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The *Alberta Emergency Statutes Amendment Act*, *2024* Surges Executive Powers under the *Water Act*

By: Brenda Heelan Powell, Arlene Kwasniak, Braum Barber, and Ruiping Luo

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Emergency Legislation and the Rule of Law

Since the 1215 *Magna Carta*, democratic society has been based on the tenet that the Executive in power is not above the rule of law. The United Nations has described the core values underlying the rule of law as follows:

> … the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. (*United Nations and the Rule of Law*).

Emergency legislation can authorize the Executive to depart from the rule of law by suspending legal rules and rights as passed by the Legislature and granting the Executive discretionary powers to deal with emergencies irrespective of those rules and rights. Provinces and the federal government have long legislated emergency powers, and such powers have long been the subject of academic discussion (e.g. Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" 52:3 *Osgoode Hall LJ* (2015), 985-1028, and Bruce Pardy, "The Unbearable License of Being the Executive: A Response to Stacey's Permanent Environmental Emergency" 52:3 *Osgoode Hall LJ* (2016), 1029-1048).

This ABlawg post focusses on recent amendments to Alberta's emergency legislation. We appreciate that although in truly unforeseen emergency circumstances it might be necessary for the Executive to exercise powers that depart from the day-to-day rule of law, the primacy of the core values of the rule of law requires that legislation that authorizes such departure must precisely define what constitutes an "emergency", clearly limit the period of departure and direct how that period is to be determined, and strictly limit Executive powers to those that are required to deal with the emergency. This post concludes that the amendments, as they pertain to the to the *Water Act* (RSA 2000, c W-3), are largely overly broad and ill-defined to respect the core values of the rule of law.

The *Emergency Statutes Amendment Act, 2024* and the *Water Act*

The *Emergency Statutes Amendment Act, 2024* came into force on May 30th. This Act amends a number of statutes including the *Emergency Management Act* (RSA 2000, c E-6.8), the *Forest and Prairie Protection Act* (RSA 2000, c F-19), and the *Water Act*. This ABlawg post focusses on amendments to the *Water Act.*

The *Water Act* sets out detailed rules regarding how government is to manage our water and regarding the rights and obligations of several types of water rights holders, including priorities with respect to how holders' rights relate to each other. The core of these rules, rights, and obligations, are historically embedded in water resource management legislation that goes back to the *North West Irrigation Act of 1894* (SC 1894, c 30). Exercising emergency powers can upend and displace these deeply rooted rules and alter rights and obligations, at least during the period of the emergency. We know from the recent federal court decision in *Canadian Frontline Nurses v Canada (Attorney General*), 2024 FC 42 (CanLII) (*Frontline Nurses*), where the federal court found federal cabinet's declaration of an emergency under the federal *Emergencies Act* (RSC 1985, c 22 (4th Supp)) relating to the disruptive Ottawa convoy and other events in Canada to be unreasonable, that a court will very carefully examine all statutory definitions, criteria, and limitations governing a declaration of an emergency to see if they were met. If not met, a finding of unreasonableness is possible, as it was in *Frontline Nurses* (though we also note that this decision is pending appeal). However, obviously if emergency legislation does not contain sufficient statutory definitions, criteria, and limitations on Executive discretion, departures from the rule of law will become less susceptible to review and more subject to Executive discretion.

To acknowledge and reflect the primacy of the rule of law, it is critical that legislation giving the Executive powers to depart from it during an emergency, clearly define what is an "emergency" and specify the period that the emergency exists, limit extraordinary Executive powers only to the emergency, and accordingly set out clear definitions, criteria, and limitations. The question posed here is how do the amended emergency provisions in the *Water Act* fare in this regard?

Prior to the amendments, the *Water Act* already contained significant emergency powers. These were set out in section 107, which enables Cabinet to declare an "emergency related to water". The previous version of section 107 of the *Water Act* read:

> **Declaring an emergency**
>
> 107(1) The Lieutenant Governor in Council may, when satisfied that an emergency related to water exists or may exist, declare an emergency relating to all or any part of Alberta.
>
> (2) Notwithstanding anything in this Act or any approval, preliminary certificate, licence or registration under this Act, if an emergency has been declared under subsection (1), the Director may issue a water management order to any person
>
> (a) suspending the operation of all or part of any approval, preliminary certificate, licence or registration,
> (b) suspending a diversion of water,

(c) designating the purposes for which, and the volumes in which, water may be diverted or used, and

(d) ordering or containing any of the measures or provisions referred to in section 99, with respect to the area of the Province affected by the declaration.

(3) Licensees or registrants affected by a declaration under subsection (1) may be entitled to compensation for any losses incurred as a result of the order in the manner and amount that the Lieutenant Governor in Council considers appropriate.

As you will note, section 99 is referenced in section 107(2)(d) and empowers the Director to issue a variety of water management orders including requiring a person to take measures to prevent, minimize, or remedy any adverse effects on the aquatic environment, human health, property, or public safety.

The Amended (Current) Version of the *Water Act*

The amendments modify section 107 to expand the types of water management orders that may be made by the Director in the event of an emergency (s 107(2.1)(a)). The amendments expand the Director's authority, such that they could make orders to require a person to:

- install water measurement equipment,
- measure the flow rate of water,
- measure the water level of a water body,
- stop diverting water, and
- conduct monitoring and reporting activities.

The amendments also allow the Director to specify a flow rate, a level of water, a decrease in the diversion volume, or a rate and timing for diversion of water.

Although these additions may be seen as positive and necessary for effective and reasonable water management, in some form they should be part of the *Water Act's* rules that always apply (the general rule of law) and not reserved for the Executive in a departure from the rule of law. This point is touched on at the end of this post, but a proper discussion is beyond its scope.

The provincial Cabinet is also granted expanded powers as a result of the amendments (s 107(2.1(b)). These powers include authority to designate priority of diversions or uses of water; to create exemptions from notice requirements for license and approval applications; to use or acquire any real or personal property; and to enter into any building or land without warrant.

Most notably, the Cabinet now may authorize the Director to authorize the transfer of water for a specified period of time between major river basins in the province (an "inter-basin transfer") for the purposes of human health, raising animals, or public safety needs. (s 107(2.1)(b)(ii)). This post focusses on this provision below.

For many of these expanded powers – including the decision to order an inter-basin transfer – the decisions cannot be appealed to the Environmental Appeals Board under section 115 of the Act.

As well, the amendments authorize Cabinet, with respect "flood or drought control, management or mitigation measure" to exempt any person from requiring any kind of authorization, certificate, instrument, etc. under any Alberta Act, specifically including the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (EPEA) and the *Public Lands Act*, RSA 2000, c P-40 (s 107 (2.4)). Cabinet could thus exempt requirements for authorization under the EPEA *Activities Designation Regulation*, Alta Reg 276/2003, for an approval or registration. Environmental assessment requirements presumably could also be exempted. Relevant to inter-basin transfer infrastructure, under the EPEA *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, (Alta Reg 111/1993, Schedule 1 s(d)) any "water diversion structure and canals with a capacity greater than 15 cubic metres per second" requires an environmental assessment.

On the positive side, the amendments provide that the emergency provisions apply to "deemed licences" (s 107(2)(i)) meaning licences and certain other rights in existence when the *Water Act* came into force in 1999 (s 18(2)(b)). Deemed licences include many major diversion rights of irrigation districts, municipalities, and other large water rights holders. Without this new provision, deemed licences arguably could continue to exercise their licence rights regardless of any emergency water management orders, which could make such orders largely ineffective. This is because section 18(2) of the *Water Act* states that if the *Water Act* is inconsistent with a term or condition of a deemed licence, the term or condition prevails over the Act.

What is an "emergency related to water"?

As we stated earlier, given that emergency legislation can suspend the rule of law and replace it with Executive authority, it is critical that the legislation precisely define what is an "emergency", clearly define the period that the emergency exists, and only provide extraordinary Executive powers in respect of emergencies. This means legislation should set out clear definitions, criteria, and limitations.

The amendments to the *Water Act* slightly change the wording of former section 107(1) to read:

> **107(1)** When satisfied that an emergency related to water exists or may exist, the Lieutenant Governor in Council may, by order, declare an emergency relating to all or any part of Alberta.

Notably, there is no definition of what constitutes an "emergency related to water" in section 107. Elsewhere in the *Water Act,* section 105(1)(b) enables a director or an inspector to take "emergency measures" if they are of the opinion that an "activity, diversion of water, or operation of works" … "caused, causes or may cause an immediate and significant adverse effect on the aquatic environment, human health, property or public safety." But the section does not define what is an emergency, much less, an emergency related to water.

We could look to the Alberta *Emergency Management Act* (RSA 2000, c E-6.8) where "emergency" is defined:

> 1(1)(f) "emergency" means an event that requires prompt co-ordination of action or special regulation of persons or property to protect the safety, health or welfare of people or to limit damage to property or the environment.

One might ask whether the Alberta *Emergency Management Act* and the *Water Act* stand *in pari materia* with each other and whether the definition just quoted can be used for the purposes of the *Water Act.* However, the *Water Act* and the *Emergency Management Act* are not on the same subject matter, as the statutory interpretation aid *in pari materia* requires, and the *Emergency Management Act* definition is not a definition of an "emergency related to water".

Not defining "emergency related to water" is a significant omission: Is an emergency related to water something short-term needing immediate response, such as a tailings pond release into a water basin? Or could it include a long-term, predictable state of affairs like drought that could be addressed via effective rule of law water management? There is significant discretion placed on the Cabinet to decide what is an emergency related to water in light of the lack of a definition or criteria providing guidance. Although Cabinet decisions are reviewable, as in the *Frontline Nurses* case, the issue for a reviewing court would be "the legality of the Proclamation and related instruments. And that entails a determination of whether they were made in accordance with the governing legal framework including the legislation which delegated the authority to the Executive and prescribed how it was to be exercised." (at para 192)

In the *Frontline Nurses* situation there was a detailed legal framework governing when federal Executive could declare an emergency under the federal *Emergency Act,* which the court closely examined leading to its decision that the Executive was unreasonable in declaring an emergency. There is no palpable legal framework in the *Water Act's* emergency provisions, leaving Alberta's Executive wide discretion to declare an emergency and a reviewing body little if anything to consider if the Executive declares one.

Inter-basin Transfers

Legislative Background

One of the authors of this ABlawg post, Arlene Kwasniak, was a member of the Water Management Review Committee, formed by the Alberta Government to have a major role in the consultation process leading to the 1996 *Water Act*. Kwasniak attests to significant public concern, interest, and comment, and Committee discussion on how the Act should treat inter-basin transfers. In the end, Government followed Committee recommendations by legislating in section 47 of the *Water Act*: "A licence shall not be issued that authorizes the transfer of water between major river basins in the Province unless the licence is specifically authorized by a special Act of the Legislature," and section 48, which requires public consultation prior to any such Special Act of Legislature. (See *Report of the Water Management Review Committee*, GOA 1995, 65-66).

Since the *Water Act* has come into effect in 1999, there have been only seven inter-basin transfers authorized in special Acts of Legislature. All of these have been municipal treated water, for example, piping potable water from the North Saskatchewan River Basin to residents in Parkland County (Brent McKay, "Emergency water transfers raise environmental and accountability

concerns", *St. Albert Gazette* (14 June 2024) (McKay)). Currently, there are six water authorization Acts in place (*North Red Deer Water Authorization Act*, SA 2002, c N-3.5; *East Central Regional Water Authorization Act*, SA 2007, c E-0.2; *County of Westlock Water Authorization Act*, SA 2007, c C-29.5; *Beaver River Basin Water Authorization Act*, SA 2017, c B-1.5; *Stettler Regional Water Authorization Act*, SA 2005, c S-19.5 (no longer in force); and *North Saskatchewan River Basin Water Authorization Act*, SA 2020, c N-3.6).

How do the new emergency provisions change the section 47 and 48 inter-basin transfer rules? The amendments do not directly amend these sections but add the following to section 107:

> 2.1
> (b) the Lieutenant Governor in Council, for the duration of the emergency and with respect to the area of the Province affected by the declaration, may, by order, … (ii) authorize the Director to issue one or more licences to authorize the transfer of water for a specified period of time between major river basins in the Province for the purposes of human health, raising animals or public safety needs without a special Act of the Legislature

Hence the amendment removes the rule of law requirement for a special Act of Legislature and leaves it to Cabinet to order an inter-basin transfer for specified purposes. This results in a huge loss in government transparency and accountability, as well as loss in an opportunity for public participation and Indigenous consultation. This is especially concerning because, as discussed above there is no definition of or criteria on of what constitutes an "emergency related to water" and accordingly Cabinet has considerable discretion to approve inter-basin transfers.

Furthermore, the only bounds on the discretion to allow an inter-basin water transfer is that it must be done "for the purposes of human health, raising animals or public safety needs" (*Water Act*, s 107(2.1)(b)(ii)). These are broad categories indeed that potentially capture many scenarios. At what point is an inter-basin water transfer justified for the "purposes of human health, raising animals or public safety needs"? Is maintaining status quo water usage enough, even if the status quo involves water wastage or poor water management decisions? Is the entirety of municipal water use a matter of human health or public safety, or are there some aspects of municipal water use that are actually wasteful and thus should not be used to justify an inter-basin water transfer but rather should be addressed through improved water management? Without a definition of an "emergency related to water", these bounds on discretion are not specific enough. And note that although the amendment does not specifically include industrial or commercial purposes it does not specifically exclude them either. They are not excluded by application of the statutory interpretation maxim *expressio unius est exclusio alterus* – "when one or more things of a class are expressly mentioned others of the same class are excluded" (Merriam-Webster.com Legal Dictionary). This legal maxim only applies to the same class of items or things. For example, a prohibition against spraying birch, maple, or elm trees would not prohibit spraying other hardwoods. But "human health, raising animals or public safety needs" do not form a class. They are disparate matters so the *expressio* rule does not apply. Accordingly, an inter-basin transfer could be ordered to address an industrial or commercial water shortage in an emergency provided that it is for a human health, raising animals, or public safety needs purpose. For example, a shortage of water for fracking or carrying out steam assisted gravity drainage processes in a

drought might qualify if the purpose for a transfer is sufficiently tied to human health or public safety.
As well, there are not clear limitations on the duration of an inter-basin water transfer order. The provision states that Cabinet may authorize the Director to make an inter-basin water transfer only for the duration of an emergency, and it states that the Director may authorize such a transfer for a specified period of time. Does the "duration of the emergency" mean that an inter-basin water transfer order can only last as long as the emergency situation in fact, or does it mean the length of the emergency as determined in Cabinet's discretion? Is the "specified period of time" meant to overlap with the period of the emergency or does this mean the Director's authority lasts throughout the emergency situation but that they can make an order that outlives the emergency (but no longer than its end date as specified in the order)?

Although, as mentioned, there are currently six water authorizations in place for inter-basin transfers under the pre-amendment rules, one wonders how many will be made under the relaxed Executive power rules, and how long they would last. More on the last point under "Emergency Infrastructure" below.

Inter-basin Transfers, Why be Concerned*?*

Ecological, Economic, and Infrastructure Concerns

There is a dearth of scientific observation on the ecological impacts of inter-basin water transfers. As such, precaution is imperative.

However, the existing literature does provide that inter-basin water transfers may have physical, chemical, hydrological, and biological implications for both the donor and recipient basins. River basins have distinct characteristics, including acidity, turbidity, temperature, and chemical content of water, as well as the various species that reside within and near the aquatic environment. Inter-basin transfers result in the mixing of these distinct waters, leading to changes in chemical balance and habitat characteristics, and easing the movement of organisms that promote the introduction of invasive species and the spread of disease. More specifically, inter-basin water transfers may to lead to:

> …the loss of biogeographical integrity, the loss of endemic biotas, the frequent introduction of alien and often invasive aquatic and terrestrial plants and animals, the genetic intermixing of once separated populations, the implications for water quality, the frequently drastic alteration of hydrological regimes, the implications for marine and estuarine processes, climatic effects, and the spread of disease vectors, amongst many others.
>
> (B. Davies, M. Thom, & M. Meador, "An assessment of the ecological impacts of inter-basin water transfers, and their threats to river basin integrity and conservation" (1992) 2 Aquatic Conservation: Marine & Freshwater Ecosystems 325)

The effect on hydrology is also important. Inter-basin water transfers can cause salinization and aridification in the donor basin, while increasing water availability in the recipient basin, affecting

groundwater levels. The change in water availability may stress both the water-reliant communities in the donor basin and the drought-tolerant communities of recipient basins, with the potential to permanently alter these ecosystems. Wetlands can be vastly altered by diversions. (Dieu Tien Bui et al, "Effects of inter-basin water transfer on water flow condition of destination basin" (2020) 12:1 Sustainability 338). Addition of water in the recipient basin may also cause salinization and water-logging of soils, thereby increasing erosion and channel scouring and destabilizing sediment in the receiving watershed, depending on the volume of transfer and the timing of the withdrawal. (Meghan Beveridge, *Piping Water Between Watersheds: An Analysis of Basin-to-basin and Sub-basin-to-sub-basin Diversions in Alberta*, (Alberta: Water Matters, 2008) 8). For example, in Australia, "transfers have increased both salinity and turbidity of all receiving waters in the Adelaide/Whyalla region," (B. Davies et al).

Greater sedimentation affects aquatic habitat and increases demands on water treatment. Water transfers may also be a source of increasing concentrations (reduced dilution) of salinity, metals or nutrients in donor basins due to diminished flowrates, as well as in receiving basins that may traditionally have lower agro-industrial loadings. In Brazil, it was observed that changes in the nutrient concentrations due to water transfers caused "accelerated algae growth in part of the receiving reservoirs and increased algal bloom risks." (Hanlu Yan et al, "A Review of the Eco-Environmental Impacts of the South-to-North Water Diversion: Implications for Interbasin Water Transfers" (2023) 30 Engineering 161)

Higher concentrations of dissolved solids, pollutants, or nutrient loadings will have impacts on human populations and industries that rely on sources of clean water. Even modest changes caused by inter-basin water transfers may have incremental and other cumulative impacts on water quality, habitat, and aquatic health on both a localized and system-wide basis (U.S. Army Corps of Engineers, "Potential Aquatic Ecological Impacts of Interbasin Water Transfers in the Southeast West-Central and South-Central Study Areas" (1996)).

And what about inter-basin water transfer infrastructure? Inter-basin transfers convey water from one river basin to another using non-natural means, such as pipelines, aqueducts, or canals. Infrastructure may also include dams and reservoirs to maintain water levels in donor basins. Depending on the distance and elevation change between the point of abstraction and the location the water is discharged into a different basin, large pumping systems could be required. Depending on the type of emergency being responded to, long pumping distances could be required, and the discharge locations would likely be upstream at higher elevations. If you consider the volume of water being moved and the upstream elevation change, pump size would be significant. Large pumping systems require significant amounts of electrical energy with related operating costs and greenhouse gas emissions. Infrastructure of this type would require long-term planning to build and would necessarily require the anticipation of the emergency. Long-term planning and construction for an emergency would suggest, contradictorily, that the emergency is anticipated and, therefore, preventable through water management.

What happens to the infrastructure once the emergency is over? Although the *Water Act* gives Cabinet and the director considerable discretion regarding emergencies, certainly the underlying intention is that once an emergency ends so do emergency measures. Do emergency inter-basin transfers then cease? Are pipelines, aqueducts, canals, pumping stations, and other infrastructure

decommissioned and removed and the land, ecological, and water body disturbances and impacts reclaimed? Or do the inter-basin transfers conveniently remain, having been executed without the benefit of planning, environmental assessment, public participation, Indigenous consultation and accommodation, approvals, and so on? As biologist Lorne Fitch cautions "these temporary diversions could have an annoying propensity to become permanent" (McKay).

Conclusions

This ABlawg post has critiqued the amendments to the *Water Act* that expand government emergency powers focusing on the ability of Cabinet to order an inter-basin transfer to deal with emergencies. With respect to inter-basin transfers, we conclude that as inter-basin transfers need prior long-term planning, have potential serious ecological and economic impacts, and could require tremendously impactful infrastructure all without regulatory, public, or Indigenous community review. The obvious follows: responding to emergencies with Executive ordered inter-basin transfers smacks of perversity. This is so, not even considering what this post did not discuss: the impacts inter-basin transfers can have on water rights, both licensed and non-licensed.

We believe that the day-to-day rule of law governing water and environmental management could be comprehensive and flexible enough to set out legislated courses of action to deal with true, unexpected emergencies related to water. If there are to be Executive powers related to such emergencies, they should be clearly defined and limited and their exercise should be appealable. Emergency response is not the place to tuck huge, practically unlimited Executive power. At the very least, the non-amended emergency provisions regarding water in the *Water Act* should be restored, and the water related amendments deleted, with certain exceptions such as the provision stipulating that emergency measures apply to deemed licenses. We believe that government and Legislature, with public and expert input, and meeting Constitutional obligations to Indigenous communities, should carefully examine the day-to-day water management law with the goal that it incorporates emergency response, as much as possible and feasible. This will require amendments to effect better rational and equitable water management, including regarding the mitigation of climate change and efforts to adapt to these changes, and to live within our ecological limits. Legislatively giving the Executive broad and ill-defined power and the almost unlimited discretion to avoid complying with the laws and policies that apply in "non-emergency" situations is a failure of governance. This is especially evident in respect to responding to water related emergencies through inter-basin transfers.

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