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**CROSS-BORDER LEGAL PREPAREDNESS:  
A COMPARATIVE REVIEW OF SELECTED PUBLIC HEALTH  
EMERGENCY LEGAL AUTHORITIES IN CANADA AND MEXICO<sup>1</sup>**

DANIEL D. STIER\* AND MARIA GUADALUPE URIBE ESQUIVEL\*\*

INTRODUCTION

Twenty U.S. states share a border with Canadian provinces or Mexican states.<sup>2,3</sup> States and provinces have formed regional groups for the purpose of collaborating to prevent or respond to public health emergencies.<sup>4</sup> These groups regularly cite “legal issues” as an obstacle to effective collaboration.<sup>5</sup> We intend this article as the initial step toward overcoming

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1. The authors acknowledge the contributions of Maureen Fonseca Ford, Pablo Marroquin, Mara K. Pollock, Steve Shakman, Susan Sherman, and Steve Waterman.

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2. While there are only seventeen states that share a geographic border with either Canada or Mexico, twenty states have been funded by HHS/CDC for the purpose of cross-border collaboration. See *Early Warning Infectious Diseases Surveillance (EWIDS) Program Activities on the Northern and Southern Border States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.bt.cdc.gov/surveillance/ewids> (last visited Jan. 20, 2011) (“In 2003, the Department of Health and Human Services (HHS), Assistant Secretary for Preparedness and Response designated \$4 million, and since 2004 over \$5 million, per year to be allocated to the northern and southern states bordering Canada and Mexico for the U.S. Border State Early Warning Infectious Disease Surveillance Project. The existing Centers for Disease Control (CDC) Public Health Emergency Preparedness Cooperative Agreement is the funding mechanism for the twenty states that have chosen to participate. In Fiscal Year 2007, eighteen of the 20 eligible U.S. border states are participating in EWIDS (Illinois and Ohio chose not to participate).”).

3. CDC’s Border Infectious Disease Surveillance program, through the Epidemiology and Laboratory Capacity Cooperative Agreement, also provides funding to the four U.S. states and six Mexican states sharing a border.

4. See Gene W. Matthews et al., *Legal Authorities For Interventions in Public Health Emergencies*, in *LAW IN PUBLIC HEALTH PRACTICE* 262, 274-75 (Richard A. Goodman et al. eds., 2d ed. 2006) (describing state, provincial, and regional collaboration situations for public health emergency responses).

5. See *id.* at 275 (describing an example of legal issues during public health emergency collaboration between states).

this obstacle by providing a basic education on the public health emergency laws of Canada and Mexico to state and local public health officials and attorneys in the twenty U.S. border states and other U.S. states affected as well by urgent binational public health issues. Since the exchange of epidemiologic information and laboratory specimens/resources is a high priority of the regional groups, this manuscript will also contribute to protection of public health in non-emergency contexts. While we certainly intend the article to be useful to attorneys, it was researched and written for an intended audience encompassing the public health officials and staff, including epidemiologists and laboratorians, who are working within the regional groups to improve public health along the borders.

#### BACKGROUND

The Public Health Service Act (PHSA), as amended by the Pandemic and All-Hazards Preparedness Act (PAHPA),<sup>6</sup> establishes “coordination” as one of the “preparedness goals” of the National Health Security Strategy, thereby “[m]inimizing duplication of, and ensuring coordination between Federal, State, local, and tribal planning, preparedness, and response activities (including the State Emergency Management Assistance Compact).”<sup>7</sup> Accomplishment of the strategy’s “integration,” “public health,” and “medical” preparedness goals will also require coordination and may therefore benefit from execution of mutual aid agreements. The integration goal contemplates integration of “public health and public and private medical capabilities with other first responder systems . . . .”<sup>8</sup> The public health goal requires all levels of government to develop and sustain “[d]isease situational awareness domestically and abroad,”<sup>9</sup> and the medical goal mandates improvement in surge capacity,<sup>10</sup> including “[e]ffective utilization of any available public and private mobile medical assets and integration of other Federal assets.”<sup>11</sup> Reporting on PAHPA, the Senate Committee on Health, Education, Labor, and Pensions noted that the strategy to improve public health situational awareness capacity should “include an emphasis on States bordering Canada and Mexico, and would

6. Pandemic and All-Hazards Preparedness Act, Pub. L. No. 109-417, 120 Stat. 2831 (2006) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter PAHPA].

7. 42 U.S.C. § 300hh-1(b)(5) (2006).

8. 42 U.S.C. § 300hh-1(b)(1).

9. 42 U.S.C. § 300hh-1(b)(2)(A).

10. 42 U.S.C. § 300hh-1(b)(3).

11. 42 U.S.C. § 300hh-1(b)(3)(D). Pursuant to the authority of the Secretary of Health and Human Services, the Assistant Secretary of Preparedness and Response is directed by section 2811(b)(6) of the Public Health Service Act to “[p]rovide leadership in international programs, initiatives, and policies that deal with public health and medical emergency preparedness and response.” 42 U.S.C. § 300hh-1(b)(6).

encourage cooperative work that improves and strengthens situational awareness capabilities in those areas.”<sup>12</sup> With regard to provisions concerning state and regional partnership grants to improve surge capacity, the committee cautioned that PAHPA provisions “should not be interpreted as precluding regional coordination across international borders with Canada or Mexico.”<sup>13</sup>

Guidance provided by the Centers for Disease Control and Prevention (CDC) Coordinating Office for Terrorism Preparedness and Emergency Response (COTPER) to its grantees includes recognizing that mutual aid agreements may be effective legal tools for emergency preparedness and response.<sup>14</sup> An essential step in making progress toward negotiating and executing such agreements with Canadian provinces or Mexican states is developing a basic understanding by public health officials and attorneys in the United States of relevant laws and legal structures in those jurisdictions.<sup>15</sup> Efforts to develop cross-border agreements will certainly be enhanced if it can initially be determined that basic public health laws in Canada and Mexico are comparable to, or compatible with, U.S. laws.<sup>16</sup>

#### SCOPE AND LIMITATIONS

We review selected laws in Canada and Mexico that are critical to an understanding of public health emergency legal authority in those countries, and that relate to such essential public health functions as surveillance, isolation, and quarantine. We compare the selected provisions with basic legal tools used to protect public health in the United States. Our intent is

12. S. REP. NO. 109-319, at 11 (2006).

13. *Id.* at 17-18.

14. *Public Health Law Program Mutual Aid*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www2a.cdc.gov/phlp/mutualaid/mutualintro.asp> (last visited Sept. 2, 2010). The CDC’s Coordinating Office for Terrorism Preparedness and Emergency Response (COTPER) has been renamed the Office of Public Health Preparedness and Response (OPHPR). See *Office of Public Health Preparedness and Response*, Ctrs. for Disease Control & Prevention, <http://www.emergency.cdc.gov/cdcpreparedness/index.asp> (last updated Mar. 2, 2010).

15. See Daniel D. Stier & Richard A. Goodman, *Mutual Aid Agreements: Essential Legal Tools for Public Health Preparedness and Response*, 97 AM. J. PUB. HEALTH S62, S62-S68 (2007), available at <http://ajph.aphapublications.org/cgi/content/abstract/97/Supplement1/S62>.

16. See *id.* See also Stephen H. Waterman et al., *A New Paradigm for Quarantine and Public Health Activities at Land Borders: Opportunities and Challenges*, 124 PUB. HEALTH REP. 203, 203-11 (2009) (discussing benefits of existing partnerships and the need for enhanced collaborative effort along land borders to address a variety of public health issues); *Inventory of Mutual Aid Agreements and Related Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www2.cdc.gov/phlp/mutualaid/mutualresources.asp> (last visited Sept. 2, 2010) (containing existing agreements).

to convey an initial sense of the extent to which common legal ground may allow each country to cooperate on future cross-border efforts.

We limit our review of Mexican laws to federal laws that have been translated into English—the Political Constitution of the Mexican United States<sup>17</sup> and the General Health Law.<sup>18</sup> We limit our review of Canadian federal laws to selected provisions of the Constitution,<sup>19</sup> Public Health Agency Act,<sup>20</sup> Quarantine Act,<sup>21</sup> and emergency management law.<sup>22</sup> Our review of provincial laws is limited to the public health and emergency management laws of the Province of Ontario.<sup>23</sup> However, other provinces generally possess similar legal authority.<sup>24</sup>

Many unanswered questions are subject to further research. We hope that this article will provide impetus for further dialogue among lawyers and legal experts from the three countries.

#### A SUMMARY NOTE ON LEGAL SYSTEMS IN CANADA AND MEXICO

We will discuss specific characteristics of the legal systems in Canada and Mexico relevant to public health emergencies in subsequent sections. In general terms, those systems appear to be compatible with the U.S. system.

Though Mexico's legal system is founded in "civil law" (i.e., statutes are the primary source of law, in contrast with the U.S. "common law" system, where statutes must be interpreted within the context of "case law" established by courts) and otherwise possesses some unique components, it has much in common with the U.S. system.<sup>25</sup>

17. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

18. Ley General de Salud [General Health Law], as amended, Diario Oficial de la Federación [D.O.], 27 de Abril de 2010 (Mex.).

19. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

20. Public Health Agency of Canada Act, S.C. 2006, c. 5 (Can.).

21. Quarantine Act, S.C. 2005, c. 20 (Can.).

22. Emergency Management Act, S.C. 2007, c. 15 (Can.).

23. See Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9 (Can.); Health Protection and Promotion Act, R.S.O. 1990, c. H.7 (Can.).

24. See Emergency Management Act, R.S.A. 2000, c. E-6.8 (Can.), available at <http://www.qp.alberta.ca/574.cfm?page=E06P8.cfm&legtype=Acts&isbncIn=9780779750139>.

39. See also Civil Protection Act, 2001 R.S.Q. c. S-2.3 (Can.), available at <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/S23/S23A.htm>.

25. William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified) (Part I)*, 4 UNIFORM L. REV. 591, 597 (1999). See also FRANCISCO A. AVALOS, *THE*

Mexico's primary legal document is the Political Constitution of the Mexican United States.<sup>26</sup> Article 40 defines the form of government as "a representative, democratic and federal Republic integrated by States which are free and sovereign in order to organize their internal regimes, but which are also united as a Federation established under this Constitution's principles."<sup>27</sup> The Federation, according to Art. 43, consists of thirty-one states and a federal district.<sup>28</sup> Reflecting its civil law foundation, Mexico's Constitution—much lengthier than the U.S. Constitution—is codified in detail in 136 articles.<sup>29</sup> Nonetheless, the Mexican Constitution possesses basic features readily cognizable even by those who are only casually familiar with the U.S. Constitution. For example, the Mexican Constitution

- Mandates a three-branch government structure, consisting of a bicameral Congress (Art. 50 et seq.), an Executive (Art. 80 et seq.), and a Judiciary (Art. 94 et seq.)<sup>30</sup>
- Protects individual rights (Art. 1, et seq.)<sup>31</sup>
- Reserves to the states the "powers not explicitly vested in the federal officers by this Constitution. . ." (Art. 124)<sup>32</sup>
- Provides that the Constitution and laws enacted by Congress, as the "supreme Law of the Union," take precedence over the constitutions and laws of the states (Art. 133)<sup>33</sup>
- Prohibits states from entering into treaties with each other or with foreign nations (Art. 117)<sup>34</sup>

In contrast with the republics created by the Mexican and U.S. Constitutions, the Constitution of Canada establishes a "constitutional monarchy," with a parliamentary-cabinet form of government rather than

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MEXICAN LEGAL SYSTEM 11 (Fred B. Rothman Publications, 2d ed. 2000) (detailing unique concepts of the Mexican legal system founded in civil law).

26. AVALOS, *supra* note 25, at 4.

27. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

28. *Id.* Art. 43.

29. Compare *id.* Art. 136 with U.S. CONST. (The Mexican Constitution has 136 articles whereas the U.S. Constitution only has twenty-seven articles.).

30. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

31. *Id.* Arts. 1-29.

32. *Id.* Art. 124.

33. *Id.* Art. 133.

34. *Id.* Art. 117.

the presidential-congressional form.<sup>35</sup> Differences include a concentration of power in the Prime Minister and Cabinet Ministers, all of whom must be members of one of the Houses of Parliament.<sup>36</sup> Terms of elected officials are not fixed.<sup>37</sup> The Prime Minister and Cabinet stay in power as long as they retain the support of a majority of the House of Commons.<sup>38</sup> In the absence of such support, the House of Commons may call for a vote of confidence in the Cabinet,<sup>39</sup> the Prime Minister may call for an election,<sup>40</sup> or the Cabinet may simply step aside in favor of another party.<sup>41</sup> Also, in particularly stark contrast to the detailed codification characterizing Mexico's civil law system, some important features of Canadian government—such as the requirement that the Prime Minister be a Member of Parliament—are based purely in custom.<sup>42</sup>

Although state public health officials and attorneys interacting with their counterparts across the Canadian border should be mindful of these differences, the feature of greatest relevance and commonality is federalism. The Constitution of Canada (1867) sets out the distribution of legislative powers; section 91 delineates the exclusive powers of the Parliament of Canada (federal government),<sup>43</sup> and section 92 delineates the exclusive powers of the Provincial legislatures.<sup>44</sup> Judicial interpretation of constitutional power by Canadian courts makes it clear that provincial governments wield considerable power in what could be characterized as a decentralized federation.<sup>45</sup>

#### DISCUSSION: COMPARING LEGAL AUTHORITIES, LEGAL LIMITS, AND GOVERNMENTAL LEVEL OF RESPONSIBILITY

An assessment of the basic legal tools possessed by a government for protecting public health begins with the following essential inquiries:<sup>46</sup>

35. AVALOS, *supra* note 25, at 4; EUGENE A. FORSEY, HOW CANADIANS GOVERN THEMSELVES 24 (7th ed. 2010), available at <http://www2.parl.gc.ca/Sites/LOP/AboutParliament/Forsey/index-e.asp>.

36. *Id.* at 25.

37. *Id.* at 26.

38. *Id.*

39. *Id.* at 27.

40. FORSEY, *supra* note 35, at 26-27.

41. *Id.*

42. FORSEY, *supra* note 35, at 28.

43. Constitution Act, 1867, 30 & 31 Vict. c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

44. *Id.* § 92.

45. FORSEY, *supra* note 35, at 29.

46. Lawrence O. Gostin, F. Ed Thompson & Frank P. Grad, *The Law and the Public's Health: The Foundations*, in LAW IN PUBLIC HEALTH PRACTICE 25, 30 (Richard A. Goodman et al. eds., 2d ed. 2006).

- I. What activities must government be required or authorized by law to take to protect public health?
- II. What limits are imposed by law on the government while it is acting to protect the public health?
- III. At which level(s) of government should the required or authorized activities be performed?

Triggered by the occurrence of a series of public health emergencies during this decade—commencing with the events of fall 2001—federal, tribal, state, and local governments in the United States have devoted considerable attention to ensuring that they possess necessary legal authority to protect public health.<sup>47</sup> Broadly outlined, these efforts have focused on legal authority to engage in the following essential activities:<sup>48</sup>

- Epidemiologic surveillance, reporting, and investigation
- Protection of persons
  - Vaccination
  - Isolation and quarantine
  - Other social distancing measures
  - Evacuation
- Management of property
  - Entry and inspection of property potentially posing a threat to public health
  - Abatement of nuisances, including seizure and destruction of contaminated material
  - Assumption of control of property needed for public health purposes
  - Prohibition of, or restriction on, use of property
- Emergency response activation
- Intergovernmental cooperation
  - Execution of cross-border and cross-sector mutual aid agreements
  - Command/coordination systems across levels and sectors

#### I. LEGAL AUTHORITIES

Though a comprehensive discussion of public health legal authorities in Canada and Mexico is beyond the scope of this report, selected provisions

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47. Zita Lazzarini, Richard A. Goodman & Kim S. Dammers, *Criminal Law and Public Health Practice*, in *LAW IN PUBLIC HEALTH PRACTICE* 136, 148-49 (Richard A. Goodman et al. eds., 2d ed. 2006).

48. Matthews et al., *supra* note 4, at 262-81.



demonstrate that, at some level, laws in both Canada and Mexico address the above-listed public health activities (See Tables 1 and 2). Epidemiologic investigation, reporting, and public health investigations, for example, are clearly enunciated responsibilities of public health officials in both countries. Isolation and quarantine—defined consistently with the accepted legal meaning of those terms in the United States—are among the health safety measures prescribed in Mexican law. Among authorized public health activities under provincial laws in Canada is the issuance of an order requiring isolation. Orders are also authorized “requiring the person to whom the order is directed to conduct himself or herself in such a manner as not to expose another person to infection.”<sup>49</sup> Such authority would certainly appear to encompass an order requiring quarantine.

Social distancing measures seem to be authorized. In Mexico, “suspension of work or services” is authorized as a public health measure, as is exclusion from, or temporary closure of, places of assembly.<sup>50</sup> Some provincial laws in Canada, in which there is the authority to direct behavior that will avoid the threat of infecting others, coupled with the authority to direct the order to a “class of persons,” appear to contemplate imposition of social distancing measures.<sup>51</sup>

Laws in both countries authorize various actions involving property management for protecting the public’s health.<sup>52</sup> Permissible activities include property inspections, disinfection or destruction of contaminated property, and property closure.<sup>53</sup> Legal provisions in one province in Canada expressly authorize public health officials to take possession of property for use as a temporary isolation facility and to acquire or seize medications or medical supplies.<sup>54</sup>

Emergency declarations are authorized at provincial and municipal levels in Canada<sup>55</sup> and Mexico authorizes a declaration of “threatened regions” subject to “extraordinary action.”<sup>56</sup> During an emergency in Ontario, a municipality may be mandated to provide assistance outside its

49. Health Protection and Promotion Act, R.S.O. 1990, c. H.7, § 22(4)(h) (Can.).

50. Ley General de Salud [General Health Law], as amended, arts. 404, 150, 152, Diario Oficial de la Federación [D.O.], 27 de Abril de 2010 (Mex.).

51. See, e.g., Health Protection and Promotion Act § 22. See also, e.g., Emergency Management Act, R.S.A. 2000, c. E-6.8, § 19(1) (Can.); Civil Protection Act, R.S.Q. 2001 c. S-2.3, §§ 47, 93 (Can.).

52. Health Protection and Promotion Act § 22(4); Ley General de Salud arts. 404 X-XI, 415.

53. Health Protection and Promotion Act § 22.

54. *Id.* §§ 77.4-77.5.

55. Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9, §§ 4, 7.01 (Can.).

56. Ley General de Salud art. 183.

jurisdiction.<sup>57</sup> In Mexico, individuals and organizations may be obligated to work with public health officials during a “serious epidemic,”<sup>58</sup> and officials are empowered to use “public, social, and private sectors” as “auxiliary elements” during an epidemic.<sup>59</sup> Laws of various types may be temporarily suspended in some provinces in Canada<sup>60</sup> and the Mexican Constitution permits suspension of rights and privileges during an emergency.<sup>61</sup>

Intergovernmental cooperation is a principal focus of the Emergency Management Act of Canada.<sup>62</sup> The Minister of Public Safety is to provide leadership in coordinating the emergency management activities of federal government entities and in cooperative efforts with the provinces.<sup>63</sup> The Act also contemplates developing joint emergency management plans with relevant authorities in the United States.<sup>64</sup> In Mexico, the Constitution prescribes that federal and state governments be concurrently involved in public health activities subject to the General Health Law issued by the Congress of the Union.<sup>65</sup> In particular, the General Health Law provides that coordination agreements between the Secretary of Health and the states shall be the “means for the coordinated exercise of the duties of the Federation and the federative bodies in the offering of public health services. . . .”<sup>66</sup>

TABLE 1: SELECTED LEGAL AUTHORITIES—MEXICO<sup>67</sup>

Public Health Activity	Provision	Subject Matter
Epidemiologic surveillance,	3	Coordination of investigations broadly relating to health matters

57. Emergency Management and Civil Protection Act § 7.0.3.

58. Ley General de Salud art. 147.

59. *Id.* art. 148.

60. Emergency Management and Civil Protection Act § 7.1; Civil Protection Act, R.S.Q. 2001, c. S-2.3, §§ 47, 93 (Can).

61. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 29, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

62. Emergency Management Act, S.C. 2007, c. 15, §§ 3-4 (Can.).

63. *Id.*

64. Emergency Management Act § 5.

65. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, arts. 4, 73, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

66. Ley General de Salud [General Health Law], as amended, art. 18, Diario Oficial de la Federación [D.O.], 27 de Abril de 2010 (Mex.).

67. Unless otherwise noted, references are to the General Health Laws [Ley General de Salud]. “Legal Authorities” may be more readily referenced and understood by attorneys in Mexico as “Competent Authorities.”

reporting, and investigation		referenced in Section XI of Art. 3, with further references to "prevention and control of communicable diseases" and "international health" in sections XVII and XXIX, respectively. Also see Art. 4 of the Constitution, referenced in "Intergovernmental cooperation" below.
	13,133, 134	Distribution of powers of federal and state governments related to public health matters, including epidemiologic surveillance, reporting, and investigation are delineated; the Secretary of Health of the federal government is directed to establish and operate the National System of Epidemiological Surveillance.
	136–38	Requirement that the Secretary of Health or the nearest authority be notified of occurrence of certain diseases, including those subject to International Health Regulations
	139, 404,407	Personal observation/observation of contacts included among measures to prevent or control communicable diseases
	146	Control of laboratories that manage pathogenic agents
Protection of persons	404	Health safety measures: isolation, quarantine, vaccination, "suspension of work or services"
	405	"Isolation" definition <sup>68</sup>

68. Ley General de Salud art. 405 ("Isolation means the separation of infected persons during the period of communicability in places and conditions that avoid the danger of infection.").

	406	"Quarantine" definition <sup>69</sup>
	144, 408	"Obligatory" vaccination for certain diseases, including disease involved in a "severe epidemic" and "[w]hen such is required in accordance with applicable international provisions"
	150, 152	Social distancing measures, including temporary closure of public places and meeting locations <sup>70</sup>
Management of property	139	Measures to prevent and control communicable disease, including among others, decontamination and disinfection of contaminated property and destruction or control of vectors
	404, 415	Health safety measures, including among others: closure, evacuation, seizure, or destruction of property. Hearing and expert opinion is required in cases of property eviction.
	399, 139 (section VII, 364	Property inspections
Emergency response activation	181, 183–84	Measures that may be taken to address serious threats to public health, and declaration of "threatened regions" subject to "extraordinary action."

69. *Id.* art. 406 ("Quarantine means the limitation of the freedom of movement of healthy persons that have been exposed to a communicable disease for the time strictly necessary to control the risk of infection.").

70. *Id.* arts. 150, 152.

	147	Civil/military/individual obligation to work with health authorities in a "serious epidemic"
	148	Public health authorities empowered to use "medical resources and the social assistance of the public, social and private sectors" as "auxiliary elements" during an epidemic
	Art. 29 of the Constitution <sup>71</sup>	Suspension of rights
Intergovernmental cooperation	Art. 4 of the Constitution <sup>1</sup>	"[C]oncurrence of the Federation and the federative entities on matters of public health[,]" according to the public health law passed by Congress
	9, 18	Federal-state coordination agreements are envisaged for consolidation and functioning of the National Health System and coordination of public health duties.

TABLE 2: SELECTED LEGAL AUTHORITIES—CANADA<sup>72</sup>

Public Health Activity	Provision	Subject Matter
Epidemiologic surveillance, reporting, and investigation	4.1	Collection and analysis of epidemiologic data—a mandatory public health service
	25–34	Duties to report
	77.1, 78	Investigative powers
Protection of persons	22(4)	Isolation, examination, treatment, and requirement to avoid

71. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 29, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

72. Unless otherwise noted, references are to the Health Protection and Promotion Act of Ontario. Health Protection and Promotion Act, R.S.O. 1990, c. H.7 (Can.).

		exposure of another person to infection
	22(5.0.1)	"Class of persons" order
	5, 38–40	Immunization—a mandatory public health service
	77.7	"Precautions and procedures" directives
Management of property	22(4)	Closure of premises Cleaning, disinfection, or destruction of property
	41	Rights of entry and power of inspection
	77.4	Possession of premises for temporary isolation facility
	77.5	Acquisition/seizure of medications/supplies
Emergency response activation— declarations of emergency <sup>73</sup>	4, 7.0.1 of EMCPA***	Provincial/municipal declarations of emergency
	7(4) of EMCPA	Municipal assistance mandate
	7.0.2(4) of EMCPA	Emergency orders
	7.1(1) of EMCPA	Victim services/benefits compensation
	7.1(2) of EMCPA	Temporary suspension of statutes, regulations, rules, by-laws, or orders

73. Emergency Management and Civil Protection Act, R.S.O 1990, c. E.9, § 7 (Can.).

Intergovernmental cooperation <sup>74</sup>	3, 4 of Emergency Mgt. Act of Canada, and Art. 6.1 of EMCPA	Federal-provincial coordination/cooperation
	Emergency Mgt. Act of Canada	Canada-U.S. coordination
	6(3), Emergency Mgt. Act of Canada	Provincial assistance requests or agreements <sup>75</sup>

## II. LEGAL LIMITS ON EXERCISE OF AUTHORITY

### A. *Limits on Authority to Enter Into Agreements*

A question to be answered by attorneys for U.S. states is the extent to which Art. I, sec. 10 of the U.S. Constitution (concerning state “Agreements or Compacts” with each other or with foreign governments)<sup>76</sup> limits the ability of states to pursue aid agreements with Canadian provinces or Mexican states. As interpreted by the U.S. Supreme Court, states appear to have the authority to execute such agreements provided that they do not encroach on federal authority, affect the federal structure of government, or enhance the power of the party states at the expense of each other or other states.<sup>77</sup> Furthermore, the PAHPA amendments to the PHSA, concerning the use of mutual aid agreements to accomplish federal, tribal, state, and local coordination and integration of resources, though applicable only to specific functions, suggest that Congress does not perceive mutual aid agreements to be a threat to federal power or to the political balance between federal and state governments.<sup>78</sup> These provisions, coupled with other relevant Congressional actions, could be construed to constitute Congressional encouragement of such agreements.<sup>79</sup>

Canada does not appear to have a constitutional provision analogous to the U.S. Constitution’s “Compact Clause.” Treaty-making nonetheless

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74. *Id.* § 6.1; Emergency Management Act, S.C. 2007, c. 15, §§ 3-4 (Can.).

75. Emergency Management and Civil Protection Act § 6(3).

76. U.S. CONST. art. I, § 10.

77. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459 (1978). See also *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893).

78. *Stier & Goodman*, *supra* note 15, at §66.

79. *Id.*

falls under the exclusive responsibility of the federal government.<sup>80</sup> This power is not found in the *Constitution Act, 1867*,<sup>81</sup> but through the 1947 Letters Patent constituting the Office of the Governor General of Canada<sup>82</sup>—an instrument that delegated the prerogative powers over foreign affairs to the Governor General of Canada.<sup>83</sup>

The Mexican Constitution contains a provision (Art. 117) prohibiting states from entering into “any Treaty, Alliance, or Confederation” with each other or with a foreign nation.<sup>84</sup> As discussed subsequently, cooperative efforts have nonetheless been initiated across the U.S.-Mexico border, and there seems to be legal flexibility to at least pursue “interinstitutional” agreements. Further legal analysis is required to determine the level and extent to which Mexican states may collaborate with their U.S. counterparts.

### B. *Protection of Individual Rights*

The U.S. Supreme Court, more than one hundred years ago, established the principle that public health officials may not unduly interfere with the fundamental rights of individuals.<sup>85</sup> Most typically implicated are the rights to due process and equal protection under the Fifth<sup>86</sup> and Fourteenth Amendments<sup>87</sup> and freedom of religion and association under the First Amendment.<sup>88</sup> Those rights in the United States have generally evolved to a point of fairly precise judicial articulation. In some form, the Constitutions of both Canada and Mexico as well acknowledge the rights to due process, equal protection, and freedom of association and religion.<sup>89</sup> For comparative analysis, our discussion is limited to the right to procedural

80. Chandler P. Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 AM. J. INT’L LAW 636, 636 (1907) (discussing how treaty-making falls under the exclusive responsibility of the federal government).

81. See generally *Constitution Act, 1867*, 30 & 31 Vict. c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.) (no mention made in the *Constitution Act of 1867* to indicate that the federal government has the exclusive responsibility to make treaties).

82. W.L. Mackenzie King, *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada*, CAN. GAZETTE, Oct. 1, 1947, at 1.

83. *Id.* at 5.

84. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 117, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

85. *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

86. U.S. CONST. amend. V, § 2.

87. *Id.* Amend. XIV, Section 1.

88. *Id.* Amend. I.

89. *Constitution Act, 1982*, being Schedule 6 to the *Canada Act, 1982*, c. 2 (U.K.); Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 14, 24, 123, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).



due process, the elements of which have been delineated in the United States as: (1) adequate written notice of grounds for the proposed action and underlying facts; (2) access to legal counsel; (3) the right to be present at a hearing, to cross-examine, and to confront and present witnesses; (4) a standard of proof requiring clear, cogent, and convincing evidence; and (5) access to a transcript for appeal.<sup>90</sup>

The Mexican Constitution, though not expressly articulating the elements of due process, provides in Article 14 that “[n]o one shall be deprived of her life, freedom, estate, possessions or rights but by a judicial ruling issued by a court which is pre-existent to the respective trial and in which due process of law has been enforced.”<sup>91</sup> Article 16 further requires observance of “[d]ue process of law’s formalities” when search powers are exercised.<sup>92</sup> Consistent with the constitutional due process mandate, the General Health Law prescribes the procedure to be followed in applying health safety measures or sanctions.<sup>93</sup> Required elements include:

- Notice (“the competent health authority shall summon the interested party personally or by certified mail with acknowledgement of receipt”)<sup>94</sup>
- Hearing (“he may appear . . . and offer evidence”)<sup>95</sup>
- Access to counsel (“Once the presumed violator or his legal representative is heard. . .”)<sup>96</sup>
- A written decision of the health authority<sup>97</sup>
- An opportunity for appeal<sup>98</sup>

Furthermore, the legal interests of an individual or organization are protected by a general administrative procedure law that is comparable to administrative procedure acts that exist at the federal and state levels in the United States.<sup>99</sup> This law prescribes in detailed fashion the procedures that

90. *Greene v. Edwards*, 263 S.E.2d 661, 663 (1980).

91. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 14, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

92. *Id.* Art. 16.

93. See Ley General de Salud [General Health Law], as amended, Diario Oficial de la Federación [D.O.], 27 de Abril de 2010 (Mex.).

94. *Id.* art. 432.

95. *Id.*

96. *Id.* art. 434

97. *Id.*

98. See Ley General de Salud [General Health Law], as amended, art. 438, Diario Oficial de la Federación [DO], 27 de Abril de 2010 (Mex.).

99. See Ley Federal de Procedimiento Administrativo, Diario Oficial de la Federación [DO], 4 de Abril de 1994 (Mex.).

are required to be followed by an administrative agency prior to issuance of an order affecting the legal interests of an individual or organization.<sup>100</sup>

The Canadian Charter of Rights and Freedoms, contained in the Constitution, provides a “right not to be arbitrarily detained.”<sup>101</sup> Upon detention, there is a right to be promptly informed of the reason, to retain counsel, and to have a hearing to test the validity of the detention.<sup>102</sup> In Ontario, the right to hearing is reiterated in the Health Protection and Promotion Act with regard to challenges to orders issued by public health officials.<sup>103</sup> The Act specifies procedures concerning the timing of the hearing, required parties, documentary evidence, availability of a transcript, and the opportunity to appeal to court.<sup>104</sup>

### III. GOVERNMENTAL LEVEL OF RESPONSIBILITY

Though the Mexican Constitution establishes federal law as “the supreme Law of the Union,”<sup>105</sup> powers “not explicitly vested” in the federal government are “implicitly vested in the States.”<sup>106</sup> The Constitution empowers Congress to legislate for the “general public health.”<sup>107</sup> It further empowers the federal health department, when faced with a “dangerous epidemic,” to make “all necessary preventive decisions which shall be ratified by the President of the Republic later on.”<sup>108</sup> Reflecting the constitutional emphasis on federal authority, Article 13(A) of the General Health Law empowers the Mexican President to mandate public health standards and to evaluate public health services throughout the country, to exercise the “extraordinary action” in public health matters, and to coordinate and oversee compliance with the General Health Law and other public health standards.<sup>109</sup>

100. *Id.* arts. 12-18.

101. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 9 (U.K.).

102. *Id.* c. 10.

103. Health Protection and Promotion Act § 44.

104. *Id.* §§ 44-46.

105. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 133, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (Carlos Pérez Vázquez trans., Universidad Nacional Autónoma México 2005).

106. *Id.* Art. 124.

107. Ley General de Salud [General Health Law], as amended, art. 1, Diario Oficial de la Federación [D.O.], 27 de Abril de 2010 (Mex.).

108. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 73, Diario Oficial de la Federación [DO], 5 de febrero de 1917 (Mex.).

109. See Ley General de Salud [General Health Law], as amended, art. 13(A), Diario Oficial de la Federación [DO], 27 de Abril de 2010 (Mex.).

On the other hand, although the states are generally authorized in Article 13(B) to address public health issues within their boundaries, they appear to be required to do so within parameters set by the federal government.<sup>110</sup> For example, states are directed to provide the public health services prescribed by the federal law, to “assist the consolidation and functioning of the National Health System,”<sup>111</sup> to develop health programs and systems “in accordance with the principles and objectives of the National Development Plan,”<sup>112</sup> to produce health statistics for federal use, and to oversee compliance with federal law.<sup>113</sup>

State public health officials seem to have the legal ability to collaborate with their U.S. counterparts. A recent example is the agreement entered into between the health department of Chihuahua and the health department of New Mexico “to improve and uphold public health conditions in the binational border region.”<sup>114</sup> Another example is the “Declaration of Cooperation” entered into between the health department of Sonora and the health department of Arizona regarding the sharing of public health information during a public health emergency.<sup>115</sup> With regard to the legal validity of future collaboration, it is important that states seek the advice and counsel of the federal government.

There is a legal distinction in Canada between public health and delivery of health care and services. Although it is generally accepted that provincial governments have primary jurisdiction over matters related to health care and services, protection of public health can most accurately be described as a shared responsibility, and the provinces bear a substantial portion of the responsibility.<sup>116</sup> As a consequence of the 2003 SARS outbreak, increased attention has been devoted to the relationship between

110. *Id.* art. 13(B).

111. *Id.* art. 13(B)(II).

112. *Id.* art. 13(B)(III).

113. *Id.* art. 13(B)(V-VI).

114. Agreement of Understanding to Improve and Uphold Public Health Conditions in the Binational Border Region of the States of Chihuahua, Mexico, and New Mexico, United States of America, May 7, 2008, available at <http://www2a.cdc.gov/phlp/docs/Mutual%20Aid%20-%20NM-Chihuahua%20PH%20Progress%20Agreement.pdf>. Existing agreements may be viewed in the *Inventory of Mutual Aid Agreements and Related Resources*. *Inventory of Mutual Aid Agreements and Related Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www2.cdc.gov/phlp/mutualaid/mutualresources.asp> (last visited Sept. 3, 2010).

115. Declaration of Cooperation to Establish the Arizona-Sonora Regional Influenza Pandemic Response Plan and to Establish a Formal Protocol to Share Public Health Information, June 17, 2006, available at <http://www2a.cdc.gov/phlp/docs/20081209155422662.pdf>.

116. See generally Nola M. Ries & Timothy Caulfield, *Legal Foundations for a National Public Health Agency in Canada*, 96 CAN. J. PUB. HEALTH 281, 282 (2005) (discussing the legal challenges of establishing a national public health agency in Canada).

the federal and provincial governments in protecting the public's health.<sup>117</sup> Parliament created the Public Health Agency of Canada<sup>118</sup> and modernized the Quarantine Act,<sup>119</sup> but there is no indication that the enhanced federal public health role served to reduce the scope of provincial jurisdiction over public health.<sup>120</sup> For example, the modernized quarantine authority of the federal government may be exercised only at international borders.<sup>121</sup> In contrast with the applicability of U.S. federal quarantine authority to interstate travel, federal quarantine authority in Canada does not apply to interprovincial travel.<sup>122</sup>

As in Mexico and the United States, only the federal government in Canada is authorized to negotiate and execute treaties.<sup>123</sup> However, provinces may enter into agreements with U.S. states in relation to public health matters, provided that the agreements are not legally binding on the provinces.<sup>124</sup> Several Canadian provinces, for example, joined the New England states as parties to the International Emergency Management Assistance Memorandum of Understanding.<sup>125</sup> Although the U.S. states sought and received Congressional approval of the agreement, the provinces acted without federal involvement.<sup>126</sup> Similarly, British Columbia and Yukon independently executed the Pacific Northwest Emergency Management Agreement,<sup>127</sup> for which the Pacific Northwest party states had earlier sought and received Congressional approval.<sup>128</sup>

### CONCLUSION

Experience with the influenza A H1N1 pandemic of 2009-2010, which originated in North America before spreading worldwide, underscores the need for attention to the legal framework for international public health

117. *Id.* at 281.

118. MARLISA TIEDEMANN, PARLIAMENTARY INFORMATION & RESEARCH SERV., LS-523E, BILL C-5: PUBLIC HEALTH AGENCY OF CANADA ACT 1 (2006).

119. Ries & Caulfield, *supra* note 116, at 282.

120. *Id.*

121. See *Questions & Answers: The Quarantine Act*, PUB. HEALTH AGENCY CAN. (Dec. 6, 2006), <http://www.phac-aspc.gc.ca/media/nr-rp/2006/200610bk1-eng.php> (last visited Sept. 4, 2010).

122. *Id.*

123. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 132 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

124. Goodman & Stier, *supra* note 15, at S66.

125. See International Emergency Management Assistance Memorandum of Understanding, July 17, 2000), available at <http://www2a.cdc.gov/PHLP/docs/IEMAC.pdf>.

126. Goodman & Stier, *supra* note 15, at S66-S67.

127. Pacific Northwest Emergency Management Arrangement, Pub. L. No. 105-381, 112 Stat. 3401 (1998).

128. *Id.*

cooperation. For example, legal issues relating to the countries' customs regulations were encountered during the pandemic with regard to the sharing of reagents and specimens for laboratory testing.

Though much remains to be learned about the laws of Canada and Mexico, their laws have a shared foundation with U.S. laws that will allow future public health emergency collaborative efforts to proceed. Nonetheless, in the course of future collaborative efforts, legal obstacles may arise, and public health officials and attorneys in each country should anticipate the possibility that laws may need to be enacted or modified to accomplish collaborative public health goals. Fortunately, each country is attentive to the importance of adequate legal authority. U.S. states, for example, have used the Model State Emergency Health Powers Act<sup>129</sup> to assist in modernizing their public health emergency laws. Likewise, national and provincial laws in Canada have been intensely reviewed and updated in the aftermath of the SARS outbreak.<sup>130</sup> In Mexico, the Secretary of Health is responsible for promoting "the constant updating" of such legal provisions.<sup>131</sup> In turn, the General Health Law requires the Council on Public Health "[t]o analyze the legal provisions on matters of [public] health and to formulate proposals for reforms and additions of them. . . ."<sup>132</sup>

We hope this article will assist in strengthening relationships between public health officials and attorneys in the three countries, and that those officials and attorneys will in turn reach out to new partners in efforts to more deeply assess and understand all laws pertinent to negotiation and execution of necessary mutual aid agreements.

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129. See CTR. FOR LAW & PUBLIC'S HEALTH AT GEORGETOWN & JOHNS HOPKINS U., THE MODEL STATE PUBLIC HEALTH POWERS ACT 1 (2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>.

130. See Ries & Caulfield, *supra* note 116, at 281

131. Ley General de Salud [General Health Law], as amended, art. 7 (XIV), Diario Oficial de la Federación [D.O.], 27 de Abril de 2010 (Mex.).

132. *Id.* art. 17.