

Submission to the Standing Committee on Procedure and House Affairs

Re: Study of Parliamentary Duties and the COVID-19 Epidemic

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Continuity of Constitutional Government

The COVID-19 epidemic is the greatest test for the maintenance of Canada's democratic constitutional order in at least 50 years – certainly since the October crisis of 1970 -- because it challenges key ordering principles of the Canadian state: What is the legitimate extent of the federal government's power during an emergency? Is Canada's federal system a boon or a bane during an emergency? What is the appropriate role of the executive and legislative branches in the Westminster parliamentary system during an emergency? To what extent can the executive abrogate civil and privacy rights in the public and common interest? In a democracy, answers to these questions and their underlying rationale must be transparent and intelligible. The unprecedented social experiment that the pandemic has occasioned in Canada raises questions about the proportionality and suitability of the measures that are being imposing. Those measures place extra-ordinary demands on Canada's democratic constitutional order, primacy, continuity and role of Parliament. In times of crisis, it is insufficient simply to tolerate criticism: the resiliency and superiority of the democratic way of life is at its best when objections to the way the state optimizes how it manages and contains societal risk are actively sought out, enabled, heard and reciprocated.

This health pandemic is very different from the national disasters experienced in recent decades; these were mostly natural phenomena such as flooding, earthquakes and tsunamis. The pandemic, although it started locally, quickly took on national and global dimensions. It is both a threat of a disaster, requiring preventive measures, and an actual disaster, requiring public health intervention. The preventive measures are effectively victimizing those directly and indirectly affected by shuttering economic activity, by limiting rights to education, democratic governance, religious freedoms, and so forth. It is also very different in magnitude from previous health pandemics: the SARS coronavirus (2002-03) and the swine flu (H1N1) (2009-10) were effectively contained internationally and locally. By contrast, COVID-19 presents an unprecedented and unknown emergency for governments.

There are two competing schools of thought on a government's response during an emergency. The best-known exponent of the extra-legalist is the late German legal theorist Carl Schmitt. Although he felt that extensive emergency powers were a requisite part of progressive liberal democracies, he famously contended that liberal democracy and emergency powers were simply immiscible. Operating under the "doctrine of necessity, a federal executive can bypass the oversight of Parliament and "take all necessary decisions, even including decisions that are unconstitutional." He concluded that the very concept of "liberal democracy is anachronistic, since it is not up to the task of providing sufficient

possibilities for executive prerogative while preserving its core identity.” In recent weeks Canadians have repeatedly seen this predisposition by their federal political executive.

By contrast, the legalist position holds that “emergency power can in fact be successfully legalized, and that legal and constitutional mechanisms for emergency power need not self-destruct.” US political scientist Bill Scheuermann explicitly rejects the extra-legalist position that the state of exception necessarily represents a legal black hole. Instead, emergency powers can be pre-emptively defined and carefully and constitutionally crafted to meet the needs of the state in an emergency. Basic legal freedoms can be maintained, although some might have to be diminished and constrained to address the emergency at hand.

First, even if one were to sympathize with the extra-legalists, it does not follow that the matter of emergency government during a state of exception should be ignored: even during a crisis, government’s power should not be absolute, unchecked and without recourse. Rather, powers that will be necessary to deal with such a crisis cannot be properly forecasted and thus cannot be written into law. In other words, adopting the extra-legalist position does not obviate the continuity of constitutional government. The hallmark of a constitutional democracy is that even during an emergency, executive power is contingent: the people have recourse through their representatives in Parliament to check executive prerogative.

Emergency Federalism

The federal system is at the crux of Canada’s management of the epidemic. On the one hand, under Section 92 of the British North America Act (BNA) many critical aspects fall (largely) under provincial jurisdiction: emergency measures, health care, and control over public institutions such as education. On the other hand, under the Peace, Order and Good Government preamble to Section 91 the federal government has the constitutional power to deal with national disasters or emergencies, which may include the federal declaration of a national state of emergency that may impinge on provincial powers. Moreover, local governments are responsible for the provision of some health care services, public hygiene, and the continued delivery of essential services such as water, sanitation, waste removal, and the control of public spaces.

Instead of a single national emergency response plan, Canada has multiple federal and provincial plans, and hundreds of local plans, many of them, as recent experience shows, ill adapted to a public welfare emergency and out of date, drafted during and for an analogue era. The result has been a confusing cacophony of measures and messaging: from federal, provincial and local politicians, civil servants and public health authorities. As the disaster at hand is global in scope, considerable vertical and horizontal intergovernmental coordination and cooperation is required.

While the provinces and their local governments took the lead on domestic service delivery in response to the pandemic, the federal government has been using the power of the purse and spare fiscal capacity to enact financial measures approaching CDN\$200 billion— with minimal scrutiny or debate. At the same time, it effectively sought to lower the threshold for seeking exceptional executive powers to statutory federal law -- before abandoning the

majoritarian temptation (by a minority government) to test the limits of the possible in band-wagging on the implicit consent of anxious citizens, and instead reverting to consultation with Parliament and the provinces. It amounted to a recognition that the actions of the executive must be based on statutory authority determining the content, purpose and extent of its powers – rather than having the executive attempt to confiscate these powers wholesale.

Chances are that this is merely at the beginning of a whole-of-government program by the political executive to revive the domestic and international economic systems. Under such extraordinary circumstances, what are the prerogatives of the legislature in holding the executive accountable? For instance, in the aftermath the tempting prospect for the executive to bankroll a burgeoning health bureaucracy looms large, when initial evidence suggests that countries with a smaller government footprint in health care and greater reliance on the private sector to procure and manage emergency stockpiles actually fared better. For over three centuries, voting supply has been the bedrock principle of the Westminster parliamentary system. The Parliament of Canada has voted on exceptional measures at an unprecedented pace. Crisis *modus notwithstanding*, Parliament has thus shown itself to be fully capable of enacting Canada's fundamental constitutional principle: responsible government – the ability of the people, through their elected representatives, to hold the government of the day to account. Although confronted with an imminent threat, Canada's Parliament has proven its capacity for swift consensus-building and decision-making. That commitment to constitutional democracy is a proximate cause for the broad popular support that governments across the country have been enjoying. The speed, efficiency and unanimity with which the fiscal and legislative measures have been passed by opposition parties – not just in Canada but across the democratic world – belies the pejorative treatment of democratic parliaments by political executives as a nuisance to be dispensed with for the sake of efficiency and effectiveness, somehow unwilling and unable to perform its fundamental constitutional duties. To the contrary, the events of recent weeks validate the resilience, adaptability and vitality of Canada's constitutional system. As a counter-factual thought experiment, had the federal government invoked the *Emergencies Act* – in yet another attempt to side-line Parliament -- several provinces would surely have sought judicial review of any sweeping unilateral expansion of federal executive powers. In addition to Parliament, federalism thus also imposes a subsidiary restraint on actions by the federal political executive.

Emergency Democracy

The emergency regimes to which the coronavirus pandemic have given rise raise a host of controversies about fundamental rights and freedoms. By way of example, debates around tracking and use of metadata from mobile devices exhibit a temptation to curtail individual, collective, civil, privacy, and constitutional rights for the collective good of containing the epidemic and nurturing the economy and society back to health. In a recent paper the Electronic Frontier Foundation proposes that any such measures be based on rational evidence, meet an imperative-need test, and adhere to strict standards of transparency, proportionality, accountability and reversibility. Concomitantly, a trans-European appeal is demanding that “all new measures must pass the test of whether they are genuinely fit for purpose, necessary and adhere to the constitutional principle of proportionality.” What

distinguishes Canada from China, Russia, Iran or North Korea is precisely a functional constitutional democracy with an effective legislative assembly to counteract authoritarian overreach by the executive. Parliament, then, is essential to ensuring the reconciliation of essential public goods, such as saving lives and maintaining a vibrant Canadian democracy.

In response to an unprecedented (albeit not unanticipated) crisis of epic proportions, the Canadian government has had to make myriad decisions expeditiously. The consequences of these decisions are difficult to anticipate, let alone control. As Yuval Noah Harari and others have warned, confronted with chaos, anger and distrust, there is a genuine and understandable temptation for over-confident political executives to overplay their hand, based on imperfect information, to show that they are in control. Populists and authoritarian adversaries are waiting in the wings to capitalize on division, derision, polarization and mistrust in democratic government that rash decisions now might foment down the road. Parliament is the people's ultimate existential bulwark against such excesses of executive power. The public trust they enjoy distinguishes constitutional democracies from authoritarian regimes, which renders the former more resilient during times of crisis. Deliberative decision-making through respect for Canada's parliamentary conventions and constitutional principles is indispensable to maintaining the legitimacy of Canada's political regime and the power of the Canadian state.

Continuity of Constitutional Government in Canada

The *Emergency Preparedness Act* (1985) appended the adjective "constitutional" to what had hitherto been "continuity of government." This was significant insofar as it enshrined in statute that full constitutional government must have representation from all three branches. The EPA's successor, the *Emergency Management Act* (2007) simply mandates "continuity of constitutional government [CCG] in the event of an emergency." However, neither the Act nor any subordinate legislation defines "constitutional government," or provides any of the government-wide doctrine, policy, or management frameworks that are necessary to effectively carry out this mandate. Such latitude necessitates an extensive role for parliamentary scrutiny of executive power because any "model of emergency power needs to explain which institution can declare an emergency, which institution can end it, what new powers are available during it, which legal protections remain inviolate, and by what standards courts review emergency power," notes Harvard Law Professor Philip Heymann. To this end, a 2012 staff briefing to the Deputy Minister of Public Safety defined CCG as the principle of establishing defined plans and procedures that allow *the three branches of the constitutional Government of Canada* to continue to conduct essential operations in case of an emergency.

Canada's CCG plan has five components: Prevention, Protection, Succession, Relocation, and Reconstitution. Failure to reconstitute the whole of government exposes personnel, key physical assets, and information to risks of exploitation. However, a complete CCG plan includes the full reconstitution of governance in a way that is *effective, representative and constitutional*. That means, as a second step, quickly and justly reconstituting Parliament in time to support emergency government so it can hold the government to account on the robustness, simplicity, clarity, immediacy, constitutionality and reversibility of executive emergency powers and decisions.

The Government of Canada has long taken a laissez-faire approach to departmental emergency planning, which facilitates event-driven reactions, where the urgent trumps the important. Canada's broad but inchoate approach to CCG is that of a jack-of-all-trades, master of none. The Prime Minister's approach to governing by press conference offers a daily reminder. For weeks the Deputy Prime Minister kept telling Canadians: "Don't worry, we got this." That approach featured the extent to which the political executive has been captive to the tyranny of experts: the public health bureaucracy and the World Health Organization. When overzealous public health autocrats want to make outlaws out of Canadians from sharing a beer in their driveway while conforming to physical distancing measures, a politician -- Ottawa's Mayor Jim Watson -- was fully within his right to rein them in so common sense could prevail. Similarly, public policy continues to remain hostage to the dismal science that modelling has shown itself to be throughout this crisis. Time and again, pressing issues are supplanting important long-term planning that should be happening concurrently.

Especially during a time of crisis, Parliament has a supreme duty to hold the executive and government of the day to account, along with the quality and timeliness of advice provided by the civil service. Canadians need a continuous parliamentary audit of the executives and the bureaucracy's judgment.

During the First World War, high commands often found themselves at odds with national assemblies. Initially, national assemblies had conceded extra powers to the executive branch and exercised restraint over the way their military prosecuted the war. Assuming the war would be brief, they deferred to experts and professionals. But in the wake of a succession of failed offenses and military stagnation, parliamentarians demurred. They attempted to regain control of the war effort by injecting criticism and new ideas. After becoming Premier in 1917 at the age of 76, Georges Clemenceau famously surmised: "War is too serious a matter to leave to soldiers." Thucydides already recognized that warriors need guidance, lest the tactical efficiencies and operational details of plans and operations sacrifice political objectives. Abraham Lincoln, Winston Churchill and David Ben Gurion succeeded precisely because they ensured their involvement in strategic affairs. After all, Churchill's generals had believed that Russia would collapse in 1941, that the United States' entry into the war would not radically change its course, that the Normandy invasion was too risky and that the pre-eminence of the battleship had not been lost. Military strategy requires civilian perspective and leadership. To paraphrase Clemenceau, a pandemic is too important to leave to the health experts alone.

Inspiration for this submission draws in part on:

Cunningham, J.W. 2013. *The Need for a Canadian Continuity of Government Policy: Being There When Canadians Need It Most*. Toronto: Canadian Forces College, JCSP 39.

Stelzenmüller, C. 2020. *COVID-19 Is A Severe Test For Germany's Postwar Constitution*. Lawfare Blog.