duty to act as he did.

<sup>86</sup> The Canadian rule of statutory interpretation is still the rule from *Re: Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, at para 21: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”

<sup>87</sup> *Supra*, note 50.



common laws which, in the words of Canada's Supreme Court, "embrace the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state."<sup>88</sup> The Supreme Court of Canada in a variety of circumstances has discussed these underlying principles, which though unwritten have the force of law. For example, in the *Provincial Judges Reference*,<sup>89</sup> the Court commented in detail on the unwritten constitutional principle of judicial independence. In the course of that decision, the Court also reiterated other unwritten principles, including: Canada's form of the doctrine of full faith and credit;<sup>90</sup> the doctrine of federal paramountcy;<sup>91</sup> the maintenance of the rule of law;<sup>92</sup> Canada's parliamentary form of representative democracy;<sup>93</sup> legislative and Parliamentary privilege;<sup>94</sup> and the protection of political speech.<sup>95</sup> These examples of unwritten constitutional principles were not exhaustive.

In the case *Reference re Secession of Quebec*,<sup>96</sup> the Supreme Court of Canada built upon some of the unwritten constitutional rules and conventions it had previously

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<sup>88</sup> *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at p 874 [*Patriation Reference*].

<sup>89</sup> *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 [*Provincial Judges Reference*].

<sup>90</sup> *Ibid* at para 97.

<sup>91</sup> *Ibid* at para 98.

<sup>92</sup> *Ibid* at para 99, referring to *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, where nearly every statute passed in Manitoba since 1890, being unilingual, was declared unconstitutional and so of no force or effect, but was permitted by order of the Court to remain in force until bilingual, constitutionally valid legislation could be passed, in order to prevent "chaos and anarchy".

<sup>93</sup> *Provincial Judges Reference, Ibid*, at para 100.

<sup>94</sup> *Ibid* at para 101.

<sup>95</sup> *Ibid* at paras 102-103. This unwritten constitutional principle pre-dates the protections under the *Charter: Reference re Alberta Statutes*, [1938] SCR 100, at 133.

<sup>96</sup> [1998] 2 S.C.R. 217. [*Secession Reference*]

discussed in *Re: Resolution to amend the Constitution*,<sup>97</sup> and *Re: Objection by Quebec to a Resolution to amend the Constitution*.<sup>98</sup> In so doing, it described the four constitutional principles that hold the greatest promise for helping us bridge public health, ethics, and the law:

Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.<sup>99</sup>

These four principles ought to inform all of the actors in our scenario: the legislature as it enacts the law granting authority to the decision maker; the decision maker as they determine what powers the law grants them, along with if, when, and how to use those powers; and finally the courts, if and when they are asked to review any of the preceding. But more than that, these underlying constitutional principles provide an excellent opportunity to bridge public health, ethics, and the law because they are *legal* principles that hold significant commonalities with certain fundamental values of public health and ethics. Improved legislation could leverage these commonalities, along with other legal considerations (such as *Charter* values), towards our stated goal of improved infectious disease emergency legal preparedness.

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<sup>97</sup> [*sic*], [1981] 1 SCR 753.

<sup>98</sup> [*sic*], [1982] 2 SCR 793.

<sup>99</sup> *Secession Reference*, *supra* note 96, at para 49.

Continuing to elaborate on the four enumerated principles, the Court explained the unwritten constitutional principle of federalism:

The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the *Constitution Act, 1867*, it was said in *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942, was

not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in *R. v. S. (S.)*, [1990] 2 S.C.R. 254, at pp. 287-88.

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture...

Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.<sup>100</sup>

[Emphasis added]

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<sup>100</sup> *Secession Reference*, *supra* note 96, at paras 58-60.

This principle, if applied to infectious disease emergencies, can be thought of as either aiding or inhibiting our stated goal of improved legal preparedness (or both). Amir Attaran and Kumanan Wilson are two of the more vocal proponents of a unified, federal emergency system under the prevailing constitutional structure. In their words:

It is telling that even after years of preparation and refinement, Canada's national plan for an influenza outbreak is still replete with dozens of references to "F/P/T" – the usual shorthand for the federal, provincial, and territorial levels of government.

But while the F/P/T lingo sounds harmonious and inclusive, it is actually a deceptive balm that covers up a dangerous failure to demarcate *specific* responsibilities and to assign them to *individual* levels of government...

[...]

Succinctly put, viruses and bacteria behave independently of political considerations. Therefore, to impose a federalist or provincialist view of the world on their reality is awfully mistaken, maybe even suicidally so.<sup>101</sup>

Attaran and Wilson go on to argue that, under contemporary Canadian constitutional law, the federal Parliament can, and should, legislate and govern infectious disease emergency responses in Canada.

For now, at least, the federal Parliament has made no specific effort to legislate infectious disease emergency response on a national scale. The body of Canada's infectious disease emergency laws remains a multiplicity of federal, provincial, and territorial statutes. Attaran and Wilson's approach, if adopted, would certainly make this thesis's suggested law reform easier to implement (it would take only a single round of amendments). On the other hand, there is nothing at present legally preventing the

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<sup>101</sup> Amir Attaran & Kumanan Wilson, "A Legal and Epidemiological Justification for Federal Authority in Public Health Emergencies" (2007) 52 McGill LJ 381 at 383-384.

suggested reform from taking place in each individual province or territory, in addition to federally. Further, there is nothing necessarily preventing each legislature from coming up with different solutions, based upon their own consideration and weighing of the relevant constitutional rules, public health principles, ethics, and *Charter* values.

Returning to the *Secession Reference*, after federalism the Court discussed the principle of democracy. Going beyond the constitutional requirement for the democratic election of the legislature, the Court elaborated that this constitutional principle embodies something deeper:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec, supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and

address those voices in the laws by which all in the community must live.<sup>102</sup>

[Emphasis added]

This underlying principle even more clearly connects with some of the core values of public health. In fact, some public health writers have specifically called for greater community involvement and consultation concerning public health initiatives.<sup>103</sup> Keri Gammon seems to have given the same significance to local community needs and involvement when she wrote:

[L]ocal needs, values and customs will often elude the federal government, which does not have an effective means of identifying these local needs and responding to them. In contrast, the local and provincial governments are likely to be seized of such mechanisms and therefore must be accorded deference in their legislative decisions...

[...]

[W]ith respect to regional differences in public health legislation, such differences should not be dogmatically impugned and subjected to standardization. Differences in approach do not suggest that provinces have abdicated their responsibility or in any way compromised their ability to protect the health of their citizenry. On the contrary, the very fact of these differences suggests that provincial and municipal governments have acted based on the needs and values of their communities, thereby fulfilling their responsibility to protect health and, at the same time, preserving local democracy and the relationship between an individual and their local community.<sup>104</sup>

Whichever approach one finds compelling, empowering statutes (which will be discussed below) exist currently in federal, provincial, and territorial jurisdictions. Whether they are to remain separate and distinct, or made uniform, or absorbed under a

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<sup>102</sup> *Secession Reference*, *supra* note 96, at paras 67-68.

<sup>103</sup> Lawrence O Gostin *Public Health Law: Power, Duty, Restraint*, 2<sup>d</sup> ed (Berkeley: University of California Press, 2008) at 18.

<sup>104</sup> Keri Gammon, "Pandemics and Pandemonium: Constitutional Jurisdiction Over Public Health", (2006) 15 Dal J Leg Stud 1 at 38.

single federal statute, is not critical to this thesis's proposed reform; the reform is required regardless.

Irrespective of which level of government has granted authority to a specific decision maker, this deeper constitutional requirement for democracy ought to inform his or her interpretation of his or her own statute, as well as their decision making process. Taking this approach further empowers the decision maker. Any incorporation of constitutional principles (as well as *Charter* values) into legal interpretation and administrative decision-making would enrich the decision, and render it more legally sound.<sup>105</sup> And, as shall be seen in chapter three, the principle of democracy is also one which lends itself to bridging public health, ethics, and the law.

In some ways, the constitutional principles of federalism and democracy may have already found some implicit expression in Canadian health law and policy, most notably in the reforms of the 1990s and 2000s towards more democratic, local decision making regarding the allocation of (mostly acute) health care resources. Diane Longley is one scholar who argued that the primacy of health in the human experience, alongside the internationally accepted notion that governments had a responsibility to promote the health of their citizens, makes for a strong case that health care resources and the systems for their deployment ought to be considered of constitutional importance.<sup>106</sup> Writing, from the perspective of the UK, on the reforms that were taking place throughout a large part of the developed world in response to radically escalating health care costs and public disenchantment with quality of delivery, she commented:

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<sup>105</sup> In fact, the decision must take into account fundamental values, in order for the decision to be considered reasonable: *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

<sup>106</sup> Diane Longley. *Health Care Constitutions* (London: Cavendish Publishing, 1996).

The philosophy, or at least the rhetorical justification that underpins many of the current changes to the public sector, including health both [in the UK] and abroad is that of user choice. Much of the health service reforms in the UK were predicated on enhanced local decision making...

Such a focus implies that the public will be enabled readily to exercise their preferences in relation to the provision of health services, and that decisions will be justified by reflecting the values of those people most affected. Where this is not the case, decisions will be open to challenge... The twin tenets here therefore are choice and accountability.<sup>107</sup>

We will see below that some public health scholars have called for increased public engagement and participation in public health programs and governance.<sup>108</sup> Hester Lessard has in a similar manner argued that the judiciary ought to take special account of such local ‘democratic’ engagement and involvement in public health initiatives when considering the constitutional division of powers between Parliament and the provincial legislatures.<sup>109</sup> These ideas are compelling from both theoretical and practical perspectives. Similar to the ideas expressed by Longley, such engagement could be thought of as giving effect to the fundamental value of democracy. As public health laws, for example, were used practically as tools to further public health goals, they could also be thought of as an expression of the democratic will of the communities who will bear the burdens, as well as reap the benefits, of those same public health decisions and/or policies. It is also possible that greater community involvement in public health policy development will lead to the more specific needs of that community being met. If this leads in turn to increased compliance with and participation in the public health initiative,

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<sup>107</sup> Longley, *ibid*, at 6-7.

<sup>108</sup> Lawrence O Gostin *Public Health Law: Power, Duty, Restraint*, 2<sup>d</sup> ed (Berkeley: University of California Press, 2008) at 18.

<sup>109</sup> Hester Lessard, “Jurisdictional Justice, Democracy and the Story of Insite” (2011) 19:2 Const Forum Const 93.



it could lead to improved public health outcomes and at the same time engender trust and cooperation. If, as the Supreme Court said, the legal “system must be capable of reflecting the aspirations of the people”, then this is at least one principled area upon which we might begin to bridge public health, ethics, and the law.

And we do need to consider the law if we wish to effectively and efficiently defeat the emergency. As we saw at the beginning of this chapter, all government action must be able to trace its authority back to law, and that traceable path is always subject to challenge before the courts. This reality finds its basis largely in the fourth underlying constitutional principle from the *Secession Reference*: that of constitutionalism, and the role of the judicial branch of government in guarding the rule of law:

...[S]imply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 SCR 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.<sup>110</sup>

[Emphasis added]

As will be seen in chapter three, infectious disease emergencies, by their very nature provoke a population-focused response with a view to safeguarding the general public before any one individual or group of individuals. This may be precisely the kind of situation where the Court saw a place for the unwritten principle of constitutionalism:

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<sup>110</sup> *Secession Reference*, *supra* note 96, at para 72. We will discuss this constitutional principle, particularly with regards to administrative decision-making and judicial review, in greater detail in chapter four.

...[A] constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection.<sup>111</sup>

Of course, one might assume that the judiciary will be as alert to the seriousness of an infectious disease outbreak as the rest of the population; the public interest in having it effectively addressed will be evident. But the underlying constitutional principles of federalism, democracy, and constitutionalism will not be suspended, even in the face of emergency measures taken during an infectious disease emergency. The public health decision maker, as well as his or her authorizing legislation, must be able to pass a judicial review that will be informed by those principles in addition to the statutory objectives.<sup>112</sup> As they attempt to balance the interests of the population as a whole against those of individuals or smaller groups, judges will be appropriately sensitive to the unique facts, but they will at the same time have a constitutional duty to ensure that government action, even emergency action, complies with the Canadian constitution. This will become even more relevant shortly, below, when we consider Canada's constitutionally entrenched bill of rights, the *Charter*.

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<sup>111</sup> *Ibid*, at para 74.

<sup>112</sup> Recently the Supreme Court of Canada considered this kind of analysis when the constitutional values at play were *Charter* values in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*] and *Loyola High School v Québec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

The final, though non-exhaustive, unwritten constitutional principle articulated by the Court in the *Secession Reference* was the protection of minorities.<sup>113</sup> It is this principle that holds the most promise for bridging public health, ethics, and the law:

The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises...

However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter's* provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man)*, s. 79(3), (4) and (7), [1993] 1 SCR 839, and *Mahe v Alberta*, [1990] 1 SCR 342.

The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference, supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of

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<sup>113</sup> *Secession Reference, supra* note 96, at para 79.

aboriginal peoples. The "promise" of s. 35, as it was termed in *R v Sparrow*, [1990] 1 SCR 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.<sup>114</sup>

At first blush, it may not be obvious how the principle of the protection of minorities could form a bridge with a discipline that takes as its focus the population at large. But as we shall see in chapter three, public health, and public health law, have as one of their core principles a commitment to social justice.<sup>115</sup> Public health initiatives are, in fact, powerful tools to achieve social justice as they can help diminish the gap in the health outcomes between the wealthy and the marginalized. We will also see in chapter three that some systems of public health ethics, though based upon significantly different normative values, can nevertheless find common ground in the importance they give to social justice and the protection of minorities. The protection of vulnerable minorities has also been posited as part of the theoretical justification for judicial review.<sup>116</sup> Thus, it ties together public health, ethics, underlying constitutional values, theoretical justifications for judicial review, as well as Canada's constitutionally enacted bill of rights.

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<sup>114</sup> *Secession Reference*, *supra* note 96, at paras 79-82.

<sup>115</sup> Lawrence O. Gostin, "Foreword: The Core Values of Public Health Law and Ethics" in Tracey M Bailey, Timothy Caulfield & Nola M Ries, eds. *Public Health Law and Policy in Canada*, 2d ed. (Markham: LexisNexis, 2008) ix at xi-xiv.

<sup>116</sup> Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 *Osgoode Hall LJ* 169 at 179, relying on the theories expressed in Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986) and John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

## 2.5 CONSTITUTIONALLY ENTRENCHED RIGHTS

In ending the focused discussion of Canada's Constitution and its underlying principles, we must discuss the significance of Part I (the first 34 sections) of the Canadian *Constitution Act, 1982*,<sup>117</sup> which incorporated a bill of rights into the Canadian constitution. Under section 34 of that *Act*, Part I may be referred to as *The Canadian Charter of Rights and Freedoms*, or often simply the *Charter*.<sup>118</sup> This constitutional bill of rights includes several individual rights guarantees that are quite relevant in the context of an infectious disease emergency, most notably<sup>119</sup> those protecting interests such as liberty, bodily integrity, privacy, and due process:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

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<sup>117</sup> Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>118</sup> Not to be confused with the more global meaning of *Charter*: the *Charter of the United Nations*.

<sup>119</sup> Section 15 of the *Charter*, which guarantees equality before the law, is another that could be relevant in the context of an infectious disease emergency, and will be discussed briefly at the end of this chapter.

A complete analysis of the last 30 years of *Charter* interpretations and judicial decisions would by far exceed the space or time available here. But we can point out that these rights will be omnipresent in the context of an infectious disease emergency. For example, warrantless entries and searches are commonly authorized under public health emergency laws. While not necessarily unconstitutional in their existence (or unconstitutionally unreasonable in their execution),<sup>120</sup> their legality most certainly has a constitutional dimension due to section 8 of the *Charter*. Likewise, mandatory hospitalization or quarantine orders could engage sections 9 and 10. Section 7 “security of the person” rights can be particularly tricky, in any legal situation. For example, as I have previously written in the family law context, section 7 security of the person rights have been found to include:

the constitutional right of destitute parents to representation by state-funded legal counsel when subjected by the state to child protection legal proceedings, where those proceedings cause severe stress and/or can attach a negative stigma to the parent.<sup>121</sup>

In the health law context, section 7 has been found by courts (though not yet by a majority of the Supreme Court of Canada), to include the right to a private health insurance option where a public-only system results in unacceptably long wait times.<sup>122</sup> It has been found to guard against, in one way or another, overly restrictive criminal-

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<sup>120</sup> Concerning the *Charter* protection against unreasonable search and seizure, see mainly: *R v Tessling*, 2004 SCC 67; *R v Plant*, [1993] 3 SCR 281; *Hunter v Southam Inc*, [1984] 2 SCR 145; *R v Collins*, [1987] 1 SCR 265; *R v Wise*, [1992] 1 SCR 527; *R v Dymont*, [1988] 2 SCR 417; *R v Grant*, 2009 SCC 32.

<sup>121</sup> Clark Colwell & The Honourable Justice Margaret E.L. Larlee, “Child Custody and Access in Mobility Cases: Getting it Right the First Time” (2010) 26:1 *Solicitor’s Journal* 10, at 11, citing *New Brunswick (Minister of Health and Community Services) v G (J)*, [1993] 3 SCR 46 at paras 61 & 67.

<sup>122</sup> *Chaoulli v Quebec (Attorney General)* 2005 SCC 35, [2005] 1 SCR 791.

regulatory regimes for abortion.<sup>123</sup> It has very recently been found to encompass the right to medically assisted suicide for certain individuals.<sup>124</sup> It was found to oblige courts to take the views of mature minors into account when deciding what is in their best interests in medical matters,<sup>125</sup> while at common law individuals over the age of majority have the right to refuse medical treatment even if it is not in their best interests to do so.<sup>126</sup> If the state were to purport to order medical treatment against such an adult, then section 7 would apply.<sup>127</sup> These are but a few examples of how constitutionally rooted civil liberties can be brought to bear in the spheres of health law, public health law, and legal preparedness in general.<sup>128</sup>

But just because they can be brought to bear, this does not mean that if a *Charter* right is engaged, then the offending public health initiative is immediately frustrated. No right is absolute. The *Charter* contains two provisions that explicitly contemplate limits. The first limit is contained in the very first section of the *Charter*, which reads:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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<sup>123</sup> *R v Morgentaler*, [1988] 1 SCR 30.

<sup>124</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331; overruling *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.

<sup>125</sup> *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 at paras 114-116.

<sup>126</sup> *Ibid.*, at paras 39-45; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 598.

<sup>127</sup> See for example: *Toronto (City, Medical Officer of Health) v Deakin*, [2002] OJ No 2777 (On Ct Jus) (QL).

<sup>128</sup> Not all scholars agree that the courts have interpreted section 7 as broadly as they could (or should). See for example: Margot Young, “Social Justice and the *Charter*: Comparison and Choice” (2013) 50 Osgoode Hall LJ 669; Jamie Cameron, “Positive Obligations Under Sections 15 and 7 of the *Charter*: a comment on *Gosselin v Quebec*” (2003) 20:2 Sup Ct L Rev 65.

The Supreme Court of Canada has interpreted this section of the Constitution many times, beginning with the landmark decision *R v Oakes*,<sup>129</sup> which created the namesake test. Though continuously revisited and refined, the general “steps” that the executive must demonstrate in order to uphold the legislature’s limit of a right is:

- (a) Is the limit prescribed by law?
- (b) Is the purpose for which the limit is imposed pressing and substantial?
- (c) Is the means by which the goal is furthered proportionate?
  - (i) Is the limit rationally connected to the purpose?
  - (ii) Does the limit minimally impair the right?
  - (iii) Is the law proportionate in its effect?<sup>130</sup>

If the government can demonstrate to the court that these steps are all satisfied, then the *prima facie* violation of a *Charter* right is “saved” by section 1, and so there is no violation at all.<sup>131</sup>

The second way that the *Charter* limits itself is section 33, which is an override provision with regards to certain rights, with a built-in sunset clause:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

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<sup>129</sup> [1986] 1 SCR 103.

<sup>130</sup> Iteration of the *Oakes* test taken from *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, at para 27.

<sup>131</sup> Since *Doré*, *supra* note 112, it is debatable how relevant the *Oakes* test should be to any judicial review of any emergency decision made under the legislation, though the subsequent case of *Loyola*, *supra* note 112, makes this less clear in that the minority concurring opinion of McLachlin CJ appeared to apply *Multani* instead of *Doré*. In any case, the *Oakes* test is still the standard against which the legislation itself will be judged.



(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Though sparsely used outside of the Province of Quebec,<sup>132</sup> the existence of s. 33 is relevant for our purposes in that it contemplates, at least in certain circumstances, the legislature disagreeing with the courts concerning the scope of *Charter* rights. As this thesis proposes that legislatures ought to provide, through statute, explicit guidance to decision makers during infectious disease emergencies, it attempts to incorporate the courts' existing constitutional rulings along with public health values and ethics. The example legislation in chapter five, included for illustration, is presented as

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<sup>132</sup> Quebec aggressively used the clause in *An Act Respecting the Constitution Act*, 1982 RSQ, ch L-4.2, essentially re-enacting every provincial statute with the override added. Quebec also used the clause in *An Act to amend the Charter of the French language*, SQ 1988 c 54, its response to the Supreme Court's decision in *Ford v Quebec (AG)*, [1988] 2 S.C.R. 712. Alberta used it once, in legislation intended to fix the definition of marriage to include only opposite sex partners (SA 2000 c 4). It was however incompetent to do so, as the Supreme Court confirmed that the legal definition of marriage was within the exclusive jurisdiction of the federal Parliament in the *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698; Saskatchewan used the clause in labour relations legislation, but the Supreme Court subsequently declared the impugned provisions constitutional in *RWDSU v Saskatchewan*, [1987] 1 SCR 460, and so the override was not necessary. It is yet to be seen whether Saskatchewan will invoke the clause again, since the recent Supreme Court decision in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 overruled *RWDSU*. The Yukon invoked the s.33 override once as well in the *Land Developments and Planning Act*, SY 1982 c 22, s. 39, but the statute was never brought into force.

constitutionally valid if enacted (and may be more easily interpreted as constitutionally compliant than the basket clauses which exist currently). But this is just one approach. If Parliament, or a provincial legislature, found that an emergency necessitated limiting the scope of a *Charter* right, then it would probably believe the limit justified under s.1. This is most likely how basket clauses are rationalized. But even if in the future judicial rulings indicate otherwise, then section 33 provides the legislature with an explicit constitutional authority to disagree with the courts and carry on with its legislation. In chapter six, the ‘dialogue’ metaphor of constitutional jurisprudence will be discussed with a view to demonstrating the rare opportunity the subject matter of infectious disease emergencies provides for the advancement of Canada’s constitution through ‘dialogue’, including through the potential use of section 33.

There are two final points to be raised concerning the *Charter* during infectious disease emergencies. The first relates to *Charter* values. Courts employ these constitutional principles as an aid in interpreting statutes, common law, as well as reviewing government actions. They include, “Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy.”<sup>133</sup> The Supreme Court of Canada recently re-articulated that these values are to be considered on judicial review of administrative action in *Doré v Barreau du Quebec*:

It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values (see *Chamberlain v Surrey School District No.*

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<sup>133</sup> *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391, at para 81. The propriety of using *Charter* values to interpret the *Charter* itself is a point of dispute: See the split decision in *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3, and the analysis in Mark S Harding and Rainer Knopff, “Constitutionalizing Everything: The Role of *Charter* Values” (2013) 18:2 Rev Const Stud 141.

36, 2002 SCC 86, [2002] 4 SCR 710, at para 71; *Pinet v St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 SCR 528, at paras 19-23; and *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815, at paras 62-75). The question then is what framework should be used to scrutinize how those values were applied?<sup>134</sup>

After considering the somewhat conflicting precedent from itself (and particularly *Multani*),<sup>135</sup> on whether or not the *Oakes* test was the appropriate framework for assessing the consistency of administration action with *Charter* values, the Court concluded:

The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised “in light of constitutional guarantees and the values they reflect” (*Multani*, at para 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are always required to consider fundamental values. The *Charter* simply acts as “a reminder that some values are clearly fundamental and . . . cannot be violated lightly” (*Cartier*, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens “an institutional dialogue about the

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<sup>134</sup> *Doré*, *supra* note 112 at para 24. *Doré* was not without controversy. See: Matthew Lewans, “Administrative Law, Judicial Deference, and the *Charter*” (2014) 23:4 Const Forum Const 19; Audrey Macklin, “*Charter* Right or *Charter*-Lite? Administrative Discretion and the *Charter*” (2014) 67:2 Sup Ct L Rev 561; Lorne Sossin and Mark Friedman, “*Charter* Values and Administrative Justice” (2014) 67:2 Sup Ct L Rev 391; Matthew Horner, “*Charter* Values: The Uncanny Valley of Canadian Constitutionalism” (2014) 67:2 Sup Ct L Rev 361; Christopher D Bredt and Ewa Krajewska, “*Doré*: All That Glitters Is Not Gold” (2014) 67:2 Sup Ct L Rev 339; Hoi L Kong, “*Doré*, Proportionality and the Virtues of Judicial Craft” (2013) 63:2 Sup Ct L Rev 501. The Supreme Court itself appeared to retreat somewhat from *Doré* in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*], where the minority seemed to apply the *ratio* from *Multani*, *infra*.

<sup>135</sup> *Multani v Commission scolaire Marguerite - Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].

appropriate use and control of discretion, rather than the older command-and-control relationship” (Liston, at p. 100).<sup>136</sup>

[Emphasis added]

We will return to the Court’s idea of “institutional dialogue” in chapter six.

The Court’s direction in *Doré* is clear: decision makers must consider fundamental legal values, including *Charter* values.<sup>137</sup> In reforming the law to increase legal preparedness in a public health context, this must be taken into account. Therefore, this thesis proposes to incorporate these fundamental values directly into legislation – legislation that would also incorporate the principles and values of public health and ethics. In this way, the law regarding infectious disease emergencies, the archetypical public health concern, would reflect a public health approach, while at the same time reflecting fundamental constitutional values. ‘Bridging’ public health, law, and ethics in this way will leverage the law to its maximum effect in defeating the emergency through the stated outcomes of improved transparency, efficiency and effectiveness, and more meaningful judicial review.

By placing the guidance directly in the legislation, the administrative decision maker will be more effectively supported by his or her legal advisor,<sup>138</sup> and will be able

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<sup>136</sup> *Doré*, *supra* note 112, at para 35.

<sup>137</sup> A court has yet to opine on the appropriate standard of review for our particular decision maker, though the Court’s ruling in *Doré* may militate heavily towards the standard being one of reasonableness. There is reason for caution, however, given the subsequent decision in, *Loyola*, *supra* note 112. In any case, the legislature is free to articulate the standard of review it wants, or to send a strong message through a privative clause. The draft legislation in chapter five does precisely this. *Doré* will appear again in chapter six.

<sup>138</sup> Anyone who has had to advise a powerful administrative decision maker will appreciate this phenomenon. The value that comes from being able to point to the very same statute that grants an official his or her discretion and authority in order to also explain concurrent restrictions cannot be overstated.

to better understand the legal requirements in order to exercise what may appear in the basket clause to be unfettered discretion. It may be easy for a lawyer to understand that basket clauses are still subject to the constitution, and that decision makers must still take into account constitutional, and especially *Charter*, values, but it is hardly transparent to the public, and may not even be transparent to the decision maker. Explicit legislative guidance will make it transparent to a much greater audience. The Campbell commission was concerned that Ontario's new emergency measures statute did not explicitly limit the measures available under the basket clause to objectively 'reasonable' ones.<sup>139</sup> This thesis proposes that the law should do more than add the word 'reasonable'.

The last point that in this chapter on the *Charter* concerns how it relates to the protection of vulnerable minorities. In addition to the unwritten principle of the protection of minorities, as well as the explicit minority protections built into Canada's original written constitution (i.e. religious and language minorities), the *Charter* contains an explicit anti-discrimination provision:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The courts interpret this section in light of its purpose and underlying values:

As this Court has pointed out on several occasions, this value of substantive equality at the heart of s. 15 is closely tied to the concept of human dignity: *Miron*, at paras 145-46; *Law*, at paras 52 and 54; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII),

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<sup>139</sup> Campbell Commission, Final Report, *supra* note 6, Vol 3, at 1190.

[2000] 2 S.C.R. 307, at para 77; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 S.C.R. 429, at para 20. The innate and equal dignity of every individual is invariably an “essential value underlying the s. 15 equality guarantee”: *Kapp*, at para 21. Indeed, the Court has said that “the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom” (*Law*, at para 51) and to eliminate any possibility of a person being treated in substance as “less worthy” than others: *Gosselin*, at para 22. In other words:

This principle recognizes the dignity of each human being and each person’s freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. It recognizes that society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences. (*Miron*, at para 145)

The principle of personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied, is an integral part of the values of dignity and freedom that underlie the equality guarantee: *Law*, at para 53; *Gosselin*, at para 65. Safeguarding personal autonomy implies the recognition of each individual’s right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices: *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 346, per Dickson J; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 164, per Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 554, per Lamer C.J., at pp. 587-88, per Sopinka J.; *Blencoe*, at para 77, per Bastarache J.<sup>140</sup>

While it is possible that a challenge to a decision, or its enabling legislation, could be brought during an emergency under section 15, this thesis does not take up this question. The point to be made here is the strength that section 15 lends to the promise the principle of protection of minorities has for bridging public health, ethics, and the law. As the Supreme Court said in the *Secession Reference*, this section of the *Charter*,

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<sup>140</sup> *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61, at paras 138-139.

along with the provisions of the Constitution specific to Canada's aboriginal peoples,<sup>141</sup> demonstrate the continued endurance of this ideal in Canada's legal history. In the next chapter, it will be shown that many of the underlying legal principles, rights and values which were discussed in this chapter hold commonalities with the values of public health and ethics, with the protection of vulnerable minorities being particularly helpful. It will also introduce the related claim that social justice, a core value of public health and central concern of relational feminist ethics, could be brought in to the law through this thesis's suggested reform.

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<sup>141</sup> *Constitution Act, 1982*, s. 35.

## **CHAPTER 3 PUBLIC HEALTH, LAW, AND ETHICS**

### **3.1 PUBLIC HEALTH AND PUBLIC HEALTH LAW<sup>142</sup>**

Our goal is to use legislation to reconcile the principles of public health, ethics, and the law with a view to improving the quality of decisions made during an infectious disease emergency. This improved legal preparedness should realize superior real world outcomes through better transparency, efficiency and effectiveness of measures, and more meaningful judicial review. We have already discussed the principles underlying Canada's constitution, and asserted that they are compatible with the principles of public health and ethics. It is time to discuss what some of those principles are.

First, it may be necessary to ask what exactly is meant by “public health,” and “public health law”. Scientific, political, and scholarly disciplines concerned with the prevention and management of infectious disease emergencies would intuitively fall within a lay understanding of “public health”, but this does not explain all that public health might mean.

This chapter will cover what can be meant by public health and public health law. It further contains a brief foray into public health ethics, in that it describes two prominent examples of public health ethical systems. With a view to providing an example of how the law can (and should) do more to guide emergency decision making, this chapter will develop that argument by demonstrating how fundamental constitutional principles could be used to reconcile, at least in part, discrepancies between different ethical models, while at the same time ensuring that at least some of the underlying

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<sup>142</sup> Parts of this section began as unpublished assignments of the author as a part of the LLM curriculum at Dalhousie University.



values of a given system are paid attention as we reform the law. Specifically, the new legislation ought to oblige the emergency decision maker to pay explicit attention to any effects a decision may have on vulnerable minorities, and to weigh those consequences separately and distinctly from any other negative effects expected from the same decision. Such a provision would be a strong example of how law reform in this area is capable of bridging public health, ethics, and law.

### 3.1.1 Public Health

Public health is at the same time a goal, a science, and a scholarly discipline. A distinct practice from acute healthcare, public health has various definitions, varying from the quite broad to the nearly universal. Barbara von Tigerstrom has proffered:

A much-quoted definition states that public health is “what we, as a society, do collectively to assure the conditions for people to be healthy.” It is “public” in the sense both of collective action (primarily, though not exclusively, government action) and of concern with the health of a population rather than specific individuals. Contemporary public health practice is characterized by an approach that is preventative, evidence-based, and holistic.<sup>143</sup>

Lawrence Gostin, building upon the same ideas found above in von Tigerstrom’s definition, has proposed five “core values” of public health as a discipline, which are: 1)

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<sup>143</sup> Barbara von Tigerstrom, “Public Health” in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds, *Canadian Health Law and Policy*, 3<sup>rd</sup> ed (Markham: LexisNexis, 2007) 479 at 479, referencing the Institute of Medicine, *The Future of Public Health* (Washington, D.C.: National Academies Press, 1988) at 1, and Lawrence O. Gostin, “Health of the People: The Highest Law?” (2004) 32 J L Med & Ethics 509 at 510. For a crash course in Public Health and Public Health Law scholarship on a global scale, see: Symposium on Global Public Health, (2007) 35:4 JL Med & Ethics.

Collective responsibility for health and well-being; 2) Population focus; 3) Community involvement and civic responsibility; 4) Prevention orientation; and 5) Social justice.<sup>144</sup>

It is from Gostin's account of public health's core values that we can immediately find some common ground with Canada's constitutional rights and values. Though the values of collective responsibility and population focus do not fit as neatly with the values of "human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy",<sup>145</sup> the core value of community involvement and civic responsibility seems synergistic with the underlying constitutional principle of democracy. Likewise, the core value of social justice could find some common ground with the underlying constitutional principle of the protection of (vulnerable) minorities.

Though the definitions of what public health means, even taking into account Gostin's proposed values, are numerous, Christopher Reynolds has expressed a fairly clear definition:

The process that keeps individuals and their communities healthy... most obviously seen as the array of interventions directed to health promotion campaigns, the things done to prevent the spread of communicable disease, the food and sanitation requirements and the pollution controls written into our environmental laws. Less obviously it is also a series of initiatives in areas of product safety, the regulation of drugs and therapeutics and a range of initiatives that aim to further the World Health Organization definition of "health" as a "state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."<sup>146</sup>

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<sup>144</sup> Lawrence O. Gostin, "Foreword: The Core Values of Public Health Law and Ethics" in Tracey M Bailey, Timothy Caulfield & Nola M Ries, eds. *Public Health Law and Policy in Canada*, 2d ed. (Markham: LexisNexis, 2008) ix at xi-xiv.

<sup>145</sup> *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391, at para 81.

<sup>146</sup> Reynolds, *supra* note 26, at 3, referencing the *Constitution of the World Health Organization*, (22 July 1946), Can TS 1946 No 32, 14 UNTS 185.

As Reynolds' mention of "health promotion" and a "range of initiatives" foreshadows, some authors have even more radically broad interpretations of what "public health" might mean, and what matters of policy might legitimately be within its discipline. Susan Sherwin, for example,<sup>147</sup> has proposed that public health might legitimately be concerned with far more than the fields cited by Reynolds. Championing the WHO Ottawa Charter of 1986 on health promotion, a sub-system of public health, she writes:

Health promotion is the process of enabling people to increase control over, and to improve, their health. To reach a state of complete physical, mental and social well-being, an individual or group must be able to identify and to realize aspirations, to satisfy needs, and to change or cope with the environment. Health is, therefore, seen as a resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities. Therefore, health promotion is not just the responsibility of the health sector, but goes beyond healthy life-styles to well-being...

The fundamental conditions and resources for health are: peace; shelter; education; food; income; a stable eco-system; sustainable resources; social justice; and equity.

Improvement in health requires a secure foundation in these basic prerequisites.<sup>148</sup>

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<sup>147</sup> Susan Sherwin, "Responsibility for Health Promotion in an Era of Social Connection and Global Threats" (Health Law and Policy Seminar Series, delivered at the Faculty of Law, Dalhousie University, 12 September 2008) [unpublished], companion piece: Susan Sherwin, "Whither Bioethics? How Feminism Can Help Re-orient Bioethics." (2008) 1:1 IJFAB 7; see also Nuala P Kenny, Susan B. Sherwin and Françoise E Baylis, "Re-visioning Public Health Ethics: A Relational Perspective" (2010) 101:1 Can J Public Health 9.

<sup>148</sup> WHO, "The Ottawa Charter on Health Promotion" (First International Conference on Health Promotion, Ottawa: 21 November 1986).

Thus, depending on one's definition, the scope of "public health" as a discipline can be as narrow as the provision of sanitation and disease control services, or as broad as facilitating and supervising multilateral-peace treaties or guaranteeing income.

It is important to flag the differing views on public health's scope in order to fully articulate how the law can do more than it currently does for public health in an emergency. Infectious disease management as a subject matter, even in the non-emergency context, fits squarely within the mandate of public health across all (or nearly all) political philosophies. This is important, since the tensions which reside within public health practice and literature is primarily political in nature, not scientific. That is to say, the question is not truly (or at least, not at its heart) about whether supplying clean syringes and safe injection sites to people with drug additions is a scientifically effective health policy – it is about whether we *ought* to provide these syringes; whether it is good or right to do so.<sup>149</sup> It is probably safe to say that most, if not all, political philosophies would agree that combatting infectious disease emergencies fits within the paradigm of public health,<sup>150</sup> and also that they ought to be combatted. But looking deeper, during that emergency, a decision to deploy or not to deploy a measure will legally turn on more than the scientific probability of effectiveness (though it will certainly turn on that as well). The emergency decision maker will be considering other factors, both legal and ethical –

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<sup>149</sup> See: *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134.

<sup>150</sup> This does not mean that they fit solely within this practice: Jacob Shelley. "Public Emergencies as Public Health Law? The Danger of Procrustean Beds" (Paper delivered at the CIHR Training Program in Health Law, Ethics, and Policy 9th Annual Colloquium, Faculty of Law, University of Toronto, 12 May 2011), [unpublished].

factors which will be influenced at least in part by the official's understanding of the proper scope of public health.

Stepping back from the emergency itself, there is another reason we must understand the wide scope of activities to which public health may lay a claim. When reform is proposed, the way in which that reform is approached will surely be subtly influenced by the underlying views various players have about the legitimate scope of public health as a discipline and practice. Public health ethics is likely to be influenced in the same manner, which we will examine in section 3.2 below.

### **3.1.2 Public Health Law**

Within public health as a scholarly discipline, there exists the subdivision of public health law. Law is a powerful tool of public health, and is the medium through which many public health initiatives and actors find their powers, legitimacy, and restraints. Nola Ries has observed that “[l]aw and legal instruments at all levels – from international agreements to local government by-laws – play a key role in public health.”<sup>151</sup>

But public health law is not only the *corpus* of laws that perform this role for public health. Law, without any modifier, is not solely a tool for organizing society and settling private and public disputes (though it surely is those things). Law is at the same time a scholarly discipline and pursuit. In this vein, Lawrence Gostin has given his definition of public health law:

Public health law is the study of the legal powers and duties of the state, in collaboration with its partners (e.g., health care, business, the community, the media, and academe), to ensure the conditions for

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<sup>151</sup> Nola M. Ries, “Legal Foundations of Public Health in Canada” *supra* note 82, at 8.

people to be healthy (to identify, prevent, and ameliorate risks to health in the population), and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals. The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice.<sup>152</sup>

[Emphasis added]

Christopher Reynolds has offered a connected, but more practice-centered description:

A general definition of public health law and its practice might be that it:

- is the specific, often long-standing, statutory responses that assist and empower public health regulators in the range of areas that they work;
- is the body of law and legal practice that affects public health practice and the public's health more generally;
- recognises that changing existing law and practices that damage the public's health is as significant a task for those involved in public health law, as the supporting of laws which stand to improve health.<sup>153</sup>

Depending upon what one considers legitimately a public health issue, nearly any law could be characterized as a "public health law" (which then might become the concern of scholarly research in the field of public health law). However, as both Gostin and Reynolds have noted, there is little to be gained from public health law making imperial claims to laws from other areas; such an approach dilutes the discipline, departs from traditional and long-held areas of expertise, and risks political polarization.<sup>154</sup>

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<sup>152</sup> Gostin, *supra* note 26 at 4.

<sup>153</sup> Reynolds, *supra* note 26, at 7.

<sup>154</sup> Gostin, *supra* note 26 at 38-41; Reynolds *supra* note 26, at 8. Laws concerning infectious disease emergencies are not likely to invite claims of imperialism. That said, the range of measures available in an emergency to achieve the desired outcome is much wider than under normal circumstances; the law will have to take into account more than public health principles if it is to withstand scrutiny.

Law as a tool of public health can operate in several fashions. It can impose taxes on unhealthy activities (e.g. alcohol taxes) and use those funds to promote healthier ones. It can alter the informational environment relating to unhealthy products (e.g. tobacco advertising prohibitions and mandatory warnings), or restrict access to certain products or behaviours (e.g. underage alcohol consumption). Occupational health and safety and environmental regulations are further examples of how law can be used as a tool of public health. Law can also be used to address larger-scale risk factors for public health ills, such as zoning for public housing, improved access to and quality of public education, and even aggressive re-distribution of wealth. Again, taking the scope of public health to its zenith, it would be difficult to argue that any law does not somehow have a public health purpose in mind.

As we discuss the discipline of public health law, and its related real-world tools, specific or combinations of public health laws, it becomes clear that public health law is inherently interdisciplinary. Public health laws and policies concerning infectious diseases, as well as their associated scholarly literature, reveal the migration of concepts and language across disciplines. This is not surprising – lawyers, politicians, policy reformers and legal scholars cannot help but bring to the table their pre-conceived notions of legal and constitutional norms and rights any more than public health practitioners and scholars cannot help but bring to the table the ethics and norms that form the substance of their own disciplines. This adds some credibility to the claim that Canadian constitutional and administrative law can (and does) inform public health law and ethics, and more vitally for this thesis, *vice-versa*.

Infectious disease control and the management of emergencies easily fall within the scope of public health and public health law. But even as this thesis criticizes the sufficiency of the current laws in Canada designed to effect that mandate, we must remain aware of the broader landscape within which infectious disease emergency law (and ethics) is but one of the challenges facing public health and public health law. Further, one does not have to be a public health legal scholar to have an opinion about the legitimate reach of public health laws into the lives of individuals or groups. Academics, professionals, and individual citizens can quite reasonably disagree on these issues. Since they will be exposed to the risks of the emergency just the same as the public health scholar or professional, they should rightly expect to have a say.

This discord can potentially be mitigated with reference to public health law's own principles. Lawrence Gostin, as one example, has written:

... [M]any forward thinkers urge greater community involvement in public health decision making so that policy formation becomes a genuine civic endeavor. Under this view, citizens strive to safeguard their communities through civic participation, open forums, and capacity building to solve local problems. Public involvement should result in stronger support for health policies and encourage citizens to take a more active role in protecting themselves and the health of their neighbors.<sup>155</sup>

Gostin further goes on to describe what this kind of involvement might look like:

Public health authorities, for example, might practice more deliberative forms of democracy, involving closer consultation with consumers and the voluntary organizations that represent them (e.g. town meetings and consumer membership on government advisory committees). This kind of deliberative democracy in public health is increasingly evident in government-community partnerships at the [United States] federal,

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<sup>155</sup> Lawrence O Gostin *Public Health Law: Power, Duty, Restraint*, 2<sup>d</sup> ed (Berkeley: University of California Press, 2008) at 18.



state, and local levels (e.g. AIDS action and breast cancer awareness).<sup>156</sup>

It could be very difficult to carry out such consultation and community involvement in the specific context of an infectious disease emergency, but this does not mean that this principle cannot find its expression in some other way. This democratic expression could be at least partially conveyed in the passing of reformed emergency legislation, more informed, transparent and accountable decision making, and more meaningful judicial review.

### **3.1.3 Public Health Legal Preparedness**

This thesis argues for legislative reform in order to guide emergency administrative decision makers during an infectious disease emergency. Consequently, this thesis could equally be considered as calling for both administrative law and public health law reform. A large portion of this thesis is dedicated to analyzing the legal requirements for reform. But this does not mean that legal considerations alone drive the need for change, nor is the call made at the expense of public health principles, goals, or concerns. Public health professionals might quite rightly perceive such an approach as an example of the tail wagging the dog.

The scholarship concerning public health legal preparedness was canvassed in chapter one. Fitting in to that literature, the law reform proposed by this thesis is with a concerted view to improving public health outcomes. This is, according to some authors, the very purpose towards which public health legal research ought to be turned.<sup>157</sup> While

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<sup>156</sup> *Ibid* at 18.

<sup>157</sup> Scott Burris et al, “Making the Case for Laws That Improve Health: A Framework for Public Health Law Research” (2010) 88:2 *The Milbank Quarterly* 169.

this thesis is not rooted in empirical research or behavioural science, it is grounded in the significant coalescence of Canadian constitutional and public health legal principles. Which principles already inform and frame both legal disputes, as well as public health professional practice.

#### **3.1.4 “Soft-Law”**

The examples of law that common law lawyers and legal scholars tend to think of as “hard” law sources, that is to say statutes, executive orders, and judicial rulings, are not the only tools available to achieve outcomes in the course of public health practice. They are likewise not the only tools available to help achieve the real-world objective of ensuring decision makers make ethical, lawful, and accountable choices in times of emergency. Professional codes of conduct, best practices, internal policy documents, and other “soft law”<sup>158</sup> instruments, have the potential to achieve some of our stated objectives, but with the advantage (in a manner of speaking) of avoiding the cumbersome legislative and/or regulatory process. The creation of something like an “ethical framework”,<sup>159</sup> a rigorous document that detailed factors to be considered when making professional judgments, might achieve some of the desired outcomes. It might also be

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<sup>158</sup> By “soft law”, I mean any written or understood instrument that is not part of the common law (i.e. judicial precedent), constitutional law, or contained in a formally adopted statute, regulation, or order, but that individuals nevertheless tend to feel compelled to follow.

<sup>159</sup> See for example: Alison K Thompson et al, “Pandemic Influenza Preparedness; an Ethical Framework to Guide Decision-making” (2006) 7:12 BMC Medical Ethics; United Kingdom, Department of Health, “Responding to Pandemic Influenza – The Ethical Framework for Policy and Planning” (London: Department of Health, 2007); Joint Centre for Bioethics “Stand on Guard for Thee: Ethical Considerations in Preparedness Planning for Pandemic Influenza” (University of Toronto, 2005); Joint Center for Bioethics, “Pandemic Influenza Planning: Ethical Framework” (Presented at the University Health Network, Toronto, Ontario, 18 October 2005) [available online: <[http://www.jcb.utoronto.ca/publications/documents/pandemic\\_influenza.pdf](http://www.jcb.utoronto.ca/publications/documents/pandemic_influenza.pdf)>].

created by the kind of public consultation and professional engagement and partnership that public health law encourages.

Clearly useful, soft-law instruments unfortunately lack the same binding (and occasionally coercive) effect of law. They may not appear as transparent to the public, and until such time as they are examined and adopted in whole or in part by a court, they lack a legal (and certainly a constitutional) expression.<sup>160</sup> They neither confer nor restrain legal authority, or *vires*, in the constitutional or administrative law sense, nor do they provide compulsory guidance on how existing authority ought to be exercised. A judicial review of a law, or of an administrative decision made pursuant to that authority, would be less likely to include deference to a soft-law document if free-standing legal rights were in the balance.

For example, in the very recent case of *Kanthasamy v Canada (Citizenship and Immigration)*,<sup>161</sup> Abella J., writing for the majority of the Supreme Court, reversed the decision of an immigration officer taken under section 25(1) of the *Immigration and Refugee Protection Act*.<sup>162</sup> In that case, an immigration officer had relied on Ministerial Guidelines in order to determine whether a foreign national who did not qualify for admission to Canada ought to be permitted to remain on humanitarian or compassionate grounds. In deciding that the officer's strict adherence to the guidelines was unreasonable, Abella J. wrote:

There is no doubt, as this Court has recognized, that the Guidelines are useful in indicating what constitutes a reasonable interpretation of a

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<sup>160</sup> A prominent example of how soft law instruments can find their way into Canadian law through a judgment is *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

<sup>161</sup> 2015 SCC 61 [*Kanthasamy*].

<sup>162</sup> SC 2001, c 27.

given provision of the *Immigration and Refugee Protection Act: Agraira*, at para 85. But as the Guidelines themselves acknowledge, they are “not legally binding” and are “not intended to be either exhaustive or restrictive”: *Inland Processing*, s. 5. Officers can, in other words, consider the Guidelines in the exercise of their s. 25(1) discretion, but should turn “[their] mind[s] to the specific circumstances of the case”: Donald J. M. Brown and The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada* (2014), at p. 12-45. They should not fetter their discretion by treating these informal Guidelines as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion granted by s. 25(1): see *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, at p. 5; *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195 (C.A.), at para 71.

The words “unusual and undeserved or disproportionate hardship” should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of “unusual and undeserved or disproportionate hardship” in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.<sup>163</sup>

In conclusion, Abella J. summarized the failure of the immigration officer:

Finding that no single factor amounted to hardship that was “unusual and undeserved or disproportionate”, the Officer ultimately concluded that humanitarian and compassionate relief was not warranted. But these three adjectives are merely descriptive, not separate legal thresholds to be strictly construed. Finally, the Officer not only unreasonably discounted both the psychological report and the clear and uncontradicted evidence of a risk of discrimination, she avoided the requisite analysis of whether, in light of the humanitarian purpose of s. 25(1) of the *Immigration and Refugee Protection Act*, the evidence *as a whole* justified relief. This approach unduly fettered her discretion and, in my respectful view, led to its unreasonable exercise.<sup>164</sup>

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<sup>163</sup> *Kanthisamy*, *supra* note 161, at paras 32-33.

<sup>164</sup> *Ibid.*, at para 60.

The decision in *Kanthisamy* illustrates the double-sided vulnerability of soft-law instruments. On the one hand, they may come to fetter the discretion of the decision maker in a manner not intended under the authorizing statute and not permitted at law. On the other hand, the decision maker may in good faith rely on them as they go about applying the law, only to find out after the fact that the result of such reliance was unreasonable. This can occur even if the soft-law instrument has previously been given favourable treatment by the courts, as was the case in *Kanthisamy*.<sup>165</sup>

Still, soft-law guidance, incorporating both public health law and principles and Canadian constitutional principles (especially *Charter* values) for emergency decision makers would certainly be superior to the current state of affairs: no guidance of any substance at all. And as we said, the great promise of soft-law instruments is that they are particularly influential upon the decisions of professionals. Professional codes of conduct and ethics, with or without the force of law, are more than morally binding upon their subjects (though they could be that as well) – professionals are held accountable for any contravening actions. In addition, soft-law documents that are not professional codes are still likely to be consulted and followed if they represent the current professional or clinical standard in a given field.

The literature already contains ethical frameworks designed to guide public health planners and emergency managers. These frameworks would be useful to our infectious disease emergency decision maker, but they are not specifically directed at him or her. A possible compromise, then, would be this: if we cannot get emergency legislation on the

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<sup>165</sup> Moldaver and Wagner JJ. dissented in *Kanthisamy* partially on this point, and were further unwilling “to overly dissect or parse [the] officer’s reasons”; the two dissenting Justices did not believe the officer had allowed the guidelines to fetter her discretion and were prepared to show deference: *ibid*, at para 111.

agenda, then perhaps we can get the desired content of that legislation into soft-law instruments explicitly directed at, and made available to, emergency decision makers. If these instruments pay due attention to Canadian constitutional and administrative legal norms, they may come close to achieving the desired public health outcomes. The courts may also give them some attention. Lost, however, will be the binding force that comes with legislation; the greater certainty with which the decision maker can rely on it in exercising his or her discretion; the community consultation and democratic legitimacy; the improved efficacy of the decision maker's legal advisors; and the potential opportunity for Canada's constitutional discourse as described in chapter six.

## **3.2 PUBLIC HEALTH LAW AND ETHICS**

### **3.2.1 Ethics Informing Law**

Precisely because professional ethics are so likely to influence the behaviour of public health professionals, public health ethics figure prominently in this thesis's proposed reform. The following section is meant to further explain the general preference<sup>166</sup> for law reform over ethical guidance. It is also meant to show the promise the law has for bridging ethical systems and allowing for a richer development and interpretation of the law.

Just as we saw that public health cuts a wide swath with regards to what may, or may not, be considered legitimately within its scope, public health ethics, and what those ethical theories or models might be, are equally diverse. A complete literature review of the current Canadian state of public health ethics is well beyond the scope of this

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<sup>166</sup> This general preference is not a denial of the significant achievements that could be attained by public health ethics as soft-law instruments.

thesis.<sup>167</sup> For illustration, we will briefly examine two major examples of public health ethics, and use them to situate the proposed draft legislation. The chosen ethical models are descriptive ethics on the one hand, and relational feminist ethics on the other.

Descriptive ethics was chosen both due to its prominence and close alignment with the main body of public health and public health law literature. It was also chosen because its findings, so obviously influenced by the same principles as Canadian

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<sup>167</sup> This is partially because public health ethics literature spans multiple topics. See generally for example: James Downar & Dori Seccareccia, “Palliating a Pandemic: ‘All Patients Must be Cared For’” (2010) 39:2 *Journal of Pain and Symptom Management* 291; Nathan Emmerich, “Anti-theory in Action? Planning for Pandemics, Triage and ICU or: How Not to Bite a Bullet” (2011) 14 *Med Health Care and Philos* 91; George P Smith II, “Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage” (2009) 18 *Annals Health L* 1; Jeffrey Kirby, “Enhancing the Fairness of Pandemic Critical Care Triage” (2010) 36 *Journal of Medical Ethics* 758; Wendy Austin, “Ethics in a Time of Contagion: A Relational Perspective” (2008) 40:4 *CJNR* 10; Tracey M. Bailey et al. “A Duty to Treat During a Pandemic: The Time for Talk is Now” (2008) 8:8 *American Journal of Bioethics* 29; Cara R Davies & Randi Zlotnik Shaul, “Physicians’ Legal Duty of Care and Legal Right to Refuse to Work During a Pandemic” (2010) 182:2 *CMAJ* 167; Margarita E Pena, Charlene B Irvin & Robert B Takla, “Ethical Considerations For Emergency Care Providers During Pandemic Influenza – Ready or Not...” (2009) 24:2 *Prehospital and Disaster Medicine* 115; James C Thomas, Pia DM MacDonald & Emily Wenink, “Ethical Decision Making in a Crisis: A Case Study of Ethics in Public Health Emergencies (2009) 15(2) *Journal of Public Health Management Practice* E16; Nancy Berlinger and Jacob Moses, “Pandemic Flu Planning in the Community: What Can Clinical Ethicists Bring to the Public Health Table?” (2008) 17 *Cambridge Quarterly of Healthcare Ethics* 468; Connal Lee, Wendy A Rogers & Annette Braunack-Mayer, “Social Justice and Pandemic Influenza Planning: The Role of Communication Strategies” (2008) 1:3 *Public Health Ethics* 223; Jacob Chapman, “Doomsday: A Look at the Ethical Issues Behind the Government’s Coercive Powers in Response to a Public Health Nightmare”(2008) 9 *Journal of Law & Social Challenges* 24; Rev Clayton L Thomason, “It’s a Small World After All: Global Health and the Ethical Lessons of SARS” (2004) 12 *Mich St J Int’l L* 315; Sara Mahmoud-Davis, “Balancing Public Health and Individual Choice: a Proposal for a Federal Emergency Vaccination Law” (2010) 20 *Health Matrix* 219; Carolina Alfieri, *Proposal of an Ethics-Based Framework for Prioritization of Scarce Resources During an Influenza Pandemic* (MSc Thesis, McGill University Department of Experimental Medicine, 2005) [unpublished]; Peter A. Singer, et al., “Ethics and SARS: lessons from Toronto” Chapter 3 in Michael Freeman, ed. *The Ethics of Public Health*, Vol II (Burlington: Ashgate, 2012) at 31;

constitutional law, provide a convenient and clear example of how public health ethics could be seamlessly incorporated into law reform.

Relational feminism was chosen for precisely the opposite reasons. First, it is a relatively novel approach, claiming a radical departure from the focus of other systems, and is beginning to attract attention in the literature. It is prescriptive, and its proposed values, providing an excellent contrast to the *status quo* exemplified by descriptive ethics, are not at first glance easy to reconcile with prevailing constitutional legal precedents. Despite this, it is still possible to give effect to certain aspects of the relational feminist ethical model in the proposed law reform. In particular, relational feminism approaches to public health ethics align particularly well with the core public health value of social justice, as well as the unwritten constitutional principle of the protection of minorities.

Thus, the two representative ethical models were chosen because, in spite of their considerable differences, they are both amenable to combining core principles of public health with unwritten constitutional principles and *Charter* values, and can therefore both inform and enrich a law reform effort concerning infectious disease emergency decision-making.

Further narrowing the scope, this discussion of public health ethics and law is not meant, in any large degree, to include discussions of public health professional ethics, based upon professional normative values. Rather it is focused on large-scale ethical decision-making. In other words, the discussion is not focused on the ethics of whether health care workers ought to refuse to go to work during an infectious disease emergency, or under what circumstances it would be ethically permissible for them to do so. Rather, the discussion is concerned with the kind of ethics that is supposed to guide the legal



decision maker in deciding whether or not to order (for example) that health care professional to work, and whether or not to physically enforce the order or to sanction non-compliance.

### **3.2.2 Introducing Public Health Ethics**

The most powerful factor driving public health ethics is the population focus of public health. Given that the discipline is concerned not with the health of individuals or groups, but rather with improving the health outcomes of a given population as a whole, it is understandable that the discussion contained within public health ethics scholarly literature often concerns the tension between individual rights, choices, and responsibilities, and the health of the population as a whole. Infectious diseases, and the problems they cause, can lead to classic examples of this tension.<sup>168</sup>

Michael J. Selgelid has aptly highlighted the kinds of ethical questions that can arise in the context of infectious diseases. After pointing out that infectious diseases ought to be addressed in greater detail by bioethicists<sup>169</sup> if only due to their drastic consequences, he writes:

A second reason why infectious diseases warrant more of bioethicists' attention is that they raise serious, difficult philosophical/ ethical questions of their own. Obvious examples arise from the fact that infectious diseases can be contagious. Depending on the disease in

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<sup>168</sup> There is a second dimension to the ethical tension between individual rights and responsibilities and the population focus which concerns the much wider impact infectious diseases make worldwide. This means asking questions like: is it ethically permissible to allow AIDS or malaria to spread through poorer communities while richer ones could, with relative ease, largely mitigate their impact. Public health's stated value of social justice is at the centre of this discussion. This second line of ethical inquiry would be very relevant to discussions of global health governance in both emergency and non-emergency situations, but would be beyond the scope of Canadian legal preparedness.

<sup>169</sup> Bioethicists are not necessarily public health ethicists.

question, infected individuals can threaten the health of other individuals or society as a whole. The public health measures required to protect other individuals and society from contagion (again, depending on the disease) might sometimes involve surveillance, mandatory testing, mandatory vaccination or treatment, notification of authorities or third parties, isolation (of individuals), quarantine (of entire regions), or travel restrictions. Because public health care measures could infringe upon widely accepted basic human rights and liberties, we are here confronted with conflicting values.<sup>170</sup>

In other words, we are confronted with ethical dilemmas.

### 3.2.3 First Example: Descriptive Ethics

In order to assist society in tackling these ethical dilemmas, some scholars have taken up the challenge in the form of descriptive ethics. They have used the concrete, real world examples of infectious disease emergencies (especially SARS) in order to identify the specific normative values at play (and in conflict) during specific situations, for example isolation, quarantine, and information sharing. This process is intricately intertwined with the identification and selection not only of what ethical values are or were at play during emergencies, but those the authors think ought to have been at play.

Peter A. Singer et al.'s article "Ethics and SARS: lessons from Toronto"<sup>171</sup> is one example of this kind of scholarship. In explaining the nine authors' mandate, they write:

We formed a working group to identify the key ethical issues and values most important for an analysis of ethical dimensions of the SARS epidemic. The final list of issues and values was agreed by a consensus process and found to have face value and credibility. We

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<sup>170</sup> Michael J. Selgelid, "Ethics and Infectious Disease" Chapter 10 in Michael Freeman, ed. *The Ethics of Public Health*, Vol I (Burlington: Ashgate, 2010) 119 at 124. .

<sup>171</sup> Peter A. Singer, et al., "Ethics and SARS: lessons from Toronto" Chapter 3 in Michael Freeman, ed. *The Ethics of Public Health*, Vol II (Burlington: Ashgate, 2012) at 31. The findings of Singer et al are considerably similar to the findings of Thompson et al, University of Toronto Joint Centre for Bioethics, as well as the United Kingdom, Department of Health, "Responding to Pandemic Influenza – The Ethical Framework for Policy and Planning" (London: Department of Health, 2007).

then developed a framework for looking at the ethical implications of the SARS outbreak, identifying 10 key ethical values relevant to SARS, and five major ethical issues faced by decision makers.<sup>172</sup>

The ten ethical values the authors identified were: 1) individual liberty; 2) protection of the public; 3) proportionality; 4) reciprocity (ethical duty of society to compensate those quarantined, isolated etc. for their economic losses); 5) transparency; 6) privacy; 7) protection of communities from undue stigmatization; 8) duty to provide care (left unresolved by the authors); 9) equity (in allocation of scarce health care resources); 10) solidarity (ethical duty to the greater global community). Most of this language should be familiar to lawyers and legal scholars, though the working group was purposefully interdisciplinary: “The authors [who] formed the working group [are] scholars in bioethics who come from various disciplines, including medicine, surgery, health law, social work, teaching, nursing, and epidemiology.”<sup>173</sup>

Descriptive ethics is useful, especially in bringing to bear the full value of the inherent interdisciplinary nature of public health, public health ethics, and public health law. For example, an infectious disease outbreak may be localized within a ghetto occupied almost exclusively by immigrants of a given ethnicity. Notifications need to be made in order to help prevent further spread. By pointing out that there actually is an ethical dimension to stigmatizing a given ethnicity (even if that was never the intent of the scientifically justified informative measure), descriptive ethics has the potential to influence behaviours and courses of action. A decision maker may alter their choice if alternatives are available which satisfy both the values of “protection of communities from undue stigmatization” and “protection of the public.” Alternatively, if there is no

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<sup>172</sup> Singer, *Ibid* at 31.

<sup>173</sup> *Ibid* at 33.

way to satisfy both completely, avenues may be considered which will at least lessen the wrong done under a value that may not otherwise have been considered.

However, descriptive ethics has limited use beyond this identification function for a legal decision maker during an infectious disease emergency. While it highlights the need to consider certain normative values (whether they are characterized as “ethical”, “legal”, “constitutional” or “*Charter*” values), it does not tell that decision maker how to go about deciding or how to balance the values. In other words, it does not help the decision maker deal with a true dilemma. Decision-making in the face of such problems can only be accomplished by appealing to a normative baseline.

One place where it is tempting to try to find these underlying normative values is the scholarship of public health ethics. Sometimes descriptive projects take on a very prescriptive dimension, selecting ethical values that ought to be at play based upon a pre-determined set of norms. This is precisely what the expert panel did, above. These values, in their recommendation, ought then to form part of the balancing act. Though in the descriptive literature we are not necessarily told how to balance them, we are told we ought to consider them. In any case, any attempt at balancing in the absence of concrete facts and probabilities of outcomes would be a less than fruitful exercise.

Part of the challenge is that even within the descriptive exercise there can be normative discord. For example, in the Singer et al. piece, no consensus could be reached regarding the ethical duty of health care professionals to provide care. This is neither a surprise nor a criticism; it is a divisive issue. The failure to reach an agreement on this problem illustrates the lack of any scholarly consensus. Emergency decision makers will

have little luck if they expect a definite answer on this difficult ethical question during an infectious disease emergency.

But this challenge alone does not mean that descriptive public health ethics cannot assist us with our goal of improving legal preparedness. Admittedly, the suggested law reform will not solve this problem, and will in fact suffer from precisely the same challenge. The decision maker will have guidance in the form of mandatory principles to consider, but legislation can never decide for him or her. Still, if public health ethics were to inform that law and if the law were to incorporate and pay attention to those values and purposes, then the decision maker would have something more than he or she had before – a democratic expression of what values and ethics the law demands he or she consider as a condition for the authority and jurisdiction, the *vires*, to act. Further, as we can see from the ethical values indicated above, despite public health’s population focus, public health ethics are not diametrically opposed to the Canadian constitution’s protection of individual rights. In fact, it seems to have been clearly informed by them. Ethics, informed by law, could re-inform the law (specifically, emergency legislation) to enhance our legal preparedness.

### **3.2.4 Second Example: Relational Feminism**

Another example of public health ethics scholarship, the relational feminist<sup>174</sup> approach, illustrates by contrast that public health ethics and the constitution are not

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<sup>174</sup> For further background on relational feminist theory, as well as its relationship to health and the law, see: Jocelyn Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law and Policy* (Vancouver: UBC Press, 2011); Susan Sherwin, “Whither Bioethics? How Feminism Can Help Re-orient Bioethics.” (2008) 1:1 IJFAB 7; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: University Press, 2012); Robert Lecky, *infra*;

necessarily always so compatible. This is, in some scholars' views, potentially a good thing. Francoise Baylis, Nuala P. Kenny and Susan Sherwin, three prominent relational feminist scholars, wrote in their extremely pertinent and helpful piece "A Relational Account of Public Health Ethics"<sup>175</sup> about the need to re-conceptualize ethical discussions in the public health context. They call for an ethical discussion that is in direct opposition to the one put forward by Michael J. Selgelid above in the previous section (where he highlighted the tension between individual rights and the rights of the population during an infectious disease emergency). These relational feminist scholars deny that this should be the primary starting point:

Much of the recent discussion of public health ethics among policy makers has occurred in the context of pandemic planning. This focus is not surprising given the urgent, uncertain, risky and fear-generating conditions of pandemic. What is surprising, however, is the primary focus in pandemic planning on the values and priorities of individuals. Many pandemic plans appear to privilege the values of liberty, dignity, and privacy and highlight the rights and interests of individuals with particular attention given to such issues as restrictions on individual liberty and freedom, potential social stigma and isolation and access to antivirals, vaccines and other potentially scarce resources. From the perspective of pandemic planning and public health, this is an odd and limited list of ethical concerns – a list that likely would not have been generated but for the fact that the analysis remains steeped in an individual rights discourse inherited from clinical ethics and research ethics, and consonant with the dominant moral and political culture.<sup>176</sup>

[Emphasis added]

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Wendy Austin, "Ethics in a Time of Contagion: A Relational Perspective" (2008) 40:4 CJNR 10.

<sup>175</sup> Francoise Baylis, Nuala P. Kenny & Susan Sherwin, "A Relational Account of Public Health Ethics" (2008) 14:1 Public Health Ethics 1.

<sup>176</sup> *Ibid*, at 2.

Throughout the article, the authors are openly critical of approaches similar to the one taken above by Singer et al., especially the one taken by the University of Toronto Joint Centre for Bioethics.<sup>177</sup> Baylis, Kenny, and Sherwin argue for a new focus:

The nature and scope of public health require an approach to ethics that is itself ‘public’ rather than individualistic, i.e., one that understands the social nature of public health work. It must do more than simply identify the tensions between individual benefit and community benefit, individual freedom and public safety, resource allocation to known affected individuals and to the community as a whole. It must make clear the complex ways in which individuals are inseparable from communities and build on the fact that the interests of both are interrelated.<sup>178</sup>

This new approach flows from the authors’ wider school of thought, which is to say, relational feminist theory. This is a theory of the human condition which posits that we are not, in the way we experience and behave in the world, independent, rational, self-interested deliberators. We are neither capable of independently knowing what we value, nor can we independently make choices based upon those values. Rather, humans are socially constructed entities, existing as systems of complex relationships. The authors sum up their theory of relational, feminist human existence in this way:

Persons are constituted by their relationships, and the communities they inhabit are complex layers of different sorts of social connections. Their interests cannot be easily divided into discrete units that operate independently of the interests of others since the interactions among persons are constitutive of persons to the point that we cannot fully make sense of individual interests apart from those of her/his community.<sup>179</sup>

The authors go on to advocate for a “relational” approach to public health ethics. Some of the real-world benefits of this approach, the authors argue, will be greater

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<sup>177</sup> “Stand on Guard for Thee,” *supra*, note 159.

<sup>178</sup> Baylis, Kenny, and Sherwin, *supra* note 72, at 5.

<sup>179</sup> *Ibid.*, at 6.

consideration given to the impact pandemic plans will have on historically marginalized groups,<sup>180</sup> alongside an increased focus upon communities rather than individuals. Relying on the relational feminist accounts of relational autonomy and relational solidarity, the authors suggest that:

A commitment to social justice requires us to recognize the special disadvantages that face members of social groups who are subject to systematic discrimination and reduced power. As regards matters of public health, it is important to remember, as Powers and Faden (2006) stress, that health risks are generally higher for those with [the] lowest social status and power and these risks are compounded by the multiple dimensions of hardship that affects members of the most vulnerable groups. Hence, when we attend to relational solidarity, we need to be attentive to the increased and quite particular risks faced by members of some social groups as compared with others. While this sort of attentiveness should not deteriorate into an ‘us’ versus ‘them’ mentality, it does require us to be more specific in our attitudes of solidarity and to eschew a vague concern for all of humanity and replace it with one that is cognizant of, and responsive to, the particular types of needs experienced by those who are socially and economically disadvantaged.<sup>181</sup>

[Emphasis added]

Given the population focus contained within public health by definition, it is not surprising that relational feminist scholars would apply their relational theory to public health problems, including responses to public health emergencies. Their re-framing of public health ethics is compelling. Instead of trying to construct an ethics that can assist in coming to ethically permissible decisions or actions when the mission and vision of public health comes into conflict with the public’s own views about right, wrong, and what has value (i.e. liberty, dignity, privacy etc.), the authors posit that this “dominant moral and political culture” is misinformed about how humans really exist, and therefore

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<sup>180</sup> *Ibid*, at 3.

<sup>181</sup> *Ibid*, at 9-10.



incorrect. Rather, public health ethics ought to be based upon a kind of “public” values, and the focus of decisions shifted accordingly.

Were an emergency decision maker to today use this theory as a foundation for legal decision-making, it might be legally risky. Whether or not it is true or correct in theory, it would at present appear to be opposed to the prevailing constitutional jurisprudence, seen in chapter two, which indicates that the protection of the individual against popular desire for “the greater good” is precisely what the constitution is for. The relational feminist account of public health ethics seems to call for a radical change in how individual rights are regarded, and indeed how each individual is regarded *in se*.

But this does not mean relational feminism is any less of a valuable tool to inform law reform. Robert Leckey aptly captured in his book *Contextual Subjects: Family, State, and Relational Theory*<sup>182</sup> why this is so: there is nothing so radical about applying a relational, or as he would have it, “contextual”, approach to human problems within the legal sphere. While he finds great value in applying the approach to human problems in the legal arena, he does not view that approach alone to be determinative of the outcome. He separates relational approaches into two categories. The first, what Leckey calls the ‘weak’ conception, employs the relational theory as a methodology alone. For Leckey, this generates no real results; similar to descriptive ethics, simply paying attention to relationships instead of individuals will not necessarily yield a particular, or desirable, policy:

Given the feminist political orientation of relational theorists, I think there is an implication that merely undertaking a relational inquiry is likelier than not to lead to policy outcomes congenial to feminist

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<sup>182</sup> Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008).

missions... When given this sense, relational theory implies, I think unhelpfully, that the basis for dispute between relational theorists and others will not be, as it sometimes is, normative disagreement over the definition of *desirable* relationships, but simply the difference between those who have turned their minds to relationships and those who have not.<sup>183</sup>

This assessment calls into question whether applying the relational approach championed by Baylis, Kenny, and Sherwin would truly bring the theory into conflict with the underlying Canadian constitutional values at all. Simply having emergency decision makers recognize that humans have and value relationships as they deploy exceptional measures would not seem controversial. Why not consider relationships? It is not as if this inquiry tells us at the outset which relationships the decision maker ought to safeguard, nor which he or she ought to hold in lesser esteem than another. ‘Relationships’ could just as easily be incorporated into the proposed legislative guidance as any other ethical value. Were the decision maker to employ a relational approach as he or she went about deciding what extraordinary measures to deploy, their legal advisor should have no cause to provide caution to the contrary. Such an approach would likely enrich the process.<sup>184</sup>

But reconciliation is not so easy as that. What is really going on in Baylis et al.’s article is not the mere suggestion of a methodology. They are plainly adopting what Leckey refers to as the ‘strong’ conception of the relational approach, which is, in his words, “frankly substantive and normative”. He goes on:

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<sup>183</sup> Leckey, *supra* note 182, at 14 (footnotes omitted).

<sup>184</sup> Some authors imply that relational theoretical approaches may already be occasionally finding their way into judicial analyses and decisions in Canada. See: J Downie & J Llewellyn, eds., *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2011).

It is not indifferent to the kinds of relationships that should be regarded as desirable in a particular setting. The normative conception dives right into substantive debates. Nailing its colours to the mast, it adopts relational autonomy as its highest or one of its highest values.<sup>185</sup>

What exactly is meant by “relational autonomy” can, of course, vary from scholar to scholar.

Leckey goes on to give many examples of how relational theory alone cannot justify the conclusions made by relational feminist scholars without admitting to the underlying, normative values driving the analysis. This commitment to a normative center is not a bad thing. It allows scholars to promote a compelling agenda, through a potentially valuable methodology. This can lead Canadians towards genuine policy and law reform (such as the reform proposed in this thesis). It allows us, in Leckey’s words, to “[criticize] the judge who excuses the homicidal cuckold”.<sup>186</sup> Like all ethical scholarship, it can express itself as powerful rhetoric as easily as compelling apologetics. In claiming the declared values of public health, arguably with the broadest view of public health, the relational feminist approach to public health ethics seeks, in a compelling way, to further the normative commitments shared between academic feminism and public health – which is to say, deep commitments to substantive equality and social justice.

And yet, “strong” relational feminism as applied to public health ethics is still largely in dissonance with Canadian constitutional jurisprudence concerning the protections of individual rights. The “values of liberty, dignity, and privacy” are still privileged, and “the rights and interests of individuals, with particular attention given to

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<sup>185</sup> Leckey, *supra* note 182, at 16.

<sup>186</sup> *Ibid*, at 21.

such issues as restrictions on individual liberty and freedom, potential social stigma and isolation and access to antivirals, vaccines and other potentially scarce resources” are still ‘highlighted,’ as a matter of ethics, as a matter of policy, and at law. To subordinate the interests of individuals, on ethical grounds, to some focus upon the “complex ways in which individuals are inseparable from communities and build on the fact that the interests of both are interrelated”, would not (yet) be legally advisable to the decision maker. As the law currently stands, the emergency decision maker does not have much of a choice. He or she can either make use of the *status quo* soft-law ethical framework(s) which their legal advisors find consistent with Canada’s constitutional jurisprudence, or they can take a leap of faith towards a re-imagined view of what it means to be human in order to achieve more progressive, equitable results.

This is one important reason why this thesis argues for legislation. Through statute, the legislature can import core public health values, including those that coincide with a “strong” relational feminist conception of rights (e.g. social justice), into the law without waiting for a shift in Canadian constitutional jurisprudence. Given that the history of constitutional, and especially *Charter*, jurisprudence seems to presume individuals exist in the way that relational feminists challenge, it may be a long road to fully realizing their desired end state by attempting incremental change through litigation.<sup>187</sup> But a partial realization could be achieved by incorporating relational feminist values and approaches into legislation that also instructed the decision maker to

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<sup>187</sup> Even more improbable would be a textual constitutional amendment, given Canada’s historical difficulties in obtaining the political consensus required for such a task over the last 33 years.

consider underlying constitutional principles (like the protection of minorities) as well as *Charter* values. There is no reason to wait for the constitution to catch up.

In a way, this thesis is arguing for a kind of re-alignment in the law similar to the re-alignment of ethics proposed by Kenny, Baylis, and Sherwin. Without needing to weigh in on the metaphysical justification for relational feminism, it is easy to agree with the claim that it shares some of the same core values as public health – and in particular, the core value of social justice. When this core value of both relational feminism and public health is placed alongside the unwritten constitutional principle of the protection of minorities, it becomes clearer how public health, ethics, and the law might be bridged through progressive legislation, while at the same time rendering that legislation, and decisions taken on its authority, more robust in the case of a constitutional challenge.

### **3.3 SUMMARY AND DISCUSSION**

This chapter began by claiming that fundamental constitutional principles could be used to reconcile, at least in part, the discrepancies between different ethical models, while at the same time ensuring that at least some of the underlying values of a given system are paid attention as we reform the law. The descriptive ethics of Singer et al.,<sup>188</sup> already informed by Canadian constitutional law and *Charter* values, could be easily integrated into legislative guidance. Relational feminist public health ethics could be partially integrated by explicitly declaring that attention be paid to protection of (vulnerable) minorities, taking advantage of the fact that Canada's underlying constitutional principle of the protection of minorities corresponds to the similar

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<sup>188</sup> Which largely accord with the ethical frameworks produced by the University of Toronto's Joint Centre for Bioethics.

emphasis given to the protection of vulnerable minorities in those ethics. Going even farther, social justice concerns could be brought into the legislation, progressively reforming the law towards that core value of public health, one that it shares with relational feminism. In the context of an infectious disease emergency, there may be any number of vulnerable minorities depending upon how the outbreak develops: the impoverished; visible minority populations; persons with disabilities; the elderly; the very young; refugees and certain immigrant populations, are a few easily imagined possibilities. The list is not closed. By taking hold of public health and feminism's core value of social justice, and correlating it with the public health ethical-and-relational-feminist value of the protection of vulnerable minorities, we can build a bridge to Canadian constitutional legal principles and import progressive reform into the law.

To be clear, any ethical model could be brought to bear to enrich the proposed legislative (or, if legislation is not possible, soft-law) reform, so long as it paid homage to Canada's fundamental constitutional values, including *Charter* values. Descriptive and relational feminist ethics were chosen for illustration due to their contrast, but this thesis asserts neither that they are the only models, nor that they are the best ones, to inform the proposed legislation. They are simply examples used to demonstrate how we can bridge public health, ethics, and law in order to try to achieve public health benefits (and potentially, other benefits). It is true that public health and Canadian constitutional law have some clear differences in focus. This is to be expected given that constitutional law must regulate decision-making in public health just as it must regulate decision-making in other realms of legislative and administrative action. At the same time, they have enough in common that each can inform, while still respecting, the other.

## CHAPTER 4      HARD LAW

It has been asserted since the beginning of this thesis that the powers granted to decision makers during an infectious disease emergency are truly extraordinary, but those powers have not yet actually been discussed in any detail. This chapter will examine the current state of Canada's infectious disease emergency laws, with a view to creating a better understanding of both the complex legal landscape, and the gravity of the current authorizations. At the same time, it will demonstrate that the spirit behind the kind of guidance this thesis proposes may already find some expression in the current statutes, just not at the level required to truly leverage its effect.

### 4.1      STATUTORY FRAMEWORKS

In the context of public health emergencies (and specifically infectious disease emergencies), there are two parallel bodies of law that are engaged at both the federal and provincial/ territorial level. On the one hand, there are general emergency preparedness and action statutes designed to deal with a multitude of disasters and threats to the public's welfare. These laws cover a wide variety of topics, from natural disasters to epidemics to states of war or insurrection. They are general instruments that tend to provide for the swift deployment of aggressive measures without the need for extensive bureaucratic processes or before-the-fact procedural safeguards. These measures might include, for example: the closure of roads, businesses, or public places; the conscription of buildings, land, or supplies for the emergency efforts; or the evacuation of certain territory. The main federal law in this vein is the *Emergencies Act*.<sup>189</sup> Provincial statutes go by various names, but are usually entitled the "Emergency Measures Act," or words to

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<sup>189</sup> RSC 1985, c 22 (4<sup>th</sup> Supp) E-4.5.

that effect. A table of each province's current legislation is provided at the end of this chapter.

At the same time, there exist specific health, or public health, statutes. At the federal level, and in the infectious disease context, the non-emergency *Quarantine Act*<sup>190</sup> is this type of statute, which is aimed at preventing the spread of diseases from individuals entering (or leaving) Canada through airports, seaports, and other kinds of international border crossings.<sup>191</sup> This act is a completely new, post-SARS version of its archaic predecessor, and was passed nearly contemporaneously with the federal *Public Health Agency of Canada Act*.<sup>192</sup> The federal agency that Act created has a narrow (though important) mandate when compared to its provincial counterparts. It serves, amongst other public health roles, as an infectious disease surveillance agency, information collector, disseminator, and public relations conduit.

Even outside of the infectious disease context, the federal Parliament in Canada has legislated, under its federal constitutional mandate, in many other areas within the public health domain. The *Food and Drugs Act*<sup>193</sup> and *Tobacco Act*<sup>194</sup> are examples of federal statutes which fit within the narrow definition of public health. Broader definitions of public health might include, for example, the new *Canadian Environmental Assessment Act, 2012*.<sup>195</sup> Whether one subscribes to a broad or narrow view of the legitimate scope of public health and public health law, it is sufficient to say that in

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<sup>190</sup> SC 2005 c 20.

<sup>191</sup> *Quarantine Act*, SC 2005 c 20. Attaran and Wilson, *supra* note 101, argue that the federal legislative authority over quarantine actually permits (or ought to permit) much more.

<sup>192</sup> SC 2006, c 5.

<sup>193</sup> RSC 1985 c F-27.

<sup>194</sup> SC 1997, c 13.

<sup>195</sup> SC 2012, c. 19, s. 52.



Canada, the federal parliament, and by extension the executive, has a role to play in ensuring the public's health, including by combating infectious diseases. However, as suggested in chapter two, the greater part of infectious disease management law comes from provincial legislatures.

Provincial public health legislation, as might be expected, is eclectic. There are however some general commonalities, and infectious diseases tend to be one of them; they are almost always dealt with in some fashion by these provincial laws. The general trend over the last decade has been for provinces to move away from specific infectious or venereal disease statutes towards ones incorporating infectious (or “communicable”) disease laws and regulations into more generalized regimes. These general public health statutes may or may not consider emergency situations.

Some provinces, such as Ontario<sup>196</sup> and New Brunswick,<sup>197</sup> have public health statutes with no, or very few, emergency (or “epidemic”) provisions. These provinces’ public health statutes, *vis-à-vis* infectious diseases, rest upon measures designed to contain infectious disease through the normal, non-emergency public health system. They leave the emergency measures strictly within the sphere of their general, emergency management statutes.

Other provinces, such as Alberta,<sup>198</sup> Nova Scotia,<sup>199</sup> and Quebec,<sup>200</sup> have special emergency regimes and powers within both statutes simultaneously. Though it is beyond the scope of this current thesis, it is worth noting that there exists great potential for at

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<sup>196</sup> *Health Protection and Promotion Act*, RSO 1990, c H-7.

<sup>197</sup> *Public Health Act*, SNB 1998 c P-22.4.

<sup>198</sup> *Public Health Act*, RSA 2000, c P-37; *Emergency Management Act*, RSA 2000 c E-6.8.

<sup>199</sup> *Health Protection Act*, SNS 2004, c 4; *Emergency Management Act*, SNS 1990, c 8.

<sup>200</sup> *Public Health Act*, RSQ, c S-2.2; *Civil Protection Act*, RSQ, c S-2.3.

best confusion and at worst, conflict, if states of emergency exist simultaneously under both statutes. In such a case, different decision makers would have different but overlapping mandates and authorities to deal with the same facts. This is especially so in the case of jurisdictions where the precedence between the statutory powers is unclear.<sup>201</sup> Coupled with the potential for an emergency to be declared under the federal *Emergencies Act* as well, there exists even greater potential for the best-intentioned cooperative plans to become confused or delayed.<sup>202</sup>

One criticism that can be levied against this arrangement is that general emergency legislation, insofar as it can be used to deal with infectious disease emergencies, passes off as ‘general’ what is really a public health issue. Potentially, it is possible to conceptualize all emergencies, be they public disturbances, wars, natural disasters or infectious diseases, as public health emergencies. At a minimum, even within a single layer of constitutional authority, the existence of multiple statutes, ministries, and staffs each with its own legal mandate, authority, and process, has the potential to delay or derail any emergency response.

Jacob Shelley has argued that, for the sake of academic and legal classification, infectious disease emergencies should conceptually be viewed as general public welfare emergencies, as opposed to uniquely and specifically public health emergencies governed by public health law.<sup>203</sup> It is not necessary for this thesis to support or disagree with his

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<sup>201</sup> In Alberta, for example, both statutes claim paramourcy: *Public Health Act*, RSA 2000, c P-37, s. 75 ; *Emergency Management Act*, RSA 2000 c E-6.8, s.18(5.1).

<sup>202</sup> The existence of this constitutional-legislative scheme, and the planning challenges it creates, has not been immune to criticism. As we saw in chapter two, Amir Attaran and Kumanan Wilson, *supra*, note 101, have called for unification under a federal mandate.

<sup>203</sup> Jacob Shelley, “Public Emergencies as Public Health Law? The Danger of Procrustean Beds” (Paper delivered at the CIHR Training Program in Health Law, Ethics,

argument, but it is mentioned at this stage to further drive home the point that, under the current legal regimes, the possibility of a legal “turf war” during an emergency is a real one (even by accident). If the law does not clarify who is in charge (as opposed to who has the public health expertise), or worse yet, seems to give charge to more than one individual,<sup>204</sup> the results could be at best delay and at worst non-response during an emergency. Law reform in this area could alleviate some of this tension if and when it reaches the stage of enactment if the Bill contained provisions designed to clarify authority. The Campbell Commission called for just such clarity.<sup>205</sup>

Since SARS, many provinces have passed updated and modernized legislation promoting the public’s health, managing communicable diseases, and dealing with emergencies. To give some examples, British Columbia passed its new *Public Health Act*<sup>206</sup> in 2008, proclaimed in force in March 2009.<sup>207</sup> New Brunswick, passed a new *Public Health Act*<sup>208</sup> before SARS in 1998, but did not proclaim it until November, 2009, after subsequent amendments and the preparation of regulations. Nova Scotia passed its *Health Protection Act*<sup>209</sup> earlier (2004), and Manitoba enacted its modernized *Public Health Act*<sup>210</sup> in 2006. Ontario made several amendments to its *Health Protection and Promotion Act*<sup>211</sup> in the wake of SARS, and took steps to refurbish its general emergency

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and Policy 9<sup>th</sup> Annual Colloquium, Faculty of Law, University of Toronto, 12 May 2011), [unpublished].

<sup>204</sup> See table at the end of this chapter.

<sup>205</sup> Campbell Commission, Final Report, *supra* note 6, Vol 1 Ch 3, at 60-61.

<sup>206</sup> *Public Health Act*, SBC 2008, c 28.

<sup>207</sup> BC OIC 126/2009 [BC Reg 49/2009].

<sup>208</sup> *Public Health Act*, SNB 1998 c P-22.4.

<sup>209</sup> *Health Protection Act*, SNS 2004, c 4.

<sup>210</sup> *Public Health Act, 2006*, SM 2006, c 14 [CCSM c P-210].

<sup>211</sup> RSO 1990, c H-7.

legislation.<sup>212</sup> Ontario's statute, as we saw in chapter one, got the attention of the Campbell Commission for multiple reasons, not the least of which was its use of an aggressive basket clause.

For the territories, the Northwest Territories also passed a new public health statute, the *Public Health Act*,<sup>213</sup> in 2007 and proclaimed it in 2009 (Nunavut has yet to follow suit, and retains the *Public Health Act*<sup>214</sup> of 1988, with no amendments save changing the French name of their workers compensation legislation<sup>215</sup>). The Yukon made substantial amendments to its *Public Health and Safety Act*,<sup>216</sup> also in 2009.

These statutes, for the most part, are the essential<sup>217</sup> legal tools for authorizing public health measures. Rules about sanitation, disease monitoring and reporting, clean water, and food preparation are usually found within these statutes. Infectious diseases are also generally dealt with, as well as emergency provisions for those jurisdictions that have chosen to incorporate them in to these types of statutes.

The legal bastions of infectious disease control are these non-emergency public health statutes. Detection, reporting, tracing, monitoring, and isolation, coupled with treatment and/or immunization are the day-to-day measures that truly deal with infectious disease risks: robust, effective non-emergency systems, it is hoped, prevent states of emergency from ever arising. The legal tools available to decision makers and actors in the non-emergency system can in themselves be quite coercive, especially in the case of a

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<sup>212</sup> Bill 138, *Emergency Management Statute Law Amendment Act, 2004*, 2<sup>nd</sup> sess, 38<sup>th</sup> Leg, ON, 2004. This was the first Bill attempted in a series of amendments up to 2009.

<sup>213</sup> *Public Health Act*, SNWT 2007, c 17.

<sup>214</sup> *Public Health Act*, RSNWT 1988, c P-13 (Nunavut).

<sup>215</sup> S Nu 2007, c 15 s 177.

<sup>216</sup> *Public Health and Safety Act*, RSY 2002, c 176.

<sup>217</sup> They are certainly not the only legal tools. Tobacco tax legislation, for example, can be considered a public health law tool.

recalcitrant patient. There need not be an emergency situation for someone's constitutional rights to liberty and bodily integrity to be at stake. Chapter two gave some examples of individuals who, with mixed results, challenged the legitimacy of infectious disease control measures in the circumstances.<sup>218</sup>

But even though it is the non-emergency system that does the heavy lifting of infectious disease control, this does not diminish the appropriateness of improving emergency legal preparedness.

#### 4.2 STATUTORY CONTENT – THE SCALE OF POWERS

At both the federal and provincial levels, the scale of powers in an emergency can be found in either general emergency legislation, specific public health legislation, or both.<sup>219</sup>

For the federal government, under the general emergencies statute, the *Emergencies Act*,<sup>220</sup> the specific legislative powers conferred in the event of an infectious disease emergency are actually quite conservative. Even in the preamble, the statute declares the government's obligations towards Canadians:

WHEREAS the safety and security of the individual, the protection of the values of the body politic and the

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<sup>218</sup> *Re: George Bowack*, *supra* note 83; *Jack v Cranston*, *supra* note 85, *Toronto (City, Medical Officer of Health) v Deakin*, *supra* note 127; and outside of Canada, *Mayhew v Hickox* (31 October 2014), Fort Kent, Maine, CV-2014-36 (Maine District Court). This case resulted from the return of a nurse who volunteered to give patient care in Africa during the Ebola outbreak.

<sup>219</sup> There may also exist in certain circumstances the executive power of crown prerogative, which if not extinguished by statute or otherwise limited by the legislature would legally endure. For our purposes, it is not really necessary to argue whether or not contemporary statute law has displaced crown prerogative within the context of infectious disease emergencies. I mention it now only to flag that statutes are not the sole source from which a decision maker could ever draw their authority.

<sup>220</sup> RSC 1985, c 22 (4<sup>th</sup> Supp) E-4.5.

preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;

AND WHEREAS the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorized, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;

AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* and must have regard to the *International Covenant on Civil and Political Rights*, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency,<sup>221</sup>

[Emphasis added]

Though not having the force of law on its own, the mentioning of the *Charter*, the *Bill of Rights*, and the *International Covenant* in the preamble is helpful.<sup>222</sup> This is so even considering that regardless of whether or not it is mentioned, no statute can contravene the *Charter* since it is a part of the Constitution.<sup>223</sup> If the *Emergencies Act* were to be in violation, then the offending provisions would simply be of no force or effect under s.52 of Canada's 1982 Constitution, regardless of the preamble.<sup>224</sup> But

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<sup>221</sup> *Emergencies Act*, RSC 1985, c 22 (4<sup>th</sup> Supp) E-4.5, preamble.

<sup>222</sup> The *War Measures Act*, which was replaced by the *Emergencies Act*, explicitly provided for the overriding of the *Canadian Bill of Rights*.

<sup>223</sup> Keeping in mind the legislature can expressly use the override clause (s.33), or argue before the courts that the measure, though a breach on its face, is justified under the *Charter*'s own s.1 (and so no violation at all).

<sup>224</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. This is admittedly a bit of an oversimplification. The courts have employed various remedies under the authority under s.52 beyond declarations of nullity, including delayed declarations, reading in, and reading down.

before the day in court, any decision maker relying upon the statute for his or her authority could take account of that preamble as they went about determining the scope of their *statutory* authority, as well as when and how to use it. The proposal in this thesis would take this general preamble statement to the next level, and provide specific, articulable principles that the decision maker must consider. Courts make substantial use of preambles when helpful for statutory or constitutional interpretation. While judicial review of administrative action will be discussed in more detail in chapter six, suffice it to say at this stage that if a decision maker were to ignore, or inappropriately weigh, this statement in the preamble, then it would be difficult to justify the decision as either correct, or even as reasonable, on review before the court.

The limits placed upon emergency action under the *International Covenant on Civil and Political Rights*, which is also included in the preamble, are of interest, especially considering that a few of the rights enumerated in that covenant cannot be limited even during an emergency (Article 4 explicitly allows for the limiting of most rights during times of national emergencies, though it does oblige states to report on and justify those infringements). The rights that are inviolable under the *Covenant* even in times of national emergency are: the right to life (that is, the right not to be deprived of life, not to be kept alive);<sup>225</sup> the right against subjection to cruel or unusual punishment or medical experimentation without consent;<sup>226</sup> the prohibition on slavery and servitude (but not compulsory labour in time of emergency);<sup>227</sup> imprisonment for breach of contract

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<sup>225</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976), art 6.

<sup>226</sup> *Ibid*, art 7.

<sup>227</sup> *Ibid*, art 8.

(debtor’s prison);<sup>228</sup> the right not to be found guilty of an offense which did not exist at the time of the act;<sup>229</sup> the right not to be deprived of legal personality;<sup>230</sup> and the right to freedom of conscience, belief, and religion (but with limits, if prescribed by law, on the “manifestation” of religious beliefs to “protect public safety, order, health, or morals or the fundamental rights and freedoms of others”).<sup>231</sup> Notably absent from the *Covenant*’s list of inalienable rights are two that could be most notably engaged during an infectious disease emergency, namely liberty and security of the person (i.e. autonomy regarding bodily integrity).

Concerning diseases, the federal *Emergencies Act* neither authorizes the kinds of measures that might be considered excluded by the *Covenant*, nor those that the *Covenant* tolerates in times of emergency. The actual powers conferred during a “public welfare” emergency are quite limited when compared to some provincial statutes.

The preamble of the *Emergencies Act* indicates that Parliament has turned its mind to providing some form of guidance to emergency decision makers. They also, potentially, express a kind of Parliamentary constitutional interpretation – indicating that certain values must be given weight. Some provincial statutes have similar provisions. Such provisions and preambles are the seedlings of the kind of principled, legislative guidance that ought to be available to decision makers in emergency situations.

The federal statute, as a general emergency statute, distinguishes between kinds of emergencies and the powers they may require. Under the law, a “public welfare emergency” is:

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<sup>228</sup> *Ibid*, art 11.

<sup>229</sup> *Ibid*, art 15.

<sup>230</sup> *Ibid*, art 16.

<sup>231</sup> *Ibid*, art 18.



an emergency that is caused by a real or imminent

(a) fire, flood, drought, storm, earthquake or other natural phenomenon,

(b) disease in human beings, animals or plants, or

(c) accident or pollution

and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.<sup>232</sup>

The co-required state of “national emergency” means:

is an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.<sup>233</sup>

If both the conditions of national emergency and public welfare emergency are established, and such an emergency is declared by the Governor-in-Council under s.6, then specific regulatory powers become available to the Governor-in-Council. They read:

8. (1) While a declaration of a public welfare emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:

(a) the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;

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<sup>232</sup> *Emergencies Act*, *supra* note 220, s.5.

<sup>233</sup> *ibid*, s. 3.

(b) the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;

(c) the requisition, use or disposition of property;

(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;

(e) the regulation of the distribution and availability of essential goods, services and resources;

(f) the authorization and making of emergency payments;

(g) the establishment of emergency shelters and hospitals;

(h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;

(i) the assessment of damage to the environment and the elimination or alleviation of the damage; and

(j) the imposition

(i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or

(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,

for contravention of any order or regulation made under this section.<sup>234</sup>

Canada's constitutional federalism manifests itself in the subsections immediately following, which dictate that the emergency powers may be exercised only within the

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<sup>234</sup> *Emergencies Act*, *supra* note 220, s. 8(1).

specific area to which the emergency is confined,<sup>235</sup> and further oblige the Governor-in-Council to avoid making rules that might interfere with provincial capacities or measures.<sup>236</sup> Still further, if the public welfare emergency situation is confined to one province, the state of emergency can only be declared and the special powers exercised with the *de facto* consent of the executive branch of government of that province:

**14.** (1) Subject to subsection (2), before the Governor in Council issues, continues or amends a declaration of a public welfare emergency, the lieutenant governor in council of each province in which the direct effects of the emergency occur shall be consulted with respect to the proposed action.

(2) The Governor in Council may not issue a declaration of a public welfare emergency where the direct effects of the emergency are confined to, or occur principally in, one province unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it.<sup>237</sup>

Viewed in light of these provisions, it is probable that if an infectious disease outbreak were confined to one province, then the federal government, in an emergency measures capacity, would be in a supporting role (as opposed to directly managing the situation pursuant to federal law).

It should be highlighted that the federal Parliament has only granted the executive specific powers (above) during a public welfare emergency. This can be contrasted with the powers granted in the event of a War Emergency, an event just as serious:

40. (1) While a declaration of a war emergency is in effect, the Governor in Council may make such orders or regulations as the Governor in Council believes, on reasonable grounds, are necessary or advisable for dealing with the emergency.

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<sup>235</sup> *Ibid*, s.8(2).

<sup>236</sup> *Ibid*, s.8(3).

<sup>237</sup> *Ibid*, s.14.

The only measure explicitly exempted from this broad authority is the ability to institute military conscription by regulation.<sup>238</sup> This broad authority to deal with a War Emergency is a “basket clause”. Unlike the specific, enumerated powers detailed for public welfare (which include infectious disease) emergencies, basket clauses grant broad powers, with few limits (e.g. articulated conditions, such as that orders must be made “on reasonable grounds”; the constitution; or the rules of statutory interpretation). We saw above in chapter one that the Campbell Commission expressed trepidation over Ontario’s post-SARs emergencies Bill, which included a basket clause.<sup>239</sup>

The federal *Emergencies Act* does not employ basket clauses for any other kind of emergency besides a War Emergency. The Campbell Commission was concerned with Ontario, but in fact nearly every provincial legislature, in contrast to the federal Parliament, has employed basket clause language in either their general emergency legislation or their public health laws, or both. Alberta, for example, contains such basket clauses in its public health statute, characteristically contained within other enumerated powers:

29(1) A medical officer of health who knows of or has reason to suspect the existence of a communicable disease or a public health emergency within the boundaries of the health region in which the medical officer of health has jurisdiction may initiate an investigation to determine whether any action is necessary to protect the public health.

(2) Where the investigation confirms the presence of a communicable disease, the medical officer of health

(a) shall carry out the measures that the medical officer of health is required by this Act and the regulations to carry out, and

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<sup>238</sup> *ibid.*, s. 40(1); 40(2).

<sup>239</sup> Campbell Commission, Final Report, *supra* note 6, Volume II, Chapter 9, “Recommendations”, at 1187-1188.

- (b) may do any or all of the following:
- (i) take whatever steps the medical officer of health considers necessary
    - (A) to suppress the disease in those who may already have been infected with it,
    - (B) to protect those who have not already been exposed to the disease,
    - (C) to break the chain of transmission and prevent spread of the disease, and
    - (D) to remove the source of infection;
  - (ii) by order
    - (A) prohibit a person from attending a school,
    - (B) prohibit a person from engaging in the person's occupation, or
    - (C) prohibit a person from having contact with other persons or any class of persons

for any period and subject to any conditions that the medical officer of health considers appropriate, where the medical officer of health determines that the person's engaging in that activity could transmit an infectious agent;

[...]

(2.1) Where the investigation confirms the existence of a public health emergency, the medical officer of health

[...]

(b) may 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.<sup>240</sup>

[Emphasis added]

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<sup>240</sup> *Public Health Act*, RSA 2000, c P-37, s.29.

Similarly, in Nova Scotia:

Where the Minister has declared a public health emergency, the Chief Medical Officer may implement special measures to mitigate or remedy the emergency including

[...]

any other measure the Chief Medical Officer reasonably believes is necessary for the protection of public health during the public health emergency.<sup>241</sup>

[Emphasis added]

And in Quebec:

123. Notwithstanding any provision to the contrary, while the public health emergency is in effect, the Government or the Minister, if he or she has been so empowered, may, without delay and without further formality, to protect the health of the population,

(1) order compulsory vaccination of the entire population or any part of it against smallpox or any other contagious disease seriously threatening the health of the population and, if necessary, prepare a list of persons or groups who require priority vaccination;

(2) order the closing of educational institutions or of any other place of assembly;

(3) order any person, government department or body to communicate or give to the Government or the Minister immediate access to any document or information held, even personal or confidential information or a confidential document;

(4) prohibit entry into all or part of the area concerned or allow access to an area only to certain persons and subject to certain conditions, or order, for the time necessary where there is no other means of protection, the evacuation of persons from all or any part of the area or their confinement and, if the persons affected have no other resources, provide for their lodging, feeding, clothing and security needs;

(5) order the construction of any work, the installation of sanitary facilities or the provision of health and social services;

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<sup>241</sup> *Health Protection Act*, SNS 2004 c 4, s. 53(2)(i).

- (6) require the assistance of any government department or body capable of assisting the personnel deployed;
- (7) incur such expenses and enter into such contracts as are considered necessary;
- (8) order any other measure necessary to protect the health of the population.

The Government, the Minister or another person may not be prosecuted by reason of an act performed in good faith in or in relation to the exercise of those powers.<sup>242</sup>

[Emphasis added]

It is evident that the scale of powers available to statutory decision maker under these statutes can be quite extraordinary, depending upon the circumstances.

The kind of legislative guidance proposed in this thesis would be an evolution of current statute law, not a radical novelty. Analogous to what was seen in the preamble to the *Emergencies Act*, many provinces have gone further and actually included guidance-related provisions into their emergency statutes. For example, Ontario's *Emergency Management and Civil Protection Act* declares in section 7.0.2:

The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the *Canadian Charter of Rights and Freedoms*.<sup>243</sup>

Taking a different approach, section 2 of Nova Scotia's *Health Protection Act* reads:

Restrictions on private rights and freedoms arising as a result of the exercise of any power under this Act shall be no greater than are reasonably required, considering all of the circumstances, to respond to a health hazard, notifiable disease or condition, communicable disease or public health emergency.<sup>244</sup>

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<sup>242</sup> *Public Health Act*, RSQ, c S-2.2, s.123.

<sup>243</sup> *Emergency Management and Civil Protection Act*, RSO 1990, c E-9, s. 7.0.2.

<sup>244</sup> *Health Protection Act*, SNS 2004 c 4, s. 2.

This is very similar to the approach taken by Manitoba, which states in its own public health statute (passed two years after Nova Scotia's):

If the exercise of a power under this Act restricts rights or freedoms, the restriction must be no greater than is reasonably necessary, in the circumstances, to respond to a health hazard, a communicable disease, a public health emergency or any other threat to public health.<sup>245</sup>

British Columbia, in its *Public Health Act*, limits the use of emergency powers by stating:

**Conditions to be met before this Part applies**

52 (1) A person must not exercise powers under this Part in respect of a localized event unless the person reasonably believes that

(a) the action is immediately necessary to protect public health from significant harm, and

(b) compliance with this Act, other than this Part, or a regulation made under this Act would hinder that person from acting in a manner that would avoid or mitigate an immediate and significant risk to public health.<sup>246</sup>

Like the preamble to the *Emergencies Act*, these provisions could imply some intention of the legislature to balance, or restrain, the power. They could be interpreted as the legislature taking account of Canada's underlying constitutional principles. They oblige the decision maker to consider "all of the circumstances". Ontario's statute makes an explicit reference to the *Charter*, communicating to the decision maker that the legislature does not consider emergencies so special as to place them outside of the constitutional order. These provisions may modestly enhance legal preparedness by increasing, in a humble measure, transparency and accountability. They at least make it clear the decision maker has to turn his or her mind to the general question of consistency of a proposed action with constitutionally protected rights.

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<sup>245</sup> *Public Health Act, 2006*, SM 2006, c 14, [CCSM c P-210], s. 3.

<sup>246</sup> *Public Health Act*, SBC 2008, c 28, s. 52(1).



It is questionable however whether the above provisions are specific enough to give full effect to this thesis's goal of improved legal preparedness. As they are very general, it is difficult to imagine them providing much ammunition to the decision maker's legal advisors. It is likewise difficult to imagine them either as reassuring or restraining the decision maker appreciably. But the greatest shortcoming with these general provisions is that they suffer from the inverse inadequacy that was levied earlier against reliance upon professional codes of ethics alone. Though some of these provisions are obviously informed by public health values (e.g. "protect public health from significant harm"; "promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies"), they represent an impoverished incorporation. A more thorough articulation of the principles to be considered by the decision maker would lead to better legal decisions and to tighter accountability. And further, if those principles were informed and enriched by public health values and ethics, we could bridge them with Canadian constitutional, (including *Charter*) values and produce better decisions for both public health and law. In other words, our legal preparedness to defeat the emergency would be enhanced.

### **4.3 COMPLIANCE**

Even after a decision is made, an order is only a piece of paper. It is not just statutory powers that make law in such scenarios relevant – it is the real-world ability to see them carried out. Under normal circumstances, government decisions made within lawful authority are expected to be obeyed, with the threat of administrative, quasi-criminal, or criminal sanction as the penalty for disobedience. The administrative state

and the Rule of Law rely on the fact that the majority of people will obey, if not out of respect for the law then out of anxiety in the face of possible sanction.

However, during an infectious disease emergency, the motivation to obey the law may be diminished or entirely absent. For example, some health care or other emergency workers may quite rationally opt to accept the risk of some form of legal sanction (e.g. professional discipline) in the future if it means not having to work in an infectious environment today.

Is the decision maker then to order police officers to round up health care workers and escort them to work? In the context of an infectious disease emergency, would police officers be able to enforce such an order with reasonable means and minimal force? Would they even be willing to do so? Under s. 273.6 of the *National Defence Act*,<sup>247</sup> provinces can request the support of the armed forces. More powerfully, under part VI of that *Act*, titled Aid of the Civil Power, in the event of a riot or disturbance of the peace, provinces can actually requisition the armed forces. Would our decision maker avail him or herself of these provisions in order to see his or her directions obeyed?<sup>248</sup>

Probably not. It is widely agreed that physically coercive measures are not the most effective tools for achieving public health outcomes. The situation would have to rise to a science-fiction state of severity in order for the decision maker to contemplate calling out the armed forces to effect his or her orders. As we saw in chapter three, public cooperation is best achieved through community consultation and buy-in, rather than

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<sup>247</sup> RSC 1985 c N-5 [NDA].

<sup>248</sup> Hollywood films, such as *Outbreak* and *Contagion*, certainly seem to predict that this would be the case in the United States.

physical coercion. As we saw above, the Campbell Commission made precisely this point:

Laws are only the last resort. Legal procedures are useless without overwhelming public cooperation of the kind demonstrated in SARS. While it is important to strengthen the legal machinery available to public health officials, it is even more important to strengthen the things that encourage public cooperation.<sup>249</sup>

In other words, cooperation would not be encouraged by calling out soldiers, but rather by making transparent, reasonable decisions according to law, based upon a demonstrable and articulated public health need or risk. The proposed legislation is designed to achieve that. If a member of the public, or a specific community, is still dissatisfied, then they always have the option of launching a challenge in a court of law.<sup>250</sup> If the legislature has enacted its guidance, and the decision maker has had occasion to follow it, such a challenge could incidentally turn out to be very productive for Canada’s constitutional discourse.

#### 4.4 TABLE OF LEGISLATION

\* An “implicit” basket clause is one where the legislation employs an open list of powers, rather than having an explicit provision authorizing the decision maker to take ‘all other necessary measures’, or words to that effect.

<u>Jurisdiction</u>	<u>Statute</u>	<u>Emergency Decision Maker</u>	<u>Powers</u>
Federal	<i>Emergencies Act</i> RSC 1985, c 22 (4 <sup>th</sup> Supp) E-4.5, s.8(1)	Governor-in-Council	Enumerated
Alberta	<i>Public Health Act</i> RSA 2000, c P-37, s. 29.	Local Medical Officer of Health, Minister of Health and Wellness, or Regional Health Authority.	Enumerated
	<i>Emergency Management Act</i> RSA 2000, c E-6.8, s. 19(1);	Minister of Municipal Affairs	Implicit Basket

<sup>249</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 251.

<sup>250</sup> Alternatively, if the legislature found it a wise policy decision, it could provide for an administrative appeal mechanism form the duration of the emergency.

	<i>Designation and Transfer of Responsibility Regulation</i> , AR 38/2008, s. 17(1).		
British Columbia	<i>Public Health Act</i> SBC 2008, c 28, ss. 54-57.	A health officer, a medical health officer, the provincial health officer, and the Minister of Health.	Enumerated
	<i>Emergency Program Act</i> , RSBC 1996, c 111, s.10.  BC Reg 477/94 [up to B.C. Reg. 200/98], s. 6, Schedule 1.	Minister of Public Safety/ Minister of Health  British Columbia is an interesting case. Under the <i>Interpretation Act</i> , RSBC 1996, c 238, the minister responsible for the Act is the “minister” mentioned in the Act (and so, would be the emergency decision maker). This is currently the Minister of Public Safety. However, under the <i>Emergency Program Management Regulation</i> , s. 6, the minister responsible for “coordinating the government’s response to the occurrence” of an infectious disease emergency is the Minister of Health.	Implicit Basket
Manitoba	<i>Public Health Act, 2006</i> , SM 2006, c 14, [CCSM c P-210], s. 67(1), (2), (3)	Chief public health officer (for certain powers, under the supervision of the Minister of Health)	Enumerated
	<i>Emergency Measures Act</i> , CCSM c E-80, s. 12; s.1 “minister”;  Manitoba OIC 349/2009, 3 November 2009 ( <i>The Executive Government Organization Act</i> , C.C.S.M. c. E170).	Minister of Infrastructure and Transportation	Implicit Basket
New Brunswick	<i>Public Health Act</i> , SNB 1998, c P-22.4, s. 1, s. 26(1), s.26.1(1).  (Ambiguous emergencies)	Minister of Health (Limited powers - appropriation of real property and	Enumerated

		designation of new disease only)	
	<i>Emergency Measures Act</i> , SNB 2011, c 147, s.12.	Minister of Public Safety	Implicit Basket
Newfoundland and Labrador	<i>Communicable Diseases Act</i> , RSNL 1990 c C-26, s.2;  <i>Department of Health and Community Services Notice, 2003</i> , OC 2003-370;  <i>Department of Government Services and Lands Notice, 2003</i> , OC 2003-369 ( <i>Executive Council Act</i> , RSNL 1990, c E-16.1).	Minister of Health and Community Services; and the Minister of Government Services and Lands, simultaneously (some powers need approval of Lt. Governor-in-Council)	Enumerated
	<i>Emergency Services Act</i> , SNL 2008 c E-9.1.  <i>Department of Municipal and Provincial Affairs Notice, 2003</i> , OC 2003-377 ( <i>Executive Council Act</i> ).	Minister of Municipal and Provincial Affairs	Implicit Basket
Northwest Territories	<i>Public Health Act</i> , SNWT 2007, c 17, s.33.	Chief Public Health Officer (once a state of emergency is declared by Minister of Health and Social Services)	Enumerated
	<i>Civil Emergency Measures Act</i> , RSNWT 1988, c C-9, s.12.	Minister of Municipal and Community Affairs	Implicit Basket
Nova Scotia	<i>Health Protection Act</i> , SNS 2004, c 4, s. 53(2).	Chief Medical Officer of Health	Explicit Basket
	<i>Emergency Management Act</i> , SNS 1990, c 8, s.2(g), s.14.  NS OIC 2011-22 ( <i>Public Service Act</i> ).	Minister of Emergency Management (currently, the Minister of Justice).	Explicit Basket
Nunavut	<i>Public Health Act</i> , RSNWT 1988, c P-12.  Government of Nunavut, online: < <a href="http://www.gov.nu.ca/en/Departments.aspx">http://www.gov.nu.ca/en/Departments.aspx</a> > .	Minister of Health and Social Services	Silent
	<i>Emergency Measures Act</i> , S Nu 2007, c 10.  Government of Nunavut, online: < <a href="http://www.gov.nu.ca/en/Departments.aspx">http://www.gov.nu.ca/en/Departments.aspx</a> > .	Minister of Community and Government Services	Implicit Basket
Ontario	<i>Health Protection and Promotion Act</i> , RSO 1990, c H-7, s.1, s.77.5, s.18(3).  (Very limited emergency provisions)	Minister of Health and Long-Term Care (Procurement of supplies only)  Chief Medical Officer of Health (directives to boards of health)	Limited

		and medical officers only)	
	<i>Emergency Management and Civil Protection Act</i> , RSO 1990, c E-9, s. 7.0.2(4)	Lieutenant-Governor-in-Council	Explicit Basket
Prince Edward Island	<i>Public Health Act</i> , RSPEI 1988 c P-30.	Chief Health Officer (requires approval of Minister of Health and Wellness for some measures)	Enumerated
	<i>Emergency Measures Act</i> , SPEI 1990, c 11, s.1.  Government of PEI, online: < <a href="http://www.gov.pe.ca/jps/index.php3?number=1030226&amp;lang=E">http://www.gov.pe.ca/jps/index.php3?number=1030226&amp;lang=E</a> >	Minister of Environment, Labour, and Justice.	Implicit Basket
Quebec	<i>Public Health Act</i> , RSQ, c S-2.2, s. 2; s.123.	Government or Minister of Health and Social Services	Explicit Basket
	<i>Civil Protection Act</i> RSQ c S-2.3, s. 93.	Government, or an empowered Minister	Explicit Basket
Saskatchewan	<i>Public Health Act, 1994</i> , SS 1994, c P-37.1, s.2  Government of Saskatchewan, online: < <a href="http://www.health.gov.sk.ca/legislation">http://www.health.gov.sk.ca/legislation</a> >.	Minister of Health	Enumerated
	<i>Emergency Planning Act</i> , SS 1989-1990, c E-8.1, s.2, 18(1).  Government of Saskatchewan, online: < <a href="http://www.cpsp.gov.sk.ca/saskemo">http://www.cpsp.gov.sk.ca/saskemo</a> >.	Minister of Corrections, Public Safety, and Policing	Explicit Basket
Yukon	<i>Public Health and Safety Act</i> , RSY 2002, c 176.	(No special emergency provisions <sup>0</sup> )	N/A
	<i>Civil Emergency Measures Act</i> , RSY 2002, c 34.  Government of the Yukon, online: < <a href="http://www.gov.yk.ca/legislation/cs.html">http://www.gov.yk.ca/legislation/cs.html</a> >	Minister of Community Services	Explicit Basket

## CHAPTER 5 PROPOSED REFORM

### 5.1 SAMPLE DRAFT LEGISLATIVE TEXT

Below is an attempt to incorporate the values of public health, ethics, and Canadian constitutional law into draft legislative provisions. The draft section and subsection numbers are arbitrary. The empowering article (s. 99) was not created from scratch, but was built upon the frame of the emergency provisions in Nova Scotia's *Health Protection Act*.<sup>251</sup> If the kind of law reform this thesis calls for were to be enacted in Nova Scotia and applied to that *Act*, below is an example of what that reform might look like.

The sample provisions are not held out as ideal or perfect. Rather, they are submitted principally with the modest view of exhibiting how the drafting of such reform is in fact possible.

The draft provisions should also not be taken as an assertion of what this author believes the reform ought to look like, nor what particular principles ought to be given greater status or more consideration than others. In keeping with the principle theme of this thesis, the underlying constitutional principle of democracy and the public health value of community consultation are central to the proposed law reform's credibility and ultimately its effectiveness; it is the legislature, using all of its tools, which needs to decide what status, if any, to give to each principle. The draft principles are only meant to reveal how the theoretical arguments in the preceding chapters might cash out in a statute. They are however drafted in a manner that is intended to be constitutionally compliant (admittedly, perhaps conservatively so).

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<sup>251</sup> SNS 2004, c 4.

The reader may notice that the emergency decision maker in the sample text is the Chief Medical Officer [of the jurisdiction]. This is simply because the Chief Medical Officer [of Health] is the decision maker in the Nova Scotia legislation. The decision maker could just as easily be some other official, a cabinet minister, or the Lieutenant Governor-in-Council. As was seen above in chapter four, Canada's many jurisdictions have between them chosen a wide variety of decision makers in their emergency legislation. The question of who the decision maker ought to be – whether for legitimacy reasons, expertise, or some other reason, is a relevant line of inquiry, but it is beyond the scope of this thesis.

#### DRAFT TEXT

99. Where the Minister has declared a public health emergency, the Chief Medical Officer may implement special measures to mitigate or remedy the emergency including any measure the Chief Medical Officer reasonably believes is necessary for the protection of public health during the public health emergency.

#### Guidance for Exercising Powers

100. (1) Restrictions on individual rights and freedoms arising as a result of the exercise of any power under this Part shall be no greater than are reasonably required, considering all of the circumstances, to respond to a public health emergency.

(2) In deciding whether to exercise the powers conferred by section 99 and this section, the Chief Medical Officer shall take into account all of the factors that the Chief Medical Officer determines to be relevant, including, but not limited to, the following guidance:

(a) the Chief Medical Officer, on behalf of and with the government of Nova Scotia, has a mandate to safeguard the health, security, and well being of the population, and for this common good has a duty to respond rapidly and effectively to the public health emergency;

(b) actions that will or that will have the potential to interfere with the rights and freedoms of individuals must be justified in relation to the best available assessment of the public health risk;

(c) wherever practicable, voluntary cooperation of individuals shall be sought before mandatory orders or coercive measures are imposed;



(d) interference with, seizure, confiscation, or use of private property under the authority of the Chief Medical Officer must be in furtherance of a demonstrable public health benefit that can be derived from such action, which justifies such interference, seizure, confiscation, or use when balanced against the best available assessment of the public health risk;

(e) the liberty of individuals should only be limited when there is a demonstrable benefit that can be derived from such action, which justifies any such limitation when balanced against the best available assessment of the public health risk;

(f) the coercive interference with the bodily integrity of individuals should only be taken as a last resort, and must in all circumstances be justified when balanced against the best available assessment of the public health risk; and

(g) all reasonable efforts shall be taken to avoid or minimize any disproportionate burdens or restrictions of rights that may be experienced by any individual or group, with particular attention to the circumstances of vulnerable or historically marginalized groups or communities.

#### Transparency Required

101. (1) Upon deciding to exercise the special powers conferred by sections 99 and 100, the Chief Medical Officer shall, within seven days, cause the decision to be communicated or published by such means as the Chief Medical Officer considers the most likely to make the contents of the decision known to the people of the area affected.

(2) Any publication under subsection (1) shall contain the reasons for the decision, including the consideration of the applicable guidance in s. 100(2) and any other factors.

(3) Unless, in the opinion of the Chief Medical Officer, it is necessary to include the personal information of individuals in a publication under subsection (1), such personal information shall not be included.

#### No Appeal From Decisions

102. (1) Decisions made during a public health emergency by Chief Medical Officer pursuant to sections 99 and 100 are final.

## **5.2 IMPROVED LEGAL PREPAREDNESS**

The above proposal fits into the body of scholarly literature that emerged mostly over the last fifteen years in the wake of Anthrax and SARS, and continues today.

Infectious diseases never really went away, and if Ebola,<sup>252</sup> MERS<sup>253</sup> and Zika<sup>254</sup> are any indication, they are not going anywhere. This thesis proposes that we build a bridge between public health, ethics, and the law through new legislation in order to be better prepared for infectious disease emergencies. In an emergency the stakes will be high, with a correspondingly high potential for disputes between individuals or vulnerable groups and the state. While the potential for disputes cannot be eliminated, the law should be able to help us reduce their occurrence and mitigate their effects. The law should also be able to help us make better decisions. This chapter discusses the implications of this thesis's research by reaffirming exactly how the proposed law reform will better legally prepare us for the next infectious disease emergency.

### 5.3 TRANSPARENCY AND ACCOUNTABILITY

Nearly every single ethical structure cited in chapter three claimed transparency as a central value.<sup>255</sup> Administrative law scholarly literature generally considers increased transparency in government decision-making desirable, even if difficult to achieve.<sup>256</sup>

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<sup>252</sup> World Health Organization, *Ebola virus disease outbreak*, online: <<http://www.who.int/csr/disease/ebola/en/>>.

<sup>253</sup> World Health Organization, *Middle East respiratory syndrome coronavirus (MERS-CoV)*, online: <<http://www.who.int/emergencies/mers-cov/en/>>.

<sup>254</sup> World Health Organization, *Microcephaly/Zika virus*, online: <<http://www.who.int/emergencies/zika-virus/en/>>.

<sup>255</sup> Peter A. Singer, et al., "Ethics and SARS: lessons from Toronto" Chapter 3 in Michael Freeman, ed. *The Ethics of Public Health*, Vol II (Burlington: Ashgate, 2012); Alison K. Thompson et al., "Pandemic Influenza Preparedness; an Ethical Framework to Guide Decision-making" (2006) 7:12 *BMC Medical Ethics*; United Kingdom, Department of Health, "Responding to Pandemic Influenza – The Ethical Framework for Policy and Planning" (London: Department of Health, 2007); Kenny, Sherwin & Baylis, *supra* note 72;

<sup>256</sup> See: Martin Shapiro, "The Giving of Reasons Requirement" in Martin Shapiro & Alec Stone Sweet, eds, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002) 228); David Markell, "The Role of Spotlighting Procedures in Promoting Citizen

Public health scholarship generally considers increased transparency a tool for increasing the effectiveness of any infectious disease outbreak response.<sup>257</sup> Both SARS commissions called for increased transparency.<sup>258</sup> Indeed, as one audience member commented when the preliminary research for this thesis was presented at the University of Toronto in 2011, “it is difficult to argue against more transparency.”

Transparency is a value that already finds some expression in the statutes.

Consider Nunavut’s *Emergency Measures Act*, which provides:

Immediately after declaring a state of emergency, the Minister shall cause the details of the declaration to be published in the manner that the Minister considers is most likely to make the contents of the declaration known to the majority of the population of the area affected.<sup>259</sup>

Other provinces and territories have similar provisions in their general emergency statutes.<sup>260</sup> The above proposal contains a section (s. 101) which is largely based upon

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Participation: Transparency, and accountability,” (2010) 45 Wake Forest L Rev 425; William Funk, “Public Participation and Transparency in Administrative Law – Three Examples as an Object Lesson” (2009) 61 Admin L Rev 171; Bojan Bugarcic, “Openness and Transparency in Public Administration: Challenges for Public Law”, (2004) 22:3 Wis Int’l LJ 483. There are rare exceptions, for example national security cases. But even those cases cry out for as much transparency as is possible in the circumstance. See: *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350, and *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33; Craig Forcese, “Clouding Accountability: Canada’s Government Secrecy and National Security Law ‘Complex,’ (2004/2005) 36:1 Ottawa L Rev 49.

<sup>257</sup> Lawrence O Gostin and Benjamin E Berkman provide a useful summary in “Pandemic Influenza: Ethics, Law, and the Public’s Health,” (2007) 59:1 Admin L Rev 121 at 149-150.

<sup>258</sup> Campbell Commission, First Interim Report, *supra* note 6, at 48-51; Second Interim Report, *supra* note 6, at 433 and 439; Naylor Report, *supra* note 2, at 72.

<sup>259</sup> *Emergency Measures Act*, SNu 2007, c 10, as amended by SNu 2010, c 14, s. 11(3).

<sup>260</sup> e.g. New Brunswick: *Emergency Measures Act*, SNB 1978 c E-7.1, s. 12; Nova Scotia: *Emergency Management Act*, SNS 1990, c 8, s. 13; Manitoba: *Emergency Measures Act*, CCSM c E-80, s 10(3). There are also statutory provisions that enhance *ex post* transparency. For example, in Nova Scotia, section 6(1)(i) of the *Health Protection Act*, *supra* note 199, states that the Minister of Health shall: “after a public health

these similar provisions requiring publication, but that applies specifically to the special measures taken (as opposed to the declaration only, which the legislation should also require) and adds the requirement for reasons. The reasons must include the consideration of the guidance in ss. 100 (2), as well as any other factors (since our decision maker must turn her mind to “all of the circumstances” if a special measure is to restrict any individual right or freedom: s. 100(1)).

Transparency of decisions is a deep-seated value in Canadian law, and often results in a demand for cogent reasons to be given for a decision.<sup>261</sup> The Supreme Court of Canada commented in the *Provincial Judges Reference*:

The importance of reasons as the basis for the legitimate exercise of public power has been recognized by a number of commentators. For example, in “Developments in Administrative Law: The 1992-93 Term” (1994), 5 S.C.L.R. (2d) 189, at p. 243, David Dyzenhaus has written that

what justifies all public power is the ability of its incumbents to offer adequate reasons for their decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.

Frederick Schauer has made a similar point (“Giving Reasons” (1995), 47 Stan. L. Rev. 633, at p. 658):

. . . when decision makers . . . expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons . . . is still a way of showing respect for the subject. . . .<sup>262</sup>

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emergency has ended, direct that a review be conducted and, within one year, report to the House of Assembly on the cause and duration of the emergency and on the measures implemented in response to the emergency.”

<sup>261</sup> See for example the decisions in: *Northwestern Utilities Ltd and al v Edmonton*, [1979] 1 SCR 684; *Baker, supra* note 160; *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869 (criminal law).

<sup>262</sup> *Provincial Judges Reference, supra*, note 89, at para 181.

The Court in the *Provincial Judges Reference* then immediately clarified that in the passage above it was not “endorsing or establishing a general duty to give reasons, neither in the constitutional nor in the administrative law context.”<sup>263</sup> But in the case of *Baker v Canada*, the Supreme Court wrote that “in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision.”<sup>264</sup> In *Dunsmuir v New Brunswick*, the Court went as far as to say that “[i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.”<sup>265</sup> The Court refined the law surrounding reasons in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,<sup>266</sup> ruling that the adequacy of reasons was not a stand-alone ground for appellate intervention, nor were reasons necessarily always required by every kind of case.

Concerning an infectious disease emergency, it is debatable whether reasons would be required of the decision maker at common law. Emergencies can justify relaxed, perhaps even suspended, procedural fairness requirements.<sup>267</sup> In any case, the Supreme Court has been willing to be flexible concerning what will qualify as reasons in

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<sup>263</sup> *Ibid* at para 182.

<sup>264</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 43.

<sup>265</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47 [*Dunsmuir*].

<sup>266</sup> 2011 SCC 62, [2011] 3 SCR 708 [*Labrador Nurses*].

<sup>267</sup> Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review” Chapter 5 in Colleen M Flood & Lorne Sossin, eds. *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery, 2013) at 162; *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 16; *Walpole Island First Nation v Ontario*, (1996), 31 OR (3d) 607 (Ont Ct Gen Div, Div Ct).

the administrative law context,<sup>268</sup> even if there were a duty for reasons at common law (and there probably is not), the minimum requirements should be easy to satisfy. The Supreme Court of Canada has also indicated an openness to the idea that the procedural fairness requirements under the *Charter*, and in particular the principles of fundamental justice under s. 7, might be justifiably infringed in emergency situations.<sup>269</sup> This will be discussed again briefly in chapter six.

But though neither the common law nor the *Charter* would likely require reasons, the legislature need not tolerate a lack of transparency from its chosen decision maker. Through statute,<sup>270</sup> the legislature should demand reasons in order to enhance transparency and improve the quality of judicial review. For this reason, the draft legislation includes a specific legal duty to publish reasons.

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<sup>268</sup> In *Labrador Nurses*, *supra* note 266, the Supreme Court ruled, at para 20: “*Baker* stands for the proposition that “in certain circumstances”, the duty of procedural fairness will require “some form of reasons” for a decision (para 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para 44)”.

<sup>269</sup> *Ref Re: BC Motor Vehicle Act*, [1985] 2 SCR 486, at 518, [1985] SCJ No 73 (QL).

<sup>270</sup> It is not unusual for a statute to require reasons from a decision maker. See for example: *Tax Court of Canada Act*, RSC 1985 c T-2, s. 18.23 (reasons required from the court); *Criminal Code of Canada*, RSC 1985 c C-46, s. 264 (5); s 719(3.2) (reasons required from the court); *Canada Labour Code*, RSC 1985 c L-2, Part I, s. 146.1(1); 147.1(2); 224(4); 251.05(2) (reasons required from both administrative decision makers and private actors); *Canadian Human Rights Act*, RSC 1985, c H-6, s. 17(4) (reasons required from the Human Rights Commission); *Children and Family Services Act*, SNS 1990 c 5, s.41(5) (reasons required from the court); *Legal Profession Act*, SNS 2004 c 28, s. 37(3) (reasons required from the Barrister’s Society); *Utilities and Review Board Act*, SNS 1992 c 11, s. 27 (reasons required from an administrative tribunal).

Giving reasons, according to some authors, may actually increase the “risk” of judicial intervention.<sup>271</sup> It is not necessary to enter the debate on the rightness or wrongness of various strengths of judicial review. In Canada, judicial review will be irresistible – and through the above-proposed law-reform the courts will be better equipped to provide the applicants and decision makers with meaningful judicial review. If the legislature communicates to the courts the factors the official must consider, and the decision maker provides his or her reasons according to those principles based upon the facts known at the time, that judicial review will become more meaningful. Judges would be better situated to analyse both the basket clause itself and the decision made under it against underlying ethical principles and constitutional and *Charter* values, interpret them,<sup>272</sup> and then apply the rules established in *Dunsmuir* and *Doré* to review the actual decision.

This enhanced, more meaningful judicial review could provide a powerful method of accountability. As we will see in chapter six, the powers of Canada’s superior courts are extensive, and especially so whenever a *Charter* right is in the balance. If decision makers rely on a statutory framework that has incorporated the relevant (applicable) ethical principles and Canada’s constitutional rights and values, and which also requires reasons explaining how those principles, rights and values were balanced with public health protecting objectives, judicial review could be more focused. It would remain a necessary check on the administrative state and maintain the rule of law. It is of course possible, perhaps even probable, that when conducting the legal balancing our decision

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<sup>271</sup> Manfredi (2007), *supra* note 279; Martin Shapiro, “The Giving of Reasons Requirement” in Martin Shapiro & Alec Stone Sweet, eds, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002).

<sup>272</sup> For the basket clause, using the rule in *Rizzo & Rizzo Shoes*, *supra* note 86.

maker, being human, will get a decision wrong. Holding him or her to account through the courts is not a bad thing. Having the discussion already framed by the legislature, not as a challenge, but as assistance to the courts, can only serve to give confidence to our decision maker (and his or her legal advisors).

Lastly, the courts are not the only avenues available to hold our decision makers accountable, nor are they necessarily the best or most effective one. Transparent decisions, with reasons, publicly justified (for example through publication), will yield significant practical benefits. It will not take long for the press and the public to make it known if the reasons for a decision are found wanting. This may or may not become a source of concern for our decision maker (likely it will depend upon the reasons for the dissatisfaction), but whether concerned or not they will certainly be accountable. Compared with whatever benefits that could be gained from an *ex post* inquiry and report, contemporaneous publication and explanation would have the potential not only to expose abuses or shortcomings, but also to highlight justifications, excellence, and identify areas for improvement and future prevention. Like transparency, public accountability could also improve the effectiveness of measures through increased cooperation and compliance – knowing that the decision maker will be held to account, and in fact seeing him or her so held, could encourage public trust, and so public health effectiveness.

#### **5.4 EFFICIENCY AND EFFECTIVENESS**

As was noted by the Campbell Commission in its Second Interim Report:

Emergency powers are inherently dangerous. They carry the twin dangers of overreaction and underreaction.



The first danger is overreaction. Every emergency power, once conferred, “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” To a hammer, everything looks like a nail. To some emergency managers, every problem may look like an opportunity to invoke emergency powers.

The second danger is underreaction. In the face of a deadly new disease with an uncertain incubation period, ambiguous symptoms, no diagnostic tests, uncertainty as to its infectiveness and mechanisms of transmission, and no idea where in the province it may be simmering, decisive action may be necessary that turns out in hindsight to have been excessive.<sup>273</sup>

Providing a legal, constitutionally considered framework within which to conduct an analysis should waylay legal hesitation or doubt on the part of the decision makers. This could help guard against the twin dangers of overreaction and underreaction. Obliging the decision maker to consider *Charter* values alongside other legislative guidance should guard against the spectre of over-reaction (with the improved safeguard of a more focused judicial review). At the same time, having a statute that lays out specific principles the legislature wants the decision maker to consider, and knowing those things were in fact considered in good faith, should provide the decision maker with confidence when faced with controversial but critical choices. It should therefore mitigate the risk of under reaction.

There would be another benefit. By including provisions obliging the decision maker to consider the effects of her decision on vulnerable individuals or groups, and to take account of the proportionality of any such effects, a core value of public health - social justice (shared with the public ethics proposed by relational feminism) - would be brought into the decision making process. At the same time, this principle should be

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<sup>273</sup> Campbell Commission, Second Interim Report, *supra* note 6 at 9.

defensible before the courts as it is grounded in the constitutional principle of the protection of minorities. By bringing this value into the process through statute, it will do more than bring an ethical dilemma to the attention of the decision maker where one may not have been thought to exist before. It will *create a legal dilemma* where one did not exist before. As was seen above in chapter three, public health, even in the narrow sense, is concerned with more than keeping the maximum number of human bodies alive. Obliging the decision maker to take account of social justice concerns during her decision-making process would reflect this.

Increased attention to the risks faced by vulnerable minorities, and more generally taking account of social justice concerns, are not merely symbolic gestures. Having these principles etched in statute should lead to better emergency decisions based upon public health's own core values. And if the law, passed through the democratically elected legislature, can be used to re-orient the administrative decision making-process away from the binary tension between the individual and the greater good and towards a broader discourse taking account of public health, ethics, and constitutional values, the novel aspects of that broader discussion would be at least more transparent and potentially more legitimate in the eyes of the real people living through the emergency.

Admittedly, stronger legislative guidance on how to go about deciding may not automatically lead to the swift implementation of public health professional recommendations, but it would at least add clarity to the emergency decision-making process. If the legislation was seen to take note of *Charter* rights, and to incorporate *Charter* values, other constitutional principles and administrative law, and public health

and ethical principles, the legal advisors to the decision maker would be better positioned to provide them with swift, useful support.<sup>274</sup>

After a legal decision has been made to deploy a measure (especially a potentially coercive one), the cooperation of the public is critical for its success. Notwithstanding the dramatic suggestions of some Hollywood films, it is quite simply not feasible to coerce large portions of the population. The Campbell Report acknowledged this:

Voluntary compliance is the bedrock of any emergency response. Even the most exquisite emergency powers will never work unless the public cooperates.

Legal powers are false hopes during a public crisis. No law will work during a disaster without the public cooperation and individual sacrifice shown during SARS. Nor will any law work without the machinery that supports and compensates those who sacrifice for the greater good of public health.

Voluntary compliance also depends on public trust in those managing the emergency and public confidence that medical decisions are made on medical evidence, not on grounds of political expediency or bureaucratic convenience.<sup>275</sup>

In sum, coercion (and the laws that enable it) is a last resort.<sup>276</sup> Public trust is fundamental.

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<sup>274</sup> The next time around, they may even be able to advise that the orders are enforceable. The Ontario SARS Commission reported that during the crisis legal advisors to public health officers doubted whether judges would enforce orders issued under pursuant to the then-extant legislation. Such opinions are remarkable precisely because they were given during the SARS crisis: the decade's most infamous infectious disease emergency! [Second Interim Report, *supra* note 6, at 274]

<sup>275</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 308.

<sup>276</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 251. George Annas, has made similar observations in the United States. Analyzing surveys from 2004, he argued in *supra*, note 21, that the key factor in getting people to voluntarily follow emergency orders was if they trusted the public figured to tell the truth. In the specific context of the SARS outbreak, he further commented at 222: "It is a public health myth, the equivalent of an urban legend, that quarantine was necessary to stop the SARS epidemic. It was not, and where it was used it probably did more harm than good. This is

The above-proposed reform is meant to maintain the public trust. If a drastic, coercive measure is actually required, it will be taken by a decision maker whose authority depends on the consideration and weighing of values that give legitimacy to decision-making. That decision maker will be required to publicly give reasons for that decision in light of those values. Such a law will not by itself create public trust, but it will be a considerable step in the right direction.

## **5.5 MORE MEANINGFUL JUDICIAL REVIEW, RESPECT FOR RIGHTS, AND ENRICHED CONSTITUTIONAL DISCOURSE**

We will discuss below Canada's constitutional requirement for recourse to judicial review in order to ensure that the choices of decision makers are made in compliance with the constitution. But a few words are necessary here to completely flesh out the argument for the proposed reform. This is because, in the context of an infectious disease emergency, the right to request review is too little, too late.

Individuals or groups seeking interlocutory injunctions or mandatory orders during the emergency itself are going to be controversial figures. During a true emergency, the stakes, and emotions, are going to be high, and it will be provocative if a party asks a judge to grant an interlocutory order while the press is reporting newly confirmed cases of infection or death. In most instances, it will be extraordinarily difficult for any judge to deliver a decision which does justice to the needs of the applicants and the public in such an expedited manner.

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because not only liberty is at stake in deciding to quarantine, but the effectiveness of public health itself. To be effective in preventing disease spread from either a new epidemic or a bioterrorist attack, public health officials must also prevent the spread of fear and panic – and, as important, must not panic themselves. Maintenance of public trust is essential to achieve this goal.”

But once the emergency is over, if it is judged that the decision maker's choices unjustifiably violated constitutional or other legal rights of individuals or vulnerable minority groups, it will be too late. This is not to say that after the fact review will not have value. Quite the opposite is true. After the fact decisions could provide the very kind of guidance for the future that this thesis proposes. In fact, judicial guidance could end up being more detailed and therefore more useful guidance than could be provided by general provisions in a statute. Depending upon the content of the decision, it could be more powerful guidance, and might conveniently come from the same courts that would be reviewing future decisions. In any case, there will always be the potential for some circumstance that could not have been anticipated by the legislature such that judicial review will need to be the vehicle for interpretation and refinement.

Nevertheless, such precedent could only come after the real people, who were affected on the ground, needed it. No *ex post* remedy, not even those available under the *Charter*, is like to make right the wrong done to those applicants who may have been, (now)-unlawfully and against their will quarantined, isolated, inoculated, or treated. The fact that the courts could be helpful in establishing guidance for the emergency decision maker is no reason for the legislature not to do so. Insofar as potential circumstances can be foreseen, the legislature can speak *now*, in proactive anticipation of a public health emergency and the decisions which may have to be taken to manage it. It can bridge public health, ethics, and the law to give real content to, and display respect for, the rights of individuals and vulnerable minorities before the emergency happens. This approach is the only one that makes sense if we are to honestly take account of what, in an emergency, the lived experiences of real people in the world are like to be.

But more than this, our context provides a target of opportunity. By speaking first on a matter of fundamental individual rights, concerning conditions where the public good must take a prominent place, the legislature will be assisting the courts in their role as arbiters of the rule of law. It is an opportunity for the beginning of, as Gregoire Webber imagines,<sup>277</sup> a true dialogue as dialectic, delivering to Canada and Canadians a renewed and enriched constitutional discourse.

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<sup>277</sup> Gregoire CN Webber, “The Unfulfilled Potential of the Court and Legislature Dialogue” (2009) 42:2 *Canadian Journal of Political Science* 443.

## CHAPTER 6 MORE MEANINGFUL JUDICIAL REVIEW AND ENRICHED CONSTITUTIONAL DISCOURSE

### 6.1 INTRODUCTION

So far, we have dug into Canada's underlying constitutional principles, canvassed the core values of public health, public health law, and public health ethics, and surveyed the content of Canadian legislation concerning infectious disease emergencies, particularly the prominence of basket clauses. To contribute to the literature of emergency legal preparedness, this thesis proposed draft legislative provisions providing more extensive guidance for decision makers on the values they should weigh and balance in exercising the authority that basket clauses give to them. This proposal connected the values of public health and ethics with Canadian constitutional principles, including *Charter* values, with a view to creating the benefits of increased transparency, accountability, efficiency, and effectiveness. This thesis also argues that one of the benefits of this legislative reform would be more meaningful judicial review, should any application be made in response to a decision made under the reformed legislation.

This penultimate chapter begins with a brief note concerning procedural fairness before recounting the approach the courts will likely take when reviewing emergency decisions taken under the kind of statutory authority canvassed in chapter four. It will then estimate how the reform proposed in this thesis might fit into that framework. It goes on to consider what the suggested approach of legislating-in-advance might mean in the greater context of Canadian administrative law, judicial review of both executive<sup>278</sup> and

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<sup>278</sup> Most of this context can be traced through a line of major Supreme Court of Canada cases: *Roncarelli v Duplessis*, [1959] SCR 121; *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1

legislative action, and Canada's larger constitutional discourse by referencing the 'dialogue' metaphor<sup>279</sup> of Canadian constitutional scholarship.

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SCR 982; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker]; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [Blencoe]; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [Multani]; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [Dunsmuir]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654; *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [Doré]; *Loyola High School v Québec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [Loyola]. For an analysis of how trial courts actually applied the law after *Pushpanathan*, see: William Lahey and Diana Ginn, "After the Revolution: Being Pragmatic and Functional in Canada's Trial Courts and Courts of Appeal" (2002) 25 Dalhousie LJ 259; For an analysis of the case law of the Supreme Court of Canada, see: Shelia M Wildeman, *Romancing Reasonableness: An aspirational account of the Canadian case law on judicial review of substantive administrative decisions since CUPE v NB Liquor Corporation* (LLM Thesis, University of Toronto, Graduate Department of Law, 2011) [unpublished]; and David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445. For a broader analysis of judicial review in general, see: David Dyzenhaus, "The Very Idea of a Judge", (2010) 60 UTLJ 61. For general commentary on the United States experience, see: Ashutosh Bhagwat, "Modes of Regulatory Enforcement and the Problem of Administrative Discretion" (1999) 50 Hastings LJ 1275; Ashutosh Bhagwat, "Separate But Equal?: The Supreme Court, The Lower Federal Courts, and the Nature of 'Judicial Power'" (2000) 80 BUL Rev 967; Sidney A Shapiro & Richard W Murphy, "Eight Things Americans Can't Figure Out About Controlling Administrative Power" (2009) 61 Admin L Rev 5.

<sup>279</sup> This metaphor has been the subject of considerable scholarly commentary since it was first proposed in Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75. See for example: Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited – or Much Ado About Metaphors" (2007) 45 Osgoode Hall LJ 1; Richard Haigh & Michael Sobkin, "Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts", (2007) 45 Osgoode Hall LJ 67; Grant Huscroft, "Constitutionalism From the Top Down", (2007) 45 Osgoode Hall LJ 91; Christopher P. Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé v Canada*," (2007) 45 Osgoode Hall LJ 105; Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on "Charter Dialogue Revisited" (2007) 45 Osgoode Hall LJ 125; Andrew Peter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All)" (2007) 45 Osgoode Hall LJ 147; Kent Roach,



It is precisely because of the extraordinary potential for the state to overstep individual constitutional rights during an infectious disease emergency that all three branches of government must be engaged in order to achieve the full effect of this thesis's proposed reform: the legislature, to improve the written law; the executive, who will better defeat the emergency through the emergency decision maker so empowered by that law; and the judiciary, which will have a crucial part to play regarding the maintenance of the rule of law as the powers are exercised.

Judges seized of cases of judicial review brought before them during, or after, an infectious disease emergency will have the final word on whether the challenged decisions are defensible in light of the relevant and applicable values and principles.<sup>280</sup> The Campbell Commission believed that the legislation itself (as opposed to the decisions alone) would inevitably be challenged.<sup>281</sup> But notwithstanding who will speak last, it is the legislature that actually ought to speak first in 'balancing' the constitutional rights and values at stake during the emergency with the exigencies of managing the emergency effectively in the interests of population health. The unique context provided by an infectious disease emergency is one where the legislature is actually much better equipped to speak first regarding what the administrative decision maker must consider when faced with challenging questions about "what weight(s) do the rights, values and

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"Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall LJ 169; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "A Reply on *Charter* Dialogue Revisited", (2007) 45 Osgoode Hall LJ 193; Rosalind Dixon, "The Supreme Court of Canada, *Charter* Dialogue, and Deference", (2009) 47 Osgoode Hall LJ 235. Gregoire CN Webber, "The Unfulfilled Potential of the Court and Legislature Dialogue" (2009) 42:2 Canadian Journal of Political Science 443.

<sup>280</sup> Though the relief granted need not be severe; the court may simply remit the contested matter back to the decision maker for a new assessment based on the court's reasons.

<sup>281</sup> Campbell Commission, Second Interim Report, *supra* note 6, at 12.

public health objectives have?” The legislature is likewise properly equipped to incorporate not only Canadian constitutional and administrative legal principles, but also the principles of public health, public health law, and ethics – which principles, as we saw in chapter three, are not necessarily at odds with Canadian constitutional, and in particular *Charter*, values. The benefits resulting from such an approach would include improved transparency, accountability, efficiency and effectiveness, and were canvassed in chapter five.

## 6.2 A BRIEF NOTE ON PROCEDURAL FAIRNESS

Though this thesis is concerned predominantly with substantive review, a few brief comments on procedural fairness are warranted. As was mentioned briefly in chapter five, during an emergency, common law procedural fairness requirements are likely to be extremely relaxed and perhaps even suspended (if the situation so warrants).<sup>282</sup> But even if this is the case at common law, the fact that *Charter* rights (and especially section 7 rights) could be breached by emergency decisions may breed uncertainty. Although this thesis has for the most part focussed on the potential for individuals or groups to allege overreaction, the suspension or relaxing of procedural rights could conceivably be relevant to those worried about underreaction as well,<sup>283</sup>

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<sup>282</sup> Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review” Chapter 5 in Colleen M Flood & Lorne Sossin, eds. *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery, 2013) at 162; *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 16; *Walpole Island First Nation v Ontario*, (1996), 31 OR (3d) 607 (Ont Ct Gen Div, Div Ct). On procedural fairness and natural justice more generally in Canadian administrative law, see: *Knight v Indian Head School Division No 19*, [1990] 1 S.C.R. 653; *Blencoe supra* note 278; *Dunsmuir, supra* note 278, and *Khadr* (2010 SCC), *supra* note 300.

<sup>283</sup> For example, a neighbourhood could be known to be at risk of exposure to the outbreak; if the decision maker has not taken any measures to protect that neighbourhood

creating a very large pool of potentially aggrieved section 7 ‘fundamental justice’ claimants.

A complete analysis of this potential issue is beyond the scope of this thesis, but the Supreme Court of Canada has established a few clues as to how it might be resolved. It has written, though in *obiter*, that if administrative efficiencies or expediencies that violate the principles of fundamental justice (which for this purpose, could be natural justice) were to be upheld under constitutional scrutiny, they would likely have to be in response to serious emergencies. In *Ref. Re: BC Motor Vehicle Act*, Lamer J. (as he then was), referring to absolute liability offenses for which imprisonment was a penalty, wrote:

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.<sup>284</sup>

[Emphasis added]

Later on, however, in *New Brunswick v G (J)*, a child protection case concerning the rights of a parent, he in contrast elaborated:

... First, the rights protected by s. 7 -- life, liberty, and security of the person -- are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing,

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nor restricted the movement of potential vectors, then that community may feel affected by such underreaction and assert a right to be heard on the matter (legal or otherwise).

<sup>284</sup> [1985] 2 SCR 486, at 518, [1985] SCJ No 73 (QL). These comments may reflect the sentiment that emergency laws and measures, even those which engage s.7 of the *Charter*, do not automatically require recourse to a s.33 “notwithstanding clause” override. As was seen in chapter two, infectious disease response has long been considered a legitimate exercise of government power - In other words, justifiable in a free and democratic society.

be upheld as a reasonable limit demonstrably justified in a free and democratic society.<sup>285</sup>

These comments from the Supreme Court of Canada may indicate a willingness on the part of the courts to be flexible when considering what markers of procedural fairness and natural justice will be required during emergencies, including “epidemics”.<sup>286</sup> Flexibility, however, does not equate to suspension. As the remarks of Lamer J. disclose, the standard of justification will be high.

### 6.3 JUDICIAL REVIEW

In 2008, The Supreme Court of Canada had the opportunity to revisit and rearticulate the underlying rationale for judicial review of administrative action<sup>287</sup> in the significant case *Dunsmuir v New Brunswick*.<sup>288</sup> On the function of judicial review, Justices Bastarache and Lebel wrote for the majority:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity

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<sup>285</sup> [1999] 3 SCR 46, at para 99.

<sup>286</sup> See for example *Walpole Island First Nation v Ontario*, (1996), 31 OR (3d) 607 (Ont Ct Gen Div, Div Ct).

<sup>287</sup> For a comprehensive account of the pertinent decisions and aspects of Canadian administrative law, see: Sheila M Wildeman, *Romancing Reasonableness: An aspirational account of the Canadian case law on judicial review of substantive administrative decisions since CUPE v NB Liquor Corporation* (LLM Thesis, University of Toronto, Graduate Department of Law, 2011) [unpublished].

<sup>288</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.<sup>289</sup>

[Emphasis added]

When the *Charter* is engaged,<sup>290</sup> the approach the courts will take towards challenges<sup>291</sup> to administrative actions can become more complex than in administrative law cases with no *Charter* element. In the 2006 case of *Multani*,<sup>292</sup> the majority of the Supreme Court of Canada decided that the administrative law standard of review was not applicable when a *Charter* right was infringed by a government decision. Charron J. wrote for the majority:

With respect for the opinion of Deschamps and Abella JJ., I am of the view that [the administrative law] approach could well reduce the fundamental rights and freedoms guaranteed by the Canadian *Charter* to mere administrative law principles or, at the very least, cause confusion between the two. It is not surprising that the values underlying the rights and freedoms

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<sup>289</sup> *Ibid*, at paras 27-28.

<sup>290</sup> There is probably no executive or legislative action that is immune from judicial consideration if a *Charter* right is engaged: *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

<sup>291</sup> Neither the executive nor the legislature can prevent such challenges from being brought before the courts. For example in *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, the Supreme Court was not hesitant to hear the case notwithstanding clear legislation denying courts review jurisdiction. See also: *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Association et al*, [1975] 1 SCR 382 [Nipawin].

<sup>292</sup> *Supra*, note 135.

guaranteed by the Canadian *Charter* form part — and sometimes even an integral part — of the laws to which we are subject. However, the fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the Canadian *Charter* establish a minimum constitutional protection that must be taken into account by the legislature and by every person or body subject to the Canadian *Charter*. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. An infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the Canadian *Charter*. Moreover, as Dickson C.J. noted in *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, the more sophisticated and structured analysis of s. 1 is the proper framework within which to review the values protected by the Canadian *Charter* (see also *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825, at para 32). Since, as I will explain below, it is the compliance of the commissioners' decision with the requirements of the Canadian *Charter* that is central to this appeal, it is my opinion that the Court of Appeal's analysis of the standard of review was inadequate and that it leads to an erroneous conclusion.

As this Court recognized in *Ross*, judicial review may involve a constitutional law component and an administrative law component (para 22). In that case, for example, the appeal raised two broad issues. From the point of view of administrative law, the Court first had to determine whether, based on the appropriate administrative law standard of review, namely reasonableness, the human rights board of inquiry had erred in making a finding of discrimination under s. 5(1) of the *Human Rights Act*, RSNB 1973, c H-11, and whether that *Act* gave it jurisdiction to make the order in issue. (It should be noted here that the Court did not confuse the protection against discrimination provided for in s. 5(1) of the *Act* with the right guaranteed in s. 15 of the Canadian *Charter*.) However, the conclusion that there was discrimination and that the *Act* granted the board of inquiry a very broad power to make orders did not end the analysis. Since the respondent had also argued that the decision infringed his freedom of expression and religion under the Canadian *Charter*, the Court also had to determine whether the board of inquiry's order that the school board remove the respondent from his teaching position was valid from the point of view of constitutional law. As the Court

recognized, “an administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*” (para 31; see also *Slaight Communications*). The Court therefore conducted an analysis under ss. 2(a) and (b) and 1 of the Canadian *Charter* to decide the constitutional issue. The administrative law standard of review is not applicable to the constitutional component of judicial review.<sup>293</sup>

[Emphasis added]

But in the 2012 case of *Doré v Barreau du Québec*,<sup>294</sup> the Supreme Court, with unanimous reasons authored by Abella J., overruled *Multani*, deciding instead that the administrative law approach was applicable to the constitutional component of judicial review:

It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to

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<sup>293</sup> *Multani*, *supra* note 135, at paras 16-17.

<sup>294</sup> *Doré*, *supra* note 112.

effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

As this Court has noted, most recently in *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.<sup>295</sup>

[Emphasis added]

The decision in *Doré* was not without commentary.<sup>296</sup> In the 2015 case *Loyola High School v Quebec (Attorney General)*,<sup>297</sup> Abella J. for the majority applied the *ratio*

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<sup>295</sup> *Doré*, *supra* note 112, at paras 4-7. The Court canvasses in that decision the eclectic and conflicting case law from the Supreme Court that existed up to this point.

<sup>296</sup> It is not settled in the literature whether the approach in *Doré* will (or ought to) endure, particularly with regards to its use of *Charter* values where perhaps rights belong. See generally: Matthew Lewans, "Administrative Law, Judicial Deference, and the *Charter*" (2014) 23:4 Const Forum Const 19; Audrey Macklin, "*Charter* Right or *Charter*-Lite? Administrative Discretion and the *Charter*" (2014) 67:2 Sup Ct L Rev 561; Lorne Sossin and Mark Friedman, "*Charter* Values and Administrative Justice" (2014) 67:2 Sup Ct L Rev 391; Matthew Horner, "*Charter* Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67:2 Sup Ct L Rev 361; Christopher D Bredt and



from *Doré*, but in a separate concurring opinion, McLachlin C.J and Moldaver J (with Rothstein J concurring) seemed to apply the approach from *Multani* as if *Doré* had not overruled it.<sup>298</sup> This calls for a degree of caution in predicting what judicial review of administrative action would look like under the proposed legislative reform.

But assuming that the approach endorsed by the entire Supreme Court in *Doré* and the majority in *Loyola* endures until the next infectious disease emergency, then the proposed law reform will be fitting, both for effective decision-making and for judicial review.<sup>299</sup> Emergency measures are going to impact protected *Charter* rights.<sup>300</sup>

Under the rule in *Doré*, the emergency decision maker must ensure that her decisions interfere with relevant *Charter* guarantees no more than necessary in order to achieve her statutory objective.<sup>301</sup> The sample draft legislative provisions in chapter five contained a provision to that effect – an explicit and specific reminder of constitutional concerns, similar to the general ones seen in contemporary emergency statutes throughout Canada

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Ewa Krajewska, “*Doré*: All That Glitters Is Not Gold” (2014) 67:2 Sup Ct L Rev 339; Hoi L Kong, “*Doré*, Proportionality and the Virtues of Judicial Craft” (2013) 63:2 Sup Ct L Rev 501.

<sup>297</sup> 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

<sup>298</sup> *Loyola*, *ibid*, at paras 145-151.

<sup>299</sup> Compare: *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, where the majority of the Supreme Court was less than deferential to an administrative decision maker’s use of a soft-law instrument.

<sup>300</sup> Note that while this thesis is concerned primarily with judicial review for correctness or reasonableness, in the event of a *Charter* breach, the remedies available to a superior court under the constitution are extensive, and are expanding. See: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3; *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206; *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28; *R v 974649 Ontario Inc*, 2001 SCC 81, [2001] 3 SCR 575; *R v Babos*, 2014 SCC 16, [2014] 1 SCR 309. But see the back-and-forth that played out in: *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Khadr v. Canada (Prime Minister)*, 2010 FC 715, [2010] 4 FCR 36; *Canada v Khadr*, 2011 FCA 92.

<sup>301</sup> *Doré*, *supra* note 112, at paras 4-7.

in chapter four. But the new legislation would do more than merely restate the idea of minimal impairment. Minimal impairment must be thought of in relation to the statutory objective. The draft legislation gives context to that objective, and provides the principles that must be considered when deciding whether or not a decision is proportional to the expected public health gain. No legislation could ever guarantee that the courts will agree with the decision maker's proportionality assessment, but the law reform proposed in this thesis would at least let the decision maker know what they are supposed to be weighing. It would be ignominious for the decision maker to have a decision declared unreasonable after failing to consider principles and factors they did not, at the time of the decision, know they were supposed to be considering.<sup>302</sup>

Consider the case of *Baker v Canada (Minister of Citizenship and Immigration)*.<sup>303</sup> In that case, the Minister possessed significant discretion to decide whether to permit a non-national to remain in Canada on humanitarian and compassionate grounds. In addition to finding that the process afforded Ms. Baker had been unfair owing to a reasonable apprehension of bias on the part of the assessing immigration officer, the Supreme Court of Canada found the Minister's decision to deny Ms. Baker's claim was in any case unreasonable. The Court quashed the refusal, and remitted it back for reconsideration.

In finding the Minister's (really, his delegate's) decision unreasonable, the Court did recognize the discretionary nature of the decision. Notwithstanding that neither the regulations, nor their authorizing statute, delineated mandatory factors for the Minister to

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<sup>302</sup> See for example the *Retired Judges* case: *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539.

<sup>303</sup> [1999] 2 SCR 817 [*Baker*].

consider, L’Heureux-Dubé J., writing for the majority, determined that the Minister was obliged to consider the best interests of Ms. Baker’s children in accordance with: the Court’s interpretation of one of the objectives of the statute<sup>304</sup>; the *Convention on the Rights of the Child*;<sup>305</sup> and the values and principles expressed in the Minister’s own Ministerial Guidelines. She further stated that the Minister was required to give substantial weight to that factor.<sup>306</sup>

Reflecting on the rulings in both *Doré* and *Baker*, it is possible to forecast to a certain degree the types of principles and factors the courts might expect the emergency decision maker to weigh<sup>307</sup> in the absence of legislation. These would of course include at a minimum *Charter* values and the objectives of the authorizing statute, but could potentially also include international legal instruments;<sup>308</sup> soft-law documents (for example Ministerial guidelines); and potentially public health and public health law principles, practices, and approaches. Legislation is capable of capturing all such considerations. And while in *Baker* the Court expressed a positive attitude towards using soft-law instruments as interpretive aids, the danger posed by over-reliance on them was

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<sup>304</sup> *Immigration Act*, RSC, 1985, c I-2, s.3(c) [since replaced by the *Immigration and Refugee Protection Act*, SC 2001, c 27].

<sup>305</sup> Can TS 1992 No 3. Iacobucci J. (Cory J. agreeing) wrote a separate concurring judgment disagreeing on this point, since the treaty, though ratified, had never been enacted into Canadian domestic law.

<sup>306</sup> *Baker*, *supra* note 160, at para 65.

<sup>307</sup> In the follow-on case to *Baker* of *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, the Court seemed to show increased deference to how the Minister weighed the appropriate factors in the context of anti-terror/ national security concerns, it nevertheless maintained, at para 29, that the decision could be reversed if it was “patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors” [emphasis added].

<sup>308</sup> For example, WHO or other instruments to which Canada has committed, e.g. *The International Health Regulations (2005)* 2<sup>d</sup> Ed. (World Health Organization, 2008).

seen in chapter three through the very recent case of *Kanthisamy v Canada (Citizenship and Immigration)*,<sup>309</sup> where the Supreme Court ruled that a decision maker's over-reliance on Ministerial Guidelines resulted in a fettering of her own discretion and so her decision was unreasonable (notwithstanding that those very same guidelines had previously been given favourable treatment by lower courts).<sup>310</sup> Legislation, then, remains the preferred tool for proactively ensuring the decision maker knows what she is supposed to be balancing when she decides if a particular emergency measure is proportional, or justified, in light of the *Charter* rights it may impact or limit.

#### 6.4 THE DIALOGUE METAPHOR

In 1997, Peter Hogg and Allison A. Bushell wrote an article<sup>311</sup> in the *Osgoode Hall Law Journal* describing the post-1982 relationship between the legislature and the judiciary as one of “dialogue”. Using the examples of legislative responses to judicial declarations of invalidity (under s. 52 of the 1982 Constitution<sup>312</sup>), the authors attempted to challenge the anti-majoritarian criticism of judicial review of legislation under the *Charter* by empirically demonstrating that in a majority of cases where the courts struck down democratically enacted legislation for lack of compliance with the *Charter*, the legislature responded by either invoking s. 33<sup>313</sup> of the *Charter* (which was rare),<sup>314</sup>

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<sup>309</sup> 2015 SCC 61 [*Kanthisamy*].

<sup>310</sup> The case is recapped above in chapter three, section 3.1.4.

<sup>311</sup> Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall LJ* 75 [*Charter Dialogue I*].

<sup>312</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>313</sup> “(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under

enacting revised legislation envisioned as justified under s.1<sup>315</sup>, or by enacting reformed legislation in accordance with the court's decision. This phenomenon, according to the authors, weakened the anti-majoritarian claim that unelected and unaccountable judges were usurping the role of democratically elected, and accountable, lawmakers.

By 2007, the scholarly and juridical discourse concerning the metaphor they had unleashed led to an entire volume of that journal<sup>316</sup> being dedicated to the topic. Writing the first article in that volume, the original authors (now joined by others) commented upon the state of the phenomenon they had ten years ago set in motion:

We could not possibly have anticipated back in 1997 that the article, and in particular our use of the dialogue metaphor, would become the subject of so much discussion, debate, and deconstruction by judges, law professors, and political scientists. By 2006, a total of 27 reported decisions (ten Supreme Court of Canada decisions, five provincial appellate decisions, seven decisions by superior courts of the provinces or territories, one decision of the Federal Court of Appeal, and one of a provincial court) had referred to the concept of *Charter* dialogue. *Charter* dialogue has been the subject of speeches by members of Parliament and members of the

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this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.” This provision is subject to a five-year sunset clause, capable of re-enactment.

<sup>314</sup> Quebec used the clause in *An Act to amend the Charter of the French language*, SQ 1988 c 54, its response to the Supreme Court's decision in *Ford v Quebec (AG)*, [1988] 2 S.C.R. 712. Saskatchewan used the clause in labour relations legislation, but the Supreme Court subsequently declared the impugned provisions constitutional in *RWDSU v Saskatchewan*, [1987] 1 SCR 460, and so the override was not necessary. It is yet to be seen whether Saskatchewan will invoke the clause again, since the recent Supreme Court decision in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 overruled *RWDSU*. Other incidences of the use of s.33 are detailed *supra*, at note 132.

<sup>315</sup> “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

<sup>316</sup> (2007) 45 Osgoode Hall LJ.

judiciary, and has been a topic for academic for academic discussion in numerous courses in law and political science.<sup>317</sup>

As indicated, scholarship considering the metaphor is as varied as it is abundant.

The authors themselves summarize that:

Scholarly critique has ranged from articles that suggest that dialogue has the potential to undermine judicial review to articles that accuse it of lending a false legitimacy to the influence of an undemocratic “court party” over courts and legislatures. The use of legislative sequels as a proxy for dialogue has been criticized by some as overstating the relationship between courts and legislatures, by some as understating it, and by others as simultaneously doing both.<sup>318</sup>

The metaphor was powerfully brought to bear by the Supreme Court of Canada in Justice Iacobucci’s decision in *Vriend v Alberta*,<sup>319</sup> where the Supreme Court added sexual orientation as a prohibited ground of discrimination to Alberta’s anti-discrimination statute by “reading it in”. Since the Alberta legislature had debated and explicitly rejected the proposal to include sexual orientation as a prohibited ground, this decision was of course bound to be controversial. Iacobucci J. was not blind to the criticism being levied against judges. While he was unequivocal in ruling that the Court, since at least the advent of the *Charter*, had the power to strike down law, he acknowledged that: “giving courts the power and commandment to invalidate legislation where necessary has not eliminated the debate over the “legitimacy” of courts taking such action.”<sup>320</sup> Invoking the dialogue metaphor in an aspirational manner, Iacobucci J. highlighted the constitutional importance granted to the protection of minorities before he

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<sup>317</sup> Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited – or Much Ado About Metaphors” (2007) 45 Osgoode Hall LJ 1 at 5 [footnotes omitted] [*Charter* Dialogue II].

<sup>318</sup> *Charter* Dialogue II, *supra* note 317, at 5-6 [footnotes omitted].

<sup>319</sup> [1998] 1 SCR 493 [CanLII] [*Vriend*].

<sup>320</sup> *Ibid.*, at para 133.

asserted that the Court's ruling was not the ending of the law's development. Legislative response was always available, and in any case s.33 of the *Charter* provided the ultimate safeguard.<sup>321</sup>

Perhaps the most promising decision, if one were to favour the idea that the so-called "dialogue" between courts and legislatures might resemble some kind of continuing discussion, was *R v Mills*.<sup>322</sup> A "second look" case, the Supreme Court of Canada upheld an amendment to the Criminal Code notwithstanding that the amendment was not in compliance with one of its earlier decisions (Parliament had, instead, largely adopted the reasons of the dissent). Writing for the majority, Justices McLachlin (as she then was) and Iacobucci developed what had begun in *Vriend*:

A posture of respect towards Parliament was endorsed by this Court in *Slaight Communications, supra*, at p. 1078, where we held that if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional. Thus courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention.

This Court has also discussed the relationship between the courts and the legislature in terms of a dialogue, and emphasized its importance to the democratic process. In *Vriend, supra*, at para 139, Iacobucci J. stated:

To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

See also P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 Osgoode Hall L.J. 75. If the common

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<sup>321</sup> *Ibid* at para 178.

<sup>322</sup> [1999] 3 SCR 668 [*Mills*] [CanLII].

law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature. Such a situation could only undermine rather than enhance democracy. Legislative change and the development of the common law are different. As this Court noted in *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at p. 666, the common law changes incrementally, “while complex changes to the law with uncertain ramifications should be left to the legislature”. While this dialogue obviously is of a somewhat different nature when the common law rule involves interpretation of the *Charter*, as in *O’Connor*, it remains a dialogue nonetheless.

Moreover, in this Court’s recent decision *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, we affirmed the proposition that constitutionalism can facilitate democracy rather than undermine it, and that one way in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection (at paras 74-78). Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. [...] If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament’s attempt to respond to such voices.<sup>323</sup>

[Emphasis added]

Most poignant for our purposes, the court went on to state: “Parliament has enacted this legislation after a long consultation process that included a consideration of the constitutional standards outlined by this Court in *O’Connor*. While it is the role of the courts to specify such standards, there may be a range of permissible regimes that can meet these standards.”<sup>324</sup>

Despite the promise that *Mills* seemed to hold, since *Mills*,<sup>325</sup> the judicial responses to requests from the government for deference under the banner of dialogue have ranged

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<sup>323</sup> *Mills*, *supra* note 322, at paras 56-58.

<sup>324</sup> *Ibid* at para 59 [Emphasis added].

<sup>325</sup> Hogg et al in *Charter Dialogue II*, *supra* note 317, provide an excellent compendium of “dialogue” cases up to 2007.



from lukewarm<sup>326</sup> to completely hostile. Indeed, in *Sauvé v Canada (Chief Electoral Officer)*,<sup>327</sup> McLachlin CJ, in her majority decision, was openly contemptuous of the idea that the Court should show deference to the legislature just because it had made an answer to a previous *Charter* decision:

My colleague Justice Gonthier proposes a deferential approach to infringement and justification. He argues that there is no reason to accord special importance to the right to vote, and that we should thus defer to Parliament's choice among a range of reasonable alternatives. He further argues that in justifying limits on the right to vote under s. 1, we owe deference to Parliament because we are dealing with "philosophical, political and social considerations", because of the abstract and symbolic nature of the government's stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts.

I must, with respect, demur. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.

[...]

The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote — one of the most fundamental rights guaranteed by the *Charter* — and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.

[...]

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<sup>326</sup> *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309.

<sup>327</sup> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 8, [2002] 3 SCR 519.

Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a “dialogue”. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of “if at first you don’t succeed, try, try again.”<sup>328</sup>

[Emphasis added]

We might glean from the cases referenced in chapter two, and could infer from the *obiter* above in section 6.2,<sup>329</sup> that the judiciary might take a more supportive attitude towards showing deference to legislative choices concerning infectious diseases. But all the same, these words from the Chief Justice of Canada temper the enthusiasm over the prospect that infectious disease emergency law reform might develop through a discourse begun with the legislature. The legal rights at stake in an infectious disease emergency will of course be ‘fundamental,’ and their prospective definition and balancing will of course also be topics of philosophical, political, and social consideration (in addition to scientific attention).

Thankfully, public health, public health law, and ethics lend themselves attractively to the kinds of constitutional legal assessments which both the legislature and the courts are likely to make. If the law providing the decision maker with guidance were crafted, as has been suggested in this thesis, with a view to enhancing attentiveness to *Charter* values, giving life to unwritten constitutional principles such as democracy and the protection of minorities, improving transparency, providing accountability, and improving public health efficiency and effectiveness, it would stand a better chance of

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<sup>328</sup> *Ibid*, at paras 8-9, 13, 17.

<sup>329</sup> Where the Supreme Court conjectured that emergencies might justify transgressing the principles of fundamental justice under s.1.

being shown “deference as respect” by the courts as one of many permissible regimes within a range. Surely, it will stand a better chance of being shown deference than the *status quo* we saw in chapter four, namely, the complete absence of articulable legislative guidance. And yet, the legislature does not have to act in this way. It could take an entirely different approach to the rights, but would still be proactively participating in the discourse.

An exhaustive analysis of scholarship and jurisprudence considering the dialogue metaphor would be a thesis in itself, but the metaphor, along with the judicial usage of it, is nonetheless pertinent. This author agrees with Peter Hogg et al. when they write: “If ‘genuine dialogue’ can occur only where legislatures share coordinate authority with the courts to interpret the constitution, then by definition it cannot exist in Canada, where legislatures have no such authority.”<sup>330</sup> That is, if by “interpret” those authors are referring to interpretation in the course of adjudication or dispute-resolution. In the Canadian legal structure, the courts will always have the final word in resolving any such constitutional dispute.<sup>331</sup> But, this does not mean the legislative branch of government does not have coordinate authority before any such dispute is live before the courts. In his 2009 article “The Unfulfilled Potential of the Court and Legislature Dialogue”,<sup>332</sup> Gregoire Webber lamented how Canadian legal discourse had missed an opportunity to develop the dialogue metaphor, which in his view was more aptly described as a kind of dialectic, to enhance the interpretation of constitutional rights:

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<sup>330</sup> Hogg et al, *Charter Dialogue II*, *supra* note 317, at 31.

<sup>331</sup> Assuming, perhaps naively, that no “dispute” between the courts, executive, or legislature will ever come to such an impasse as to threaten what we consider the rule of law. I have, regretfully, seen this occur personally in other nations.

<sup>332</sup> Gregoire CN Webber, “The Unfulfilled Potential of the Court and Legislature Dialogue” (2009) 42:2 *Canadian Journal of Political Science* 443 [*Dialogue*];

In this way, dialogue provides a richer epistemological account than the idea of judicial deference. Whereas deference is generally understood in spatial terms such that the court exercises voluntary restraint in favour of a legislative choice that is not, according to the court, either unreasonable or sufficiently within the court's sphere of competence to evaluate (Hunt, 2003) dialogue focuses on the exchange of reasons justifying constitutional meaning. Each institution's reasons for action are subject to critical evaluation by the other. The court evaluates the justification for legislation and highlights its insufficiency, if any. In light of the court's judgment on the failed justification, the legislature in turn further participates in the exchange of reasons either by re-enacting the same legislative account of rights with a different justification or by enacting a modified legislative proposal. The aim of the dialogic exchange is reasoned agreement.

[...]

The argument developed here does not depend on the view that the legislature or the court has poorly performed the task of expounding the meaning of the constitution, or that one or the other is institutionally unsuited to that task. Nor does the argument depend on comparative institutional analysis, evaluating the different institutional capacities of court and legislature before concluding in favour of one or the other as the preferred expounder of constitutional meaning (see Komesar, 1994; Fuller, 1978: 393ff). Rather, it is grounded in the conviction that the court should not be the sole or supreme expounder of the constitution. Constitutional scholarship should forgo the thought that any legislative challenge to a judicial determination of constitutional meaning "diminish[es] respect for the Court as an institution, trivializes the Court's precedents, and allows the rights of the most unpopular people to be defined by elected politicians" (Roach, 2001a: 276). It is no violation of the rule of law to question a judicial ruling on the meaning of the constitution. It does not require one to confront false statements like "either the Constitution is supreme or it is not" (Cameron, 2000: [27]). Unless one erroneously equates the court's constitutional decisions with the constitution itself, a legislative challenge to the court's judgment is no affront to the supremacy of the constitution (Huscroft, 2004: 249). Rather, it is a challenge to judicial supremacy, a challenge to the court's delimitation of a constitutional provision, but not a challenge to the constitution which the legislature is itself committed to expound.<sup>333</sup>

In this thesis, we are considering the case for anticipatory and preventative legislative action where there is no such specific judicial decision or interpretation for the

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<sup>333</sup> Webber, *supra* note 332, at 458, 459-460.

legislature to ‘challenge’. In any case, it is unhelpful to characterise the interaction that will occur between courts, decision makers, and legislatures in this way. Should the legislature “speak first” in a genuine attempt to breathe constitutional life into emergency decision-making, the decider (and their advisors) will *ex ante* be in a better position to act in accordance with the rule of law.<sup>334</sup> The trepidation expressed by the Campbell Commission concerning emergency statutes would be mitigated. Instead of a void, the courts will have a statute (debate, preamble and all), along with argument from an Attorney General, to assist it as it wrestles with intricate constitutional issues. And lastly, concerning the decision or decisions being impugned, it is of course possible that the emergency decision maker, being human, may get some decisions wrong. Armed with the expanded legislation, the court will be pre-equipped with a stronger statutory context within which to judge the reasonableness (or correctness) of any decisions taken under that same statutory authority. This does not describe any branch of government challenging another. It is rather the purest form of teamwork: the three branches of government fighting together to ensure that the infectious disease emergency is overcome, constitutional rights are valued, and the rule of law is maintained in the face of adversity.

This approach has the added benefit of incorporating the federalist nature of Canada. As Webber writes: “[t]he dialogues about the meaning of the constitution can be as multiple as the range of constitutional meaning. By allowing the legislatures of Canada

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<sup>334</sup> See Bhagwat (1999), *supra* note 278, for further discussion on *ex ante* vs *ex post* modes of regulatory enforcement. For further commentary on modes of regulatory enforcement, see for example: Richard Brown, “Theory and Practice of Regulatory Enforcement: Occupational Health and Safety Regulation in British Columbia” (1994) 16 *Law & Pol’y* 63; Andrew Hopkins, “Compliance With What? The Fundamental Regulatory Question” (1994) 34:4 *British Journal of Criminology* 431.

to assume a co-ordinate role in expounding this meaning, the actualization of constitutional rights may differ from one jurisdiction to another.”<sup>335</sup> Though Canada’s constitutional design has bestowed upon the courts final interpretive authority, there is no reason for the legislature not to tackle difficult issues of rights definition, scope, and balancing.<sup>336</sup> A legislature sitting in ‘peace time’ has some considerable advantages over a judge sitting alone during (or even immediately after) an emergency. Peter Hogg et al. seem to share this position in the broad sense:

We should make clear that our support for the traditional role of the courts as the authoritative interpreters of the constitution should not be taken to suggest that the courts are more important or useful or progressive institutions than the legislative and executive branches. In a democracy, that would be a ridiculous position. Important change inevitably comes primarily from the legislative and executive branches of government, not from the courts. The courts have very limited power to cause social change. They are not accountable to public opinion (and have no way of canvassing it anyway); they have no power to order independent research or to hold public hearings on policy issues; they have no power to create many of the policy instruments that legislatures routinely use; they have no access to public funds; and, they have no capacity to administer programs. Unemployment insurance, workers’ compensation, old age pensions, social assistance, food and drug standards, labour standards, public health care, public education and human rights codes are among the progressive measures initiated and implemented by the legislative and executive branches of government.<sup>337</sup>

Concerning emergencies, David Dyzenhaus similarly accepted the role of the legislature and the executive when he wrote: “Certain situations, and emergencies are one, might require that Parliament or the executive play the lead role. The rule of law

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<sup>335</sup> Webber, *supra* note 332, at 461.

<sup>336</sup> Hogg et al, *Charter Dialogue II*, *supra* note 317, at 37. Of course, the salient issues encountered during infectious disease emergencies will be challenging and invite controversy. This of course makes them, practically speaking, politically less than palatable; as a practical matter, it may be difficult to get them on the legislative agenda.

<sup>337</sup> Hogg et al, *Charter Dialogue II*, *supra* note 317, at 37.

project does not require allegiance to a rigid doctrine of the separation of powers in which judges are the exclusive guardians of the rule of law.”<sup>338</sup> But, Dyzenhaus offered the following caveat: “Nevertheless, judges will always have some role in ensuring that the rule of law is maintained even when the legislature and the executive are in fact cooperating in the project. Judges also have an important role in calling public attention to a situation in which such cooperation wanes or ceases.”<sup>339</sup> That critical role is the one just described in the vision above.

## 6.5 CHAPTER SIX CONCLUSION

Canadian courts may never return to the constitutional discourse that appeared briefly in *Mills*, but this does not truly inhibit our design. *Mills* concerned law passed in response to a judicial decision; on our facts, it is actually only the legislature that can meaningfully create a “permissible regime” *ex ante*. To propose otherwise, i.e. to await for a challenge and direction from a judge once the emergency powers are deployed, is to doom all parties to a legal regime which will be pronounced unacceptably late: both for the public as a whole, who are counting on the emergency being successfully met in accordance with the rule of law, and for the individuals or vulnerable groups whose rights may be at risk of unjustified infringement. If even one person falls sick and dies as a consequence of inaction due to legal uncertainty, it is too late to pass a statute relying on section 1 or invoking section 33 of the *Charter*. In contrast, once a mandatory inoculation is unjustifiably administered under an insufficient statutory regime, it will be too late to draw out the serum.

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<sup>338</sup> David Dyzenhaus, “Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?” (2006) 27 *Cardozo L Rev* 2005, at 2011.

<sup>339</sup> *Ibid.*

Emergencies will most likely result in flexibility from the courts, but only insofar as they are convinced such flexibility is justified; law reform in this area does not need to be purely reactionary and fear-driven, and indeed this thesis is driven by neither. As we saw in both chapters one and three, public health emergency legal preparedness is forward-looking, with a view to ultimately improving the concrete outcomes experienced by the public. The legal advantages that decision makers (and their advisors and staffs) will gain from law reform will not be insular. By incorporating both Canadian constitutional requirements and public health principles, the emergency law will be a stronger tool for public health, better able to serve what Gostin posited as “the prime objective of public health law... to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice.”<sup>340</sup> And lastly, using legislation, or hard law, to achieve this objective seizes a prime opportunity to breathe a new kind of life into Canadian constitutional law and the dialogue metaphor. By speaking first when only it can, the legislature can provide the courts with a constitutionally informed public health decision-making framework, allowing for a more focused and meaningful judicial review that is less likely to get it wrong from either a public health or constitutional perspective.

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<sup>340</sup> Gostin, *supra* note 26 at 4.



## CHAPTER 7 CONCLUSION

Since SARS, Canada has taken some steps towards improving its preparedness to deal with infectious diseases, both in their everyday occurrences, and in the event of an emergency. This preparation includes legal preparedness. However, as we have seen, there has been a lack of attention paid to an important component of legal preparedness. The legislature should act to remedy this deficiency.

In chapter five there are sample draft legislative provisions. A full discussion about how this legislation ought to look, and what its provisions ought to say, would be an entire thesis in itself, and if the democratic aspirations of public health and Canada's constitution are to be respected, then the legislature, with its inherent legitimacy and the ability to engage in public consultation, is the appropriate body to take on this challenge. In any event, the argument of this thesis is not that the guidance to be embedded in legislation should reflect precisely the values this author thinks it ought to. Rather, it is that legislation should provide more guidance than it now does in any jurisdiction in Canada, informed by the principles of public health, ethics, and Canadian constitutional law. This will enrich our constitutional discourse and improve Canada's readiness to meet future infectious disease emergencies. The sample legislation sketched here is meant only to serve the modest purpose of demonstrating that what is proposed, namely the integration of public health and ethical principles into legislative guidance, is not impracticable. It can be done.

And we ought to do so. Silence on the issue is a choice. Intentionally or not, it communicates something about our underlying normative values. To let the law remain silent, and perpetuate the risks of legal uncertainty, will be unfair to both the majority and

the vulnerable minority; harmful to both the public good and individual rights. It would also be a tragic waste. The fruits of further research, debate, and jurisprudence in this area could be relevant to other professional and scholarly fields beyond the already numerous fields of emergency legal preparedness, public health, public health law, public health ethics, and constitutional and administrative law. It could encourage research and the exchange of ideas, leading to the development of stronger theoretical and ethical frameworks. Perhaps some of them will challenge and test the argument that professional ethics ought to be informed by law. Such research and discussion can only benefit Canada's emergency legal preparedness. I agree with Tracey M. Baily et al.: "The Time for Talk is Now."<sup>341</sup> Let us reflect now upon whether we are being guided by the best principles, and even whether we are asking the right questions. Let us step back from the question "In an emergency, what are we going to do?" and ask a deeper, more fundamental question.

"In time of emergency, what kind of a people do we want to be?"

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<sup>341</sup> *Supra*, note 28.

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