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THE IMPACT OF COVID-19 ON THE FUTURE OF GOVERNANCE IN CANADA

Kathy L. Brock
Helen Cooper
Toby Fyfe
Andrew Graham
Kyle Hanniman
Samantha Kieffer
Eugene Lang
Graeme Murray
Jonathan Rose
Gregory Tardi
Lori Turnbull
Mark Walters
Grégoire Webber
Jacob Weinrib

COVID-19 Governance Working Group
School of Policy Studies, Queen's University

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About the Authors

Dr. Kathy L. Brock, professor and senior fellow, School of Policy Studies, Queen's University, chair of the National Accreditation Board for Programs in Public Administration, and former president of the Canadian Association of Programs in Public Administration. She has advised FPT and Indigenous governments and leaders on governance issues. She is co-author of *Canadian Politics Today: Democracy, Diversity and Good Government* (Pearson, 2020).

Helen Cooper, distinguished fellow, School of Policy Studies, former mayor, City of Kingston. She is a former president of the Association of Municipalities of Ontario and a former chair of the Ontario Municipal Board.

Toby Fyfe, President, President of the Canada-based not-for-profit Institute on Governance, and SPS Advisory Council member. He has over 20 years' experience as an executive with the Government of Canada, including central agencies and government departments. He provides support to government institutions and leaders across Canada and internationally as they respond to the challenges of public-sector governance in the 21st century.

Andrew Graham, adjunct professor, School of Policy Studies, Queen's University, and former ADM with over 30 years in the Canadian public service. He was formerly the national editor of the Case Study Program of the Institute of Public Administration of Canada and is author of *Canadian Public Sector Financial Management*. His academic focus is on the public service, leadership, management, and financial management. He also works extensively on police governance issues nationally and with First Nations.

Kyle Hanniman, assistant professor of political studies and research fellow at the Institute of Intergovernmental Relations, Queen's University. His research interests include comparative federalism, political economy, public debt, and Canadian politics. His commentary has appeared in the *Globe and Mail*, *National Post*, and *Financial Post*.

Samantha Kieffer, MPA candidate, School of Policy Studies, Queen's University. She has begun her career as a program officer with the federal public service and her continued research interests include taxation mechanisms and trade policy.

Eugene Lang, adjunct professor, School of Policy Studies, and fellow, Canadian Global Affairs Institute. He has worked in five federal government departments, in both the public service and in ministers' offices. Lang is co-author (with Janice Stein) of *The Unexpected War: Canada in Kandahar*.

Graeme Murray, MPA candidate and research assistant to the Governance Working Group, School of Policy Studies. He is a former writer for the *McGill International Review* and has published in the *McGill Journal of Political Studies*.

Gregory Tardi, executive director of the Institute of Parliamentary and Political Law and executive editor of the *Journal of Parliamentary and Political Law*; former legal counsel at Elections Canada and senior parliamentary counsel in the Office of the Law Clerk of the House of Commons. He is author of *The Theory and Practice of Political Law* (2016) and *Anatomy of an Election* (2020).

Dr. Lori Turnbull, adjunct professor, School of Policy Studies, Queen's University, and director, School of Policy Studies, Dalhousie University. She was former policy advisor in the Privy Council Office of Canada, liaison to the minister of democratic institutions, and at the Priorities and Planning Secretariat. Co-author of *Democratizing the Constitution: Reforming Responsible Government* (2011).

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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-term implications for the citizens of this country. A rapidly-evolving mindset has shifted from ‘how can we recover’ to ‘how can we recover better than we were before’. The challenge for policymakers thus has morphed from simply responding to the outbreak, to designing policy that supports the specialized goals of various groups across our population. This is an extremely significant challenge; while health policy remains ascendant, there is a growing need to coordinate policy across a number of related areas in designing countermeasures, including (but not limited to) policies grouped in the following eight categories: arts & culture, economics & employment, education, energy & environment, governance, health & healthcare mental health, and security.

To accelerate the development of strong policies that can facilitate Canada’s recovery from COVID-19, the School of Policy Studies at Queen’s University launched a research programme in the summer of 2020 that brought together researchers from across Queen’s University and beyond to consider options in each of the eight policy categories identified above. In this report, the impact of COVID-19 on the future of governance in Canada is explored.

In this paper, the authors explore the implications of COVID-19 on different aspects of governance across Canada, with a particular focus on the federal government, the operations of parliament, and the cabinet. The ability of the public service to create new pathways to governance is investigated. The important role of provinces and cities are also covered through case studies, and the implications for future laws are described.

This paper brings together an array of extremely informed authors, organized by Professor Kathy Brock of the School of Policy Studies. They make an important contribution to one of the most important public policy discussions of our time. As Director of the School of Policy Studies, I would like to thank each of our contributors for their work.

Warren Mabee, Director, School of Policy Studies, Queen’s University

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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,
and the circumstances are necessitating a big expansion of the government's role.

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

Question: What is white and black but seldom red (read)?

Answer: A white paper.

- 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 governments 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 in this White Paper. Knowing that they could only capture snapshots of this transformation in government, the authors concentrated their work on key areas of Canadian governance and selected topics within those areas.

This White Paper has four main sections. The first section begins by looking at the heart of our parliamentary democracy. Our intention was to examine how the executive and legislative branches have functioned both together and separately during the pandemic. The first topic in this section addresses the important question of whether the executive branch has escaped the

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 is more sanguine about how Parliament operated to hold the government to account.

The second section examines how the Canadian public sector responded during the pandemic. This section offers a high level, integrated analysis of how the public sector pivoted to handle the challenges that the pandemic posed and the short- and long-term implications of these shifts. On the positive side, the sector demonstrated great flexibility and adeptness in rolling out new programs and meeting new demands within compressed time frames. The public sector delivered for Canadians at a time when they needed it the most. However, important policy fault lines emerged, especially for long-term care. Government responses were targeted and reactionary, lacking coherence in the short term and a clear strategy for moving forward. The task facing the public service as it exits crisis mode will involve assessing which practices should be retained, what needs to change permanently, and how it can build and deliver better public services in a fundamentally changed world.

The Canadian government did not act alone to meet the needs of Canadians. The third section enters into the world of intergovernmental relations to explore two important questions. The first topic addresses the intractable issue of how governments will address the unprecedented levels of provincial debt and deficit caused by the pandemic. It begins with an examination of the nature, source, and scope of provincial fiscal instability, asking very sensibly whether we should be worried about the debt levels and their ramifications. While provincial vulnerabilities should not be exaggerated, there are some creative but practical ways to put them on a more sustainable path, including the establishment of a conditional bailout facility to lend at federal rates. The second paper delves further into the workings of intergovernmental relations to explore how the provincial-municipal relationship affected the ability of local governments and health authorities to respond to the pandemic. It begins with a sketch of the provincial authorities invoked during the pandemic in the context of the current structure and funding of public health provision in Ontario. Using the Kingston, Frontenac, Lennox and Addington area as a case study, it explores how this region maintained one of the best health records in the country despite an anachronistic provincial fiscal structure for local governments. Given the importance of local

governments in addressing health crises, municipal finances need to be stabilized and the taxation system revised.

The fourth section of this White Paper delves into the legal aspects of the pandemic. It begins by distinguishing the legal and litigious argumentation arising out of the pandemic from the underlying political forces. A scan around the world provides insight into the types of legal challenges that are arising and may continue to arise including ones related to the general legal accountability of states and state actors for the spread of the illness and those related to the specific legal accountability for state actions taken with respect to the illness. The law is a powerful tool for holding governments accountable in democratic states as this chapter demonstrates. Democracy and the rule of law are inescapably intertwined in ensuring good governance.

The paper concludes with a compilation of the recommendations from each chapter.

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

The Executive and Parliament

The Perils of Reduced Parliamentary Scrutiny¹

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 their 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 alleged he had done nothing wrong and had even delayed Cabinet approval of the contract until the public sector had done its due diligence in vetting the contract (Trudeau 2020). The prime minister explained:

We learned that there had been tough questions asked about the CSSG proposal and WE Charity during the COVID committee a few days earlier. We both [the prime minister and his chief of staff, Katie Telford] felt that we needed more time before this item was presented to Cabinet—time to consider and understand the reasons behind the proposal that WE Charity deliver the program.

¹ An earlier and shorter version of this article appeared as an Op-Ed in the *Ottawa Citizen*. See Kathy Brock, "Is the Executive Evading Parliamentary Scrutiny?" May 30, 2020. <https://ottawacitizen.com/opinion/brock-the-coronavirus-challenge-to-democracy>.

After noting the connections between WE and his government members, the prime minister continued:

My primary concern was to make sure that the public service could fully support its recommendation that, without a doubt, WE Charity was the right and indeed the only partner to deliver the program. I was briefed again on May 21 and the public service told me that they had done the due diligence we had asked for and that they were confident in the recommendation. In effect, they said that, if we wanted this program to happen, it could only be with WE Charity.

However, the testimony also reveals what happens when Parliament is not working at full capacity. Under a multiparty agreement, the sittings of the House of Commons and its committees were reduced significantly. The lack of a daily Question Period and the irregular attendance of the prime minister and opposition party leaders at the improvised COVID-19 Committee meetings (Walsh 2020), rendered the opposition unable to sustain its line of tough questions on issues like the contract for the Canadian Student Service Grant program. As a result, the contract was awarded without adequate scrutiny of the recipient organization or the terms of the grant. This triggered the need for the House of Commons Finance committee to investigate the terms and process of the WE contract and to call key members of government, like the prime minister, to testify.

Four things are significant about this aspect of the prime minister's testimony. First, "tough questions" had been raised in Parliament by the opposition when the COVID-19 Committee was sitting. Parliament was holding the government to account for its decisions. Second, it reveals that the government pays attention to Parliament and concerns raised there. The executive does not act unfettered or unexamined. Third, the public sector will, at the government's direction, do its due diligence and review proposed policies to ensure that they comply with the government's expected standards. Fourth, when these safeguards falter, then Parliament can fulfill its accountability function by calling the key government players to testify before a committee to bring any wrongdoing to light and ensure that the public can judge whether the political and administrative officials did, indeed, act in the public interest. Parliament is a powerful, although often undervalued, actor in the policy process.

The Power of Parliament

These four elements of the prime minister's testimony reveal the checks and balances built into the parliamentary process regarding the executive and legislative branches. As the Supreme Court of Canada has recently reminded us,² the executive branch (including the elected and administrative components) is subject to the legislative branch:

² Reference pan-Canadian securities regulation, 2018 SCC 48, [2018] 3 S.C.R. 189.

Parliamentary sovereignty therefore means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments, and neither can usurp or interfere with the legislature's law-making function (para 55).³

Although parliamentary supremacy is subject to the limits imposed by the constitution, it is still a fundamental principle that the legislative branch is supreme over the executive as well as judicial branches. The corollary of this principle is, thus, that the "executive cannot fetter the legislature's law-making power" (para 59). Parliamentary sovereignty protects the power of the legislatures to make and unmake any law.

Amidst the Finance committee's investigation into the WE contract, questions arose concerning other contracts involving housing relief and employment benefits to ease the negative effects of COVID-19 on Canadians. Once again, questions were raised about the links between government members and staff ties to the organizations and the terms of the deals. While the intentions of government to help Canadians in a time of need and uncertainty were good, the means chosen were flawed. As the controversies around government spending during the pandemic swelled in August, the leader of the Bloc Québécois threatened to trigger an election when Parliament resumed sitting in September. Herein lies the rub. Had Parliament been sitting with full powers to hold the government to account during COVID-19, the current controversy might have been avoided. Let's begin investigating this claim by unpacking the importance of Parliament in our system of government and how it operated during COVID-19.

Two Core Strengths of Parliament

A core strength of the Canadian political system is that the executive, embodied in the prime minister and Cabinet, is empowered to act decisively and efficiently on behalf of Canadians. In both majority and minority government situations, the first duty of Parliament is to support the executive by passing its legislative agenda. While this support is normally provided by the government members in the House of Commons, it will be supplemented by the opposition parties where there is agreement on policies and by necessity if the government does not hold a majority of seats in the House. These clear roles for a strong executive and a supporting legislature ensure order and uninterrupted governance even during emergencies.

This strength of the Canadian political system was evident when the government, reacting to the effects of the economic shutdown during the pandemic, proposed emergency legislation and Parliament quickly reconvened to pass it, authorizing massive government funding to help Canadians cope. The executive acted quickly, and Parliament supported this decisive action, as both should have.

³ Just as the 2011 Court delivered a message to the Harper government with its comments on Statistics Canada and data collection, one wonders if the 2018 Court is delivering a message to the Trudeau government's directions to ministers that they are accountable to the prime minister and Parliament by noting that the executive is responsible and subordinate to Parliament.

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 then-Conservative MP Lisa Raitt’s methodical questioning of former Justice Minister Jody Wilson-Raybould and former Clerk of the Privy Council Michael Wernick during the SNC-Lavalin affair at the Justice committee in the summer of 2019. And, political observers will not likely forget former NDP opposition leader Tom Mulcair’s intense cross-examination of then-Prime Minister Stephen Harper over the Mike Duffy spending controversy day after day in the Commons back in 2013.

By confronting the government directly in the House of Commons, opposition parties shine a light on instances of questionable or poor judgment, and offer alternative views or scenarios, so that citizens can decide to keep or fire the government in the next election. By performing this duty, the opposition helps ensure that governance is not only undisrupted but also that it is transparent – good governance during both normal times and crises – although often at the cost of appearing negative or confrontational.

Canadians witnessed the opposition performing this important function during the COVID-19 crisis when the opposition parties asked about support for farmers, seniors, and students and others who were suffering financially but not included in the government’s initial assistance packages. The Liberals responded by extending assistance to more Canadians. The Conservative and NDP opposition also asked tough questions about government measures to process assistance applications and deny fraudulent applications by individuals or scam artists. Here, Prime Minister Trudeau reiterated the government’s focus on helping Canadians and promised “retroactive action” on fraudulent claims.

In these two ways during the initial weeks of the pandemic, the system worked well, and Canadians witnessed Parliament functioning both to support the government and to hold it accountable for its actions. However, in the extraordinary conditions created by the pandemic, while the executive has been able to act expeditiously, it may have escaped the level of parliamentary scrutiny necessary for democratic controls of fairness and fiscal probity to have been exercised adequately. This lapse gave rise to the WE and other contract scandals. Closer examination reveals that the weakness does not lie in the governing institutions per se but in how the government and opposition parties acted to hamstring Parliament during COVID-19. Let’s begin with a comparison of how the Canadian Parliament operated in contrast with the British one during the early months of the pandemic.

Limiting Parliament

In March 2020, The UK Parliament moved quickly to adopt a hybrid model of operation of the House of Commons.⁴ Under this model, the House retained full powers of scrutiny and substantive proceedings but reduced sitting hours to Monday through Wednesday with only up to 50 members allowed in the House and a further 120 to attend by Zoom. The UK Parliament introduced remote electronic voting in its procedures by May 2020. This hybrid (in-person and virtual attendance) model of the House with voting ensured that it could continue its surveillance function of the government for regular and COVID-19–related matters throughout the crisis.

In contrast, at first the minority Canadian government secured an agreement with two opposition parties for a special arrangement of weekly meetings comprising one in-person sitting of the House with up to 30 MPs and two virtual sessions of a Special Committee on the COVID-19 Pandemic (Special Committee) of all 338 members. The Special Committee was restricted to raising matters related to the pandemic. Electronic voting was not introduced. The Conservative opposition party objected to this arrangement and called for a restoration of the full powers of Parliament under a hybrid arrangement of the House similar to the British one to ensure that Parliament could hold the government accountable during the pandemic. In mid-May, the Standing Committee on Procedure and House Affairs (PROC) recommended adoption of a hybrid model of the House similar to the British one that would restore parliamentary powers and privileges for regular matters and introduce electronic voting (See Appendix B).⁵ However, the Liberal government, New Democratic Party (NDP), and Green Party agreed to continue a variation of the current arrangement with additional House meetings and more Special Committee (now hybrid) meetings and widened the topics that the opposition could raise to non-Covid matters. Despite the recommendation of PROC, the government declined to introduce electronic voting citing technological complications.

By comparison with the British House of Commons then, the Canadian one was impaired in its ability to execute its second duty of holding the government to account. Four examples lay bare the extent of this weakness and how it gives rise to the current controversies.

First, and most critically, the two duties of Parliament – to support and scrutinize government actions – are captured in two of the most fundamental principles of our system underpinning how government raises and spends money:

1. government cannot raise money except by parliamentary approval; and
2. government can only spend money as authorized by Parliament.

⁴ See details on the April decisions at <https://publications.parliament.uk/pa/cm5801/cmvote/200421v01.html> and <https://publications.parliament.uk/pa/cm5801/cmvote/200422v01.html>.

⁵ See <https://www.ourcommons.ca/Content/Committee/431/PROC/Reports/RP10754813/procrp05/procrp05-e.pdf>.

These core principles of democratic control of the public purse were at the heart of the Conservative opposition party's strenuous objection when the Liberals included a clause in the COVID-19 emergency legislation that would have allowed the government to spend, borrow, or raise money without parliamentary approval until December 2021. In a dramatic late-night Commons session in late March, the parties compromised on an extension to September 30, 2020.

Money bills are confidence matters, meaning that the government can fall and an election writ will be dropped if it loses a vote on one. Thus, this agreement significantly loosened the reins on government spending, allowing the government to act expeditiously but perhaps with less caution than if it knew all measures would be subject to full House scrutiny and action with the potential for the government to be defeated and dissolved. In the case of the WE contract, it meant that the government pulled it back in response to questions raised in the House on potential conflicts of interest. However, given that the scrutiny was not sustained, full, and immediate, and that there would be no confidence vote, it perhaps reduced the incentive for a full vetting of the contract up to and including the internal operations, status, and financial viability of the contracted organization.⁶ Certainly Minister Carla Qualtrough conceded this possibility before the Standing Committee on Access to Information, Privacy and Ethics (House Ethics committee) in August when she suggested the government dropped the ball when it "hurried" the contracts.⁷ Questions being raised about other contracts imply that expediency and efficiency overtook the essential requirement for good governance. The consequence was that an important program was never delivered despite millions of dollars being paid to the organization.⁸

Second, the delay of the 2020 Budget and the government's ability to spend without Parliamentary approval until 30 September 2020 – though ultimately allowed by the opposition – strike at the heart of accountability. Although the government did release a fiscal update in July, it was not comprehensive and did not offer a fiscal map for the future. The government has not begun the necessary preparatory groundwork for preparing Canadians for the fiscal measures that will be needed to bring the deficit and debt under some semblance of control.

Third, as noted, the House operated with limited sittings. Under the May agreement, full parliamentary sittings were pushed back to September, no electronic voting was introduced, and the sittings of the Special Committee allowed MPs to attend in person and virtually over the

⁶ See opposition comments in Jordan Press, "WE Charity Scandal: Committee hears from charity watchdog organization." *Globe and Mail*, August 5, 2020. Available at <https://www.theglobeandmail.com/politics/article-opposition-parties-hope-we-charity-documents-shed-some-light-on-how/>.

⁷ See Kathleen Harris, "Government 'dropped the ball' on We Charity deal, Qualtrough says." *CBC News*. August 11, 2020. Available at <https://www.cbc.ca/news/politics/liberal-we-charity-student-program-chagger-qualtrough-1.5681995>.

⁸ Repayment of those funds is now underway as the matter is investigated. Tonda MacCharles, "WE Charity says it will pay back remaining money for student volunteer program as soon as Ottawa can take it." *The Toronto Star*, August 12, 2020. Available at <https://www.thestar.com/politics/federal/2020/08/12/we-charity-says-it-will-pay-back-remaining-money-for-student-volunteer-program-as-soon-as-ottawa-can-take-it.html>.

summer to raise questions on a range of matters. This meant that during the first four months of the pandemic, Prime Minister Trudeau was able to make massive spending announcements directly to the news media in a government-controlled setting outside Rideau Cottage rather than in the Commons where he would face immediate opposition criticism and interrogation. Opposition responses were often delayed and given limited coverage by contrast. Limited parliamentary sittings failed to attract the public attention necessary for meaningful accountability. More regular meetings of Parliament give opposition parties the opportunity to relentlessly pursue issues day after day and to raise other important subjects that are being subsumed by COVID-19. Even the four scheduled sittings of the House during the summer were less effective with the prime minister not even attending the first of the two August meetings.

Fourth, the House operated without full powers under the two agreements, the virtual sittings of the Special Committee on the COVID-19 Pandemic (Committee) served as a temporary oversight and accountability mechanism of the government but the Committee could only consider ministerial announcements, allow members to present petitions, and question ministers regarding the pandemic initially. It lacks the full authority of Parliament to compel the government to produce documents or witnesses. Although the government has been producing witnesses, the leader of the opposition has charged that if the government “is allowed to hide information” or “pick and choose which questions they want to answer and when,” then Parliament’s effectiveness in scrutinizing government decisions on COVID-19 spending and other matters is significantly reduced.⁹ Even at time of writing in August 2020, the prime minister has not agreed to appear before the House Ethics committee to speak about his role in the WE scandal despite committee calls.

Actions Have Consequences

The sidelining of Parliament during the pandemic has consequences.

The short-term danger is that the government’s responses to COVID-19 may have costly flaws that could have been prevented with adequate opposition scrutiny. We are beginning to see the cracks with the WE controversy and the questions surfacing about the Canadian Emergency Response Benefit (CERB) program. The long-term peril is that the balance between the executive’s ability to act decisively and Parliament’s ability to ensure that government action is scrutinized, justified, and transparent no longer holds, with good government and financial probity two casualties.

Restoring the balance between efficient and effective government and restoring the role of Parliament in the policy process in the aftermath of COVID-19 will be difficult, perhaps impossible. The price, financial and democratic, will be paid by future generations.

⁹ Mike Blanchfield, “Tories want Parliament declared ‘essential service,’ regular House sittings.” *CTVNews Politics*, May 22, 2020. Available at <https://www.ctvnews.ca/politics/tories-want-parliament-declared-essential-service-regular-house-sittings-1.4950363?cache=yes%3Fot%3DAjaxLayout>.

Recommendations

In the spirit of encouraging good governance practices, a number of actions may be worth consideration.

To the prime minister:

- Announce major decisions, particularly spending ones, in Parliament.
- Maintain a high public profile to reassure Canadians and keep them informed directly.

To the political parties:

- Respect Parliament and ensure its full functioning in times of crisis as well as regular times by supporting and scrutinizing the decisions and actions of the government.

To the public and media:

- In times of crises, be vigilant to ensure that Parliament is able to function with its full powers.
- Ask the tough questions and consider the short- and long-term consequences of government actions.

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Multiparty Agreements and a Better Model for Parliament during Crises¹⁰

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 Parliament to hold the executive to account by eliminating key levers of power at the opposition's 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 meet the challenges posed by the pandemic. This episode raises serious questions about the nature and scope of multi-party agreements, the relationship of the executive to the legislative branch, and the role of Parliament in crises; all of which merit further investigation and research in the future.*

Introduction

Westminster parliamentary systems work by striking a well-calibrated balance between a powerful executive branch that can make decisions and actions effectively and a functional legislative branch that holds the government to account. In times of emergency, the balance between decisiveness and accountability tends to lean more heavily towards an even more powerful, effective executive. However, even in exceptional times, the actions of the executive have been subject to the review of Parliament, sometimes retroactively. Once an emergency or exceptional circumstances pass, the equilibrium between the branches should be restored to normal levels of accountability, lest we lose the healthy and vital system of counterweights in a parliamentary democracy.

During the extraordinary conditions created during the COVID-19 crisis, the Liberal minority government made deals with the NDP, Bloc Québécois, and Green Party which reduced the ability of Parliament to hold the executive to account by eliminating key levers of power at the opposition's disposal and by limiting the frequency of House of Commons sittings. This was neither necessary nor desirable given that the parties could have opted for an alternate model retaining the full powers of Parliament to scrutinize the executive while enabling the executive to act swiftly to meet the challenges posed by the pandemic. This episode raises serious questions about the nature and scope of multiparty agreements, the relationship of the executive to the

¹⁰ This contribution has been published as part of a series of reflections on the effects of COVID-19 on public administration in Canada: "Beyond COVID-19: Five Commentaries on expert knowledge, executive action and accountability," *Canadian Public Administration* (September 25, 2020), 1–29. Available at <https://doi.org/10.1111/capa.12388>.

legislative branch, and the role of Parliament in crises – all of which merit further investigation and research in the future.

Government Interventions under Pressure

In the early days of the pandemic, the federal government amended *the* Financial Administration Act to permit using special warrants to make payments to Canadians without Parliament sitting (Bill C-12). Parliament passed the amendments quickly and under pressure just before adjourning to allow members of Parliament to return home and social distance. Within two weeks, a reconvened Parliament passed an \$82 billion federal aid package called the COVID-19 Emergency Response Act (Bill C-13). This sweeping statute made several amendments to existing legislation to extend deadlines for tax filing and payment, increase Canada Child Benefit payments, introduce new Emergency Care and Emergency Support benefits as well as an Indigenous Community Support Fund. It also allowed the Ministry of Finance to borrow without authorization of the Governor in Council and extended budget and debt reporting requirements. This bill also was passed under pressure with scrutiny mainly limited to a special House committee and House members and senators passing it without full scrutiny or knowledge of its contents. Two further bills (C-14 and C-15) provided subsidies to small business employees and students and extended reporting deadlines for other Finance matters. Further emergency measures were introduced under the Quarantine Act, the Aeronautics Act, and other federal legislation and regulations. Orders in council have been used to implement many important aspects of the federal response to COVID-19, including the Canada–US border closure, efforts to manage food and drug shortages, and Income Tax Act amendments. In contrast, the UK and Australian COVID-19 Response Acts and other legislation were debated and amended in both of those parliaments which operated to allow opposition questioning of government actions on Covid-related and other matters.

Throughout the COVID-19 lockdown period, Prime Minister Justin Trudeau announced relief programs for individuals and businesses, travel restrictions, physical distancing rules, and border closures that posed unprecedented economic, social, and health-related consequences. These announcements were made from his Rideau Cottage residence as opposed to the House of Commons, which meant that the immediate reaction to these announcements came from journalists rather than members of Parliament. As a result, the response of the opposition to the announcements was often delayed or received little coverage in the media.

Sidelining the Legislative Branch

Under a multiparty agreement struck by the Liberals, NDP, and Bloc Québécois, the House met in plenary one day per week with most members attending through remote technology. A Special COVID-19 Committee of all House members met virtually two days per week to raise any matters related to the COVID-19 crisis. Votes were suspended in the House owing to technical complications. Standing committees continued virtual meetings. The Senate decided to adjourn to June 2 unless required to meet to pass legislation relating to COVID-19, although its committees could continue any COVID-19–related business through virtual meetings. This meant

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 member's bills, and order paper questions for the remainder of the spring sitting. All of these mechanisms are integral to opposition parties' ability 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 there. The NDP and Greens' deal with the Liberals, who were looking to break for the summer, significantly undermined Parliament's ability to do its job. In exchange for a promise from the prime minister to talk to the provinces about pursuing universal sick leave, the two opposition parties gave away almost every tool in the opposition's toolkit. The multiparty agreement effectively neutralized the opposition at a time when the government was exercising tremendous power.

The government and opposition parties were acting in a compressed time period in an exceptional time when pressures to respond to the COVID-19 crisis were escalating daily. Members of Parliament wanted to meet the needs of Canadians in the crisis and to model the need for social distancing. These considerations affected their decision to have a truncated Parliament in operation. It is understandable but, as mentioned, the UK and Australian parliaments were able to continue operations with virtual voting. In Canada, the government and opposition parties did not use, but had available to them, a model of how Parliament could operate with full powers to scrutinize government without limiting the ability of the executive to respond decisively and powerfully to the crisis. That model can be found in the provisions of the Emergencies Act.

Multiparty Agreements vs. the Emergencies Act

In March 2020, the federal government contemplated invoking the Emergencies Act (R.S.C. 1988, c.29) to empower it to deal with coronavirus-related matters. The Act was written "to ensure safety and security" during emergencies by authorizing the Canadian government "to take special temporary measures that may not be appropriate in normal times" (Preamble). Instead, the government decided not to invoke the Act, viewing it as "a measure of last resort" in the words of Deputy Prime Minister Chrystia Freeland.¹¹ Under the terms of the Act, it could only be invoked if the federal government proclaimed that the COVID-19 situation constituted a "public welfare

¹¹ J. P. Tasker "The 'measure of last resort': What is the Emergencies Act and what does it do?" *CBC News*, March 23, 2020. Available at <https://www.cbc.ca/news/politics/trudeau-emergencies-act-premier-1.5507205>.

emergency” after consultations with the provinces had yielded intergovernmental agreement that the situation exceeded “the capacity or authority of a province to deal with it” (Ss. 3, 3.a, 5.b).

Using the legislative and other policy instruments mentioned above, the federal government was able to adopt the necessary measures that complemented the actions being taken by the provinces and territories to deal with the crisis. Although *not* invoked in the initial phases of the crisis, the Emergencies Act provides a model for ensuring executive accountability to Parliament during a crisis that the parties could have adopted for the COVID-19 crisis rather than the one secured by the multiparty agreements.

First, and foremost, the Emergencies Act, locates responsibility and powers for dealing with a declared emergency to the executive consistent with the Westminster model of parliamentary government in two ways. The responsibility for assessing the situation and declaring that it constitutes an emergency consistent with the defined terms in the Act rests with Cabinet (S. 3). The legislation also confers on Cabinet broad and sweeping powers to make temporary orders and regulations that it constitutes are necessary for dealing with the emergency but that might not be appropriate in normal circumstances (Ss. 8, Preamble). To this extent, the actions that the Liberal government took during the COVID-19 crisis (to the time of writing), were consistent with the Act’s vision of strong, decisive executive action.

Second, the terms of the Emergencies Act depart from the multiparty agreement and what transpired during the COVID-19 crisis. The Act renders the executive fully accountable for the decisions and actions that government takes in an emergency both during the emergency and afterwards. Unlike the preceding War Measures Act, which allowed Cabinet to govern by order-in-council and bypass the House of Commons and Senate,¹² the Emergencies Act stipulates that Cabinet exercises its temporary emergency powers “subject to the supervision of Parliament,” the Charter of Rights and Freedoms and other rights legislation, and the federal division of powers in the Constitution Act 1867 (Preamble). Judicial review of government actions is likely to be limited “as courts would defer to Cabinet’s interpretation of the Act, its assessment of the situation and its determination of which particular measures are necessary.”¹³ Thus, the more powerful and immediate oversight power resides with Parliament.

Parliament exercises its powers of review in three ways according to the Emergencies Act: reviewing the declaration of an emergency; reviewing every order or regulation made by Cabinet

¹² Denis Smith, “War Measures Act” in the *The Canadian Encyclopedia*, March 13, 2020, Historica Canada. Available at <https://thecanadianencyclopedia.ca/en/article/war-measures-act>.

¹³ Eric S. Block and Adam Goldenberg, “COVID-19: Can they do that? Part II: The Emergencies Act” McCarthy Tetrault Insights, March 23, 2020. Available at <https://www.mccarthy.ca/en/insights/articles/COVID-19-can-they-do-part-ix-enforcement-emergency-measures>. Accessed 2 July 2020; Leah West and Craig Forcece, *National Security Law*, 2nd ed. (Toronto: Irwin Law as quoted in Anita Balakrishnan (2020), “Emergencies Act different than ‘any other law of Canada’” *Canadian Lawyer*, 30 March.) Available at <https://www.canadianlawyermag.com/news/general/emergencies-act-different-than-any-other-law-of-canada/328104>.

during the emergency; and a post-emergency review. Under the Act, Parliament has the power to review Cabinet's emergency declaration, reasons for the declaration, and the report prepared by the government on its own consultations with the provinces within seven sitting days of the declaration (Ss. 58.1, 58.5). Parliament may revoke the emergency declaration (S. 58.7) or a continuation or amendment of an emergency declaration (S. 60). Given that a declaration of emergency is likely to be taken with much forethought as the previous comments by Freeland indicates, this power is important but not where a government is likely to stumble. For our purposes here, it is significant that in contrast to the multiparty agreement, in this model Parliament is fully operational with enhanced opportunities to examine the decisions and reasoning of the government.

More pertinent to the COVID-19 situation are the provisions in the Act concerning orders and regulations. Cabinet must submit every order or regulation to Parliament for review. Both Houses, not just one, would need to agree if an order or regulation were to be revoked (S. 61). This allows for transparency and review of government actions but sets a high bar for those actions to be quashed. If an order or regulation is confidential, then it would be reviewed in private by a parliamentary review committee comprising members from both Houses and accepted or rejected (Ss. 61, 62). This review would bolster public confidence that all government actions are not taken surreptitiously or arbitrarily. Under the multiparty agreement, the opposition parties relinquished this important power of review and veto.

The most important power of review lies in the post-emergency phase. The Emergencies Act requires Cabinet to strike an inquiry into its declaration of an emergency and the actions it took during the emergency with a report to Parliament within a year of the end of the emergency (S. 63). This allows Parliament to consider the government's action in a more reasonable time and to make recommendations for future situations. This step is not covered by the agreement and yet is critical to good governance.

In contrast to the multiparty agreements, the Emergencies Act provides a model of a fully operational Parliament that can ensure executive accountability and is much closer to the model that operated in Britain. If the parties had agreed to adopt a similar model using remote technology, then Parliament would have continued to play a vital role in responding to the COVID-19 crisis and would have been able to ensure that the regular business of government would have continued to be subject to debate and scrutiny. Among other things, special unsupervised spending warrants would not have been justified, the government could have been rigorously questioned in the House on its spending announcements, and the delay in closing the border or any orders under other Acts could have been investigated and perhaps revoked in Parliament if over-reaching or not justified.¹⁴ Parliament would have remained and been seen to

¹⁴ In contrast to the federal legislation, the BC emergency legislation does not provide for legislative scrutiny of the temporary suspension, override, or replacement of existing statutes in an emergency which the BC Ombudsperson found contrary to the principles of good administration including transparency and accountability (2020: 35) British Columbia. Office of the Ombudsperson. 2020. "Extraordinary Times, Extraordinary Measures: Two ministerial orders made under the *Emergency Program Act* in response to the COVID-19 pandemic. Special Report No. 44."

be a vital institution in responding to emergencies and crises rather than as a shadow in the wings.

Conclusion and Recommendations

These events raise important questions about the role of Parliament and whether multiparty agreements ought to be used as a vehicle through which to cede critical levers of power at its disposal.

To the government and political parties:

- Amend House rules and procedures to provide for a model of Parliament to operate during crises like COVID-19 similar to the model in the Emergencies Act or other means of ensuring executive accountability to Parliament during crises and exceptional circumstances if an emergency is not declared.
- Consider whether any fundamental changes to the operation of the House of Commons should require all-party agreement under the rules and procedures of the House.

To the government:

- Update the Emergencies Act given recent changes in the Senate.
- Consider whether the Emergencies Act should be amended to make it easier to invoke during crises like the pandemic.

To academics:

- Engage in research that compares how parliaments within Canada and internationally fared in holding the executive to account during the global pandemic.
- Conduct research with recommendations on the nature and scope of multiparty agreements in parliamentary systems.

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Parliament: Managing Change during the Pandemic

Gregory Tardi

Abstract: *In the national life of Canada, one of the most visible changes brought about by the 2020 pandemic has been the seemingly altered role of Parliament. The method of democratic legislation and deliberation has evolved over centuries but has been generally stable. We must look at how it has changed over the last few months. The pandemic immediately posed a challenge for convening meetings of the legislature that was met with relative ease. However, other changes were not as successful, and parliamentarians will need to consider further reforms to adapt to the new circumstances ushered in by the pandemic. This is equally true in the provinces and territories.*

Introduction

Understanding the issues broached in this chapter, the nature of the problems caused by the current coronavirus pandemic (hereinafter COVID-19) and the solutions that may be envisaged to lessen those problems requires a return to the sources. The historically accepted notion was that parliament would be "convened," meaning that its members would gather in the same location, deliberate with each other, legislate on a collective basis, and hold the government to account while acting as a body. The practice of genuine meetings of parliament seemed immutable. There seemed no legal, political, or policy reason why parliaments should not meet in the pure sense of the word. Moreover, until recently, there existed no technology that would permit parliamentarians from being intellectually in touch with each other and fulfilling their meeting functions, while being physically separate. In all of this, Canada followed the British model.

In 2020, COVID-19 changed two components of this institutional consensus. With the global pandemic being reflected within Canada, public health considerations required that parliamentarians, like members of other collective endeavours, work while physically distanced from each other. Simultaneously, for the first time since the emergence of parliaments, technology enabling audio-visual communications while interlocutors remained separate became possible.

Until relatively recently, it was possible to "parliament," only on a face-to-face basis. Today that is no longer the case. The combination of the traditional modus operandi of parliamentarians with the urgent need for their physical separation, along with the ability to execute their mandate while distanced, has caused controversy, upheaval, and doubt as to the legitimacy of the resulting work.

Bedrock Issues

Indispensability

Over the last several decades, there has been much discussion in Canada about the relative ascendancy of the executive branch of government over the legislative.¹⁵ Some of the observations of scholars and pundits may have been justified. Despite that, it remains true that a democratic form of government requires the existence and full functioning of a Parliament. The legislative branch cannot be dispensed with, notwithstanding any national emergency. This reality is so self-evident that beyond stating it, no further argumentation seems necessary.

Abidance by the Constitution Acts, 1867–1982

Whatever measures Parliament, or either of its Houses, adopts, pursuant to s. 16 of the Constitution Act, 1867, Ottawa shall remain the capital city. That quality inherently endows the city with being the centre of government, including being the seat of the legislative branch. Whatever measures Parliament, or either of its Houses, adopts, pursuant to s. 5 of the Constitution Act, 1982, Parliament is constitutionally bound to meet once a year.

A Caution about Timing

In the late winter, spring, and early summer of 2020, while the first wave of COVID-19 was ravaging populations, in a number of democratic countries, a lively, indeed intense, public debate took place regarding the ability of parliaments to function at a time of pandemic. Considering that no parliament or similar body had ever functioned with either some or all of its members dispersed throughout a country, many citizens, indeed many legislators, questioned whether a legislative body purporting to function in either a partially or completely dispensed manner had the requisite legitimacy to be considered a valid institution and capable of making valid decisions. However, events "on the ground" would not wait for either public opinion or scholarly study. In consequence, necessity became the mother of invention and a number of parliamentary bodies began operating in a spread-out manner. This is true of, among others, the Senate and House of Commons of Canada. In a sense, therefore, the question has already been rendered moot by the force of circumstances. With the help of communications technology, the 43rd Parliament of Canada is operating with some of its members in Ottawa and others in various locations across the country. What current circumstances mean is that, in addition to examining the concept of dispersal, the study must look at:

- whether a dispersed or hybrid (partially dispersed) parliament can function in the future,
- whether a dispersed or hybrid (partially dispersed) parliament can function in circumstances other than a pandemic, and

¹⁵ See for example the writings of Professor Donald Savoie of the Université de Moncton. Available at <https://nationalpost.com/opinion/opinion-canada-needs-a-parliamentary-revival>.

- 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 Essence of Parliament

For centuries, Parliament was convened with its membership in a single location. In Canada and its provinces and territories, the single location meeting place can be said to have acquired the status of constitutional convention. However, in 2020, a single meeting location, that is, a system of the mutual presence and proximity of parliamentarians would put each member, as well as the parliamentary staff, in danger. The core issue is whether adaptation of the convention would destroy the essence of Parliament, whether it would deprive Parliament of legitimacy.

The essence of parliamentary democracy is reasoned political deliberation and decision-making, bounded by constitutionalism and the rule of law.¹⁶ This reality must be perceived as being subject first, to *the rule of necessity*: the law of parliamentary privilege requires that Parliament itself must protect its participants from incapacitation to participate.¹⁷ In a modern context, such incapacitation can be thought of as including causing imminent harm to their health and well-being. This reality must also be perceived as being subject to *the rule of viable possibility*. Given the latest audio-visual methodologies of communication, parliamentarians can participate in the workings of Parliament without simultaneous physical presence, but while maintaining full participation. Thus, adopting a purposive approach to the constitutional convention, no matter of how long-standing, can lead us to conclude that a dispersed or hybrid parliament does not dissolve the essence of Parliament and therefore should not be perceived as tainting its legitimacy.¹⁸ The best rationale in favour of the view expressed above is actual practice. In Ottawa,¹⁹ Parliament has actually begun to function in dispersed or hybrid fashion and its legitimacy is not questioned, in constitutional or legal terms. The custom has, effectively, been adapted.

¹⁶ This sentence is adapted from the author's own article entitled: *Coronavirus should not infect democracy*. Ottawa Citizen, June 8, 2010.

¹⁷ In this context, incapacitation to participate refers to the rules dealing with the prevention of parliamentarians from attending to their functions during a session as well as for a number of days before and after.

¹⁸ In testimony before the House of Commons Standing Committee on Procedure and House Affairs, on April 23, 2020, the author argued for the proposition that the "quorum" required in the House of Commons should be interpreted in the sense of participation, rather than simultaneous physical presence. Logically, the same interpretation should be considered valid in respect of the Senate.

¹⁹ *Parliamentary Duties and the COVID-19 Pandemic*: Fifth Report of the House of Commons Standing Committee on Procedure and House Affairs, Ruby Sahota, Chair, May 2020.

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 dispute. 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, one may question what addition or improvement to the functioning of Parliament adoption of this proposal would have implemented. In the context of COVID-19, the expression "essential services" did acquire another, COVID-19-specific meaning, relating to national critical infrastructure.²¹

The essential service debate was, however, constructive in another sense. It highlighted the rather sparse sitting schedule of the House of Commons²² throughout this period and pointed to the focused, but limited, legislative endeavours of the current Parliament.²³

Democracy and the Rule of Law

Democracy is a complex web of principles and practices, supported by texts of various degrees of an inherently binding nature. At its core is self-government in the public interest, executed by three branches of government, each of which has its proper role and function, working in a sort of balance. All of this should function subject to the rule of law. While the democratic nature of a government can be assessed in a variety of ways, the particular aspect of the overall concept that animates the present debate is that no branch of government should gain ascendancy over the others in any specific situation.

By its nature, COVID-19 represents an exception to the normal functioning of democracy. A suitable response to the circumstances of COVID-19 requires urgent and decisive science-based

²⁰ Available at <https://www.nationalnewswatch.com/2020/05/22/tories-want-parliament-declared-essential-service-regular-house-sittings/#.XygOUihKjIW>.

²¹ Available at <https://www.publicsafety.gc.ca/cnt/ntnl-scrtr/crtcl-nfrstrctr/esf-sfe-en.aspx>.

²² During the first seven months of 2020, the House of Commons met for only 37 days: January 27–31, February 3–7, 18–21, 24–28, March 9–13, 24, April 11, 20, 29, May 13, 25–26, June 10, 17, July 8, and 20–22. This is a far fewer number of sitting days than usual.

²³ During the first seven months of 2020, Parliament enacted only the following legislative items: Bill C-2 (SC 2019, c. 30), Bill C-10 (SC 2020, c. 2), Bill C-11 (SC 2020, c. 3), Bill C-18 (SC 2020, c. 9), Bill C-19 (SC 2020, c. 10), all of which were Appropriations Bills; Bill C-13 (SC 2020, c. 5), Bill C-14 (SC 2020, c. 6), Bill C-15 (SC 2020, c. 7), C-20 (SC 2020, c. 11), all of which were COVID-related Bills; Bill C-4 (SC 2020, c. 1), the CUSMA Trade Agreement Bill; Bill C-12 (SC 2020, c. 4), an amendment to the FAA; Bill C-16 (SC 2020, c. 8), an amendment to the legislation on the Canada Dairy Commission. During this time, not a single Private Member's Public Bill was enacted.

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 often 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 Act 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 or 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-19 had been noted in Canada.²⁷ It was on Wednesday, March 11, 2020 that the WHO declared COVID-19 to be a pandemic. By then, the virus was so widespread in Canada that the series of provincial declarations of state of emergency began in Québec the very next day. On Friday, March 13, the House of Commons reacted. The Hansard of that day records the pithy comment of the member for Saanich – Gulf Islands, Elizabeth May: “these are not normal times.”²⁸ Similar sentiments regarding the fundamental nature of the changes brought on by COVID-19 were voiced at Westminster.²⁹

March 13, 2020 marked the start of the adaptation of the rules of the House of Commons to the special circumstances of the abnormal times. In contrast to the several centuries of institutional setting, this motion of March 13 set the tone for the adaptation of the House of Commons, and ultimately of the entire Parliament of Canada, to the extraordinary circumstances of COVID-19. Three specific characteristics should be noted in this process. First, the Standing Orders were neither repealed nor even suspended; rather, they were left in place. Second, on a pragmatic basis, when and where necessary, the Standing Orders were augmented by new and deliberately temporary rules framed in terms of either motions or sessional orders. These would have the effect of suspending discrete elements of the more permanent Standing Orders, but only for the duration of the public health emergency, or to be more precise, until Parliament itself would declare that the public health emergency was resolved. Third, the guiding principle of these temporary changes was, and indeed on several occasions was specifically declared to be, the public interest.

Meetings: Method and Frequency

The primary and perhaps so far most controversial issue regarding the functioning of Parliament was that of how, and how often, it could meet in the current pandemic circumstances while protecting the health of MPs.³⁰ Generally speaking, there were three possible models: the *status*

²⁷ Available at <https://www.canadianhealthcarenetwork.ca/COVID-19-a-canadian-timeline>.

²⁸ Available at <https://www.ourcommons.ca/DocumentViewer/en/43-1/house/sitting-31/hansard> at 10:14.

²⁹ Available at https://www.theguardian.com/news/audio/2020/jun/10/the-rees-mogg-conga-how-has-the-pandemic-changed-parliament-podcast?utm_term=RWRpdG9yaWFsX0d1YXJkaWFuVG9kYXlVS19XZWVrZGF5cy0yMDA2MTA%3D&utm_source=es&utm_medium=Email&CMP=GTUK_email&utm_campaign=GuardianTodayUK.

³⁰ Available at <https://www.ctvnews.ca/politics/don-martin-mps-should-boost-pandemic-productivity-by-physical-distancing-from-house-1.4978645>.

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. On a different level of reasoning, MPs vigorously discussed the issue of how often to meet.³¹ At first, long-held positions were deeply entrenched;³² over the course of time and in the face of inescapable facts, opinions have softened.³³ Through subsequent motions, the Commons gradually introduced into parliamentary procedure the use of videoconferencing and teleconferencing. This was a hotly debated issue, amongst other reasons because of its novelty.

The legal – procedural crux of the debate at the so-directed committee meeting was the notion of "quorum." For centuries, quorum had been interpreted as meaning "simultaneous physical presence." The notion that, using the purposive methodology favoured by the Supreme Court of Canada, it could be understood to mean "participation" was argued by a number of experts.³⁴ To a great extent in response to circumstances, the idea of dispersed meetings has by now been adopted. None of this stops MPs from making partisan points on the issue.³⁵

Starting on March 13, 2020, the Commons also determined that its meetings be less frequent and less regular than the 2020 parliamentary calendar would have originally called for. In fact, from March 13 until September 1, the time of writing of this section, the House will have sat for only 15 days.³⁶ This change had unexpected side effects in that it would entail rather substantial infrastructure costs. However, such a matter could be overcome. Within a few weeks, the media analysis became more positive, forecasting improvements.³⁷

Committee Structure

Following the March 13 adjournment of its normal proceedings, the House of Commons quickly realized that it would have to focus its committee work on Covid-related issues. Thus, as early as April 11, it started adopting motions in which it specifically allowed certain committees to hold meetings, as long as these were "for the sole purpose of receiving evidence related to the COVID-19 pandemic".³⁸ What is of far greater importance, indeed an innovative feature of the work of the Commons, is that on April 20, by motion, the House recreated itself as a Special Committee

³¹ Available at <https://www.cbc.ca/news/politics/mp-voting-virtual-parliament-1.5639677> and

<https://www.prpeak.com/news/north-island-powell-river-mp-involved-in-restructuring-parliament-1.24168606>.

³² Available at <https://vancouver.sun.com/pmn/news-pmn/canada-news-pmn/tories-want-in-person-parliament-but-no-electronic-voting-by-mps-during-pandemic/wcm/3bb76188-491f-4a41-953e-17a107fc2aed/>.

³³ Available at <https://ottawacitizen.com/opinion/editorial>.

³⁴ Amongst others, this was argued by the undersigned in testimony before the Commons Standing Committee of Procedure and House Affairs (PROC) on Thursday, April 23, 2020. Ironically, that meeting itself was conducted by videoconference rather than in person. See *Parliamentary Duties and the COVID-19 Pandemic*, Report no. 5 of the PROC Committee, May 2020.

³⁵ Available at <https://www.nationalnewswatch.com/2020/07/04/you-have-to-show-up-ndp-mp-questions-virtual-attendance-of-alberta-tories/#.XzBxKShKjIX>.

³⁶ Available at <https://www.cbc.ca/news/politics/grenier-house-sittings-1.5629082>.

³⁷ Available at <https://www.cbc.ca/news/politics/parliament-commons-trudeau-scheer-1.5591224>.

³⁸ Available at <https://www.ourcommons.ca/DocumentViewer/en/43-1/house/sitting-33/hansard> at 12:25.

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 in an alternate fashion, it also referred to the House as “the grand inquest of the nation.” These fundamentals of the parliamentary process have remained unchanged. None of the motions or sessional orders resulting from the COVID-19 circumstances altered the essence of the legislative process, nor the deliberations of parliamentarians. Nevertheless, there is some unease as to what changes to parliamentary deliberation and debate a hybrid Parliament could bring.³⁹

Voting

Over the course of Westminster-originated parliamentary history, it has been taken for granted that voting could take place only in person, that is by the member of Parliament (MP), in his or her place, in the chamber. In the Canadian variant of the Westminster model, within these parameters, there were votes by counting the members, by voice, or by transposition of earlier votes. In sharp contrast, COVID-19 has raised the prospects of voting through the use of machinery and voting in a dispersed manner, with some MPs being physically located in the House and others in various locations. The House itself has not adopted any new rules on this topic. Observers of the parliamentary scene will note, however, that this matter has become a serious controversy, dividing political parties. For the first time in Canadian parliamentary history, serious consideration is being given to electronic or virtual voting.⁴⁰

Supply

The sense in which the term “Supply” is used here refers to the constitutionally based requirement for Parliament to approve the expenditure of funds by the government of the day. The legislative consequence of Supply are Appropriations Acts. Without Supply, the Government of Canada is unable to function. In the COVID-19 period, the following Supply measures have been enacted:

- C-2 – which became S.C. 2019, c., 30;
- C-10 – which became S.C. 2020, c., 2;

³⁹ Available at <https://www.ctvnews.ca/politics/technology-representation-butt-heads-amid-debate-over-resuming-parliament-1.4952428>.
<https://www.nationalnewswatch.com/2020/05/27/ok-lets-make-history-hybrid-house-of-commons-convenes-to-debate-COVID-19/#.XzB3uyhKjIW>

⁴⁰ Available at <https://www.hindustantimes.com/world-news/canadian-parliament-plans-to-launch-virtual-voting-for-mps/story-V5eVF0uvglD3nrgorQ7c3L.html>.

- C-11 – which became S.C. 2020, c., 3;
- C-18 – which became S.C. 2020, c., 9; and
- C-19 – 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 disruption of Question Period, the government took the initiative in fostering inter-party cooperation. Notwithstanding this seemingly parliamentary good will, the political parties continued to engage in seriously contentious public discussion and debate.

Holding the Government to Account: Audits and Program Reviews

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 expenditures incurred by the government were subject to audit.

⁴¹ Available at <https://www.theguardian.com/commentisfree/2020/apr/19/the-guardian-view-on-parliaments-return-in-dark-days-mps-must-shine-a-light>.

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.

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

There seems to be a consensus that if Canada is to avoid the possibility of a statutorily unscheduled⁴² 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

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

Pursuant to the Standing Orders of the House of Commons, private members, so-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.

Holding the Government to Account: Appointment of Officers of Parliament

On February 2, 2019, Auditor General Michael Ferguson, one of the officers of Parliament, died unexpectedly. On April 20, 2020, as part of an overall motion regarding parliamentary procedure in the face of COVID-19, the leader of the government in the House of Commons, called upon the government to initiate the steps required to have a successor designated. This required use of s. 3(1) of the Auditor General Act and Standing Order 111.1 to fill the vacancy. The importance of this matter is the demonstration that even in times of emergency, the necessary work of Parliament must continue.

⁴² See Canada Elections Act, S.C. 2000, c. 9, s. 56.1

⁴³ Available at http://www.iconnectblog.com/2020/05/governments-of-national-unity-a-potential-solution-to-legitimacy-crises-caused-by-the-pandemic/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+I-CONnect+%28I-CONnect+Blog%29.

⁴⁴ See Chapter XI of the Standing Orders of the House of Commons and Chapter 21 of House of Commons Procedure and Practice, 3rd ed. by Bosc and Gagnon.

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, foolproof, 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 departments and agencies of the Government of Canada that have responsibility for dealing with matters of health, in particular pandemics; and
 - a larger and broader review, actually to be conducted by HESA itself, would have as its aim to review the actual functioning of the entire federal health sector to determine Canada's future pandemic readiness including
 - a look at the Department of Health Act, the Public Health Agency of Canada Act, the Quarantine Act and the Emergencies Act to examine whether the Government of Canada has sufficient statutory and regulatory powers to adequately deal with situations of pandemic on an urgent basis; and
 - an examination of the federalism aspect of the matter, namely whether there exist sufficient coordination mechanisms among the chief medical officer of health of Canada and the chief medical officers of health of the

provinces and territories to engender a nation-wide strategy to deal with pandemics.

- Consider the establishment of a position of a parliamentary medical officer of health (PMOH). The PMOH could be an official in the employ of the two Houses. Another option would be to render the PMOH an officer of Parliament, though this would require amendment of the Parliament of Canada Act. The holder of this position should be a medical doctor or a specialist in virology, tasked with ensuring the medical (including physical and mental) safety, security, and well-being of senators, members of Parliament, the staff of the administration of each of the Houses, the staff of senators and members, as well as the staff of recognized political parties and independent parliamentarians.⁴⁵

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⁴⁵ The best indication of the fact that such a position is required is the public confusion regarding Parliament's jurisdictional autonomy vis-à-vis the City of Ottawa. See <https://ottawacitizen.com/news/politics/mask-bylaw-applies-throughout-ottawa-but-not-on-parliament-hill/wcm/a1e8b4ef-0f36-4cf5-9951-8ce617f3f6ff/>.

COVID-19, Cabinet, and Central Agencies⁴⁶

Dr. Lori Turnbull

Abstract: *Westminster parliamentary systems are often criticized for concentrating or centralizing power in the hands of the prime minister and a small number of close advisors, including select cabinet ministers, trusted political staff, and senior public officials such as the clerk of the privy council. As was to be expected, in the federal government's response to COVID-19 as both a public health and an economic crisis, central agencies were front and centre. Though it is clear that central agencies played their horizontal coordinating role in many ways as was required of them to manage the federal government's response to COVID-19, it is also possible that the complexities of the crisis overwhelmed the traditional central coordinating function. In some cases, the horizontal collaboration and coordination that is necessary to ensuring coherence and calibration across departments did not happen. This exploration of key activities of the three main central agencies during the COVID-19 crisis suggests that there is a need for more research, both in the federal and provincial contexts, about the operationalization and effectiveness of central coordination during times of crisis.*

Introduction

Westminster parliamentary systems are often described in critical terms for concentrating or centralizing power in the hands of the prime minister and a small number of close advisors, including select Cabinet ministers, trusted political staff, and senior public officials such as the clerk of the privy council. Donald Savoie's analysis of "court government" in Canada depicts a top-down approach to governance and decision-making with very little in the way of real accountability for the powerful few.⁴⁷ Several factors reinforce the trend toward the centralization of power and decision-making, including globalization, a tendency to focus on the leader, the culture of strong party discipline in Canada, and the prime minister's power of appointment. Ministers, staffers, and senior public servants alike, whose positions are filled by the prime minister, cannot help but recognize the incentive for responsiveness to the prime minister's agenda and preferences should they wish to be part of the inner circle.

Responsiveness looks different for each of these sub-groups within the prime minister's inner circle. Political staff in the prime minister's office (PMO) serve at the pleasure of the prime minister and are presumed to share political values and objectives, so staff advice tends to focus on how to coordinate ministers to achieve political goals without setting off political landmines. Senior public servants are expected to give frank, objective advice, even if the prime minister does not want to hear it. However, that advice, to be relevant, must not be politically tone deaf. Ministers, for their part, owe their jobs to the prime minister but also come with constituencies, political backing, as well as personal and professional expertise. While all ministers must

⁴⁶ An earlier and shorter version of this argument appeared in the *Ottawa Citizen* as "The Coronavirus Challenge to Democracy: Who's in Charge?" June 1, 2020. Available at: <https://ottawacitizen.com/opinion/turnbull-the-coronavirus-challenge-to-democracy-whos-in-charge/wcm/160dc189-38f9-4163-b4b4-e4686ae7107d/>.

⁴⁷ Donald Savoie, "The Rise of Court Government in Canada," *Canadian Journal of Political Science* (1999).

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 entities in that they have a “central coordinating role” that comes with considerable power and 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 tension to the extent that central agencies push back on the initiatives of line departments, ostensibly as part of the effort to maintain coherence, which can lead to frustration by line departments and to a struggle over territory and mandate. The central agencies’ relative power as compared to line departments mirrors that of the power of the prime minister’s inner circle as compared to other ministers.

As was to be expected, in the federal government’s response to COVID-19 as both a public health and an economic crisis, central agencies were front and centre. The Department of Finance led efforts to fortify the Canadian economy as businesses, schools, government offices, and all public places closed abruptly in March of 2020 to contain the spread of COVID-19. Unprecedented levels of financial support through a range of new programs went to businesses, seniors, students, and laid-off workers. The Treasury Board Secretariat oversaw the migration of the federal public service to remote work, a huge undertaking that could have far-reaching implications for the nature and organization of work in the future. The Privy Council Office provided support to both Prime Minister Justin Trudeau and Deputy Prime Minister Chrystia Freeland in their leadership roles, as well as to the newly created cabinet committee on COVID-19.

Though it is clear that central agencies played their horizontal coordinating role in many ways as was required of them to manage the federal government’s response to COVID-19, there is a need for future research on how the coordination function was exercised during the pandemic period. Is it possible that the complexities of the crisis overwhelmed the traditional central coordinating function which, in some cases, affected the horizontal collaboration and coordination necessary to ensure coherence and calibration across departments did not happen? With short timelines and urgent needs, it became necessary to delegate and divide work so that objectives were met. In the words of Carla Qualtrough, minister for employment, workforce development, and disability inclusion: “It was a pandemic and things were crazy and we were going at break-neck speed.”⁴⁹ The emphasis was placed on getting things done rather than getting things done

⁴⁸ Alex Smith, “The Roles and Responsibilities of Central Agencies” (Library of Parliament, 2009). Available at <https://central.bac-lac.gc.ca/.item?id=2009-01-eng&op=pdf&app=Library>.

⁴⁹ Kathleen Harris, “Government dropped the ball on WE Charity deal, Qualtrough says,” *CBC News*. August 11, 2020. Available at <https://www.cbc.ca/news/politics/liberal-we-charity-student-program-chagger-qualtrough-1.5681995>.

perfectly and, as a result, the usual protocols with regard to coordination between and across departments were not always followed. At the same time, political realities during COVID-19 resulted in changes in the structure and composition of Cabinet; in turn, these changes had a significant impact on the work of the central agencies that support the Cabinet.

This short section explores the main activities of the three central agencies during the COVID-19 crisis and suggests that there is a need for more research, both in the federal and provincial contexts, about the operation and effectiveness of central coordination during times of crisis. Further, there is a need for further research on the implications of the structure and organization of Cabinet government for central agencies. As Peter Aucoin argued back in 1986, the organization of the machinery of government – including central agencies – has evolved over time according to the leadership style of the prime minister.⁵⁰ There is a need for more research on how this affects governance both during times of crisis and more generally.

The Department of Finance: Emergency Financial Support

The Department of Finance plays the lead role in developing the “fiscal framework” for the Government of Canada.⁵¹ Officials support the minister of finance in all matters related to the raising and spending of money. All other departments must work with Finance to procure the necessary resources for their policy initiatives. In the case of the federal government’s response to COVID-19, several departments and agencies coordinated with Finance to provide emergency support programs for businesses and individuals. Key programs include the Canada Emergency Response Benefit, the Canada Emergency Wage Subsidy, and the Canada Emergency Business Account. In addition to these programs, the federal government offered tax and loan deferrals, as well as special payments and top-ups. As of July 2020, the federal government’s COVID-19 response measures totaled over \$212 billion and represented 14 percent of gross domestic product (GDP). The programs were delivered in collaboration among the Department of Finance, the Canada Revenue Agency (CRA), and Employment and Social Development Canada.

Normally, the most important piece of business for the Department of Finance is the annual budget. However, the government determined that the uncertainties of the pandemic made economic predictions impossible and opted to offer a “fiscal snapshot” in July rather than a full budget. This was a controversial decision, given that economic predictions are always somewhat uncertain, and it could be argued that the need for transparency was greater than the need for certainty. Nevertheless, in a speech before the House of Commons, then Finance Minister Bill Morneau explained that, in rolling out the emergency benefits package, the government kept its emphasis on three key priorities: speed, scale, and simplicity.⁵² This speaks to the government’s intent to get money out to the people and businesses that needed it; it vowed to fix mistakes

⁵⁰ Peter Aucoin, “Organizational Change in the Machinery of Canadian Government: From Rational Management to Brokerage Politics,” *Canadian Journal of Political Science* 19, no.1.

⁵¹ Smith 2009.

⁵² Department of Finance, “Economic and Fiscal Snapshot 2020,” July 8, 2020. Available at <https://www.canada.ca/en/department-finance/news/2020/07/economic-and-fiscal-snapshot-2020--house-speech.html>.

later rather than strive for glitch-free administration up front. The public service was lauded for its responsiveness, including former Clerk of the Privy Council Mel Cappe who championed the focus on progress rather than perfection.⁵³

Both former Finance Minister Bill Morneau and Parliamentary Budget Officer Yves Giroux have stated that the deficit, which increased to \$343 billion due to COVID-19 response measures, could be manageable without increased taxes due in large part to the low cost of borrowing.⁵⁴ But this all depends on whether the measures are temporary; a second wave of COVID-19 could create a need for another emergency aid response.

The Treasury Board Secretariat: Support for, and Coordination of, Remote Work

The Treasury Board Secretariat (TBS) provides horizontal oversight on the following issues: the government's financial management and spending, human resources, defence procurement, and the government pay system. As the employer for the Government of Canada, the TBS is responsible for maintaining a common framework for "administrative, personnel, financial and organizational practices across government."⁵⁵ During the pandemic, it became necessary for the federal public service to move very quickly to working remotely while responding to the urgent needs of the public. TBS issued guidelines to support this transition, including information on the following topics: how to set up an effective home office; how to collaborate with colleagues and teams using digital technology; how to manage sensitive, classified, or protected information from home; how to maximize productivity while maintaining a healthy work/life balance; how to facilitate bilingual conference calls; and, how to be mindful of challenges with respect to equity, diversity, and inclusion.⁵⁶

In June of 2020, as physical distancing restrictions eased and provincial economies began to reopen, Treasury Board President Jean-Yves Duclos announced that the TBS had worked with Health Canada and Public Services and Procurement Canada to develop plans and guidelines for the eventual reopening of federal workspaces. However, many employees will continue with remote work for the foreseeable future and the reopening of federal offices will be gradual and in keeping with public health regulations.⁵⁷

⁵³ Peter Zimonjic, "How Do You Process a Million EI Claims? Don't Try to Make It Perfect, Say Experts," *CBC News*, March 25, 2020. Available at <https://www.cbc.ca/news/politics/covid-experts-employment-insurance-parliament-1.5509000>.

⁵⁴ Hannah Jackson, "Canada's Deficit 'Manageable' without Tax Increase if COVID-19 Measures Temporary: PBO," *Global News*, August 2, 2020. Available at <https://globalnews.ca/news/7245944/coronavirus-canada-taxes-pbo/>.

⁵⁵ Treasury Board Secretariat, "Treasury Board of Canada Secretariat Mandate," 2018. Available at <https://www.canada.ca/en/treasury-board-secretariat/corporate/mandate.html>.

⁵⁶ Government of Canada, "Coronavirus Disease (Covid 19): Working Remotely," 2020. Available at <https://www.canada.ca/en/government/publicservice/COVID-19/working-remotely.html>.

⁵⁷ Treasury Board of Canada Secretariat, "Statement by the Honorable Jean-Yves Duclos on the Easing of Restrictions Related to COVID-19," 2020. Available at <https://www.canada.ca/en/treasury-board-secretariat/news/2020/06/statement-by-the-honourable-jean-yves-duclos-on-the-easing-of-restrictions-related-to-COVID-19.html>.

The Privy Council Office: Support for Cabinet

The Privy Council Office (PCO) is the public service department that provides support for Prime Minister Justin Trudeau and Deputy Prime Minister Chrystia Freeland, both of whom played lead roles in the federal government's response to COVID-19. It also provides support for the Cabinet Committee on COVID-19, which was created in early March and is chaired by Minister Freeland. Other members include Jean-Yves Duclos, president of the treasury board; Navdeep Bains, minister of innovation, science and industry; Bill Blair, minister of public safety and emergency preparedness; Patty Hajdu, minister of health; Melanie Joly, minister of economic development and official languages; Bill Morneau, minister of finance (resigned); and Carla Qualtrough, minister of employment, workforce development and disability inclusion. The ministers on this committee were the most visible to the public during the pandemic period. They participated in joint press conferences with Dr. Theresa Tam, chief public health officer, and in announcements on emergency benefits and public health regulations.

In a press release, the prime minister described the role of the committee in the following terms: "It will meet regularly to ensure whole-of-government leadership, coordination, and preparedness for a response to the health and economic impacts of the virus. This includes coordination of efforts with other orders of government."⁵⁸ Clearly, the key word here is *coordination*. The ministers from all three central agencies are present in this group, as well as other ministers whose portfolios are critical to the COVID-19 response. The committee's work complements that of the Incident Response Group, appointed by the prime minister back in 2018. Though not a Cabinet committee because its membership can extend to senior officials who are not privy councillors, the Incident Response Group is a "dedicated, emergency committee" that convenes "in the event of a national crisis." The Group, like the COVID-19 Cabinet committee, performs a coordination function; in the event of an emergency, the individuals who are called to be part of the group come together "to coordinate a prompt federal response and make fast, effective decisions."⁵⁹ The membership on this committee changes depending on the emergency, as different situations would require engagement from different portfolios, but the prime minister and the deputy prime minister are always at the table.

Analysis

After the general election of 2015, which resulted in a majority government for the Liberal Party, Prime Minister Trudeau indicated his preference to move away from the concentration of power that Savoie and others describe in favour of a "government by Cabinet" approach. He spoke of his commitment to open, transparent, and accountable government and to ending the tradition of a powerful, omnipresent PMO. Prime Minister Trudeau pledged to empower ministers by trusting them to manage their files and run their departments. He appointed Canada's first

⁵⁸ Prime Minister of Canada, "Prime Minister Creates Committee on Covid 19," March 4, 2020. Available at <https://pm.gc.ca/en/news/news-releases/2020/03/04/prime-minister-creates-committee-COVID-19>.

⁵⁹ Prime Minister of Canada, "Prime Minister Announces Changes to the Cabinet Committees," August 28, 2018. Available at <https://pm.gc.ca/en/news/news-releases/2018/08/28/prime-minister-announces-changes-cabinet-committees>.

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 appointed a “priorities and planning” committee of Cabinet. 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 Minister Trudeau’s approach to Cabinet has been flat 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 Minister Trudeau’s leadership, full 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 between Prime Minister Trudeau’s approach and that of his late father in terms of their attitudes toward the concentration of power, they both show an inclination toward a collegial, robust, empowered full Cabinet. The elder Prime Minister Trudeau believed in making decisions on the basis of rationality and reason. This approach lends 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 capacity for policy advice and coordination grew under the first Prime Minister Trudeau’s leadership as the matters before government became more numerous and complex.⁶⁰ Colin Campbell described “highly differentiated central agencies (that) support(ed) ministers’ efforts toward collective decision-making.”⁶¹ But Prime Minister John Turner found this system of Cabinet government and strong, engaged central agencies to be “too elaborate, too complex, too slow and too expensive.” Central agencies were perhaps too big and too powerful, and cabinet too reliant upon them. The late Peter Aucoin described how Prime Minister Turner, followed by Prime Minister Brian Mulroney, altered the central machinery of government to effectively concentrate and streamline executive decision-making.⁶² This alteration had the effect of recasting the role of central agencies. Aucoin described the leadership style of Prime Minister Brian Mulroney as “transaction” rather than rational; power was concentrated in the hands of the prime minister and the priorities and planning committee. His tendency toward “bureaucracy bashing,” combined with the dismantling of the complex committee system that Prime Minister Trudeau had developed, undermined the role and function that central agencies had played in support of Cabinet. A version of this approach was resurrected with Prime Minister Harper.

For the current Prime Minister Trudeau who, in his first days on the job, lauded the benefits of “Cabinet government,” the creation of the Incident Response Group and, later, of the COVID-19 Cabinet committee signalled an important shift in his thinking about cabinet government; each of these committees is, in its own way, a “priorities and planning” committee in that each

⁶⁰ Aucoin 10.

⁶¹ Colin Campbell, *Governments Under Stress* (Toronto: University of Toronto Press, 1983), 351.

⁶² Peter Aucoin, “Organizational Change in the Machinery of Canadian Government: From Rational Management to Brokerage Politics,” *Canadian Journal of Political Science* (1986).

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 is moving toward “court government.” Her competence and ambition, combined with the broad range of issues that fall under her portfolio as deputy prime minister, cannot help but elevate her status and power among ministers. Further, the departure of Bill Morneau as minister of finance in August of 2020 necessitated a cabinet shuffle. Minister Freeland is now both the deputy prime minister and the minister of finance, which means that two central agencies now work in support of her: both the Department of Finance and PCO. There is a need for further research on how this dual appointment will affect the role and independence of the two central agencies.

Recommendations

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 on the implications of the structure and organization of Cabinet government for central agencies in relation to the leadership styles of prime ministers in normal times and crises.

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The Public Sector/Service

Public Policy and Delivery: Temporary Response or Creating New Pathways?⁶³

Andrew Graham, Eugene Lang, and Toby Fyfe

Abstract: *Government played a pivotal role in the response to COVID-19, adopting new policies and administrative practices with speed, innovation, and sharp focus. This section identifies both policy and public-sector administrative issues arising from the response. Policy fault lines emerged such as long-term care. Further, the short-term policy responses to the crisis, especially on the economic side, require a careful unwinding. The crisis has created new issues of what exactly is public safety that need debate. Finally, there needs to be a national discussion to create a roadmap into the changed world. On the public-sector side, the crisis showed that policy design can change and engage more stakeholders. The public sector has to adapt to the new work environment while building better public services. Finally, the public service needs to rethink, profoundly, its management of risk to better serve the public good it exists to serve.*

Introduction and Bottom Line

Canada's public service, from frontline workers to top leadership, has risen to the challenges of the COVID-19 crisis. In general, the federal government has delivered unprecedented financial support to Canadians with bewildering speed and has dealt with the public health dimension of split federal-provincial-municipal jurisdictions reasonably well. The response reveals a public service ready and willing to adapt. No one predicted this crisis and there was no existing battle plan for it. The public service and its political leadership have had to improvise, innovate, and turn on a dime over the past few months. These are traits not normally associated with government.

In policy development, decision-making and program and service delivery, the public service – with a mandate, and a lot of top cover from their political masters – has experimented and innovated to navigate unprecedented government intervention in the economy and the lives of Canadians. Policies and programs have been made and implemented at lightning speed, using new ways to both create and deliver them. Old rules have been set aside, but not necessarily abandoned permanently. Even within the Canadian public service writ large (federal, provincial,

⁶³ Earlier versions of this contribution appeared as separate Op Eds in the *Ottawa Citizen*: Andrew Graham (School of Policy Studies), "After the Pandemic: Three Challenges to the Public Service," June 29, 2020. Available at <https://ottawacitizen.com/opinion/graham-after-the-pandemic-three-challenges-to-the-public-service>; Toby Fife (School of Policy Studies, Institute on Governance), "The Great Policy Unwind: Post-Pandemic Canada's Leaders Must Decide How to Tackle Fresh Challenges," June 22, 2020. Available at <https://ottawacitizen.com/opinion/fyfe-the-great-policy-unwind-post-pandemic-canadas-leaders-must-decide-how-to-tackle-fresh-challenges>; and, Eugene Lang (School of Policy Studies), "COVID-19 Aftermath – The Government Can't Keep Improvising Forever," June 15, 2020. Available at <https://ottawacitizen.com/opinion/lang-COVID-19-aftermath-the-government-cant-keep-improvising-forever>.

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

A controversy associated with the government's attempt to deliver support to students through 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. The risk is that this controversy will turn into a full-blown scandal and blot out all the good that has been done to date by Ottawa in managing this crisis.

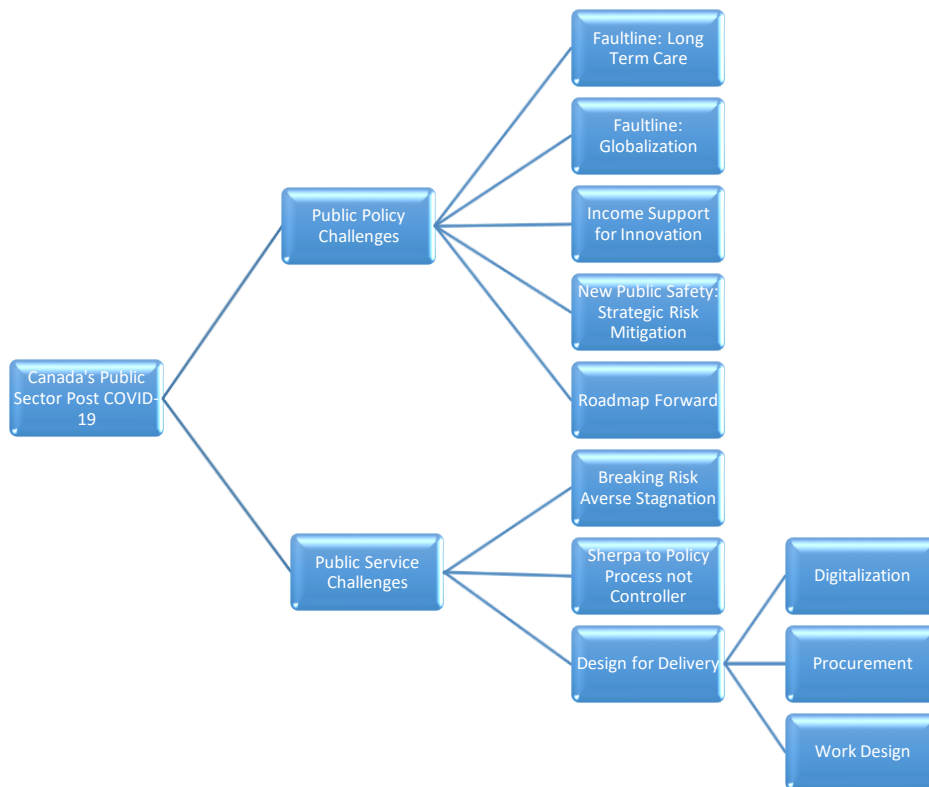
The big question is whether the response to a unique and profound emergency will lead to better governance, policy, and service delivery to Canadians. Is this a critical juncture or simply a systemic one-off response with a return to the old ways? What can be learned from this crisis to improve the policymaking process – more specifically to improve its speed, to break out of orthodoxies, to take on more risk and thus ensure the public sector's relevance? Has the crisis shown the path to “the new public service”? Has it changed the skill sets needed of public servants? Has it changed the “role of government”?

In other words, what should governance in Ottawa and beyond look like once the pandemic is under control and Canadian life, and the work of public servants and policymakers, gets back to some form of normality? Or, will the old forms of governance return uninformed by this experience and will the policy agenda ignore both the glaring faultiness and immense challenges that this crisis is opening up?

On the policy front, we identify three types of challenges, both serious and both demanding a concerted cross-governmental response:

1. **Fault lines:** It will be necessary to recoup and repair the fault lines that emerged in the crisis, particularly long-term care and sovereign control and supply in a global, just-in-time economy.
2. **Building out of the great unwinding:** A process is required to unwind many of the policies put in place to address the crisis in a way that addresses specific fundamental public policy challenges and creates an opportunity to fill policy gaps. We focus on unemployment support in the modern economy and a redefinition of public safety. These are the wicked problems.
3. **A roadmap to sustaining the country:** At some point Canadians will need a sense of how governments will work their way out of fiscal deficits that have been created on a scale not seen since the Second World War, and a ballooning debt level that future generations will have to live with.

This chart summarizes the policy and public service issues we discuss:



What We See Happening

Eugene Lang has called the current phase “gigantic government,” which “seems to mean creating and then adjusting public programs and initiatives on a daily basis and at lightning speed, in a way we have never seen before. Process government — where respecting methodical government processes are as important to officials and ministers as the policy output itself — is a luxury that is out the window in this era.”

This quotation captures some of the signals about the most important trends coming out of this crisis that may well lead to major policy challenges and changes to how public service in the country work. Long standing orthodoxies about what to do and how to do it have been cast aside in the effort to tackle the unrivalled, ongoing, and ever-changing challenges thrown up by the COVID-19 crisis.

In the process, Ottawa is learning things about the real economy – small, medium, and large businesses and how they actually operate, the constraints they face, how their management thinks, the vulnerabilities of their workers – that officials and politicians have never before been exposed to. Daily stakeholder calls, for example, between senior officials in several departments and hundreds if not thousands of people across the country, from all walks of life, try to get the on-the-ground truth of what is going on in the economy and in communities, has become an

important feature of the policy process in the COVID-19 crisis. It is a labour-intensive feedback loop between the federal government and citizens, the likes of which we have never seen before, and it has had a significant impact on policy development (or at least policy adjustment) and service delivery. People who have rarely if ever interacted directly with federal officials before are now doing so on a regular basis to help shape outcomes.

Risk tolerance, by federal government standards, has seen a new day, permitting if not demanding, rapid, out-of-the-box policy thinking and expedited decision-making. The urgency to get financial support to people and businesses has brought new meaning to the term “customer service” as new programs have been developed and implemented rapidly. As noted, there have missteps, but overall, given the number of initiatives and their scope, that preparedness to take risk to service the needs has worked.

Age-old processes designed to ensure methodical decision-making and accountability became an unaffordable luxury. The concept of an annual budget, for example, that compiles all major new expenditures for the coming year or two, has been obliterated by the announcement of budget level expenditures on a weekly basis, without much controversy. This is not sustainable or compatible with the rights and duty of Parliament to approve government spending.

The centralization of government, particularly the increasing power of the Prime Minister’s Office, Finance Canada and the Privy Council Office – a well-documented trend for a generation now – has been taken to a higher level. This has short-circuited decision-making on vital files, getting the funding, policy design and delivery lined up quickly. It has also produced a potential echo-chamber of like-minded officials and political masters to the exclusion of other departments and more distant players and parts of government.

Cross-departmental communication and cooperation – always a major cultural and practical challenge in the Canadian variant of Westminster government – seems to have improved in the past few months.

Remote working is suddenly the norm for tens of thousands of public servants. The government and its IT systems have not collapsed, as many predicted, though gaps in the government’s ability to work remotely and securely have been exposed. While remote working has worked in the short-term and is certainly a testament to the many public servants carrying on their work remotely, is it sustainable? What, in fact, should the future of work look like in a government with hundreds of thousands of employees, multiple classifications, and a huge real estate footprint across the country?

In short, experiments have been tried in both policy and public administration that never would have been attempted without this crisis. In a sense, the federal government has become a giant policy and administrative laboratory, producing both successes and failures, as in any innovative enterprise.

This is improvisational government. And, it is unsustainable. At a certain point in time, when the virus is under control, and the economy begins to recover, there will be a need to unwind many of the programs, procedures, and attitudes put in place to respond to the crisis, in an effort to get back to some kind of “normal.” The challenge is to define what “normal” should now look like: how to keep what works, how to land in the right policy zone, and adapt the public service based on this experience. What follows are the challenges in each of these areas.

The Policy Challenges

Two themes emerge from how the government has adapted quickly and nimbly to changing events. The first deals with the policy process and the second with specific policy challenges in the great unwind. For, as Heath Pickering from Belgium’s Public Governance Institute has pointed out, “The idea is that these policies are temporary, to be drawn back or expire after first use or when the pandemic subsides. However, history tells us that some of these policies will remain in place post-pandemic.”

How Policy is Made

The crisis policy-making process reflected both an increased risk tolerance and a willingness to adapt decision-making processes. First, by necessity, the policy process was shortened from over time to overnight. Governments, including the federal government, made announcements and then changed them the next day, not with a flood of criticism and defensiveness but with acknowledgement that changing events and data had to be responded to not just managed and word-crafted.

The government learned and adjusted on the fly and we saw creative destruction public service style: make a mistake, identify and acknowledge it, try to correct it quickly, and move on. This is innovation. It is also the antithesis of how policy has been made for decades, where governments have taken considerable time to minimize mistakes, admit them with great reluctance when they are evident, and demonstrate an even greater reluctance to fix that which was not seen as broken.

Second, the actors in the policy process shifted, although neither development was new, just more powerful. At times, private sector and not-for-profit sector players were at the heart of the design process. Sectors were so affected by the government-engineered shut down that they became part of the mitigation process – is there a lesson here that requires a new approach to bringing outside actors more formally into the policy process? On the other hand, technical experts within and outside government played a much more central role in the rapid-fire policy design. In the end, with so many changes and adjustments underway, there was mix of centrally driven policy initiatives as well as more decentralized ones. This pragmatic realism, combined with a much greater focus on implementation and feasibility, as well as speed, proved the capacity of the government to respond to the needs of the public.

Long-term care: With the tragic deaths of residents and the overwhelming of service personnel, the pandemic exposed one of the great lies in Canada's healthcare system. Put simply, long-term care, often touted as the solution for bed blockers in acute care and a service much in need as the boomer generation ages, is a hodgepodge of provincial, local, and private programs, some publicly funded some not, some regulated well, some with frontline workers paid at appalling rates. The policy challenge is whether to take it in under the umbrella of the national healthcare system. Currently, this is not federal jurisdiction as most of health care is not. Certainly, individual provinces, which carry the responsibility for regulatory and funding oversight, are already being forced to make major changes. They will also be pressing the federal government to pony up funding. The greater challenge is whether to open up our much-vaunted national healthcare policy to recognize this as a fault in the system that needs rectifying.

Globalization: For all its great momentum and advantages, globalization has shown its weaknesses in terms of Canada's near-total dependencies for vital healthcare products, pharmaceuticals, and critical materials from other countries, notably China and the United States. The crisis has shown the exposure Canada faces in the globalized supply chain and the need to develop, to a limited degree, more Canadian industrial capacity or strategic sourcing relationships that can be relied upon in extremis to move Canada to the front of the line in securing essential goods. Deputy Prime Minister Chrystia Freeland has alluded in public to this need. Can we step back and take a look at globalization and, without abandoning what good it does, be more realistic about its risks? Globalization has emerged from this crisis with a bad name. Governments need to engage in a robust discussion about its pros and cons. This will be tough to do.

Building Out of The Great Unwinding

Our identified wicked problems are consequential and major, but more amorphous and, to a degree, more in need of in-depth policy leadership.

The great unwind: New income support programs such as the Canada Emergency Response Benefit (CERB) the Canada Emergency Student Benefit, and the Canada Emergency Commercial Rent Assistance program, were both necessary and quickly implemented, almost overnight in some cases. The impact of CERB was immediate and probably saved tens of thousands of families from social assistance while helping to preserve critical purchasing power in the economy. But few people think the CERB is sustainable or desirable permanently, either from a financial perspective (it has already cost the federal government \$50 billion) or in terms of its basic design, which is already showing signs of perverse incentive effects. The CERB will therefore be wound down soon enough.

If nothing else, the crisis has to tell the government that our present Employment Insurance program – which covers about 40 percent of the work force – needs a major reform. The last time there was a major EI overhaul, some 25 years ago, the process took two years, was hugely

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 undertaking.

A new concept of public safety: Strategic risk mitigation: The crisis has demonstrated that for too long we have viewed public safety and risk in a siloed way, often leaning too much on traditional security threats and not understanding that true public safety involves many more players in this connected globalized world. Public policy that integrates a much broader understanding of global risks to Canada should incorporate not just health matters better, but also a broader concept of Canadian sovereignty and national security. Can Canada start to reconsider the concept of national security taking on board a genuine all-hazards view of risk, including health, racialized inequities that weaken us all, supply chain dependencies, and the need for a new definition of strategic reserves?

Nobel economist Joseph Stiglitz said recently in reference to the United States, “We built an economy with no shock absorbers.” Strategic risk mitigation is about building better shock absorbers. This will take a thorough rethink of what we call public safety today. We suggest that the real objective is strategic risk mitigation in all its forms. This crisis has shown varying degrees of emergency readiness and understanding of the risks our present system of planning and supply create. Overall, while our responses have shown our general resilience and capacity to crisis manage, they have also shown some emerging policy issues that bundle into a need for a new approach to strategic readiness. Some of those new risks are

- Globalized supply chains for mission-critical supplies combined with inadequate redundancy in key supplies and their distribution.
- Weakening, if not fracture, the internationally mutually dependent systems to keep the supply chain moving.
- The need to broaden our strategic reserves system. We cannot always be ready for the last crisis. It is the next one, quite different, that we need to develop capacity for.
- We know that many recommendations were pursued after SARS, including setting up the Public Health Agency of Canada. Yet political priorities intervened so that the planning for today’s health crisis was inadequate: how do we prioritize these decisions in our federated system?
- We cannot just throw money at any of the above policy challenges: we need to be able to review real, hard data to make real hard decisions that reflect real – not just interest group – needs.

A Roadmap Forward

No one leader and no one government has the key to return to normal. They don't even know 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 Canada's approach to daily life involved 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.

It's a much different culture today. "Stakeholders" consider themselves, and are often considered by government, as central actors in the policy play. A "roadmap" is therefore needed 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 government should be going forward, and how to get there in a way that Canadians broadly support. It is beyond the mandate of this Paper to make specific recommendations as to the means to arrive at a roadmap. However, we should not shy away from some highly consultative process such as a Royal Commission or the creation of a national dialogue serving government but not controlled by it. Such a process as the Truth and Reconciliation Commission could also generate the national discussion we need. We are not returning to the old normal but must continue to come to grips with the new. As a nation, building a roadmap would enable the building of that new normal.

The Public Sector Challenge

Stories abound of how the public services of all governments in Canada have worked together to respond to the imperatives of the crisis – all the while working out of their own homes, with new technologies to learn (who would have thought that the term "Zoomies" would have such salience?). While much of federal government was sequestered or slowed down, the response elements moved quickly. The federal public service has demonstrated over the past months that the government of Canada can operate remotely and do so effectively, even in a crisis and even though it was not designed to do this.

Kathryn May of iPolitics pointed out that, "The COVID-19 pandemic has handed the public service a grand-scale opportunity to experiment with new ways of operating, including rethinking the need for massive office buildings in Ottawa-Gatineau and embracing digital government more fully."

There are things to learn in all of this:

- **Policy design can change:**
 - More players, especially from the private sector and the expert level of government, were involved in policy design.
 - Feasibility and assurance of delivery meant that the policy design had to engage more fully the technical and operational players. The operational level of government, often an orphan in policymaking, was front and centre.
 - Digital delivery to get financial support quickly to Canadians was an imperative not an option.
- **Remote work and digital communications:** Everyone was at home, in their spare room if they had one, attending Zoom meetings or on the phone. This forced new work routines, new ways of making decisions. It also opened up the issue of increasing this form of work. It remains to be seen if this is feasible, or even desirable in the longer-term. What skills will be required? The conversation itself, while useful, needs to acknowledge that not all public servants are tied to desks. Much of government is in-your-face 24/7 and not office bound. Can we protect our border and our meat supply working from home? These are the kinds of questions that must be asked with respect to remote working.
- **Speeding up procurement:** Vital supplies were needed. The slow, risk averse procurement system had to be overcome to buy things quickly, and in some cases, this seems to have happened. A crisis can support this, but what does it say about the old system? What drives that lugubrious system of procurement? The answer is messy, but it boils down to a misplaced sense of value and a risk averse blame culture when protection from criticisms, competition at all costs, and lowest price (as distinct from best value) dominate the system. The crisis reveals a need to shift the procurement process from buying by the rules and processes to buying for results. This will require a culture change in the public service and at the political level of government, followed by a mountain of policy and rule changes in the procurement system itself.
- **Innovation and risk are partners not enemies:** Many tales are emerging about how planned innovations were moved forward at lightning speed, the quick turnarounds, fixes from “odd” sources, and workarounds that showed individuals and organizations in public service can innovate, take risks, and deliver. Emergencies ease the concern for what the auditor will say and whether all T’s are crossed as needed. Forgiveness gives way to permission. The danger is these local heroes of innovation will become the tall poppies, so often cut off as atypical of a risk averse culture. What is needed is a risk savvy culture that knows when to move quickly and deftly and when to be deliberate and careful. But that will only happen when the mandates of various oversight bodies refocus on results and risk rather than compliance. It will also take senior leadership to stop simply making speeches about taking smart risks, as virtually every clerk of the privy council has done

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 and 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-hot ones like this.
 - Canada's broadband system is not just a system with both distribution and load risks being exposed.
 - Distance work can be invaluable but is in its infancy for the Canadian public service.
 - Major and fundamental policy delivery systems are ancient, archaic, and totally unfit for their remit.
 - Some systems such as CRA responded innovatively and well above mission. This shows the power of investment in systems.

Going Forward

The purpose of this section is to present some observations, issues, and point to lines of enquiry and potential arising from the COVID-19 crisis, recognizing that hard data on successes, failures, and in-betweens is not yet available. These issues and possible solutions to them will take more work, thought and committed leadership from both within and outside government. Centres of thought and influence on how governments work, such as universities and public policy institutes, can play a role here. Ideas have to come from multiple sources but government itself has to drive the bus. Their preoccupation has to redefine what the post COVID-19 crisis policy and process architecture should look like.

Some Strategic Governance Questions Going Forward

The following are some questions that could guide further inquiry.

First of all, what future do we want, and what do we see as a role for the federal government in moving us there? How should it engage with stakeholders and other governments? What should the process be, and who should be involved both within and outside government, for the coming great policy unwind?

What are the lessons learned from moving from risk aversion to risk taking in this crisis? How do we strike a better balance in public administration between these two poles going forward?

Broadly defined, how can the national government move from fully embracing globalization of supply chains to gaining a greater measure of sovereign control over certain goods and services deemed to be in the national security interest? And what goods and services are of national

security interest? Assuming some kind of pandemic will occur every decade or so, how does the federal government prepare to fight the next war, rather than the last one?

- Is there a need, for example, for a re-think about the role of the federal government in national pandemics, including the federal-provincial sharing of responsibilities, and the organizational structure and departmental mandates?

What are the lessons – both successes and failures – from the public service shifting to extreme remote working overnight through this crisis? For example:

- Was there sufficient IT and broadband infrastructure/support to enable this?
- What was the toll on public servants?
- Did service delivery to Canadians deteriorate, improve, or stay about the same?

Can governments find the means to create a national consensus on the lessons learned, the changes made, and the roadmap for the future that embraces fiscal rebalancing along with new notions of public safety and support to those in need?

Recommendations

In the spirit of moving forward on a number of these items, a number of proposed actions, aimed at key actors is proposed.

To the prime minister

- **Build a roadmap circle of leadership:** Assemble, working with provinces but all sectors, a “best and brightest” team to fan out and talk to Canadians to advise on the creation of a Canadian roadmap to health, safety and security. Start soon.

To provincial leaders

- **Change long-term care to aging in health and dignity:** The provinces hold the authority and responsibility to fix what went wrong here. They also have the capacity to rethink the system, drawing in a mix of players into a national consensus and action.

To leaders of the public service (clerks, cabinet secretaries):

- **Create a frank conversation about risk culture:** This will take time, consistency, and leadership, but it has to start with an understanding of what must be done. The public service should draw in academics, business leaders, and their international colleagues to form that agenda. It remains an elusive set of clichés at this point.

- **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.

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Intergovernmental Relations

Fiscal Transfers, Discipline and the Sustainability of Provincial Debt⁶⁴

Kyle Hanniman

Abstract: *One of the greatest sources of Canada's resiliency in recent years has been the public sector's 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 – including the provision of adequate services – are met. Above all that means finding ways to bolster provincial fiscal capacity while strengthening incentives for fiscal discipline. This section proposes a two-pronged approach: a significant increase in federal transfers to provinces, and the establishment of a conditional bailout facility to finance provincial deficits at federal interest rates.*

Introduction

One of the greatest sources of Canada's resiliency in recent years has been the public sector's ability to borrow. It allowed us to run countercyclical deficits during the global financial crisis (GFC) and it has allowed us to build a bridge for struggling businesses and households during the current pandemic. But this capacity varies considerably across orders of government. The federal government is in a far better position than provinces to stabilize its borrowing. It is also less vulnerable to credit shocks. This asymmetry is not unique to Canada, but it poses special risks for us because of our unparalleled stock of subnational debt.

Canada needs to gradually stabilize provincial borrowing, while ensuring other policy goals – including the provision of adequate services, investment, and fiscal stabilization – are met. Unlike the 1990s, low interest rates will help policymakers reconcile these objectives. But low interest rates will not be enough. We also need to find ways to bolster provincial fiscal capacity while strengthening incentives for fiscal discipline. That was true before the pandemic sent deficits soaring. It will be even truer as the economy recovers.

This section proposes a two-pronged approach: a significant increase in federal transfers, and the establishment of a conditional bailout facility to finance provincial deficits at federal interest rates. The additional transfers would boost provincial fiscal capacity, while the facility would require applicants to agree to a fiscal consolidation plan. The first piece would signal Ottawa's willingness to support provincial revenues. The second would define the limits of that support and the conditions for seeking more.

⁶⁴ An earlier and abbreviated version of this article appeared as an Op Ed in the *Ottawa Citizen*: Kyle Hanniman (Department of Political Studies), "Post-Pandemic Canada Will Have to Confront Soaring Provincial Debt," July 6, 2020. Available at <https://ottawacitizen.com/opinion/hanniman-post-pandemic-canada-will-have-to-confront-soaring-provincial-debt>.

The Size and Sources of Provincial Debt

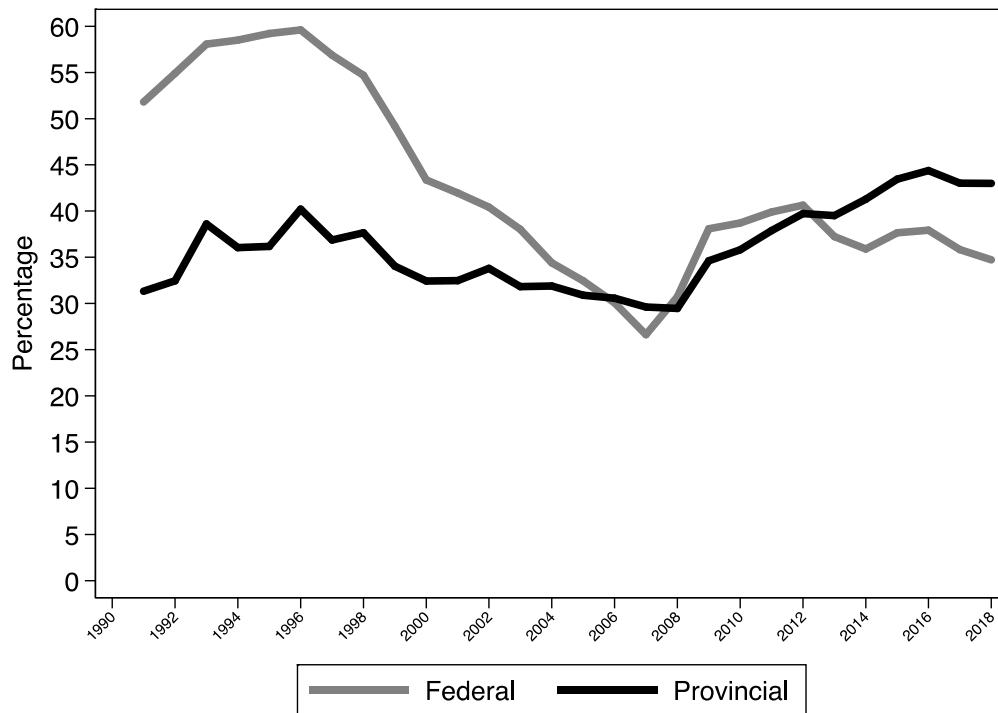
As a percentage of GDP, the provinces entered the crisis with the highest gross subnational debt in the world. Even more worrying, however, was the trend. The provinces had yet to recover from the GFC when COVID-19 struck. Indeed, at 43 percent of GDP, their 2018 ratio was nearly 50 percent higher than 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' (1) rigid and open-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. And, source 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 – given the provinces' massive presence in capital markets – have devastating consequences for Canada's economy. And it would also – given the integration of federal and provincial welfare states – undermine Ottawa's capacity to realize its social welfare commitments. Provincial bondholders 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 Kyle Hanniman, "Is Canadian Federalism Market-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. (Montréal and Kingston: McGill Queen's University Press, 2018).

Figure 1: Gross Debt to GDP

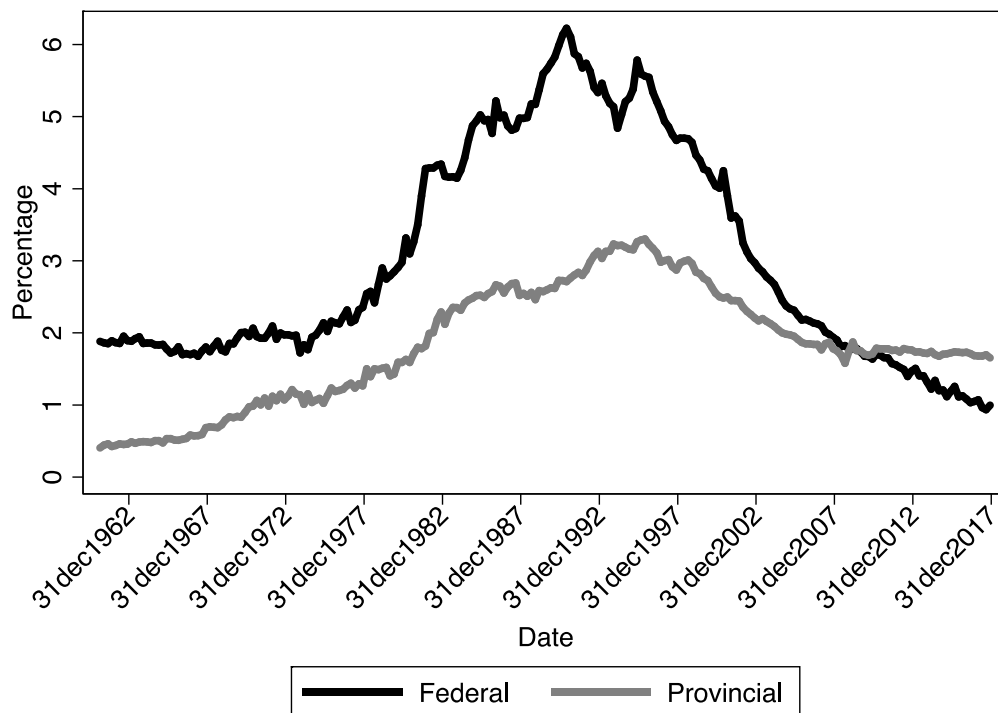


Source: IMF. Debt defined according to Maastricht criteria: loans, debt securities and currency deposits.

Should We Be Worried?

Provincial debts now exceed their previous 1996 peak, a scary thought for academics and policymakers who cut their teeth during the early 1990s. Deficits were soaring, provincial credit ratings were plummeting, and Saskatchewan and Newfoundland were struggling to roll over their debt. But interest rates are much lower today – so much so that the provinces’ interest payments to GDP have been flat since the shock of 2008. Clearly, the provinces *can* shoulder higher debts than ever before.

Figure 2: Interest Payments to GDP



Source: Standard and Poor's

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 economies toward a state of “secular stagnation.”⁶⁶ Business 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 macro-economically

⁶⁶ Lawrence Summers, “Reflections on the ‘New Secular Stagnation Hypothesis,’” in *Secular Stagnation: Facts, Causes and Cures*, eds. Coen Teulings and Richard Baldwin (2014), 27–38.

consequential for that. But they are not central government borrowers either. Their bonds are less liquid or easy to trade on secondary markets. They are also less creditworthy. That is partly because provinces rely on a narrower and more volatile set of tax bases. More importantly, it is because they do not own their central bank. The provinces cannot rely on the electronic printing press in the event of a repayments crisis. They have to generate cash through taxes and other less certain means. Bailout expectations compensate for that asymmetry to some extent. But there is always some possibility that Ottawa or the Bank of Canada (BoC) will fail to pull a teetering province from the brink. The sector's borrowing costs reflect that fact.

Three implications follow. First, the provincial sector is more vulnerable to credit shocks. The provinces pay an additional interest rate spread over the federal government and that spread increases when financial volatility rises and investors seek safety and liquidity in federal bonds. Higher spreads often result from falling federal yields, leaving provincial borrowing costs lower overall. But the spreads prevent provinces from fully exploiting Canada's safe-haven status and if market conditions become too volatile, it becomes difficult to price and issue provincial debt (as we saw, for example, for brief periods during the GFC, the commodity bust of 2015–16 and the stock market meltdown of early 2020).⁶⁷

Second, Ottawa is in a much better position to stabilize its debt. Canada's long-run economic growth rate (G) has exceeded the long-run federal interest rate (R) for much of the country's history,⁶⁸ meaning Ottawa can potentially lower its debt to GDP without ever running a surplus. Some provinces have also borrowed at sub-G rates in recent years, but Ottawa's superior credit standing and diversified economy make it a better bet for a favourable G-to-R ratio going forward.

Third, the vulnerability of provinces – along with the scale of their spending and debt – redefines the country's relationship with capital markets. It makes the public sector more vulnerable to credit shocks and rising interest rates than the centralized peers. It also makes the public more vulnerable to the austerity those changes can trigger.

Provincial vulnerabilities should not be exaggerated. The provinces benefit from rock bottom interest rates and a robust fiscal union (imagine what shape their budgets would be in without Ottawa's emergency supports to businesses and households). And as of April, the BoC has been buying significant quantities of the provinces' short- and long-term debt, which will help stabilize provincial borrowing conditions the next time financial turmoil strikes.

But BoC interventions are primarily liquidity, not solvency, devices and they have not fully insulated provinces from global shocks.⁶⁹ We also need to appreciate that provincial borrowing capacity stems, in part, from investors' bailout expectations. Those expectations lower spreads

⁶⁷ This is a bigger problem for provinces with small and illiquid pools of debt than it is for Ontario and Quebec.

⁶⁸ Jeremy K. Kronick, "A Baseline Understanding of Fiscal Sustainability." CD Howe Intelligence Memo, 2020.

⁶⁹ Oil prices plummeted, for example, shortly after the announcement of the Provincial Bond Purchase Program in April and provincial bond spreads briefly spiked.

in the short run, but they encourage more borrowing in the end. That is not a big deal as long as interest rates remain low; Ottawa's fiscal capacity remains robust; and bond buying does not interfere with the BoC's other policy objectives (which they could in a more inflationary environment). But it increases the odds of austerity if and when one or more of these conditions shifts. It also chips away at Ottawa's credit standing. This is a slow process given Ottawa's credit strengths,⁷⁰ but we caught a glimpse of it in June when Fitch cited rising provincial debt – and the multilevel challenges of containing it – as one of the motivations for downgrading Ottawa's AAA credit rating to AA+.

In short, provinces can and should borrow more than they did in the 1990s, but their debts are uncomfortably high given the sector's vulnerabilities and the broader national risks. How do we put them on a more sustainable path?

Reforming the Transfer System⁷¹

The answer depends, in part, on the source of provincial deficits. According to many, it is the vertical fiscal imbalance. The provinces are responsible for the brunt of fixed and open-ended expenditures, while the federal government enjoys a disproportionate share of the revenue-raising capacity and space. A natural solution, therefore, is to transfer a larger share of federal revenues to the provincial level.⁷² These proposals often come in two forms: one-off transfers to help provinces with the pandemic and the economic recovery and longer-term measures to address their structural and cyclical deficits. The former includes the \$19 billion the federal government has committed to help provinces restart their economies. The latter includes a larger and needs-based Canadian Health Transfer, particularly for provinces with ageing populations, and an enhanced Fiscal Stabilization Program (FSP) to offset provincial revenue shocks.⁷³

How likely is the federal government to adopt these or similar reforms? Given its own bulging deficit, a repeat of 1995 – when it slashed provincial transfers – may seem like a more likely post-pandemic response. But most of the deficit spending is temporary and interest rates are likely to remain low for some time. Ottawa will have to make fiscal adjustments, but it has far more fiscal space than many assume. Political conditions also seem ripe. The federal government was poised to enhance the FSP before the pandemic and the crisis has piqued federal interest in several areas of provincial jurisdiction, including childcare and long-term care. Some believe supporting these policies will become a major part of the federal government's post-pandemic economic plan.

A bigger role is not, of course, a given. Several provinces objected to the conditions attached to the restart funds and similar resistance may dampen federal enthusiasm to provide further

⁷⁰ Canada's wealthy economy, stable institutions and ability to borrow in its own currency still make its bonds very attractive in relative terms.

⁷¹ The following two sections draw on Kyle Hanniman, "COVID-19, Fiscal Federalism and Provincial Debt: Have We Reached a Critical Juncture," *Canadian Journal of Political Science* (Forthcoming).

⁷² Transferring tax points is another approach, but not one I have space to cover here.

⁷³ Daniel Béland, André Lecours, Mireille Paquet, and Trevor Tombe, "A Critical Juncture in Fiscal Federalism? Canada's Response to COVID-19," *Canadian Journal of Political Science* (Forthcoming).

support. Ottawa may also come under pressure to rapidly consolidate its deficit – if not from bond markets, then from political forces.

There is also no guarantee that additional transfers would work. Cross-national evidence shows higher transfers often increase deficits, particularly if they shield (or appear to shield) borrowers from irresponsible choices.⁷⁴ Pandemic-related transfers are temporary and unlikely to create this perception. And Ottawa can mitigate moral hazard, as it usually does, by allocating transfers according to clear and fixed criteria. But the pressure for bailouts will be high and no amount of fiscal engineering will substantially lower investors' bailout expectations. Additional transfers may increase the capacity to balance provincial budgets. Incentives are another matter.

National Fiscal Constraints

The provinces are not the only federal units that borrow with an implicit guarantee. But they are one of the few implicitly backed sectors that borrow without national constraint. Often, these constraints arise precisely because bailout beliefs were present: markets allow units to borrow more than they can sustain, a bailout arrives, and the centre demands a degree of fiscal restraint in return. This process has played out in several federations, including Germany and Brazil. But it has yet to materialize in Canada despite the provinces' periodic market struggles. Why?

For starters, Canada is a deeply federal society with powerful provincial governments. A conditional bailout would be met with about as much enthusiasm as a structural adjustment from the International Monetary Fund (IMF). Canadian governments have generally tried, therefore, to avoid it. In 1936, Alberta's Social Credit government took avoidance to the extreme, opting to default rather than accept the supervision of a federal loans council (a condition of the next bailout).

Another obstacle is institutional. Renegotiating intergovernmental burdens is challenging in any federation. But certain institutions – notably a vertically integrated party system – help facilitate and enforce the bargains.⁷⁵ Canada lacks this institutional machinery.

Neither obstacle would matter if provinces faced a prolonged repayments crisis. They would have to accept Ottawa's dictates or default. But it is not clear, outside of the Great Depression, when that moment would have been. Saskatchewan flirted with default in 1993, but quickly turned it around, first with a small and unconditional bailout, which allowed it to maintain its investment grade credit rating⁷⁶ and then austerity, which was motivated by the fear of requiring a larger and thus conditional level of support. Saskatchewan's response was a natural one in a country that avoids centralization at all costs, but it is precisely the sort of abrupt and ad hoc adjustment that we ought to avoid. How can we get ahead of the next crisis?

⁷⁴ Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism*. (New York: Cambridge University Press, 2006). And this says nothing about the additional provincial spending pressures Ottawa's future transfers might create.

⁷⁵ Ibid.

⁷⁶ Janice MacKinnon, *Minding the Public Purse*. (Montréal and Kingston: McGill-Queen's University Press, 2003).

Reconciling Fiscal Capacity and Discipline

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 Ottawa's approach in 1995, when it slashed provincial transfers and left the disciplining to bond 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, we need to find ways to reconcile fiscal solidarity and discipline. Otherwise our fiscal resilience may be at stake.

Recommendation

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.

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A Local Government Response to the Pandemic: The Kingston Case

Helen Cooper and Samantha Kieffer

Abstract: *The pervasive arrival of COVID-19 and the dramatically different outcomes in various countries naturally leads to an examination of what systemic responses are most effective. The City of Kingston and the counties of Frontenac and Lennox & Addington in Ontario have an admirable track record in halting the virus initially, then responding rapidly and effectively when a spike occurred. This example illustrates how both federal and provincial attempts to control the spread are largely dependent on well-functioning local public health and municipal administrations. At the same time, the pandemic has exposed municipal financial vulnerabilities and the deleterious effects of an archaic municipal taxation system.*

Introduction

On May 5, 2020, the chief medical officer of health for Kingston Frontenac Lennox & Addington (KFL&A) Public Health sent a letter to the premier of Ontario, co-signed by the mayor of Kingston and the wardens of Frontenac and Lennox & Addington Counties. They were asking that the Ontario government grant permission for reopening portions of the local economy within their municipal boundaries at a pace faster than that for the province as a whole. KFL&A had met all the initial reopening criteria that the province had laid out, namely, reduced community spread and adequate assessment capacity.⁷⁷

The answer from the premier was a categorical “no.” He further stated, “We can’t have people going rogue, per se, and loosening up restrictions in one area. ... If we loosen up restrictions in one area, well, guess where all the people from Toronto and the GTA are going if they want to go out for dinner: they’re all going to flock to Kingston and I don’t think that would be very fair for that jurisdiction.”⁷⁸

Throughout May, the KFL&A Public Health unit reported only two cases of the coronavirus in the region, with no deaths, one of the best outcomes in the whole province. When a spike occurred in early June, the health unit took quick and effective action to limit the outbreak. A combination of circumstances – early action by local epidemiological experts, well established relationships amongst healthcare providers and city officials, flexibility of public health employees, responsiveness of the local business community – were all factors leading to this relative success. At the same time, the City of Kingston had to deal with the consequences of COVID-19 with a taxation system that, for some residents and businesses, exacerbates inequities.

⁷⁷ Government of Ontario, “Reopening Ontario.” Available at <https://www.ontario.ca/page/reopening-ontario>.

⁷⁸ *The Kingston Whig-Standard*, “The answer is no,” May 6, 2020. Available at <https://www.thewhig.com/news/local-news/the-answers-no>.

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 EMCPA, 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 must seek and obtain the Legislature's approval for any further 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 a 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 legislation extends some COVID-19 emergency orders for one year, giving the government the power to amend orders without a vote in the legislature: "[t]he power to amend or revoke the orders rests with the Minister, not the Legislative Assembly."⁸¹

The Health Protection and Promotion Act [HPPA]⁸² is the provincial statute giving public health units their legal mandate to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease, and the promotion and protection of the health of the people of Ontario. The Act also details the structures and functions of boards of health, and the role of medical officers of health.

In Ontario, the Ministry of Long-Term Care regulates, inspects and sets out accommodation fees for all long-term care homes. The enabling legislation, Long-Term Care Homes Act, 2007 [LTCHA],⁸³ came into force on July 1, 2010. The COVID-19 pandemic has revealed the lack of adherence to the LTCHA by several long-term care homes in Ontario. The enforcement mechanism for the LTCHA rests with the Ministry of Long-Term Care which is supposed to undertake inspections in response to information received from homes, from residents and families, and from other sources. It is also responsible to undertake resident quality inspections (RQIs) annually which are focused on the residents and which provide a more comprehensive review of the whole operation of each home.

⁷⁹ Ontario Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9. Available at <https://www.ontario.ca/laws/statute/90e09>.

⁸⁰ Bill 195, Reopening Ontario (A Flexible Response to COVID-19) Act, 2020. Available at <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-195>.

⁸¹ *Law Times*, Reopening Ontario Act, which Extends COVID-19 Emergency Orders, Met with Chorus of Opposition. Available at <https://www.lawtimesnews.com/practice-areas/human-rights/reopening-ontario-act-which-extends-COVID-19-emergency-orders-met-with-chorus-of-opposition/331810>.

⁸² Ontario Health Protection and Promotion Act, R.S.O. 1990, c. H.7. Available at <https://www.ontario.ca/laws/statute/90h07>.

⁸³ Ontario Long-Term Care Homes Act, 2007, S.O. 2007, c. 8. Available at <https://www.ontario.ca/laws/statute/07l08>.

Current Structure and Funding of Public Health Provision in Ontario

There are currently 35 boards/departments of health in Ontario. The changes in municipal structures since the 1990s have led to three variations in structure:⁸⁴

1. The size and composition of the boards of health of the largest municipalities (e.g., Toronto, Hamilton, Ottawa) are determined by the municipal councils and may be composed of councillors exclusively or of a mix of councillors and members of the public appointed by council. The public health budget is subject to the approval of the municipal council;
2. For two-tier regions (Niagara, Waterloo, Halton, Peel, York, Durham) the health unit functions as a department of the upper tier municipality and undergoes budget approval in the same way as any other department;
3. For the remaining municipalities, the health unit jurisdictions are combinations of separated cities and adjacent counties (e.g., Kingston Frontenac Lennox & Addington). In each of these cases, both municipal and provincial appointees serve on the governing boards, which set annual budgets and then notify the municipalities as to their contribution according to a prescribed formula.

Program costs are split in several ways between the province and the municipalities. The federal government may also contribute to a specific program. The provincial/municipal contribution ratio varies between approximately 75/25 and 60/40 depending upon individual initiatives by health units and the concurrence of the contributing municipalities.

In June 2017, the provincial government of the day set up an expert panel on public health, charged with considering the “optimal organizational structure for public health in Ontario” with a complementary system for governance. Its recommendations were also intended to strengthen the role of public health, recognizing the links with municipal governments, community organizations, schools, and social services outside the health system with a greater focus on the social determinants of health and health equity. The intent was to influence social, environmental, and structural factors that can contribute to poor population health. This would then lead to the identification of high-risk populations and offer targeted interventions that can prevent or delay the onset of diseases and their complications. This was all very prescient given the outbreak of COVID-19 where it has since become clear that the most vulnerable to the disease have chronic comorbidities, especially the elderly and those with low-income.⁸⁵

⁸⁴ healthydebate, Public Health in Ontario: What it does, and what might change, Dafna Izenberg, May 9, 2019. Available at <https://healthydebate.ca/2019/05/topic/public-health-in-ontario#:~:text=The%20structure%20of%20Ontario's%20public%20health%20system&text=There%20are%20three%20types%3A%20autonomous,bill%E2%80%9D%20to%20their%20sponsoring%20municipalities.>

⁸⁵ Public Health Ontario, “COVID-19 – What We Know So Far About ... Social Determinants of Health. Available at <https://www.publichealthontario.ca/-/media/documents/ncov/covid-wwksf/2020/05/what-we-know-social-determinants-health.pdf?la=en>.

For public health units to take on not only promotion of healthy living, as they have traditionally done, but also to develop a much more sophisticated epidemiological approach to population health measurement, requires an enhanced level of sophistication not readily available in several of the small health units,⁸⁶ thus offering a rationale for consolidations.

In April 2019, with the release of its budget, the current provincial government announced a very ambitious restructuring plan for public health units. This was on top of the dissolution of the local health integration networks (LHINs) and the formation of Ontario Health Teams. The number of public health units was to be reduced from 35 to 10 and the provincial contribution to public health by \$200M, to come from administrative savings without affecting delivery of mandated programs and services. The health units countered that such a reduction would affect service levels without a significant new financial contribution from the municipal sector. Thus, public health units and municipalities in Ontario were caught in the general maelstrom of healthcare restructuring just at the time when COVID-19 appeared in Ontario.

On July 28, 2020, the Financial Accountability Office of Ontario issued its Expenditure Monitor 2019-20: Q4.⁸⁷ The province was under budget by \$49 M in the vote-item for Population and Public Health that supports the chief medical officer of health to promote and protect the public health of Ontario. Given the demands on public health services as of March 2020 with respect to COVID-19, it may well be that the public health system was more vulnerable to address the pandemic adequately than might otherwise have been the case.

Current Provision of Long-Term Care (LTC) in Ontario

There are 626 LTC homes licenced by the Government of Ontario (with approximately 77,250 long-stay placements): 58 percent are privately owned/operated, 24 percent are owned/operated by a not-for-profit/charitable organization, and 16 percent are owned/operated by a municipality. The province has slated approximately 300 current homes for redevelopment because of inadequacy with respect to current building safety and accommodation standards.⁸⁸

In October 2019, the Ontario financial accountability officer⁸⁹ reported that in 2018–19 there were approximately 35,000 people on waitlists for LTC, an increase of 78 percent over seven

⁸⁶ Dr. Robert Cushman, former medical officer of health, Ottawa, “The small health units are sort of living day-to-day and their capacity is really challenged when there’s a public health crisis.” In Dafna Izenberg, “Public Health in Ontario: What It Does, and What Might Change,” May 9, 2019. Available at <https://healthydebate.ca/2019/05/topic/public-health-in-ontario>.

⁸⁷ Financial Accountability Office of Ontario, Expenditure Monitor 2019-20: Q4, July 28, 2020. Available at <https://www.fao-on.org/en/Blog/Publications/2019-20-expenditure-monitor-q4>.

⁸⁸ Ontario Long Term Care Association, “About Long-Term Care in Ontario: Facts and Figures.” Available at <https://www.oltca.com/oltca/OLTCA/Public/LongTermCare/FactsFigures.aspx>.

⁸⁹ Ontario Financial Accountability Officer (FAO) Report, October 30, 2019, “Long-Term Care Homes Program, A Review of the Plan to Create 15,000 New Long-Term Care Beds in Ontario.” Available at <https://www.fao->

years, with an estimated peak of approximately 40,000 in 2020/21. The current provincial government had committed to 15,000 new placements over five years (\$1.7B capital cost; \$970M annual operating cost). Once these are occupied the waitlist is projected at 36,900 people. It will require an additional 55,000 new long-term places by 2033 just to maintain this waitlist. Furthermore, all these new homes would have to be staffed.

Most of the 626 LTC homes received a comprehensive resident quality inspection (RQI) in 2015, 2016 and 2017, but the number dropped to just over half in 2018, and then, only nine in 2019.⁹⁰ As of June 25, 2020, deaths of residents in LTC facilities made up 81 percent of the country's total number of fatalities due to COVID-19 compared to an average of 42 percent in other OECD countries.^{91 92} In Ontario, as of May 6, 2020, the number of homes with COVID-19 outbreaks resulting in death was three times higher for private ownership compared to not-for-profit ownership and five times higher compared to municipal ownership.⁹³

On July 29, 2020, the Ontario government announced the launch of the "Independent Long-Term Care COVID-19 Commission" as an acknowledgement of the inadequacy of almost half of Ontario's LTC homes to protect residents and healthcare staff from the virus.^{94 95} The commission is assigned the singular task of identifying ways to prevent the future spread of disease in Ontario's LTC homes. The final report is anticipated by April 2021.

The City of Kingston, Frontenac County, and Lennox and Addington County Case Study

The City of Kingston and the two counties of Frontenac and Lennox and Addington are in eastern Ontario at the confluence of Lake Ontario, the St. Lawrence River, and the Cataraqui River. The combined population of the city and Frontenac County is 150,475⁹⁶ and that of Lennox and

on.org/web/default/files/publications/FA1810%20Long-term%20Care%20Bed%20Expansion%20Analysis/Long-term-care-homes%20program.pdf.

⁹⁰ *CBC News*, CBC Investigates, "Ontario Scaled Back Comprehensive, Annual Inspections of Nursing Homes to Only a Handful Last Year." Available at <https://www.cbc.ca/news/canada/seniors-homes-inspections-1.5532585>.

⁹¹ *The Globe & Mail*, "81% of COVID-19 Deaths in Canada Were in Long-Term Care – Nearly Double OECD Average." Available at <https://www.theglobeandmail.com/canada/article-new-data-show-canada-ranks-among-worlds-worst-for-ltc-deaths/>.

⁹² CIHI Snapshot: Pandemic Experience in the Long-Term Care Sector. Available at https://www.cihi.ca/sites/default/files/document/COVID-19-rapid-response-long-term-care-snapshot-en.pdf?emktg_lang=en&emktg_order=1.

⁹³ Ontario Health Coalition: Release and Analysis: COVID-19 Death Rates in Ontario Long-Term Care Homes Significantly Higher and Increasing in For-Profit Homes vs. Non-Profit and Publicly-Owned Homes: New Data Analysis, <https://www.ontariohealthcoalition.ca/index.php/death-rates-in-long-term-care-by-ownership-release/>

⁹⁴ "Ontario Launches Independent Long-Term Care COVID-19 Commission: Findings Will Help Protect Residents and Staff from Future Outbreaks." Available at <https://news.ontario.ca/opo/en/2020/07/ontario-launches-independent-long-term-care-COVID-19-commission.html>.

⁹⁵ *CBC News*, "Ontario Nursing Homes Have Had 22 Years to Do Safety Upgrades. COVID-19 Reveals Deadly Cost of Delay, June 9, 2020. Available at <https://www.cbc.ca/news/health/COVID-19-coronavirus-long-term-care-homes-ontario-1.5604009>.

⁹⁶ Statistics Canada, Census Profile, 2016 Census. Available at <https://www12.statcan.gc.ca/census-recensement/2016/dp->

Addington County is 42,888⁹⁷ 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.

The Kingston area is well endowed with both acute and chronic healthcare treatment facilities with the Kingston Health Sciences Centre (KHSC),⁹⁸ Southeastern Ontario's largest acute care hospital complex and Providence Care Hospital⁹⁹ which offers fully integrated long-term mental health and psychiatric programs with physical rehabilitation, palliative care, and complex medical management. Both hospitals are closely affiliated with the Faculty of Health Sciences at Queen's University consisting of the Schools of Medicine, Nursing and Rehabilitation Therapy.¹⁰⁰

In the case of COVID-19, perhaps the most critical affiliations have been those between KFL&A Public Health and Queen's University. The Public Health Research, Education and Development Program (PHRED) has the goal to promote service, teaching, and research through the participation by Queen's University staff in the work of the health unit. The Queen's Faculty of Health Sciences supports the Health Services and Policy Research Institute (HSPRI), which maintains close ties with the Department of Public Health Sciences and KFL&A Public Health.

As of June 16, 2020, the KFL&A Public Health catchment area had one of the best track records in the whole of Ontario for both COVID-19 active case incidence and death rate. As of June 19, 2020, the number of reported cases was 63, of which 16 were healthcare workers and none were residents of long-term care facilities. In all cases, those who contracted the virus have recovered; there have been no deaths due to COVID-19.

The story of this success began in late December 2019,¹⁰¹ when the chair of the Division of Infectious Diseases at Queen's University first paid attention to news reports of a novel coronavirus spreading through the city of Wuhan. By the end of January, KFL&A Public Health activated its incident management system and, by mid-February, established a call centre for the public, a critically important early step to quell false information and calm an increasingly worried

[pd/prof/details/page.cfm?Lang=E&Geo1=CD&Code1=3510&Geo2=POPC&Code2=0415&Data=Count&SearchText=Kingston&SearchType=Begins&SearchPR=01&B1=All](https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CD&Code1=3510&Geo2=POPC&Code2=0415&Data=Count&SearchText=Kingston&SearchType=Begins&SearchPR=01&B1=All).

⁹⁷ Statistics Canada, Census Profile, 2016 Census. Available at <https://www12.statcan.gc.ca/census-recensement/2016/dp->

[pd/prof/details/page.cfm?Lang=E&Geo1=CD&Code1=3511&Geo2=PR&Code2=35&SearchText=Lennox%20and%20Addington&SearchType=Begins&SearchPR=01&B1=All&GeoLevel=PR&GeoCode=3511&TABID=1&type=0](https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CD&Code1=3511&Geo2=PR&Code2=35&SearchText=Lennox%20and%20Addington&SearchType=Begins&SearchPR=01&B1=All&GeoLevel=PR&GeoCode=3511&TABID=1&type=0).

⁹⁸ Kingston Health Sciences Centre. Available at <https://kingstonhsc.ca/>.

⁹⁹ Providence Care. Available at <https://providencecare.ca/providence-care-hospital/>.

¹⁰⁰ Queen's University Faculty of Health Sciences. Available at <https://healthsci.queensu.ca/>.

¹⁰¹ *The Kingston Whig-Standard*, "Inside the Bubble," Part 1, May 15, 2020. Available at <https://www.thewhig.com/news/local-news/inside-the-bubble-part-1-the-inside-story-of-kingstons-response-to-COVID-19>. Part 2, May 17, 2020. Available at <https://www.thewhig.com/news/local-news/inside-the-bubble-part-2-bracing-for-the-virus-arrival>. Part 3, May 19, 2020. <https://www.thewhig.com/news/local-news/inside-the-bubble-part-3-aftermath-of-the-coronaviruss-arrival>. Part 4, May 19, 2020. Available at <https://www.thewhig.com/news/local-news/inside-the-bubble-part-4-outbreaks-setbacks-and-success-stories>. Part 5, May 21, 2020. Available at <https://www.thewhig.com/news/local-news/inside-the-bubble-part-5-personal-impacts-and-lessons-learned>.

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 “Command Table” on March 2, 2020.¹⁰²

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 USA, 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-London and Waterloo public health jurisdictions had all contacted him requesting assistance with case and contact management.¹⁰³ KFL&A Public Health provided support remotely.

On June 24, 2020, KFL&A Public Health officials notified the public of an outbreak of COVID-19 at a west-end nail salon and spa which had reopened on June 12, the date at which the province had allowed Phase 2 reopening across most of the province. Outbreaks subsequently occurred in two other nail salons where staff had moved from one site to another. The extensive contact tracing system, which the region had already established, identified hundreds of people who had been exposed and were then tested. Public health inspectors also began conducting additional inspections at all similar businesses in the region. On June 26, 2020, KFL&A Public Health ordered that masks and face coverings be worn in any public place in the region, and any establishment not enforcing mandatory face coverings were fined up to \$5,000 a day under the provisions of the HPPA. KFL&A was one of the first jurisdictions in Ontario to require mandatory mask wearing in prescribed locations.

¹⁰² *Ontario Newsroom*, “Ontario Implementing Enhanced Measures to Safeguard Public from COVID-19,” March 2, 2020. Available at <https://news.ontario.ca/mohltc/en/2020/03/ontario-implementing-enhanced-measures-to-safeguard-public-from-COVID-19.html>.

¹⁰³ *Kingstonist*, “Kingston Healthcare Workers Offering Remote Support to Toronto Public Health.” Available at <https://www.kingstonist.com/news/kingston-healthcare-workers-offering-remote-to-toronto-public-health/>.

As of August 4, 2020, there were two active cases in KFL&A with no one in hospital. In all KFL&A has experienced 109 cases and no deaths.¹⁰⁴ The outbreak was effectively managed using the well-established contact tracing and testing system as well as repeated preventative action by health unit staff. In this time of crisis, when a swift response is required, the fact that professional relationships across institutional boundaries were already well established provided rapid, coordinated, and effective action. Having the right people in the right place at the right time may be regarded as luck, but it is more likely the result of a well-established, effective, professional environment that encourages collaboration, good will, and initiative.

Implications for the City of Kingston of COVID-19

As required under the EMPCA, the City of Kingston has in place an Emergency Response Plan and Program By-law.¹⁰⁵ On March 24, 2020, City Council enacted a by-law to delegate certain authority and powers to the chief administrative officer, or his or her delegate, “in order to expediently implement decisions for the protective measures required to manage the COVID-19 outbreak.”¹⁰⁶ On March 26, 2020, the mayor of Kingston declared a state of emergency in response to COVID-19. He did so by authority of Section 4 (1) of the EMCPA.

Service Delivery

In compliance with strict social distancing requirements, the City had to immediately close, or severely restrict access to all facilities where people normally congregate or are in close contact. Despite an easing of some restrictions (Phase 3), the list remains extensive and is a testament to the diversity of services that municipalities, especially cities, normally offer.¹⁰⁷

The City of Kingston is the consolidated municipal *service manager* (CMSM) for Kingston and Frontenac County.¹⁰⁸ It is, therefore, the logical choice to also administer emergency financial assistance for all residents who are currently without any income as well the expansion of discretionary benefits under Ontario Works and the Ontario Disability Support Program (which is not municipally administered) for those recipients facing one-time exceptional costs related to COVID-19. The City has also worked with licensed childcare providers to offer emergency childcare to essential workers.

Safe survival during a pandemic is a challenge for the homeless when temporary shelters have greatly reduced capacity. In Kingston’s case a group of homeless people formed a tent

¹⁰⁴ KFL&A Public Health Unit COVID-19 dashboard. Available at <https://www.kflaph.ca/en/healthy-living/status-of-cases-in-kfla.aspx>.

¹⁰⁵ City of Kingston Emergency Response Plan. Available at <https://www.cityofkingston.ca/documents/10180/14264/City+Emergency+Plan/f4c33862-c0ff-4210-8c48-f2ffc5389573>.

¹⁰⁶ City of Kingston, Council Meeting Number 2020-11 Addendum, March 24, 2020. Available at [https://www.cityofkingston.ca/documents/10180/0/City-Council Meeting-2020-11 Addendum and Schedule-pages March-24-2020.pdf/3238a9de-7242-faed-0764-ba9cb45318d6?t=1585085379094](https://www.cityofkingston.ca/documents/10180/0/City-Council+Meeting-2020-11+Addendum+and+Schedule-pages+March-24-2020.pdf/3238a9de-7242-faed-0764-ba9cb45318d6?t=1585085379094).

¹⁰⁷ City of Kingston, COVID. Available at <https://www.cityofkingston.ca/Resident/COVID-19>.

¹⁰⁸ List of service managers in Ontario. Available at <https://www.ontario.ca/page/find-your-local-service-manager>.

encampment in Belle Park. Both City Council and staff handled the matter sensitively by not ordering immediate evictions which could have scattered a highly vulnerable population without adequate resources to protect themselves. This led to the creation of an “Integrated Care Hub”¹⁰⁹ at a downtown community recreation centre, providing 24-hour supports to individuals as an interim measure until longer-term housing can be located. The City set a July 31st eviction date and, on August 11th, removed temporary services (power, portable toilets, dumpsters) for the 30 people remaining there, insisting the site was unsuitable for continued camping since it sits on an old landfill. Community advocates for the campers, including some city councillors, have been highly critical of this and argue that the campers should be allowed to remain until the City can offer “real housing solutions.”^{110 111}

The pandemic has served to illustrate vividly how much more difficult it is for homeless people to adhere to the safety measures that are promoted by provincial and local governments. This is just one example of how COVID-19 is more dangerous for disadvantaged populations when they do not have access to adequate shelter and sanitation.

Financial

It is illegal for municipalities in Ontario to incur year-to-year operating deficits. The City has released financial reports detailing sources of revenue and major changes to them in light of the COVID-19 pandemic.¹¹² The projected user-fee revenue loss from May–August 2020 is expected to surpass \$13.4M. An important component of this loss is the decision by the Alma Mater Society of Queen’s University and the Student Association of St. Lawrence College to terminate their agreements with the City that provided universal, unlimited Kingston Transit access for post-secondary students, given that students will not be attending classes on campus for at least the remainder of 2020.¹¹³ The City waived the penalty and interest for April and May on unpaid interim property tax billings, thus suffering a loss of penalty and interest revenues, and deferred the final 2020 bill due date until August 31st to assist all property taxpayers with the financial challenges of COVID-19. With all the operational disruptions, the City projects a deficit to the end of August 2020 of approximately \$4M.

The City is offering relief to some small business property owners financially impacted by the pandemic with an additional deferral to November 30, 2020, through the property tax hardship deferral program. The City, however, cannot estimate, in this early stage of the pandemic, the

¹⁰⁹ City of Kingston, Integrated Care Hub. Available at <https://www.cityofkingston.ca/-/activities-underway-for-the-transition-to-the-integrated-care-hub>.

¹¹⁰ Toni Thornton, Mutual Aid Katarokwi-Kingston. Available at <https://mutualaidkatarokwi.wordpress.com/>.

¹¹¹ CTV News, “City of Kingston Removes Services at Belle Park,” August 11, 2020 Available at <https://ottawa.ctvnews.ca/city-of-kingston-removes-services-at-belle-park-1.5060227?cache=yes%2Fweather-7.623929%3FclipId%3D104069>.

¹¹² City of Kingston, Report #20-128 to City Council regarding the COVID-19 response, May 20, 2020. Available at https://www.cityofkingston.ca/documents/10180/37998574/City-Council_Meeting-17-2020_Report-20-128_COVID-19_Response-Update_Operational-and-Financial-Impacts.pdf/4d00ff48-52c8-3f19-757f-c11161fc3525?t=1589481846816.

¹¹³ City of Kingston, COVID-19 Updates. Available at <https://www.cityofkingston.ca/resident/COVID-19>.

ultimate business failure rate. It cannot know how much revenue from property tax will decline in 2020 and beyond. Utilities Kingston, which bills for water, sewer, electricity, and gas is offering relief by suspending disconnections for non-payment and granting more time for paying outstanding balances.

Economic Recovery

The City of Kingston has undertaken a vast array of initiatives to come to the aid of its residents and businesses, recruiting resources in the community to assist in navigating and surviving COVID-19's impact. The Smith School of Business at Queen's University, in cooperation with the Kingston Economic Development Commission (KEDCO), is offering the time and expertise of students through a matching platform as well as free webinars and surveys to assess the challenges and opportunities of local businesses. The mayor of Kingston has established the Kingston Economic Recovery Team (KERT), a community working group focused on planning and coordinating strategies to respond to the economic impact of COVID-19.¹¹⁴ One of its most significant recommendations is a plan to create more public space for pedestrians and businesses in the downtown core.¹¹⁵

In addition to the key medical and professional relationships that the city has relied upon, Kingston has also developed some initiatives to help save the local economy which relies heavily on tourism and Queen's University. In 2019, about 4.5 million people visited the city, which is estimated to have generated over \$500 million in economic impact. Also, Kingston's tourism sector employed around 8.7 percent of the city's total workforce in 2019.¹¹⁶ The cancelling of in-person classes by Queen's University until at least January 2021, and the move to virtual graduations and Homecoming are further challenging the retail and hospitality sectors.

Conclusions and Recommendations

Public Health Structure and Delivery in Ontario

KFL&A Public Health, in partnership with Kingston Health Sciences Centre and Providence Care, responded with great alacrity to the threat of COVID-19, outpacing the provincial government and leading to a commendable outcome for its residents. Initial cases were rapidly treated, and local testing and contact tracing were effectively established.

The KFL&A case vividly illustrates that the provincial government and, by extension, the federal government, are heavily reliant upon strong municipal-level public health expertise. Otherwise, provincial and federal leaders portray a sense of helplessness in being able to respond effectively

¹¹⁴ City of Kingston, Kingston Economic Recovery Team. Available at <https://www.cityofkingston.ca/city-hall/projects-construction/kingston-economic-recovery-team>.

¹¹⁵ *Kingstonist*, "City CAO Lanie Hurdle Explains Changes to Love Kingston Marketplace." Available at <https://www.kingstonist.com/news/city-cao-lanie-hurdle-explains-changes-to-love-kingston-marketplace/>.

¹¹⁶ *The Kingston Whig-Standard*, "Kingston's Tourism Economy Hit Hard by Pandemic," April 6, 2020. Available at <https://www.thewhig.com/news/local-news/kingstons-tourism-economy-hit-hard-by-pandemic>.

to outbreaks. There is also a need to achieve greater consistency in data reporting to the public amongst all health units.

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.

- Given that the length and course of the current pandemic is far from clear,¹¹⁷ this partnership should be further refined. Since other health units in the province sought assistance from KFL&A Public Health, Public Health Ontario could use this as 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.

The Ontario government is reliant upon well-resourced and sophisticated public health units, especially as COVID-19 is not to be the last pandemic this province will face. It is important to continue with health unit reorganization in line with other health service restructuring initiatives such as the formation of Ontario Health Teams. The experience of COVID-19 has illustrated how important it is for the health units to be geographically aligned with their constituent municipalities for public policy enactment to be coherent within each municipality. For health units to retain the necessary expert staff, it is most unwise for the provincial government to pursue its announced reduction in health unit budgets based on some general idea of achieving administrative efficiencies. A high performing health unit such as that in KFL&A illustrated very effectively how all staff resources are essential in performing a variety of preventative tasks such as testing and advising local governments and health services providers. No better example was the redeployment of staff to long-term care homes to explain the necessary precautionary measures.

To the Ontario government:

The Ontario Government had announced in April 2019 that it intended to restructure public health delivery. The pandemic has demonstrated the need for a new blueprint for this, taking into account the following factors:

- The heavy reliance of both the federal and provincial government upon highly functional public health units and the municipalities with which they are aligned is necessary to coordinate an adequate response to a public health emergency.
- The optimal size of public health units required to develop a sophisticated epidemiological approach to identifying and managing the threat of an epidemic or pandemic, including coordinating responses with their constituent municipalities.

¹¹⁷ Nature, "How the Pandemic Might Play Out in 2021 and Beyond." Available at <https://www.nature.com/articles/d41586-020-02278-5>.

- 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 relationship between the province and municipalities, particularly the cities. On July 16, 2020, the federal government announced a \$19B provincial and territorial COVID-19 recovery fund, about \$7B for Ontario, a portion of which could be used for current municipal operating deficit relief at the discretion of each province.¹¹⁸ Whether the \$7B will be sufficient to cover all the expenses in 2020 for which it is intended remains an open question. This may relieve the initial financial pain caused by the COVID-19 lockdown but, as a one-time injection of cash, does not address the ongoing operating shortfalls to be incurred by municipalities in 2021 and beyond, if property tax revenues do appreciably decline. The result will be even harsher if there is a second wave of COVID-19 in the fall of 2020.

Another question is if the experience of the pandemic will lead to a more comprehensive evaluation of the provincial-municipal financial relationship. What is in essence occurring, if the province uses at least part of the \$7B to support municipal operating costs, is the federal and provincial governments allowing municipalities a share of income or sales tax revenue. Which tax

¹¹⁸ CTV News, "Ontario to Get \$7B of Federal Government's \$19B Pandemic Recovery Funds," July 16, 2020. Available at <https://toronto.ctvnews.ca/ontario-to-get-7b-of-federal-government-s-19b-pandemic-recovery-funds-1.5026474>.

instruments continue to be used post-pandemic is as important a policy question as the level of taxation. Municipalities internationally use property tax, determined through market value assessment or something very similar, as the means to raise money for services to property.¹¹⁹
¹²⁰ It can be regressive with respect to income of residential property owners, residential tenants, or small business owners and tenants.

As municipalities continue to finance a greater diversity of programs (e.g., social housing and other social services, childcare, transit, culture, economic development, public health), the use of property tax to fund these services becomes increasingly regressive. User fees can be a policy instrument to influence behaviour (e.g., water user fees to conserve water) but can also be a regressive tax when acting as a barrier to usage for those of low income (e.g., fees for recreational facilities or transit fares).

With the challenges that urban municipalities are facing to restore normalcy to their communities as the pandemic continues, instituting a permanent more progressive taxation system in addition to the property tax system becomes a much more logical and reasonable source of revenue.

To the federal and provincial governments:

The federal and provincial governments should regard the experience of the pandemic as an opportunity to review tax policy with respect to municipalities. Rather than simply offering municipalities a one-time handout to cover operating deficits in 2020, they should understand that the main sources of revenue for municipalities, namely, property tax and user fees are inadequate and often regressive for addressing the costs of the full array of municipal services.

- Municipalities should have access to a more progressive taxation system to cover the extensive social, cultural and environmental services they provide.

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¹¹⁹ Enid Slack, "Is the Property Tax System Broken?" Available at <https://www.youtube.com/watch?v=MZy4ndmVM0U>.

¹²⁰ "The Future of Municipal Finance," *The Agenda* with Steve Paikin. Available at <https://www.tvo.org/video/the-future-of-municipal-finance>.

At the Intersection of Law and Politics

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

In a modern democratic society, no public event escapes the regard of the law, or its consequences. Thus, while the current COVID-19 pandemic has given rise primarily to the efforts of public health authorities in limiting and combatting the illness through legislation, regulation and public administration, the actions, disputed actions and inactions of states, of heads of state or government, and of state authorities specializing in various aspects of public administration are now attracting, and will in the future continue to attract, other legal consequences. Many of these will be developed and expressed through litigation. In that context, the first purpose of this section is to provide a summary of the main issues relating to the legalities that will initially have arisen from COVID-19. Considering that COVID-19 and the struggle undertaken by state authorities against it is also a political process, for a proper understanding of the divergent lines of reasoning, it is also necessary to extricate the legal and litigious argumentation relating to COVID-19 from the underlying political forces at play. Given that accountability to law is a factor of democracy rather than of domestic public life in Canada alone, this section necessarily takes a trans-national perspective.

Democratic Governmental Action in Response to the Outbreak of COVID-19

From the Canadian perspective, governmental response to the facts and circumstances of COVID-19 must be considered in the light of democracy. It bears emphasis and repetition that the COVID-19 pandemic is a natural phenomenon that arose unexpectedly. Consequently, rational decision-makers should consider everything about it in the cold light of scientific and medical evidence. As with all other choices made by governments in the realms of both politics and public administration, such decision-making involves choice, prioritizing, and trade-offs, all based on the public welfare and benefit. In order that the decision-making response be democratic, it is necessary for it to be intended to serve the public interest. This entails that governmental responses afford primacy to evidence-based health-protecting measures.

Among democratic states, many took the evidence of COVID-19 seriously from the beginning of its spread. They acknowledged that COVID-19 was indeed a genuine problem; they engaged in a variety of steps required to attenuate the spread of the illness; they organized their medical systems for testing to deal with the identified cases and they organized combinations of upgrade of hospitals, reorganization of elder-care, quarantine, domestic lockdowns, and closure of international frontiers. Some others did not.

Distinguishing Between Genuinely Legal Challenges and Politically Grounded Legal Actions

In democracies, the law grants individual persons and corporate entities the right of access to the justice system. Where a legal person considers himself or herself harmed by the actions or inactions of another in a political context, and where the necessary civil procedural requirements are met, that person can initiate an action in damages against the alleged originator of the harm. For such a legal proceeding to have a chance of success in the courts of a democratic state based on the rule of law, the action must be expressed on legal grounds, even where the pith and substance is political in nature.

With rare exceptions,¹²¹ the court does not look at the nature of a litigant's motive in trying to use the justice system or the courts. Nevertheless, where a legal action is viewed by the court as being genuine, in the sense of being grounded in legal norms and motivated by legal rules, the court will not take the litigant's foundational motive into consideration. If the court perceives that the litigation is other than genuinely legal, for example, if it is an entirely political manoeuvre or if it forms part of a ploy seeking political, rather than legal advantage, there are strong chances the legal action will fail, if on no other ground than the doctrine of justiciability. Such an argument may perhaps even cause more harm than benefit to the plaintiff, as a result of public embarrassment. However, where the action is either partly legal and partly political, or where the political arguments are successfully cloaked as being legal in nature, the action is likely to proceed. It is important to understand the distinction between litigious proceedings that are purely legal from those that bear a political component. In characterizing litigious proceedings as "ordinary" in the sense of being purely legal or "political," a key question for analysts, rather than for judges, there is a need for more perceptible categories.

Where at least one of the parties to an action is a state institution or a political figure, the legal action is rendered political in nature. This is all the more true where both parties to the proceeding are political actors. It is not unheard of for actors in the political realm to engage in litigation, or at least to launch litigious proceedings, for the purpose of bolstering their political stance. Similarly, where the subject matter of the legal dispute is an issue in current public discussion or controversy, or where it relates to a political matter, the legal action can be considered political in nature. Thirdly, where, in the context of an ordinary legal action, one of the parties raises a political line of reasoning, the proceeding should be considered political in nature. Moreover, where a party to a public issue, matter, or dispute has the option to resolve

¹²¹ The traditional exceptions relate to champerty and maintenance, and separately to frivolous vexatious litigants. A more modern variation is found in relation to SLAPP (strategic lawsuits against public participation) lawsuits.

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 more 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.
- The use of litigation should be understood to mean that citizens and corporate bodies have more confidence in the judiciary than in the legislative or executive branches to resolve issues and to produce outcomes that are just, and in particular that deliver clear and definitive results.
- In particular in times of great uncertainty such as a pandemic, litigation may be seen as not only bringing advantage, but also ensuring certainty vis-à-vis difficult circumstances.

Politically motivated legal actions should not be treated with less interest or deference than other cases. The court judgments arising from them are just as valid as non-politicized ones, and perhaps more interesting than most. Let us consider the foregoing analysis to the current circumstances of the COVID-19 file. The subject matter at stake is public policy and political action, inaction, or allegedly wrong action of states, state institutions, or state officials. In the politically sensitive environment of a Covid-type pandemic, public positions, political careers, the reputations of publicly known individuals, even the public stances of heads of state or government, and of course the state's treasury and economic well-being can all be at stake. The policy and political stakes at play are very high: the lives of citizens, the ability of the health-care system to cope, the finding of a way to diminish public harm, and generally, the welfare of the people. There is great urgency, as Covid always risks spreading unchecked and destroying society and the economy. Moreover, there is intense controversiality, necessitating public and media attention to the proceedings. In consequence, all litigation dealing with this subject-matter should be thought of as likely being politically motivated at least in part.

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. For it to be representative and interesting, it needs to take a more comparative, multi-national, perspective.

General Legal Accountability of States for the Spread of the Illness

The first, and by far most noteworthy, form of litigation arising from the pandemic is that which is aimed at a sovereign state. In circumstances where there is an atmosphere of confrontation between states, and especially where there are multiple subjects of discord, namely political, military, as well as trade, the addition of yet another subject matter, namely public health, provides fertile ground for the use of litigation as a form of inter-state confrontation. The use of litigation may then be a genuinely legal strategy, or it may form part of a broader political confrontation.

The Missouri Case

On April 21, 2020, the State of Missouri initiated a legal action against the People's Republic of China as well as several of its national institutions and provincial and municipal authorities.¹²² The action comprises the following allegations: (a) inadequate and ill-timed response to the outbreak of COVID-19, (b) suppression of information about COVID-19 within China, (c) lack of reporting to the WHO, (d) enabling the illness to spread, and (e) tampering with trade in, and hoarding of, personal protective equipment (PPE). Missouri alleges that these actions amount to public nuisance, abnormally dangerous activities, allowing the transmission of COVID-19, and breach of duty in respect of PPE. On the basis of these assertions, the plaintiff seeks restitution, injunctive relief, civil penalties as well as damages. It is still too early for there to be any ruling in this case, but it is impossible to dismiss the importance of such a prominent resort to litigation. Nevertheless, analysis of the nature, context, and possible effectiveness of this use of the instrument of litigation is likely to leave observers skeptical as to the true intent of the plaintiff. The action may be supremely interesting but unlikely to lead to resolution of the problem at hand.

The attempts through litigation to achieve accountability to law on the part of states in respect of the spread of the illness go to the heart of the issue, namely, to determine whether state action, disputed action, or inaction contributed to the pandemic. Separate from the issue of state

¹²² The State of Missouri v. The People's Republic of China, The Communist Party of China, National Health Commission of the People's Republic of China, Ministry of Emergency Management of the People's Republic of China, Ministry of Civil Affairs of the People's Republic of China, People's Government of Hubei Province, People's Government of Wuhan City, Wuhan Institute of Virology and Chinese Academy of Sciences. United States District Court for the Eastern District of Missouri Case 1: 20-cv-00099, filed 04/21/20.

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 so-far, 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 danger de la vie d'autrui*," failure to provide assistance to a person in danger: "*non-assistance à personne en danger*" and homicide: "*homicide involontaire*." None of the complaints has yet led to a hearing, let alone a judgment. However, there is serious public attention paid to this matter, not only because of its inherent public interest, but also because there is an effort in the Senate of France to amend the law underlying the issue. The jurisprudence of the *Cour* will be well worth watching, as it may provide examples for other democratic jurisdictions.

The Italian Case

The first cases of COVID-19 in Europe developed in the Region of Lombardy, in the north of Italy. At the appearance of the illness, a tripartite debate took place. The national government was (and still is) of centre-left coloration. The regional government was (and still is) centre-right. The

¹²³ Available at <https://www.opendemocracy.net/en/oureconomy/wave-of-corporate-lawsuits-challenging-emergency-COVID-19-measures/>.

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 or inactions in relation to COVID-19. This is the application filed on May 27, 2020 by the Canadian Institute for International Law Expertise (CIFILE)¹²⁵ with the prosecutor of the International Criminal Court.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-19 pandemic has generated such sharp degrees of ill feeling in the body politic of certain states that those negatively affected have given up on political opposition and have resorted to judicial process. In this sense, on July 17, 2020, a very large group of healthcare workers presented a file to the ICC in The Hague, requesting an investigation of President Jair Bolsonaro and his government, regarding the manner in which they have responded to the public health emergency.¹²⁷ This is the complaint that has given rise to the expression "virus crime."

Specific Legal Accountability for Governmental Actions Related to the Illness

Legal Challenges to COVID-19 Remedial Legal Instruments

As is natural in a democratic system, some citizens are pleased with the existence and use of additional governmental powers to respond to a pandemic, while others are not. Where dissatisfaction arises, it is most often resolved through the expression of opposition, complaint or petition. There are instances, however, in which the political culture prevailing either in a part of the country or among a segment of the population leads to attempts at achieving accountability of the state to perceived breach of democratic norms through litigation. Such cases can not only be thought of as seeking to achieve accountability. They can also be counted as politically motivated litigation.

¹²⁴ Available at <https://www.republicworld.com/world-news/europe/italy-pm-giuseppe-conte-heard-by-prosecutors.html>, and <https://www.euronews.com/2020/06/12/coronavirus-italy-prosecutors-question-pm-giuseppe-conte-over-lockdown-delay>.

¹²⁵ Available at <https://cifile.org/>.

¹²⁶ Available at <https://cifile.org/complaint-over-the-COVID-19-outbreak-before-the-icc/>.

¹²⁷ Available at <https://www.bbc.com/news/live/world-53534638>.

The JCCF Alberta Case

The earliest legal action fitting into this category is entitled *Justice Centre for Constitutional Freedoms v. Alberta*. In Alberta, the Public Health Act, R.S.A. 2000, c. P-37, generally discusses the legal steps in the province's dealing with situations of health emergency, in particular influenza pandemic, and frames the powers and functions of the province's chief medical officer of health (CMO). More specifically, it deals with public health emergencies (s. 18.3), isolation, quarantine, and special measures (s. 29). Starting at s. 52.1, the Act deals with states of public health emergency and outlines the powers of the CMO and the lieutenant governor in council, that is in effect the Cabinet.¹²⁸ In 2020, revisions were made to the Public Health Act retroactive to March 17, 2020, the date on which Alberta declared a provincial state of public health emergency. In effect, the revisions vastly broadened governmental powers to apply and adapt legislative powers. The 2020 amendment set out a number of similar extensions of legislative powers and of powers to interpret legislation. During the enactment of the legislative amendment, of the Legislature membership of 87 MLAs, only 22 were present, including the Speaker. The Bill was approved on a 14–7 basis.

In response to the enactment of the amendments, the Justice Centre for Constitutional Freedoms (JCCF) launched its legal action. Among the more fundamental and interesting issues raised are:

- The Constitution of Canada, which incorporates both written and unwritten foundational principles, is not suspended by a pandemic (arts. 12 and 13 of the Originating Application).
- The amendments substitute ministerial fiat in place of the rule of law (art. 14).
- There can be no delegation of legislative power (art. 19).
- There can be no divesting of legislative power (art. 29).
- The amendments and the process of their adoption violate the principle of democracy (art. 20) and lack democratic legitimacy (art. 26).

The Centre's filing is presently before the Alberta Court of Queen's Bench. Judging by the manner of drafting of this Application as well as by its contents, there can be no doubt that this action is both legal and political in nature. It will be of great interest to see whether, and how, this case evolves. The most serious threat to its success is that, in particular at present, as the judicial process is far slower than the legislative one, the courts may hold the issues raised by the Centre to be moot by the time they can be adjudicated.

The British Columbia Ombudsperson Report

This item is, strictly speaking, not the result of litigation; rather, it is a public officer's Report on the use of ministerial powers that, for our purposes, can be assimilated to a judgment. On March 18, 2020, the minister of public safety and solicitor general in British Columbia declared an

¹²⁸ Available at <https://www.qp.alberta.ca/documents/Acts/P37.pdf>.

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.

While the minister wields broad powers under the Emergency Program Act, those powers are not unlimited or absolute. Even in a health emergency, Canada remains a free and democratic society governed by the rule of law. A health emergency does not suspend the fundamental principle that every exercise of public authority, including authority exercised by a minister, must find its source in law. Adherence to this constitutional principle is particularly important in a public health emergency, where compliance with the rule of law is a critical guarantor of the civil liberties of British Columbians.

In a free and democratic society, the supreme law-making body is the legislature. The whole history of democracy and the rule of law reject the idea that a single individual, however benevolent or well intentioned, could be “supreme” or make laws without underlying legal authorization from a democratically elected legislature. Related to this is the principle that where the law does authorize a single official to exercise power, that official cannot pass that power along to someone else without express legislative authority.¹²⁹

The Vaccine Choice Case

Perhaps the most ambitious legal action in Canada now aiming to contest the validity of the use of governmental powers and COVID-19 remedial legal instruments is a case entitled *Vaccine Choice Canada v. Trudeau et al.*, filed in the Ontario Superior Court of Justice on July 6, 2020. Several aspects of this action deserve specific mention. The first is that it not only takes on the federal HSG, Prime Minister Trudeau, but that it also lists the Ontario HSG, Premier Ford, and the mayor of Toronto as defendants. Such a crossing of jurisdictional boundaries, a simultaneous legal attack on federal, provincial, and municipal authorities, is unusual. Another point of interest is that the COVID-19 measures undertaken and orchestrated by Prime Minister Trudeau constitutionally violate the English Bill of Rights of 1689 as incorporated into the Constitution of Canada by the 1867 Preamble, in that they rely on the pretense of the Royal Prerogative. The essence of the action is that it seeks declaratory judgments against self-isolation, social distancing, compulsory wearing of masks, and what it designates as the arbitrary and compulsory closure of businesses. This case has not yet been heard.

¹²⁹ Available at https://bcombudsperson.ca/assets/media/ExtraordinaryTimesMeasures_Final-Report.pdf, 5.

The Georgia Case

During the height of the summer of 2020, the incidence of COVID-19 in Georgia expanded seemingly beyond control. In response, on July 15, the governor issued an executive order that, among other things, recommended that citizens wear masks. Following the example of President Trump, based on the notion that resort to compulsion is contrary to the American notion of the role of government, the executive order left the ultimate decision to each individual. By contrast, the mayor of Atlanta issued a mandatory order for the wearing of masks. These circumstances led to a litigious confrontation that in one sense epitomized the domestic treatment of COVID-19 in the United States. On July 16, the governor initiated proceedings in the State Superior Court,¹³⁰ seeking as remedies a declaratory judgment, interlocutory and permanent injunctions to prevent enforcement by the mayor of municipal executive orders more restrictive than the ones issued in the name of the state, as well as an order that the mayor immediately comply with and enforce all provisions of the governor's executive orders. This case has now been settled.

Legal Challenges to Request Lockdown

In a society that tends to either shrug at obvious public dangers or to resist what it perceives to be any form of compulsion, even in the public interest, the use of litigation to request locking down is a note of litigious courage. To date, there is only one American case the author has found that belongs to this category. That is *Uhlfelder v. DeSantis*, Governor of Florida. The plaintiff is a Florida lawyer who, on March 20, 2020 filed a complaint in the Leon County Circuit Court, requesting that all, rather than merely some, Florida beaches be closed. He based the action on the position that, pursuant to s. 252.36 (1)(a) of the Florida Statutes which sets out the emergency powers of the governor, the latter is responsible for meeting the dangers presented to the state and its people by emergencies. Relying on the separation of powers clause in the Florida constitution, the court dismissed the complaint. Nevertheless, the judge was sufficiently impressed with the plaintiff's legal reasoning that he urged the plaintiff to appeal.¹³¹ At the time of writing, the matter is before the First District Court of Appeal.¹³²

Legal Challenges to Resist Lockdown

The Dolan Case

More to the point in respect of the present chapter are the rare systematic legal arguments made in opposition to the validity or the extent of lockdown rules. To date, the author is not aware of such litigation arising in Canada. There is one case, however, in the United Kingdom, which ought to be watched with great interest. It is styled *R. (On the application of Simon Dolan) v. The*

¹³⁰ *Kemp v. Bottoms et al.*, Superior Court of Fulton County, Georgia, Civil Action filed July 16, 2020.

¹³¹ Available at <https://www.orlandoweekly.com/Blogs/archives/2020/07/14/florida-attorney-and-coronavirus-grim-reaper-keeps-pushing-lawsuit-to-force-gov-desantis-into-closing-beaches>.

¹³² Available at <http://onlinedocketsdca.flcourts.org/DCAResults/LTCases?CaseNumber=1178&CaseYear=2020&Court=1>.

Secretary of State for Health and Social Care and The Secretary of State for Education.¹³³ This is an application for judicial review, prepared during April and May 2020 and launched on May 20, 2020. The applicant, Dolan, is a self-made businessman. He claims that the various public health regulations adopted by the UK government to respond to COVID-19, and as he characterizes them, imposed on every aspect of personal and public life in England, are ultra vires. The application is aimed specifically at the regulations (a) preventing the general public from remaining outside their residences rather than restricting them from leaving them save for a “reasonable excuse,” and (b) the closure of schools.

Among a number of reasons supporting his application, Dolan argues that the scientific evidence on which the regulations are based is uncertain, that the defendants failed to consider the effect of the regulations on public health and that they did not give weight to the medium- and long-term effects of the measures, that they ought to have considered adopting less restrictive measures. Most interestingly of all, Dolan invokes the *European Convention on Human Rights*. He argues that the rules constitute a disproportionate breach of fundamental rights and freedoms guaranteed by the European Convention on Human Rights. The process of Dolan's application is just now getting started.

The De Beer Case

In South Africa, the litigation of the constitutional validity of locking the country down is much further ahead than elsewhere. In *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*,¹³⁴ the High Court of South Africa, North Gauteng Division dealt with an urgent application to determine whether lockdown regulations made by the minister pursuant to a Declaration of National State of Disaster were in compliance with the Constitution. The Court found that although the declaration had a rational basis, the regulations made pursuant to the Disaster Management Act did not and were invalid. However, the declaration of invalidity was suspended until the minister could review, amend, and re-publish them.¹³⁵

The Harvard – MIT Case

In the United States, the lockdown had an unanticipated impact on foreign students granted entry into the country on the basis of an F-1 visa, that required them to attend classes in person. On March 13, 2020, when President Trump declared a national emergency, the Immigration and Customs Enforcement Service (ICE) recognized that the lockdown warranted an exception to the in-person attendance rule. Pursuant to the exception, Harvard and the Massachusetts Institute of Technology continued to offer education to American and foreign students alike, remotely. On July 6, ICE announced the rescinding of the COVID-19 exemption. Within two days, the two well-known universities sued, indicating that the revised ICE policy threw them and all of United States

¹³³ Available at https://static.crowdjustice.com/group_claim_document/Statement_of_Facts_and_Grounds_-_Written_Submissions_of_the_Claimant_69dBeCS.PDF.

¹³⁴ [2020] ZAGPPHC 184 (2 June 2020).

¹³⁵ Available at <http://www.saflii.org/za/cases/ZAGPPHC/2020/184.html>.

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, perceive that the calculation of the lesser of two evils operates 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 of Harvard College and Massachusetts Institute of Technology v. United States Department of Homeland Security. US District Court for the District of Massachusetts, Civil Action No. 1:20-cv-11283, filed July 8, 2020.

¹³⁷ Available at <https://www.mass.gov/doc/ag-complaint/download>.

¹³⁸ Available at <https://www.jurist.org/news/2020/07/trump-administration-abandons-new-restrictive-student-visa-policy-in-face-of-legal-actions/>.

¹³⁹ Available at https://www.huffingtonpost.ca/entry/canada-international-students-travel-restrictions_ca_5f189490c5b6f2f6c9f0c7de??ncid=newsltcahpmgnews.

The JCCF Ontario Case

One example of such a worldview is that of the Justice Centre for Constitutional Freedoms (JCCF). On May 28, 2020, JCCF announced that it was planning to initiate a Charter challenge in respect of Ontario Regulation 52/20, an Order made pursuant to the Emergency Management and Civil Protection Act.¹⁴⁰ The Order temporarily prohibits any person from attending an organized public event of more than five people. If the action goes ahead, the JCCF would be acting on behalf of a group of Orthodox Jews who indicate that they are required to pray seven times a day in groups of no less than 10 males.¹⁴¹ The courts would then be charged with determining which legal value, the public welfare of society or the freedom of religion of the applicants, to place ahead.

The California Case

American jurisprudence regarding specific practices aiming to avoid COVID-19 has in large measure been phrased in terms of the constitution-based rights of individuals or groups to act in their own perceived best interest, irrespective of community benefit or harm. Based on the subject-matter, this clearly amounts to political litigation. On July 2, 2020, in *South Bay United Pentecostal Church v. Newsom*,¹⁴² under the pen of the chief justice, the Supreme Court of the United States left in place a guideline promulgated by the state to limit attendance at places of worship to 25 percent of building capacity or a maximum of 100 attendees. The genuinely interesting aspect of the ruling was the Court's opinion on the matter of who should decide such an issue, the executive or the judiciary. The Supreme Court opted to defer to the executive, with its greater expertise in medical and scientific uncertainties.¹⁴³ It specifically stated that the decision should be made by the "politically accountable" branch, namely the legislative branch. Thus, the issue brought before the court was "political" both in the sense of the American constitution, in that it was not judicial, and in the sense in which the expression "political" is used here to denote a matter relating to the conduct of public affairs and live controversies of public life.

The Texas Case

From the perspective of political law, there will be greater interest in judgments affecting the legal positions of political actors. On July 13–18, 2020, the Texas Republican Party was scheduled to hold its convention in a Houston arena. On July 8, the management company operating the convention center on behalf of the city terminated its agreement, citing "the unprecedented scope and severity of the COVID-19 epidemic in Houston" as force majeure. Relying on the State's Election Code,¹⁴⁴ the Republican Party sued for a declaration and injunction, attempting to rely

¹⁴⁰ R.S.O., c. E-9

¹⁴¹ Available at <https://nationalpost.com/news/legal-group-threatens-court-challenge-over-right-of-ontario-orthodox-jews-to-worship-during-pandemic>.

¹⁴² 590 U.S., May 29, 2020, a 5–4 decision. The majority consisted of justices Roberts, Kagan, Sotomayor, Ginsburg, and Breyer. Kavanaugh, Alito, Gorsuch, and Thomas constituted the minority.

¹⁴³ 590 U.S., May 29, 2020, C. J. Roberts concurring.

¹⁴⁴ TEX. ELEC. CODE § 273.061

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: *Commissioner of Police (NSW) v. Gibson*.¹⁴⁶ First, it defined the constitutional conflict: (a) 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 freedom. It decided not to accede to the plaintiff's application for a prohibition order.

The Court then took into consideration whether, in making the decision to oppose the demonstration, the Commissioner of Police and his staff had an apprehended bias. In order to analyze this point, it distinguished a police official's decision from that of a political figure. It found that the impartiality expected of judicial officers is more exacting than that of a political figure. By contrast to a government official, a minister making a decision is electorally and politically accountable. The role of a minister as an elected official includes being drawn into public debate and expressing opinions on issues that he may have the power to make decisions on.¹⁴⁷ In this instance, the Court detected no bias in the decisions of the police officials. It therefore based its decision to allow the banning of the march on the basis of public health considerations. The officials' decisions were allowed to stand. This case is probably the most thorough and dispassionate judicial pronouncement balancing public health considerations versus other, namely political, ones.

Legal Challenges to the Closure of Borders

The issue of border closures at the international level should be thought of as one of public international law. Fundamentally, sovereign states are free to treat their international borders as open or closed on the basis of sovereign decisions. The two qualifications to this general rule are international treaties or treaty-like arrangements and domestic constitutional requirements.

¹⁴⁵ Available at <https://www.jurist.org/news/2020/07/texas-supreme-court-rejects-state-republican-bid-to-hold-in-person-convention-in-houston/>, and <https://www.txcourts.gov/media/1448816/200525.pdf>.

¹⁴⁶ (2020) NSWSC 953

¹⁴⁷ (2020) NSWSC 953, at para. 50

This reality has left relatively little need for accountability to law in respect of boundaries between countries. The situation is somewhat more complicated regarding border closures involving the constituent jurisdictions of federal states.

In the case of Canada, the foundational law regarding national boundaries is s. 6 of the Constitution Act, 1982. In relation to COVID-19, the aspect of s. 6 we must most closely note is that Canadian citizens have the right to enter the country or exit from it. In practical terms, this means that citizens caught outside Canada when the country's international boundaries were closed (or partially closed) cannot be refused entry. However, upon entry, they may still be subject to quarantine or other health-related provisions of law or regulation. Equally, no Canadian citizen may be prevented from going abroad. Beyond the scope of s. 6, Canada is constitutionally unrestricted in the manner it treats any category of individual other than citizens.

The domestic situation in Canada is not so simple. We should first note that while the aforementioned s. 6 right applies at international borders to citizens, the rules applicable at interprovincial and interterritorial borders can apply to all individuals, citizen or not. Boundary closures are thought by various public authorities to be useful in limiting the spread of COVID-19. Reference to the geography of Canada may validate the conclusion that jurisdictions with low population density and/or relative isolation from the rest of the country are more likely to favor such closures. The provinces of Québec, New Brunswick, Prince Edward Island and Newfoundland and Labrador (NL) have, at various times, adjusted their legislative and regulatory regimes to put closures into effect. The same is true of the three territories, Yukon, Northwest Territories and Nunavut.¹⁴⁸

The Taylor Case

Some of the individuals affected by the consequences of closures have resorted to litigation to attempt to hold local jurisdictions to account. The most interesting of these is the case of Kimberley Taylor, a resident of Halifax, who tried to enter NL to attend her mother's funeral. She reapplied and was eventually given the exemption necessary to be admitted to NL. Upon being first denied entry, she initiated legal action in the Supreme Court of Newfoundland and Labrador, based on subsection 6 (2) of the Constitution Act, 1982, which guarantees to everyone the right to take up residence or gain a livelihood anywhere in Canada. This action is likely to gain prominence by the fact that the Canadian Civil Liberties Association (CCLA) has taken on the position of Second Applicant.¹⁴⁹ The CCLA pleads that ss. 28.1 and 50 (1) of the Public Health Protection and Promotion Act of NL are constitutionally invalid and not saved by s. 1, the reasonable limits clause of the Canadian Charter of Rights and Freedoms. It affirms that NL's travel ban is *ultra vires* the province; it argues that the provincial law violates s. 6 of the Charter;

¹⁴⁸ For a more in-depth analysis of the constitutional and legal aspects of this topic, see: <http://www.slaw.ca/2020/05/19/the-constitutionality-of-interprovincial-territorial-boundary-closures-part-i/>, <http://www.slaw.ca/2020/05/26/the-constitutionality-of-interprovincial-boundary-closures-part-ii/>, and <http://www.slaw.ca/2020/06/02/the-constitutionality-of-interprovincial-boundary-closures-part-iii/>.

¹⁴⁹ Kimberley Taylor and Canadian Civil Liberties Association v. Her Majesty In Right of Newfoundland and Labrador and Janice Fitzgerald, Chief Medical Officer of Health. Case 2020 01G 2342. Filed June 15, 2020.

and also, that it violates s. 7 of the Charter because it amounts to a deprivation of liberty not in accordance with the principles of fundamental justice. Considering that the validity of intra-Canadian travel bans or border closures to individuals have never been tested in court, this case is potentially ground-breaking.

The Newfoundland and Labrador Class Action

Separately, in June 2020, a St. John's lawyer started proceedings to have a class action certified, the purpose of which was also to dispute the NL closure rules.¹⁵⁰

The Yukon Case

Similarly, to what is happening in the Atlantic Provinces, a case regarding the closure of interprovincial borders has also been initiated in relation to Yukon.¹⁵¹

Legal Challenges to Governmental Funding in Relation to COVID-19

In order to respond to the economic, social, and societal ills occasioned by COVID-19, the Government of Canada has dedicated very large sums of money to various categories of citizens and classes of participants in the economy. Entire new programs were created in very short time spans. One such tranche of funding was dedicated to off-reserve status and non-status First Nations people, Métis, and southern Inuit people. The Congress of Aboriginal Peoples (CAP), the body representing these segments of population, was of the view that the funds dedicated to them were inadequate. On May 13, 2020, the CAP applied to the Federal Court of Canada for judicial review. With an agreement reached on additional funding, this action was discontinued.

Legal Challenges to Reopening After Lockdown

The Trump Re-Election Rally Case

In the category of legal challenges to the prohibition of activities resulting from the lockdown, perhaps the most interesting litigation occurred in Oklahoma. As part of the campaign for the re-election of Trump as president, a public gathering was scheduled to be held in a stadium in Tulsa on Friday, June 19, 2020. The attendees would be unencumbered by rules of social distancing or mask-wearing but were required not to sue the re-election campaign if they contracted the coronavirus. In *Greenwood Centre Limited et al. v. Nightingale*, the Supreme Court of the State of Oklahoma denied a petition to prevent the rally. The common good was made subservient to the property rights of the owners of the venue.¹⁵²

¹⁵⁰ Available at <https://www.cbc.ca/news/canada/newfoundland-labrador/class-action-suit-border-closure-seasonal-residents-1.5596685>.

¹⁵¹ Available at <https://ccla.org/cclanewsites/wp-content/uploads/2020/05/Originating-Application.pdf?fbclid=IwAR30I3n3bsl5xM1cWo5dxIN0jIKfLLUywHtFPYcmO5aJGI24vQhr7-sLAzs>
<https://www.cbc.ca/news/business/n-b-p-e-i-n-l-territories-border-ban-ccla-court-challenge-1.5600235>.

¹⁵² Available at <https://www.bbc.com/news/world-us-canada-53116623>.

Accountability: Achieving Clarity about Public Duty

The concept of accountability to law is the insurance policy to provide for the primacy of the rule of law over efficient, effective, and economic management on one hand and political perspective and ideology on the other. The basic means of providing for accountability to law is for public administrators and members of the political class to internalize rule of law criteria and apply them to their work integrally. Where there is a public perception that such internalization has not taken place, or that it is insufficient, litigation becomes the necessary remedial tool.

As applied to the pandemic, the notion of accountability has two branches. We must look first at whether the public actions undertaken were politically–administratively suitable: did they help lessen the impact of the illness for each individual patient and diminish the harm to society at large, and all of this done in an efficient, effective, and economic manner? Next, we must establish whether the state actions undertaken were constitutionally and legally valid, and therefore legitimate. These two branches of accountability are inseparably intertwined.

The Responsibility to Govern Democratically

Besides being at its foundation a medical and scientific phenomenon, COVID-19 has become a simultaneously political event and a legal phenomenon. This study would not be complete if it did not consider the consequences of all the litigation comprehensively and follow up on that branch of the discussion about democratic action in response to COVID-19. The question we must address is whether the foregoing examples of litigation can lead to a comprehensive conclusion about the relationship between the legal obligations of political figures and public administrators vis-à-vis democracy. It is too early to try to rely on the judgments. Many of the litigious actions may take years to wind their way through the courts. Some cases may never be ruled upon. However, even at this early stage, a fundamental trend can be detected in the actions/complaints/applications. In fact, the key initial observation is that there are underlying commonalities among the cases dealing with responsibility or liability for COVID-19.

These cases all deal with aspects of public decision-making in response to the pandemic. They all trend in the direction that public decision-makers arrived at solutions that did not protect, or at least did not adequately protect, the health of a majority of the people. They all argue that such decisions were made on the basis of inadequate preparation, incomplete information, or taking the wrong criteria into account as the foundations of decision-making. Most important of all, the cases all argue, openly or implicitly, that public officials at both political and administrative levels have an obligation to govern for the benefit of the people and that they failed to do so.

The fundamental part of this train of thought is that public officials in a democracy have the obligation to govern for the benefit of the people. This means basing political decisions in the realm of public health on medical-scientific facts rather than either political belief or worldview, or economic self-interest such as profit. At this point, stated legal obligation equates to perceived public administrative and political obligation. The tasks of political figures and state

administrators that combine elements of law, public administration, and politics can be framed in terms of democracy itself. We can thus conclude that COVID-19 has demonstrated a responsibility to govern democratically (RGD).

Considering that what we are analyzing is *democratic* government, with the emphasis on the word democratic as a qualifier, the first significant element of RGD is that this should be thought of as comprising both political and legal aspects, seamlessly. No responsibility can exist without a mirror right. We should therefore also note that RGD, as a responsibility of those involved in statecraft, is the natural counterpart of the evolving right to democratic government (RDG), to be enjoyed by citizens. RGD is best described as the obligation of the state, of state institutions and state officials at both political and administrative levels to act (a) on the basis of evidence rather than belief, and (b) for the general benefit of the population. In the sense that this relates to the state and to governance, RGD can be perceived as an evolving customary rule of constitutional law.

Recommendations

With the notable exception of frivolous and vexatious litigation, the right to have resort to the process of the courts can, by custom, not be limited. Moreover, the content and motive of legal actions is extremely difficult, if not impossible, to predict. With the exception of justiciability, the courts are bound to consider and render judgment in every case brought before them. Based on these realities, there is rather serious difficulty in making recommendations in the realm of litigation.

To legal counsel:

- On the side of prospective plaintiffs, any attempt to forestall serious litigation would be inadvisable. Advice to avoid frivolous and vexatious litigation is counterproductive.

To governments:

- Govern with one eye to constitutionalism and the rule of law, and in such a manner as always to practice (peace, order, and) good government. However, based on the diversity of views of prospective litigants and on the ingenuity of counsel well-versed in the laws, no amount of regard for these criteria will avoid or reduce litigation.

To governments and academics:

- COVID-19 is a new domain of legal practice, though of course it encompasses numerous traditional domains of law (constitutional law, public duties, tort, contract, property, etc.). Consider cataloguing all pleadings and judgments related to COVID-19.

Recommendations

1. The Executive and Parliament

To the prime minister:

- Announce major decisions, particularly spending ones, in Parliament.
- Maintain a high public profile to reassure Canadians and keep them informed directly.

To the political parties:

- Respect Parliament and ensure its full functioning in times of crisis as well as regular times by supporting and scrutinizing the decisions and actions of the government.

To the public and media:

- In times of crises, be vigilant to ensure that Parliament is able to function with its full powers.
- Ask the tough questions and consider the short- and long-term consequences of government actions.

To the Canadian government and political parties:

- Amend House rules and procedures to provide for a model of Parliament to operate during crises like COVID-19 similar to the model in the Emergencies Act or other means of ensuring executive accountability to Parliament during crises and exceptional circumstances if an emergency is not declared.
- Consider whether any fundamental changes to the operation of the House of Commons should require all-party agreement under the rules and procedures of the House.

To the Canadian government:

- Update the Emergencies Act given recent changes in the Senate.
- Consider whether the Emergencies Act should be amended to make it easier to invoke during crises like the pandemic.

To academics:

- Engage in research that compares how parliaments within Canada and internationally fared in holding the executive to account during the global pandemic.
- Conduct research with recommendations on the nature and scope of multiparty agreements in parliamentary systems.

To Parliament and the Procedures and House Affairs Committee:

- Assess whether the procedures adopted by the House of Commons were the best ones possible with special attention to House sittings in a dispersed or hybrid fashion, rules governing committees, House voting procedures, and the need for secure communications equipment.

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, a “best and brightest” team to fan out and talk to Canadians to advise on the creation of a Canadian roadmap to health, safety, and security. Start soon.

To provincial leaders:

- Change the references to long-term care to “aging in health and dignity”: The provinces hold the authority and responsibility to fix what went wrong here. But they also hold the capacity to rethink the system, drawing in a mix of players into a national consensus and action.

To leaders of the public service (clerks, cabinet secretaries):

- Create a frank conversation about risk culture: This will take time, consistency and leadership, but it has to start with an understanding of what has to be done. The public service should draw in academics, business leaders, and their international colleagues to form that agenda. It remains an elusive bunch of clichés at this point.
- Develop a new public service model. Public services lunge 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 more stable, foundation for a modernization agenda. Modernization is not a free good.

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 in 2020, they should understand that the main sources of revenue for municipalities, namely, property tax and user fees, are inadequate and often regressive for addressing the costs of the full array of municipal services. Municipalities should have access to a more progressive taxation system to cover the extensive social, cultural, and environmental services they provide.

4. At the Intersection of Law and Politics

To legal counsel:

- On the side of prospective plaintiffs, any attempt to forestall serious litigation would be inadvisable. Moreover, advice to avoid frivolous and vexatious litigation is counterproductive.

To governments:

- Govern with one eye to constitutionalism and the rule of law, and in such a manner as always to practice (peace, order, and) good government. However, based on the diversity of views of prospective litigants and on the ingenuity of counsel well-versed in the laws, no amount of regard for these criteria will avoid or reduce litigation.

To governments and academics:

- COVID-19 is a new domain of legal practice, though of course it encompasses numerous traditional domains of law (constitutional law, public duties, tort, contract, property, etc.). Consider cataloguing all pleadings and judgments related to COVID-19.

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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 airports (Montreal, Toronto, Vancouver) and would be monitoring the situation to assess the need for further measures. At this point in time, there is little understanding of the virus and the threat it 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 their position that it would be discriminatory to exclude travellers from China, suggesting that border closings or travel bans do not work in trying to limit the spread.

March 4: The Cabinet Committee on the federal response to the coronavirus disease was created, 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 same 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 residents, and their immediate families, as of March 18. International flights were all routed through four principal airports to ease enhanced screening.

March 24: A reduced number of members of Parliament met to discuss Bill C-13 (An Act respecting certain measures in response to COVID-19). The Bill received unanimous support on March 25. The legislation included the Canada Emergency Response Benefit (CERB), which provided financial stimulus to those negatively impacted by the spread of COVID-19. The Bill also allowed the federal government sweeping spending powers related to COVID-19.

April 6: The prime minister announced the government's intention to expand CERB to include some who did not meet the initial eligibility criteria, such as seasonal workers, or those who have not lost their jobs but have still experienced a reduction in income as a result of COVID-19.

April 10: The RCMP publicly disclosed that it had been asked to enforce the Quarantine Act (2005), including penalties for violations such as fines and possible imprisonment. The goal was to enforce self-isolation.

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 weekly, for as long as COVID-19 can reasonably be considered a grave health and safety risk. The vote was 22–15 with all party support except the Conservative Party which objected to the reduction in Parliament’s powers.

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 not find 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 of 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, workers’ pensions, and 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 Canada’s credit rating from AAA to AA+.

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 revert to 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.

APPENDIX B: PROC AND VIRTUAL VOTING IN THE HOUSE OF COMMONS

PROC and Virtual Voting in the House of Commons

Graeme Murray

The Standing Committee on Procedure and House Affairs (PROC) is mandated to review and report Standing Orders, procedure, and practice in the House of Commons and its committees.

Pursuant to motions adopted in the House on April 11 and May 26, PROC studied the COVID-19 pandemic and its relationship to parliamentary duties.

Their first report was presented May 15, which, drawing on examples from other countries like the United Kingdom and Australia, and weighing the legal, procedural, and technical considerations of modifying House proceedings in response to the pandemic, provided observations and initial recommendations. An example is the recommendations that the House enable the implementation of a virtual Parliament, through an alternative set of Standing Orders. These modified Standing Orders should only come into force with the agreement of all recognized parties for a predetermined, agreed upon, period of time.

A second report, submitted July 21 that can be considered an extension of the first, has a meaningful evaluation of the prospect of virtual voting for members of Parliament.

The Committee's report identified four possible types of electronic voting that could enable remote voting. Email voting, where members receive a ballot form electronically and submit their vote via email. Web-based voting, where members access and cast ballots via a website. Application-based voting, where members access and cast ballots via a downloadable application. Video voting, where members vote on-screen by voice or a show of hands. Video voting was the preferred option among experts because it was less anonymous, less of a security risk, easiest to deploy, and resembled most closely parliamentary traditions of standing in the House.

In PROC's report, of primary concern to remote voting was IT security and internet access. Experts shared concerns about security risks such as scams and malware, untrustworthy software or hardware, or access by unauthorized individuals as well as the availability of fast and reliable internet connection for all members.

A disadvantage to virtual voting mentioned was that it could create a tendency for some members to stay in their constituencies more often if it becomes a permanent option, leading to a two-tier system of parliamentarians where those participating in Ottawa would have more influence. Conversely, it could also carry the advantage of increasing the participation of members who need to travel a lot, have disabilities, or have young children.

Alternatives to remote voting discussed in the report include shift voting where a maximum of 86 members would be permitted at any one time, block voting where one representative from each party would vote on behalf of their membership, and proxy voting where members would designate a colleague to vote on their behalf.

The Committee submitted an extensive list of virtual and remote voting recommendations, including a vote notification system, member authentication, publication of results, and others.

As it relates specifically to voting, a complete account of the Committee recommendations follows:

- remote voting be built before September for use during the COVID-19 pandemic;
- during virtual or hybrid sittings, members can avail themselves of remote voting by electronic means;
- the Speaker may, with the agreement of House leaders, modify procedures, practices, or Standing Orders related to the taking of recorded divisions for the purpose of respecting public health guidance concerning physical distancing;
- a secure means of conducting votes via secret ballots electronically in the rare event that they are necessary when members are unable to physically be present in the Chamber;
- a secure virtual voting system include when members should vote, what they are voting on, how much time they have to vote, how they can check their vote, and how they could correct a vote cast in error;
- any new electronic voting system include an integrated solution that fits with the House of Commons' current motion management system, a vote notification system which includes notifications to members' mobile devices, end-to-end encryption, enhancements to monitoring technologies, recording of all activity on the system in immutable logs, various methods of member authentication, a dedicated secure application on members' House of Commons-managed mobile device to read the motion and cast their vote, recording, archiving, and publication of results, auditability of the system, multiple redundancies that would enable recovery from various failures, and the use of technologies that have the appropriate security certifications and permit security partners to perform the appropriate audits to mitigate risks;
- monitoring occurs on any remote voting system for threats and performance;
- procedure safeguards be developed for potential challenges that may arise;
- the House administration provide an alternative voting system to supplement any electronic voting system in case of problems;
- any electronic voting sessions be carried out using a multi-level security system for authenticating and validating results and that this system be approved by all recognized parties prior to implementation;
- CSEC review and report on the secure use of any technological voting solutions;
- voting periods occur only during the period that will be determined when the Standing Orders that apply are triggered by unanimous consent;
- members only vote during scheduled sitting weeks or after the House is recalled;
- the House administration consider and plan for potential adaptations for members living with a disability;
- the House administration provide regular reports to the Committee on additional expenses and internally allocated resources incurred in the implementation and operation of any remote voting system.