Submission to the Standing Committee on Health and Social Development

With regards to: Bill No. 37 (An Act to Amend the Emergency Measures Act)

Submitted by

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– in his capacity as a private citizen –

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Summary:

- The proposed legislation, An Act to Amend the Emergency Measures Act (Bill No. 37), would allow the Lieutenant Governor in Council (and so the Cabinet) to amend or suspend legislation without the need to seek approval of the Prince Edward Island Legislative Assembly.

- There are no explicit restrictions on what legislation could be suspended or amended.

- There are no requirements for PEI's elected representatives to be even informed as to what regulations would be amended or suspended, and when.

- The Emergency Measures Act allows the Cabinet to renew a state of emergency without requiring legislative approval (EMA sec 15 (2). The powers provided by Bill 37 are dependent on the Minister of Public Works and Safety declaring the emergency over, and extend well beyond that point. Therefore the time limits allowed under Bill 37 stretch beyond what is reasonable.

- By definition, such executive actions are arbitrary and fail to meet the constitutional standards or principles outlined below. These measures are contrary to principles of democracy and the rule of law.

- As well, the powers that would be delegated to the Crown are an overstep, and are beyond the capacity of the legislature as they amount to the legislature relinquishing its legislative authority. Under Canadian constitutional law and practice, legislatures do not have the power to abnegate their responsibilities.

- Furthermore, the Canadian Constitution already affords the government ample power to accomplish its goals. The Constitution is flexible and allows for the government to take extraordinary measures to deal with a crisis, such as the current COVID -19 pandemic. But it requires the government to do so within the existing rules.

- The government should find ways to work within the constitutionally-required legislative process. The onus is on the government to prove that the legislative process is the problem. Note that expediency is not a sufficient reason to usurp the legislature's constitutional powers. But if it is indeed the case that the legislative process is an impediment to the government's ability to manage a crisis, then the government should consider reforming the legislative process. It has the constitutional ability to do so, as long as it respects the fundamentals of responsible government and the parliamentary system.

As it stands, Bill 37 is in my view unconstitutional.

Rule of Law

By giving Cabinet authority to amend or suspend unspecified legislation without the need for legislative debate, committee scrutiny or house approval, the proposed legislation violates the rule of law principle.

The Canadian Constitution is founded on the principle of the rule of law.

The Constitution Act 1867 (CA 1867) implicitly acknowledges the rule of law principle in its Preamble, where it states:

> The Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.

The fundamental principle of the constitution of the UK is the rule of law, and has been so recognized for hundreds of years, going back to the Magna Carta if not earlier.[1]

The Constitution Act 1982 (CA 1982) explicitly states that the Canadian Constitution is founded on the rule of law. The preamble to the CA 1982 states:

> Canada is founded upon principles that recognize the supremacy of God and the rule of law.

The rule of law embodies three concepts:

> 1) the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen;
> 2) the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts;
> 3) and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations.[2]

Rules and rule making that is arbitrary (number 1) or abstract (that is, having no concrete or explicit purpose) (number 3) are, therefore, contrary to the rule of law.

The rule of law is inextricably connected to the principles of a democratically elected legislative

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[1] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition, 1985: 413. Dicey actually dates the rule of law in Britain back to the Norman Conquest, so 1066.

[2] "Rule of Law," *A Dictionary of Law*, OUP.

assembly and responsible government. Ferejohn and Pasquino write:

> ... the rule of law ... is the notion that government should work its will through general legislation ... rather than through irregular decrees and ... proclamations. [The rule of law requires] that people are able to foresee accurately the legal consequences of their actions and not be subject to sudden surprises.[3]

"Irregular decrees and proclamations" refer to governing through executive orders under the prerogatives of the Executive, rather than through legislation. The rule of law, then, means that governments rule through laws, not decrees or executive orders. Laws result from legislation passed by the elected assembly, as only the legislature can make or amend laws. Bill 37 would empower Cabinet to amend or suspend laws without recourse to the legislature. This is not governing through laws.

Prerogative Powers

The proposed legislation violates the Bill of Rights of 1689, which prohibits the Crown from suspending legislation on its own initiative. This violates the constitutional restrictions on the Crown's prerogative powers.

Prerogative power is "the residue of discretionary or arbitrary authority" exercised in the name of the Crown by the Executive Council or Cabinet. It was precisely this type of rule that the Bill of Rights of 1689 meant to limit.

The 1689 Bill of Rights asserted the supremacy of Parliament and ensured the primacy of its representative and legislative role. It is still regarded as "active" in British constitutional law.[4] By virtue of the Preamble of the CA 1867, the Bill of Rights 1689 is still active in Canadian constitutional law as well. As recently as 2018, the Supreme Court of Canada relied on the 1689 Bill of Rights in one of its decisions. It is still, then, "good" law.

Peter Hogg, writing in his *Constitutional Law of Canada*, explains that the Bill of Rights explicitly "denie[s] the prerogative powers to 'suspend' a law for a period of time, or to 'dispense' with a law in a particular case."[6]

These restrictions continue today. There is no prerogative power to legislate. Only Parliament or a provincial legislative assembly can make, amend, or suspend laws. While the Executive still

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[3] John Ferejohn and Paquale Pasquino, "Rule of Democracy and Rule of Law," *Democracy and the Rule of Law*, eds Adam Przeworski and José María Maravall, Cambridge University Press, 2003 (ch. 10).

[4] See Geoffrey Lock, "The 1689 Bill of Rights," *Political Studies*, XXXVII (1989): 540-561.

retains some prerogative powers, Hogg writes that courts in Canada will "require, not only that prerogative powers be exercised in conformity with the Charter of Rights and other constitutional norms, but that administrative law norms such as the duty of fairness be observed."[5]

These other constitutional norms include principles of the rule of law, but also Responsible Government.

Responsible Government

By authorizing Cabinet to govern without the scrutiny of the PEI Legislature, this Bill 37 runs the risk of violating the constitutional requirements of Responsible Government.

Responsible Government is a fundamental principle of Canada and PEI's constitution. In the 1981 Patriation Reference Case (Re: Resolution to amend the Constitution [1981] 1 S.C.R. 753), the Court pointed out that:

> Responsible government was clearly the intention of those who framed the British North America Act, 1867, that responsible government should continue in Canada when they stated in the preamble to that Act that Canada was to have 'a Constitution similar in Principle to that of the United Kingdom'.

Prince Edward Island has enjoyed Responsible Government since 1851.[6] Peter Aucoin writes that responsible government means that the executive "must always have the confidence of a majority of elected [members]. This one rule is the foundation of our democratic system, from which everything else derives."[7]

The confidence of the elected assembly in the executive is demonstrated on a continual basis; that is, it is not simply the function of special and sporadic votes.[8] This means that governments must govern through their legislative assemblies. Executive actions that do not permit regular and predictable scrutiny and approval by the legislature undermine responsible government.

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[5] Peter Hogg, *Constitutional Law of Canada*, Carswell (2001): 15, 17.

[6] W.R. Livingston, *Responsible Government in Prince Edward Island: a triumph of self-government under the Crown* (1931).

[7] Peter Aucoin, *Responsible government: clarifying essentials, dispelling myths and exploring change*, Canadian Centre for Management Development, (2004): 11.

[8] I elaborate on this in "The Decision to Prorogue," *Canadian Political Science Review*, 3 (2009): 40-54 and "The Confidence Convention under the Canadian Parliamentary System," *Canadian Study of Parliament Occasional Paper Series* No. 7, October (2006).

Limitations on Charter Rights

The powers allocated to Cabinet by Bill 37 are so broad and vague, future governments might well use these to infringe on Charter rights.

The CA 1982 does contain measures by which the constitutional protection guaranteed by the Charter of Rights and Freedoms can be limited. It is worthwhile to consider these, because within these limits can be found immutable constitutional principles; that is, those that cannot be either usurped or relinquished.

Section 1 of the Charter states:

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

Section 33 allows governments to exempt legislation from certain Charter rights, specifically those found in section 2 and in 7 through 15:

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

In order to limit the rights found in section 2 or 7 to 15, a legislature must explicitly state that it is invoking section 33. "Expressly declared" means that the legislation must identify precisely which right is to be overruled. The legislation can be neither vague nor abstract. Exempting legislation from one right does not imply exemptions from others, nor would the legislation be exempt from any other constitutional restrictions. Any such legislation, unless re-enacted, expires within five years.

Although the rights covered by sections 2 and 7 to 15 are expansive, those not included (that is, sections 1, and 3 to 6) are significant. Democratic rights are covered by sections 3-5, and include the right to vote for representatives in a legislative assembly (sec 3), maximum duration of legislative bodies (sec 4), and annual sittings of legislative bodies (sec 5). These cannot be exempted by section 33.

This may seem to be somewhat of a moot point, as Bill 37 is not invoking section 33. However, it is important to realize that the very fact that democratic rights cannot be exempted by section 33 is evidence that citizens have a right to a viable and active legislative system.[9] Usurping the

[9] Mobility rights (sec. 6) also cannot be exempted through section 33, although these rights are not as expansive as some critics of the PEI government's decision to regulate traffic at

ability of a legislature to do its job would undermine the integrity of these democratic rights. The right to vote for representatives in a legislative assembly, and ensuring that assemblies have regular sessions, would be rendered irrelevant if legislatures were prevented from fulfilling their responsibilities.

As well, recall that parliamentary privilege, something much discussed in the PEI Legislature in 2018, is meant to guarantee a robust and effective legislature. Anything that seeks to undermine this would be a breach of that privilege, even if that effort comes from the legislature itself.

The government does have the ability to limit any right in the Charter through CA 1982 sec. 1, where it states that the rights set out in the Charter are subject (only) to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." However, this phrase requires parsing.

First, any limits governments seek to impose on Charter rights must be "reasonable." Courts have ruled that reasonable in this context means minimal; that is, the limits cannot be more than is required to achieve a specific goal, which itself must be valid.

Second, these limits must be "prescribed by law." This means the limits must be contain in legislation, and so follow the principle of the rule of law (already explicitly stated in the Preamble of CA 1982). Governments limit rights through decrees or orders. They can only do so through specific legislation.[10]

Third, the proposed laws must be able to be "demonstrably justified in a free and democratic society." Hence, rules of liberty, which includes the rule of law, as well as democratic principles such as responsible government, must be followed.

These laws must also be able to be justified in a demonstrable way. Courts have ruled that this means, basically, that the laws must be judicable (so subject to scrutiny by a court). They must also be capable of such scrutiny, and so can't be vague or unpredictable.

The Supreme Court of Canada has created what is known as the Oakes Test, by which courts are meant to determine whether legislation that infringes on the Charter can be regarded as "demonstrably justified in a free and democratic society."

PEI's borders would suggest. Mobility rights found in the Charter do not refer to casual travel. Rather, they refer to the rights of Canadian citizens to relocate and become a resident in another province. These rights are nevertheless subject to provincial residency requirements.

[10] See James Johnson, "The Case for a Canadian Nondelegation Doctrine," *University of British Columbia Law Review*, 52 (2019): 817-890.

The Oakes Test lists the following criteria:

> 1) The measures must be rationally connected to the objective;
> 2) The means used must be carefully designed to achieve the objective;
> 3) If the legislation is not effective, it is not rationally connected;
> 4) The legislation cannot be arbitrary, unfair, or based on irrational considerations;
> 5) The legislation must impair the specified right or freedom as little as possible;
> 6) If there are alternative modes of achieving Parliament's objective that would infringe to a lesser extent, then the legislation in question is not minimally impairing.[11]

I maintain the Bill 37 would not pass the Oakes Test:

> A) It is not at all clear why Cabinet requires such extraordinary powers and why the role of the legislature should be usurped. The Bill provides no statement of intent, hence there is no way to determine whether it is or is not rationally connected to its objective. It would therefore fail number 1 of the Test.
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> B) The bill would fail both number 2 and 4 of the Test: it does not explain what legislation would be suspended or amended, or what such amendments would be, or why. As such, it is not carefully designed, and it allows for arbitrary exercise of power. I won't, however, go so far as to say it is based on irrational considerations.
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> C) I accept that the current government has no intention to impair the rights and freedoms of Islanders, minimally or not (number 5). However, we are given no guarantee in the legislation that it would not, or that a future government would not.
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> D) Finally, there are alternative methods of achieving the government's objectives (number 6). I predict a court would find this to be the most egregious aspect of the proposed legislation. Indeed, the irony here is that the government is prepared to participate in a protracted legislative process – in the middle of a crisis – in order to pass this legislation, all the while arguing that engaging in such a process during a crisis is impossible. Clearly, it is not.

Delegation of Power

The legislation seeks to delegate power, but in such a way as to usurp the constitutional responsibilities of the legislature. Under the Westminster system, legislatures cannot relinquish their own responsibilities.

It is true that legislative assemblies have the ability to delegate power to the executive. This has been upheld by Canada's Supreme Court, for example, in Alberta v Hutterian Brethren of Wilson

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[11] From: R. v. Oakes, [1986] 1 SCR 103.

Colony, 2009 SCC 37. In this decision, the Court stated that:

> [r]egulations, passed by Order in Council and applied in accordance with the principles of administrative law and subject to challenge for constitutionality, are the life blood of the administrative state and do not imperil the rule of law.[12]

However, the Court's ruling does not give *carte blanche* to legislatures to abnegate their responsibilities or relinquish their constitutional powers, nor does it sanction the executive usurping the legislature's role. Rather, this is a power to create specific regulations "in accordance with the principles of administrative law and subject to challenge for constitutionality." The constitutional principles outlined above, then, must nevertheless be followed.

In any case, the proposed legislation does not speak of the Crown making regulations; it speaks of suspending or amending existing legislation and regulations.

My impression from listening to the debates in the Legislature regarding this bill and its necessity is that the government is frustrated by the restrictions the legislative process imposes on the government when it wants to act quickly and expediently.

If this is indeed the case, then it behooves the government, and indeed the Legislature, to review its own procedures and practices, to see how the legislative process could be made more efficient. It is in times of crisis that flaws in such systems become more apparent.

The CA 1867 gives provinces the unilateral right to amend their own constitutions, "except as regards the Office of the Lieutenant Governor" (CA 1867 92(1)). Nor can a province exempt itself from other constitutional principles, such as Responsible Government. But it can change its own House Rules, its procedures, its committee system, and so forth.

In conclusion, I would add one more point: just because the legislation to amend the Emergency Measures Act itself follows all the constitutional principles explained above does not make the amendment constitutional. Governments cannot accomplish something indirectly that it is prohibited from accomplishing directly. This is known as "colourable legislation" and is also unconstitutional.[13] Governments cannot "trick" the Constitution.

Respectively submitted,

Don Desserud

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[12] Johnson (2019): 817.

[13] Hogg, 371.