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Preface

Governments around the world have been under extreme pressure to develop responses to the COVID-19 pandemic. After achieving some success in the early months of the disruption, Canada once again sees rising COVID cases in many provinces. Governance decisions have never been more critical.

The impact of the COVID-19 pandemic will be felt by every Canadian and affect every aspect of our economy and society. The responses that are implemented will have long

The Impact of COVID-19 on the Future of Governance in Canada: A White Paper

Just like in wartime, people are frightened, public attitudes are changing, DQG WKH FLUFXPVWDQFHV DUH QHFHVVLWDWLQJ D ELJ

John Cassidy, *The New Yorker*, April 3, 2020

Question: What is white and black but seldom read()?
Answer: A white paper.

[2] Anonymous

Introduction: A Results-Based Synopsis

Kathy Brock with Graeme Murray

Canada shut down in March 2020. The spread of the novel coronavirus (COVID-19) worldwide had reached the Canadian shores, inspiring fears that the public healthcare system would be overwhelmed as Canadians fought for their health and lives. To prevent these fears from becoming reality, the Canadian government ordered a shutdown of social and economic activity nationwide and closure of the entire border for the first time in Canadian history. Only essential services were permitted to operate. Canadian governments shifted into overdrive in an effort to keep Canadians well-informed, healthy and economically viable. The extent of government activity at the federal level is traced in the chronology presented in Appendix A.

While the health, economic and social effects of this WHO-designated pandemic have received much attention, the impact of the pandemic on government operations in the immediate and long term have remained underexplored. And yet, government is being transformed. Not only has its role in society and the economy expanded enormously, its ways of working, from the practical to the theoretical assumptions of good governance have been fundamentally changed. Is this change temporary or a paradigmatic shift akin to ones caused by the Great Wars, the Depression, and 9/11? What is the impact of the coronavirus on the nature and future of governance in Canada? Those questions perplexed the authors and inspired them to come together to present the work contained i

parliamentary scrutiny that is so critical to ensuring good democratic governance practices. It suggests that democratic accountability was not as robust as it needed to be during this crisis. This resulted in some missteps that might have been avoided and that may prove costly in the longer term. The second topic follows up with an examination of the multiparty agreements that outlined the operating procedures of Parliament. It suggests that a more effective model for delineating how Parliament could have functioned during the pandemic could have been adapted from the Emergencies Act without invoking that legislation. The third paper drills down into how the executive functioned when the full light of accountability was not on it. It suggests that although the federal government responded with alacrity to meet the needs of Canadians, the central agencies were overtaxed to the point that their ability to coordinate and oversee the departments may have been compromised. The final topic investigates how Parliament responded to the challenge of adapting to circumstances that required hybrid meetings of MPs attending in-person and online and suggests changes to the parliamentary institutional infrastructure that might ensure its effectiveness in future crises of a similar nature. In contrast to the previous contributions, this section the

The Impact and Implications of COVID-19 on Selected Areas of Governance in Canada

The Executive and Parliament

The Perils of Reduced Parliamentary Scrutiny[1]

Kathy Brock

Abstract: A strength of the Canadian system of governance is that during crises Prime Minister Trudeau and Cabinet have been able to act decisively and effectively. What is often overlooked is the pivotal balancing role that Parliament normally plays in supporting government decisions (efficiency) and in ensuring that these decisions are in the best interests of the public (effectiveness) by holding the government to account. However, in the extraordinary conditions created by the COVID-19 crisis, the executive is escaping both parts of the parliamentary scrutiny necessary to ensure democratic controls of fairness and fiscal probity. The balance has tilted away from effectiveness in favour of efficiency and away from scrutinized and justified decisions to politically popular ones. The short-term danger is that government actions are flawed and partial to certain interests. The long-term peril is that the critical importance of Parliament holding the government accountable for its spending decisions may be eclipsed.

Introduction: Truth in Words

In August 2020, Canadians witnessed the prime minister testifying before the House of Commons Standing Committee on Finance (Finance committee) about his role in awarding a multi-million dollar contract intended to assist students during the pandemic to the WE charitable organization which had financial ties to his family members. The testimony revealed both how well our institutions work and the consequences when they do not.

During his opening remarks to the Finance committee, the prime minister

To ensure that the prime minister and Cabinet do not become too powerful, however, Parliament has a second important duty, one that is often undervalued. Parliament must hold the government to account for its decisions and actions.

Opposition parties normally perform this function by asking the government tough questions in the House of Commons during Question Period, debating the Throne Speech, scrutinizing the budget and fiscal updates, or calling government witnesses to appear before House committees. Recall the methodical questioning of former Justice Minister Jody Wilson-Raybould and former Clerk of the Privy Council Michael Wernick during the SNC-Lavalin

Multiparty Agreements and a Better Model for Parliament during Crises[10]

Kathy Brock and Lori Turnbull

Abstract: A strong executive held to account by a vigilant Parliament is fundamental to the good functioning of democracy in Canada. During the extraordinary conditions created during the COVID-19 crisis, the Liberal minority government made deals with the New Democratic Party (NDP), Bloc Québécois, and the Green Party that had the effect of reducing the ability of W Œ o] u v š š } Z } o š Z Æ µ š] À š } } µ v š Ç o] u] v š] v P l Ç o disposal and by limiting the frequency of House of Commons sittings. This marginalization of Parliament in the COVID-19 decision-making process was neither necessary nor desirable given that the parties could have chosen to follow an alternate model that would have retained the full powers of Parliament to scrutinize the executive while still enabling the executive to act swiftly to

that the ability of both houses to consider government measures was limited. Another multiparty agreement (between the Liberals, the NDP, and the Greens) commenced in late May, removing the possibility of opposition days, private members' bills, and order paper questions for the Œ u]v Œ }(šZ •‰Œ]vP •]š š]vPX oo }(šZ • u Z v]•u• Œ]v š to affect the parliamentary agenda, initiate confidence votes, give voice to their priorities, and obtain meaningful answers to their questions on government actions and policies. It was easy to forget that this was, in fact, a minority government, whose command of the confidence of the House could not be tested or assured in such an environment.

There was one shining moment that demonstrated the indispensable role that the opposition plays in holding the government to account and validated the importance of Parliament. Though all federal parties supported the aid package (Bill C-13), the Conservative Party pushed back on a government proposal to tax, spend, and borrow broadly without parliamentary approval until December 2021. The Liberals acquiesced to a revised deadline of September 30. But things went downhill from ther X dZ E W v 'Œ v•[o Á]šZ šZ >] Œ o•U ÁZ} Á šZ •µuu ŒU •]Pv](] všoÇ µv Œu]v W Œo] u evolving promise šÇ š} } from the prime m

Bedrock Issues

Indispensability

Over the last several decades, there has been much discussion in Canada about the relative

- the way to ensure in the longer term that parliament has the ability to carry out its functions.

The Issue of Principle: The Legitimacy of a Dispersed or Hybrid Parliament

The EssencBDC q cpuPaiam-4(m)en

The Essential Service Debate

On May 22, 2020, the leader of the opposition called publicly for a declaration that Parliament be declared "an essential service".[20] The most broadly accepted sense of the term essential service derives from labour law, where it is used to designate a component of the labour force that is treated separately from the majority of workers, because its tasks are essential to society. One example of the use of this terminology relates to a component of the workforce that is exempt from strike action in the case of industrial disputes. It is likely that this proposal was aimed at ensuring that Parliament would continue to function. However, the actual terms of the proposal were that the Commons function through a reduced number of MPs. Parliament is the focus of the democratic nature of the country; it is not a mere "service" akin to a designation current in labour law. Moreover, with the dispersed hybrid model that had developed by then,

action at the national level.[24] The need for urgency means that the instrument of governance of choice is the declaration of public emergency by the government, here meaning the executive branch. While such declarations enable required responses, they also advantage the executive branch at the expense of the legislative. Rule by order or decree (or similar mechanisms) are used and legislative oversight of the government is delayed and/or diminished for a time. While this departure from the normal course of democracy is warranted by events, democratic governing requires that it should not be allowed to remain in place for longer than the minimum time needed to resolve the emergency situation in question.[25]

A particular variant of this kind of departure from democracy is the introduction in Parliament of legislative proposals that would afford executive government either unnecessarily broad powers or powers for an unnecessarily long period of time. This was, in respect of both breadth and duration of powers, what occurred in the Parliament of Canada through Bill C-13, which eventually became SC 2020, c. 5. This, respecting certain measures in response to COVID-19 was roundly criticized in the serious media. The interaction among the political parties, that is the democratic dialogue, prevented an end run around the necessary safeguards on this occasion.

In the same manner as the executive government should protect democracy by not overreaching in respect of governing through overbroad laws, it should not attempt to govern through instruments of a non-legal nature. During the height of the pandemic, Prime Minister Trudeau made an almost daily public announcement and briefing. A variety of provincial premiers employed the same strategy. Incidentally, these briefings contrasted sharply with the briefing practices developed in the White House. Such contacts are useful and indeed necessary as supplements to legislated instruments. They must be understood in context, however. Briefings can never take the place of legislation or regulations or other instruments that have the force of law. They rank far lower on the scale of what is considered democracy.

Protection of Civil, Political, and Human Rights

In democratic states, parliaments have a role in holding the executive branch of government to account for the manner in which they govern. Part of this aspect of accountability is the legislature's ongoing attempt to curb the excesses of government in respect of individuals' rights. An authority no less significant and knowledgeable than the Secretary General of the United Nations has spoken out publicly about the possibility that governments may use COVID-19 as an opportunity to restrict civil, political, and human rights under the guise of emergency.[26] While such a development is less likely in Canada than in a number of other jurisdictions, there is always a need for vigilance even here.

[24] See Debora Mackenzie, COVID-19: The Pandemic that Never Should Have Happened and how to Stop the Next One (New York: Hachette Books, 2020), especially chapter 1.
[25] Available at https://montrealgazette.com/opinion/opinion-the-dangers-of-governing-quebec-by-decree
[26] Available at https://www.dw.com/en/un-chief-pandemic-is-fast-becoming-human-rights-crisis/a-53214547

Matters of Practicality: Organization of a Dispersed Hybrid Parliament

The internal structure, organization, and rules of procedure and functioning of the House of Commons are based on constitutional custom, the law of parliamentary privilege, practice and, most visibly, the Standing Orders of the House of Commons (Standing Orders). In examining whether, and how, these sources of rules, individually and in combination, may have been affected by COVID-19, it becomes necessary to break down the subject-matter into its various components. The 2020 parliamentary year began on Monday, January 27, 2020. By that time, news of the existence of COVID-19 was widespread. Indeed, as early as January 25, the first case of COVID-

quo of face-to-face meetings of all MPs, an intermediate solution of having some MPs in the chamber, while others were dispersed in their respective electoral districts, and a third based on a regime of complete dispersal.[31] On a different level of reasoning, MPs vigorously discussed the issue of how often to meet. At first, long-held positions were deeply entrenched,[32] over the

on COVID-19. In that same motion, the Leader set out a complete set of rules for the House to function as the Special Committee.

Legislation and Deliberation

Having dealt with the framework issues of meetings and committee structure, we now confront the core of parliamentary tasks. In *Vaid v. Canada (House of Commons)*, 2005 SCC 30, the Supreme Court of Canada defined the work of the House of Commons in several instances as being "legislation, deliberation and holding the government to account". We may also recall that

- C-11 t which became S.C. 2020, c., 3;
- C-18 t which became S.C. 2020, c., 9; and
- C-19 t which became S.C. 2020, c., 10.

These statutes are particularly important in the sense that some of them authorized the expenditure by government of hundreds of billions of dollars. Part of the controversy regarding Supply has been the government's delay on tabling a budget, or even providing a fiscal update.

Holding the Government to Account: Question Period

The disruption of the parliamentary calendar may be said to have seriously diminished, if not temporarily extinguished, the utility of Question Period. Within the parliamentary context, there was nevertheless an effort to enable opposition questioning of the government. In this regard, the evolution of question time in the United Kingdom is also of interest to us. On April 19, 2020, when the House of Commons resumed at Westminster after a COVID-19 break, it was with 170 MPs instead of the usual 650. The serious press emphasized that ministerial accountability was a fundamental aspect of democracy.[41]

Holding the Government to Account: Written Questions

The absence of routine Question Periods resulted in the increased use, and therefore importance, of Written Questions. One feature of this accrued importance was the erasure of deadlines for responding to such questions.

Holding the Government to Account: Inter-Party Cooperation

Perhaps in recognition of the extraordinary circumstances of the COVID-19 crisis and of the

In addition to the more traditional methods of holding the government to account set out above, on several occasions, the Covid-related motions adopted by the Commons included specific requirements to ensure that the extraordinary programs put in place by the government were useful for the objectives they were designed to meet.

C. Holding the Government to Account: Confidence (Bearing in Mind that This Is a Minority Parliament)

There seems to be a consensus that in Canada is to avoid the possibility of a statutorily unscheduled[42] and unexpected general election in the midst of a pandemic, none of the issues now before the House should be treated as ones of confidence. The risk of having the government unravel, perhaps even unintentionally, is too great to engage in votes of confidence. Moreover, the currently tenuous position of the governor general heightens the risks involved. Naturally, were there an unexpected loss of confidence in the government, Canadian parliamentary practice would leave several options other than a general election. One of these may be a caretaker government, to be in place until the pandemic had subsided. Another may be a government of national unity, put in place with the aim of avoiding an election.[43]

D. Holding the Government to Account: Private Members' Public Bills and Petitions

Pursuant to the Standing Orders of the House of Commons, private members, also called backbenchers, meaning MPs other than members of the Cabinet, are allowed to table Public Bills (PMPB).[44] Since the suspension of normal proceedings in the House of Commons, no PMPB proceedings have taken place. There seems to be an implicit understanding that this aspect of parliamentary work is less important, certainly less urgent, than transacting the nation's principal business.

Recommendations

The changes in parliamentary procedure discussed above were deliberately adopted by means of sessional orders and motions, rather than by way of changes to the Standing Orders of the House. In part, this process was a measure designed for speed and ease; in part, this process was deliberately chosen so as to indicate that the procedural changes were designed to be of a temporary nature. At a time when the pandemic is over, the House is likely to resume its pre-Covid *modus operandi*, though of course in Parliamentary politics, only a fool would make forecasts of future development.

To Parliament:

- There will certainly be a need for Parliament (House of Commons and Senate) to assess the utility of the measures adopted, as well as to assess whether the procedures adopted were the best ones possible;
- In particular, in the House of Commons, the Procedures and House Affairs Committee (PROC) should undertake a thorough and non-partisan review. This examination should include:
  - whether new rules regarding sittings may be appropriate, rendering it possible in the longer-term for either House to function in a dispersed or hybrid fashion;
  - whether similar new rules regarding the sittings of the committees of each House may be necessary or appropriate;
  - whether new rules regarding voting would be appropriate; and
  - whether either House, or the two Houses together, may invest in the purchase or development, followed by installation, of audio-visual communications systems among parliamentarians, that is as secure, fool-proof, and tamper-proof as is currently possible.

To the House of Commons:

- Undertake a comprehensive review of Canada's level of preparedness in case of pandemics. Such a review would need to be undertaken along two parallel tracks:
  - to determine whether the Standing Committee on Health (HESA) has sufficient powers to scrutinize the powers, duties, functions, and actual operations of those

ultimately fall in line behind the Cabinet consensus, which is determined by the prime minister, discussions around the Cabinet table get heated as ministers offer frank advice of their own.

As Savoie explains, the concentration of power on the political side has a significant effect on public administration. The federal government has three central agencies (the Privy Council Office (PCO), Department of Finance, and Treasury Board Secretariat (TBS)) that work in support of the prime minister and their courtiers. Central agencies are unique among public sector v š] š] •] v š Z š š Z Ç Z À ^ v š Œ E o } } Œ E] v š] v P Œ E } o _ š Z š } influence. Central agencies work across line departments to ensure overall coherence in advice and policies so that what goes up to the centre is logical and horizontally consistent. Line departments, for their part, are essentially service providers that do not direct other departments.[48] The dynamic between central agencies and line departments can be fraught with

later rather than strive for glitch-free administration up front. The public service was lauded for

gender-equal Cabinet of 30 ministers, some of whom had previous Cabinet experience while others were first time members of parliament.

Unlike several of his predecessors, Prime Minister Trudeau has never appoint^ ‰ iEs]hE] š ‰ o v v] v P _ } u u] š š Prime Minister Stephen Harper, for example, used the priorities and planning committee as a space for key ministers to deliberate and reach consensus on important matters; the full Cabinet met with less frequency to ratify the decisions of this central committee. In contrast, Prime Mi] • š Œ d Œ µ µ [• a‰ ‰ Œ} Z š} rather than hierarchical. He has insisted that all ministers are equal and encourages full deliberation and participation on all issues from all ministers. Under Prime Minis š Œ d Œ µ µ [• o Œ • Z] ‰ Cabinet meets every week that Parliament sits (and other times as needed).

Though many, including the current prime minister himself, have commented on the differences betwee v W Œ] u D] v] • š Œ d Œ µ µ [• ‰ ‰ Œ } Z v š Z š } (Z] • o š (toward the concentration of power, they both show an inclination toward a collegial, st bu empowered full Cabinet. The elder Prime Minister Trudeau believed in making decisions on the basis of rationality and reason. This approach lent itself to a collegial model of Cabinet governance in which frank ideas were exchanged among all members. In order to support their ministers in this environment, central agencies had to be robust too. Their size, complexity, and ‰] š Ç (} Œ ‰ } o] Ç À] v } } Œ] v š] } v P Œ Á µ v Œ š Z (leadership as the matters before government became more numerous and complex.[60] u ‰ o o • Œ] Z o Ç ^ Z] ((Œ v š] š v š Œ o P v] • ~ š Z š • • µ ‰ ‰ toward collective decision-making.[61] But Prime Minister John Turner found this system of C] v š P } À Œ v u v š v • š Œ } v P U v P P v š Œ o P v] to o š } ^ š } • o } Á v š } } Æ ‰ v •] À X _ v š Œ o P v] • Á Œ ‰ Œ Z ‰ • š } }] P

provides a venue for the prime minister to huddle with key ministers to develop quick, effective responses to issues rather than convene discussions of the full Cabinet.

Further, the appointment of Chrystia Freeland as deputy prime minister in November of 2019 can also be interpreted as a sign that the prime minister

municipal) traditional notions of public safety have shifted from peace, order, and good government to health, social control, and the power of science.

}vš Œ}À Œ•Ç ••}] š Á]šZ šZ P}À Œvu vš[• šš u‰š š} o]À the WE Charity is a singular glaring example of failure, with what appears to be little to no due diligence from officials or optionality provided to the government in the interest, we are told, of moving forward quickly. At the time of writing, we still do not know the full scope of what happened.

Thisis improvisational governmenAnd,

fractious, and some think almost led to the Chrétien government losing its majority in 1997. There is a reason EI is often considered the third rail of Canadian politics, but someone has to touch that rail or develop a fourth rail going forward.

Now is the time to examine how supporting the unemployed and dealing with other social inequities can be better addressed. It may include a basic income support system, as already proposed by many in the country, though this would be a Herculean undertakin

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A Roadmap Forward

E } } v o Œ v v } } v P } À Œ v u v š Z • š Z l Ç š } Œ š µ Œ v š } v } what that is. There is a need for reflection, debate, and consensus-building that engages Canadians and their leaders on a path forward. While the crisis has exposed big policy change imperatives in several areas, it has also produced a significant fiscal problem for all governments that inevitably constrains the room to manoeuvre. Getting that balance right will be a key political challenge going forward. There is a danger that anxiety over the deficit and debt will kill consideration of the critical policy shifts we identify here.

More importantly, Canadians need a sense of a way out and forward. The last great shift in v [• ‰ ‰ Œ } daily life šinvolved a major change in the role of government and a redefinition of rights and responsibilities after 9/11. This resulted in the growth of the surveillance state, all of which was designed from within government itself with little reference to those outside it.

/ š [• u µ Z] ((Œ v š µ o š µ Œ š } Ç X ^ ^ š l Z } o Œ • _ } v •] Œ considered by government, as can actors in the policy play. A roadmap is therefore needed Œ as much for the process as the result. The government needs to create space for people inside and outside government to consider what this crisis means at its deepest level, what the role of

for the past 30 years and start driving significant change. There is no simple answer and slippages and failures to avert stupid risk taking, as we have seen in these times, can sometimes hurt progress. However, while there has been a lot of talk about system after system has been introduced, the cultural imperative towards risk aversion remains.

- Digital gaps abound: The crisis showed major weaknesses on several digital fronts:
  - Data collection is massively out-of-whack with what is needed for managing major policy issues, especially red dot ones like this.
  - Cav [• Œ } v • ç] š u] v •] v •] v •

- A new public service model: Public services lurch from one fad to another. Digitalization seems top of mind right now. The basic public-sector values of service, loyalty, and excellence seem a more prosaic but sturdier foundation for a modernization agenda. Modernization is not a free good.

Table of Contents

Fiscal Transfers, Discipline and the Sustainability of Provincial Debt[64]

Kyle Hanniman

Abstract: One of the greatest sources of v [resiliency in recent years has been the public • š } ability to borrow. It allowed us to run countercyclical deficits during the financial crisis and to build a bridge for struggling businesses and households during the pandemic. But as the pandemic and the economic crisis subside, we will need to find ways to gradually stabilize the country's outsized provincial debts, while ensuring other policy goals t including the provision of adequate services t are met. Above all that means finding ways to bolster provincial fiscal capacity while strengthening incentives for fiscal discipline. This section pro

The Size and Sources of Provincial Debt

As a percentage of GDP, the provinces entered the crisis with the highest gross subnational debt in the world. Even more worrying, however, was the trend. The provinces had yet to recover from the GFC when COVID-19 struck. Indeed, at 43 percent of GDP, their 2018 ratio was nearly 50 percent higher than the pre-GFC level. Now provinces are forecasting deficits of over 4 percent of GDP, significantly higher than anything we saw after 2008.

Why are provincial debts so high? The causes are many, but three sources stand out: The provinces' [~ í • Œ] P] -ended }‰ expenditures (especially healthcare); (2) cyclical revenue streams (including income tax, sales tax, and resource royalties); and (3) ability to borrow without federal restriction at low interest rates. The first source puts spending under steady upward pressure. Sources 2 and 3 make provincial budget balances vulnerable to shocks, sources 1 and 3 allows provinces to finance structural and cyclical shortfalls with debt.

But how, if provincial debts are so high, do provinces manage to borrow so cheaply? One reason is the secular plunge in global interest rates. Another is the assumption, widely held among investors, that Ottawa is unlikely to let a province default. A provincial default would be given the ‰ Œ } À] v v ę presence in capital markets t h À À • š š] v P } v • ‹ µ v • (} Œ v economy. And it would also be given the integration of federal and provincial welfare states u v Œ u] v K š š Á [• ‰] š Ç š } Œ o] Ì] š • • }] o Á o (Œ } u u] š u are betting, therefore, that Ottawa will ultimately keep them whole.[65] This does not elevate provinces to the status of federal borrower, but it does increase their borrowing capacity significantly.

[65] < Ç o , v v] u v U ^ / • v] v &-Preserving? The View from Credit Markets," in Federalism and the Welfare State in a Multicultural World, ed. Elizabeth Goodyear-Grant, Richard Johnston, Will Kymlicka and John Myles, 49–72. (D } v š Œ o v <] v P • š } v W D '] o o Y µ 2018). [• h v] À Œ •] š Ç W Œ • • U

Figure 1: Gross Debt to GDP

Source: IMF.

Figure 2: Interest Payments to GDP

6RXUFH 6WDQGDUG DQG 3RRU¶V

But should they? This is a harder question. On the one hand, there is no question that governments should borrow more and for longer and not just because they are in the midst of a pandemic. Many believe COVID-19 has merely accelerated the long-term trend of advanced

economy investment has been languishing for years and the recent shock will only depress it further. The lockdowns may also lead to a structural decline in household spending, as demand for precautionary savings grows. The consequence is a low-growth, low-inflation environment likely to extend well beyond official lockdowns or the discovery of a vaccine. Central banks cannot fix the problem. Their principal stimulant, the interest rate, is already at zero. Only fiscal authorities can mobilize the stimulus investment and rehabilitation the economy need. Borrowing is not riskless in this environment as interest rates and inflation may rise. But the balance of risks clearly recommends larger deficits and longer paths to fiscal balance.

On the other hand, it is not clear how provincial borrowers should contribute. The textbook rules for subnational borrowing (limiting borrowing to investment and a modest degree of tax smoothing) have never applied to provinces. They are too powerful and mature economically

consequential for that. But they are not central government borrowers either. Their bonds are

One possibility is the establishment of a conditional bailout facility to lend at federal rates. If it is established soon, it could lend unconditionally until the recovery is well under way. Beyond that, it could require recipients to commit to a fiscal consolidation plan. If the federal government launched the facility with an expanded set of transfers, the message would be clear: the federal government would be available to assist the provinces, but there would be limits to that support and no free bailouts for provinces that failed to live within them.

Consolidation plans imply a loss of provincial autonomy, but the use of the facility would be voluntary, and the stigma of application alone might provide enough incentive to avoid it. None of this will satisfy ardent decentralists, but it is a reasonable compromise given the costs and risks of provincial bailouts and debt.

Another objection is that the scheme would transform the federal government into the IMF: allowing it to impose austerity on vulnerable populations through conditional loans. But combining the facility with additional transfers, including ones that reflect differing spending needs, should disabuse many of those beliefs. It would also provide an improvement over K š š Á [• ‰ ‰ Œ } Z] v í õ õ ñ U Á Z v] š • o • Z ‰ Œ } À] v] o š Œ v • (markets.

None of this would be easy. Fiscal rules would have to be robust enough to stabilize provincial debt, but general and flexible enough to protect provincial autonomy; accommodate swings in business cycles; and ensure adequate levels of public investment. We would also have to monitor compliance and commit federal and provincial governments to consolidation plans. These are daunting collective action problems, even for relatively centralized multilevel governance and we may decide our highly fragmented and contested model is not up to the task. But that does not make the challenge any less urgent. Somehow, some way,

Ontario Provincial Authority in the Time of COVID-19

On March 17, 2020, the Ontario government declared the COVID-19 pandemic to be a provincial emergency under the Emergency Management and Civil Protection Act [EMCPA].[79] Under the EMPCA, most of the discretionary powers previously exercised by the premier were transferred to Cabinet including the authority to alleviate the effects of an emergency. The Cabinet has the power to declare an emergency initially for up to 14 days, as well as an extension for 14 days, without legislative concurrence. The EMCPA does make provision for legislative oversight in that the legislature then has the power to disallow the emergency declaration, thus revoking all emergency orders; the premier u µ • š • l v } š] v š Z > P] • o š µ Œ [• ‰ ‰ Œ } A extensions (each lasting up to 28 days). The EMCPA also requires that every municipality must develop, implement, and maintain an emergency management program and adopt it as by-law.

On July 21, 2020, the last day of sitting of the legislature until September 14, 2020, the Ontario provincial parliament passed Bill 195 which enacts the Reopening Ontario (A Flexible Response to COVID-19) Act 2020.[80] This

Addington County is 42,888 for a total of 193,363 people. There are 11 LTC facilities: 6 (55 percent) are privately owned; 2 (18 percent) are not-for-profit owned (and one is operated by a private corporation); and 3 (27 percent) are municipally owned.[97]

public. By the end of February, the hospitals, community health clinics, and care homes introduced heightened infection control measures despite advice from the World Health Organization and the Canadian government that Canada would be largely unaffected. KFL&A Public Health had sprung into action before the provincial government implemented its ^ }uu v d o _ }v D CE[102]Z îU îìîìX

With mounting evidence of the virulence and contagiousness of COVID-19, redeployment and training of health unit staff began with nurses from the immunization team going out to every medical clinic in the region to perform readiness checks. On March 17, 2020, the Ontario government declared a state of emergency that led to the closure of schools and all but essential businesses. Health inspectors were paired with public health nurses to visit each long-term care home in the region to train staff to institute adequate protection measures. Moreover, the municipalities and the KHSC established an agreement for redeployment of nursing staff in the event of outbreaks in long-term care homes in the region.

The medical officer of health was an advocate for early testing. With information that commercial testing kits had failed in the US, the molecular biology lab at the KHSC created its own functional test that allowed for a turnaround time of 24 hours. A team of 26 people at the health unit began contact tracing. The health unit credits social distancing measures and early contact tracing with dramatically limiting the spread of the virus in the Kingston area.

On May 27, 2020, the medical officer of health informed the board of KFL&A Public Health that Toronto, Peel, York, Middlesex

- The level of resource requirements needed for each health unit particularly with respect to staff capacity to manage through an epidemic or pandemic.

Long-Term Care in Ontario

Precautionary measures by the KFL&A Public Health were largely responsible for this region not experiencing any incidence of COVID-19 in LTC homes. Municipally owned and operated homes, in general, in Ontario, have a better track record than charitable facilities and an even better record than privately owned and operated homes. The newly announced Independent Long-Term Care COVID-19 Commission could examine the fact that employees in LTC facilities owned and operated by municipalities are more likely to be unionized, hence, can enjoy a more stable working environment with negotiated pay and benefits. Of importance to note is that the province was not in compliance in 2019 with its own legislation which requires intensive annual inspections by provincial inspectors of every provincially funded home.

To the provincial government

- The recently announced Independent Commission into Long-Term Care in Ontario should examine very closely why the COVID-19 death rate in privately owned and operated LTC homes is five times that of municipally owned and operated homes. A thorough analysis should examine capital and operating cost variances, especially regarding staff qualifications, deployment, and compensation.

Municipal Finance

This pandemic has inevitably illustrated the longstanding strained jurisdictional and financial

Accountability to Law through Litigation

Gregory Tardi

Abstract: The pandemic of 2020 has engendered a great deal of political discussion about preparedness or the lack of it, about the appropriateness and especially about the adequacy of measures to struggle against the illness, while maintaining economic activity and safeguarding the social networks of society. Beyond the political rhetoric, there have been many significant instances where litigation has been used to attribute responsibility about various aspects of the emergency. This section is a first attempt at an overview of that resort to law.

Introduction

Among democratic states, many took the evidence of COVID-19 seriously from the beginning of

that situation through any other means, such as negotiation, lobbying, legislation, regulation, or inducing executive action, but chooses to litigate instead, the process may be considered as being political. These criteria are as true in the realm of international relations as they are in domestic politics.

At this juncture, it becomes appropriate to examine the reasons for which some individuals and corporate groups resort to litigation in respect of Covid-related issues, rather than utilizing other types of instruments of public action. A number of interrelated factors must be considered:

- Litigation based on the expectation of a genuine outcome arises more notably in democratic states than in authoritarian or dictatorial states.
- A Statement of Claim, an Application, or a Complaint is occasionally used as a vehicle for a political or partisan argument, as long as it is cloaked in legal terms.
- Litigation in democratic states is likely perceived as being a more principled way of expressing a public policy or a political position than other forms of communication.
- Public positions, including political ones, are perceived as carrying gravitas, or greater weight, vis-à-vis the general public and in the face of legislative and executive branch officials, than other types of political instruments.
- Court judgments are perceived to be more effective than seeking to convince legislators to enact laws or heads of government to govern.
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Finally, it must be understood that in the same way as the goal of all litigation is to enforce accountability to law, the goal of political litigation in particular is to enforce the democratic accountability to the law of the state, state institutions, and state officials. A short study such as this should not be perceived as dealing with all COVID-19 originated litigation, nor even all COVID-19 originated political litigation. Rather, it should be viewed as affording the reader a sample of the most interesting legal actions. Such a sampling cannot be limited to Canada if it is to be representative and interesting, it needs to take a more comparative, multi-national, perspective.

liability or responsibility is the matter of the alleged impact of COVID-19 related actions, policies or programs of specific state institutions.

The likely mechanism for such litigation is the myriad "investor-state dispute settlement mechanisms." These mechanisms are a-for, little-known branch of international trade law. They enable corporations to sue states (or state institutions) where the corporations believe that state action will have deprived the corporation of profits, or even potential profits. The crux of the issue is that such litigation can take place even where the action of the state or state body was taken in the public interest, or in circumstances of national emergency. In effect, the underlying legal instruments place private corporate profit ahead of the public interest. Such cases, moreover, are litigated not in the general court system, but in specialized trade tribunals created through the trade treaties that established such corporate rights.

It is becoming common knowledge in the transnational legal community that specialized law firms are lining up clients to engage in such litigation.[123]

Legal Liability of Heads of State or Government (HSG)

To date, in Canada, no attempt seems to have been taken place to attribute legal liability for COVID-19 to an HSG, federal or provincial.

The French Cases

The democratic jurisdiction in which the mechanism of HSG accountability to law has made the greatest strides in relation to the COVID-19 file is France. On the margins of COVID-19, dozens of complaints have been filed with the Cour de justice de la République, notably against the prime minister, Édouard Philippe, the previous minister of health, Madame Agnès Buzyn, and the current minister of health, Monsieur Olivier Véran. The claims fall into three categories: endangering human life: "mise en v P Œ o À] [µ š Œ µ]

third party influencing decision-making regarding whether to lock the region, or some parts of it, down or not, was what the media is calling a "leading business lobby". In due course, a number of cities were locked down to prevent the spread of infection and eventually, all of Lombardy underwent this fate. The issue of the timing of the various parts of the Lombardy lockdown has given rise to some 50 legal complaints by a civic group entitled "Noi Denunceremo" ("We Will Denounce [in the sense of "accuse"]). At the time of writing, it is not yet known whether this initial investigation may lead to court proceedings.[124]

The Canadian ICC Case

There is now at least one ongoing attempt to resort to international venues, administering various components of international law, to hold HSG responsible for their actions and inactions in relation to COVID-19. This is the application filed on May 27, 2020 by the Canadian Institute for International Law Expertise (CIFILE) with the prosecutor of the International Criminal Court.[125][126] The application is aimed at "individual world leaders" but, strangely, the publicly available documentation does not divulge which world leaders are implicated.

The Brazilian ICC Case

The COVID

emergency pursuant to the Emergency Program Act. Under cover of that Act, the minister made a number of orders that purported to suspend or amend the operation of other legislation. These orders were the instruments the Ombudsperson investigated. He found that they exceeded the allowable use of powers. These two paragraphs are worth reproducing in their entirety, as they summarize the Canadian view on the issue of the use of extraordinary powers in a democratic and rule of law regime.

> [illegible]
>
> While the minister wields broad powers under the Emergency Program Act, those powers are not unlimited [illegible]

[illegible]

[illegible]

higher education into chaos.[136] Within a long and detailed Complaint for Declaratory and Injunctive Relief, a single paragraph was sufficient to highlight the political nature of the governmental action complained of and consequently the political nature of the response. This litigation was ostensibly designed to maintain the universities' plans for the conduct of the 2020-2021 academic year in a safe and responsible manner. More to the point, it was primarily a political instrument aimed as a response to the government's arbitrary political instrument meant to force universities to adopt the posture of the president. On July 13, 17 states and the District of Columbia filed a complaint similar to that of Harvard,[137] thus providing more evidence that while litigation was the chosen methodology to resolve the issue, the foundational stake was political. The very next day, in the face of a layered struggle it calculated it could not win, the Trump administration abandoned its restrictive visa policy.[138]

By comparison, the barring of foreign students by Canada does not seem to have elicited a litigious response.[139]

Legal Challenges to the Prohibition of Activities Resulting from the Lockdown

The lockdown necessitated by the pandemic has also given rise to a number of orders and similar legal instruments, made pursuant to legislation, aiming at reducing or eliminating public activities, at limiting the number of individuals allowed to congregate for common purposes and at the closure of business institutions of various types. Many, if not most, citizens recognize the necessity and the bona fides of such measures: they are aimed at preserving public health by limiting the opportunity for the illness to spread further than it has. In a sense, such measures are based on the philosophy and the practicality of the lesser of two evils. Thus, an unwanted but perhaps unavoidable consequence of such measures is the temporary restriction of customary civil and political rights and especially Charter and Charter-type rights.

Among members of the citizenry, there are those who, by personal conviction, permit the calculation of the lesser of two evils operate in the opposite direction. They believe that public health provisions must give way to their own, specific, non-public health-related rights despite the consequences for themselves or for society at large. The members of such groups find their public voice through advocacy organizations that tolerate no bounds or limitations on alleged rights, however necessary or temporary they may appear to society-at-large.

[136] President and Fellows o

on provisions of election law. The Supreme Court of Texas decided by distinguishing constitutional and public law duty from contract. The Court relied on the statutory definition of "law" and held that as the agreement between the Party and the convention center did not fit into that definition, it would not be able to "commandeer" the premises.[145]

The New South Wales Case

The effect of the COVID-19 originated lockdown on the exercise of constitutionally guaranteed rights is of particular interest in this analysis. In Sydney, a demonstration regarding Aboriginal deaths in custody, a kind of Australian version of the Black Lives Matter movement, was planned for lunch-time, Tuesday, July 28, 2020, in the centre of Sydney. Pursuant to his powers under the Summary Offences Act 1988, the commissioner of police sought an order of the New South Wales Supreme Court prohibiting the assembly and procession. In essence, the debate was between the constitutionally guaranteed freedoms of assembly and expression versus considerations of public health. The Court ruled on July 26.[146] Commissioner of Police (NSW) v. Gibson. First, it defined the constitutional conflict: (a) that that the Public Health Order was ultra vires because it impermissibly restricted implied freedom of political communication and (b) that, in exercising its jurisdiction, the Court felt obliged to exercise its powers in conformity with the implied freedomns of

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To the House of Commons:

- Undertake a comprehensive review of Canada's level of preparedness in case of pandemics
- Consider the establishment of a position of parliamentary medical officer of health (PMOH).

To academics and think tanks:

- Undertake research both in the federal and provincial contexts, about the operationalization and effectiveness of central coordination during times of crisis.
- Conduct further research about the implications of the structure and organization of cabinet government for central agencies compared with the leadership styles of prime ministers during normal times and crises.

2. The Public Sector

To the prime minister:

- Build a roadmap circle of leadership: Assemble, working with provinces but all sectors,

3. Intergovernmental Relations

To the federal and provincial governments

- Increase federal transfers to provinces and consider the establishment of a conditional bailout facility to lend at federal rates for provinces struggling to service their debts.

To Public Health Ontario, the regional health units and municipalities

- The response to the pandemic in Kingston, Frontenac, Lennox & Addington was based on a well-coordinated effort on the part of the public health unit, the regional healthcare system, and the municipalities. This partnership should be further refined and could provide a model for future pandemic response preparation and action throughout Ontario.
- Public Health Ontario should lead the development of consistent public reporting of epidemic/pandemic incidence amongst the public health units.

To the Ontario government:

- Develop a blueprint for public health delivery with consideration to
  - The heavy reliance of both the federal and provincial government upon highly functional public health units/departments and the municipalities with which they are aligned to coordinate an adequate response to a public health emergency;
  - The optimal size of public health units/departments to develop a sophisticated epidemiological approach to identifying and managing the threat of an epidemic or pandemic; and
  - The level of resource requirements for each health unit/department to manage through an epidemic or pandemic.
- The recently announced Independent Commission into Long-Term Care in Ontario should examine very closely why the COVID-19 death rate in privately owned and operated LTC homes is five times that of municipally owned and operated homes, including capital and operating cost variances, and especially regarding staff qualifications, deployment and compensation.

To the federal and provincial governments:

- The pandemic provides an opportunity to review tax policy with respect to municipalities. Rather than simply offering municipalities a one-time handout to cover operating deficits

APPENDIX A: COVID-19 POLITICAL AND POLICY CHRONOLOGY IN CANADA

COVID-19 Political and Policy Chronology in Canada
Graeme Murray

January 17: The CBSA implements health-related security screening questions at some airp
(Montreal, Toronto, Vancouver) and would be monitoring the situation to assess the ne
further measures. At this point in time, there is little understanding of the virus and the th
may pose outside of Hubei Province in China.

January 25: Canada announces the issuing of a travel advisory against non-essential travel to
China. This came after the first presumptive case of COVID-19 was identified in Canada.

February 1: Canada maintained the position that it would be discriminatory to exclud
travellers from China, suggesting that border closings or travel bans do not work in trying t
the spread.

March 4: The Cabinet Committee on the federal response to the coronavirus disease (COVID
to be chaired by Deputy Prime Minister Chrystia Freeland.

March 11: The prime minister announced a $1 billion fund for COVID-19, including funds for
the provinces and territories, the WHO, and COVID-19 research in Canada. This was the sa
day that the WHO declared COVID-19 a global pandemic.

March 13: The House of Commons voted unanimously to close as a result of COVID-19, for an
initial period of five weeks.

March 16: The prime minister announced the implementation of travel restrictions, limiting entry
to Canadian citizens, permanent resid 0 0 1 192.33 321.1 Tm /F4 12 Tf 1 0 0 1 192.1

April 11: Parliament convened to pass Bill C-14 (a second Act respecting certain measures in response to COVID-19). This Bill introduced an emergency wage subsidy to help employers pay employees. The Bill received unanimous support in the House.

April 20: Parliament convened to vote to sit once every for as long as COVID-19 can reasonably be considered a grave health and safety risk. The vote was 221-15 with all party support except the Conservative Party. Z K L F K R E M H F W H G W R W K H U H G X F W L

May 1: Parliament passed Bill C-15 (an Act respecting Canada emergency student benefits) which was meant to provide financial relief to Canadian students who could find no work as a result of COVID-19 and were not eligible for the CERB.

May 7: An agreement between the federal and provincial governments topped up wages for essential workers earning less than $2,500 per month.

May 11: The federal government created the Large Employer Emergency Financing Facility with the goal of avoiding bankruptcies of companies with annual revenues exceeding $300 million conditional upon agreement to respect collective bargaining agreements. H Q W V Z R U N H U V national climate change goals.

May 12: The parliamentary budget officer raised the possibility that the federal debt could reach $1 trillion as a result of the pandemic relief spending.

June 16: The prime minister announced that the eligibility period for CERB would extend beyond the original four four-week periods, to include periods in August and September.

June 24: Fitch Ratings Inc. downgrades & D Q D G D ¶ V F U HAGAWAAD. W L Q J I U

June 25: The federal government announced that WE Charity would administer the Canada Student Service Grant, a component of COVID-19-related financial aid for post-secondary students. The choice of WE Charity was subsequently criticized given that it was chosen through a non-competitive process and both the prime minister and finance minister did not recuse themselves despite ties to the organization.

July 8: The Department of Finance tabled a "fiscal snapshot" which shows that the federal government expects to hit a $343 billion deficit for this year, largely as a result of pandemic relief spending. This is expected to bring the total debt load to $1.2 trillion.

July 31: The federal government announced its intention to end CERB payments and to transition Employment Insurance at the end of September.

August 14: The Canada-US border closure to non-essential travel was extended, as it has been on a monthly basis since March. This new extension lasts until September 21.

August 17: Finance Minister Bill Morneau resigns amid criticisms of his role in the WE Charity controversy. Deputy Prime Minister Chrystia Freeland is named finance minister.