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Constitutional Principles & Ontario's *Crown Liability and Proceedings Act*[1]

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INTRODUCTION

On April 11, 2019, Ontario introduced its first budget under Premier Ford. Buried deep within is the *Crown Liability and Proceedings Act, 2019*, a bill promoted as updating how we, the people of Ontario, pursue civil claims against the Province. The Ontario envisioned by the Ford Government is one in which the Province faces scant liability in tort; indeed, as a recent CBC headline notes, the bill would make it essentially impossible to sue.[2] This is concerning to those of us who monitor the relationship between a government and its people.

The bill, if and when it is passed, will no doubt face constitutional challenge under the *Canadian Charter of Rights and Freedoms*. But this article reminds that there is, and needs to be, more to the conversation. I therefore ask the basic question of whether the bill comports with the constitutional principles of democracy and the rule of law. Sadly, my conclusion is that it does not. These principles are explored prior to scrutinizing the bill.

CONSTITUTIONAL PRINCIPLES

Canada is regarded as a bastion of political and legal stability in large part due to our constitutional structure. We do not have a single document called "the constitution"; rather, we have a patchwork of written texts and unwritten principles.

The Supreme Court of Canada discussed constitutional principles at length in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217. For the Court, these principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based".[3] Constitutional principles are of vital importance: "it would be impossible to conceive of our constitutional structure without them" because they "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[4] The Court recognized that principles are of powerful normative force, are binding upon both courts and governments, and may place substantive legal obligations upon governments.[5]

The Court explored four principles in the Quebec secession reference: democracy, constitutionalism and the rule of law, federalism, and respect for minority rights. Although the Court found these principles operate symbiotically, democracy and the rule of law are particularly relevant here.

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[1] Thank you to Leah Sampson for assistance with this article.
[2] Lucas Powers, "Ontario PCs want to make it next to impossible to sue the government" CBC News (14 April 2019) online: CBC News <https://www.cbc.ca/news/canada/toronto/proceedings-against-the-crown-act-repeal-replace-pcs-1.5097205>
[3] *Reference Re Secession of Quebec*, [1998] S.C.R. 217 at para. 49.
[4] *Ibid.*, at para. 51.
[5] *Ibid.*, at para. 54.

We tend to think of democracy in minimal terms; *i.e.* some of us show up every few years to vote. But, for the Court, democracy is fundamentally concerned with a people's substantive goals and it "would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values".[6] Indeed, as the Court notes, "A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live."[7]

A fundamental component of Canadian democracy is the dialogue between courts and governments.[8] The concept of dialogue views law as evolving through a process of conversations. When a legislature passes a law, it may be scrutinized by a court which, in turn, might require legislative changes on constitutional grounds. The legislature then has the option to make those changes or, in some cases, override the court decision by invoking the notwithstanding clause. Dialogue obviously occurs on a macro level and, I submit, also on a micro level through the legal and normative force of civil litigation.

On a macro level, it occurs when a court scrutinizes the constitutionality of a law. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 is a good example. There, the Supreme Court invalidated the criminal prohibition of abortion but suspended its declaration to give the federal government time to fix the law. Canada did not address the issue, so the law became invalid. As *Morgentaler* illustrates, dialogue on a macro scale typically features issues that are of concern to an array of Canadians.

Dialogue on a micro scale is localized to the individual and concerns an individual's interaction with the state. We all interact with government in infinite ways and, when harm occurs, the affected individual may be able to obtain recourse through court. Litigation, then, is a function of democracy because it checks the government, and majority that elected it, neither of which have incentive to address legal issues particular to an individual.

The democratic principle dovetails with the rule of law; indeed, this is precisely what the Court meant when it said that constitutional principles operate in symbiosis. Perhaps expressed most succinctly in *Reference Re Manitoba Language Rights*, [1992] 1 S.C.R. 212, the rule of law means:

1. There is one law for all and it applies equally to governments and individuals.
2. The state must create and maintain an actual order of positive laws that preserve and embody the more general principles of a normative order.
3. The exercise of all public power must be rooted in the law such that the relationship between the state and individual must be regulated by law.

In *Reference Re Secession of Quebec*, the Supreme Court describes how government is limited by the rule of law: "Canadians have never accepted that ours is a system of simple majority

[6] *Ibid.*, at para. 67.
[7] *Ibid.*, at para 68.
[8] PW Hogg & AA Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75.

rule. Our principle of democracy … is richer."[9] Litigation, in short, is important to hold government accountable and ensure the broadest range of voices are considered in our dialogue.

CROWN LIABILITY AND PROCEEDINGS ACT, 2019

This bill stifles dialogue, particularly on a micro level, by making it so onerous and risky to pursue litigation against the Province that few will bother.

Sections 7(1) and (2) provide that the bill prevails over any law it conflicts with to the extent there is a conflict. There is an exception: if the other law provides greater protection against liability, that law prevails.

Section 11 extinguishes any tort claim against the crown for negligence in performing duties of a legislative nature as well as the making of policy and regulatory decisions provided these decisions are made in "good faith". These duties and decisions are defined broadly. A regulatory decision, for instance, includes whether a person has met an obligation under an act.

The good faith requirement serves a gatekeeping function. Section 17 of the bill creates a new procedure to determine good faith. No action can be brought against the crown without first obtaining leave of the court on motion. Before the motion occurs, the plaintiff must provide (a) an affidavit setting out all material facts s/he intends to rely upon in the claim and (b) an affidavit of documents disclosing all relevant documents in his/her possession. The crown may, but is not required, to serve a responding affidavit. The crown has a right to conduct an examination for discovery of the plaintiff before the motion, although the plaintiff may not examine a crown representative. When the motion finally occurs, the court must be satisfied that (a) the proceeding is being brought in good faith and (b) there is a reasonable possibility the case will be decided in the plaintiff's favour. In other words, the court essentially pre-judges the action — based on limited evidence and potentially no evidence from the Province — before a statement of claim is even filed.

The bill specifies that the parties are responsible for their own legal costs. This is another barrier to the plaintiff as the court is stripped of its broad discretion over costs. The presumption in Ontario is that the successful party is entitled to its costs. Courts use costs awards to compensate the successful party and, more importantly to the present conversation, deter unreasonable conduct. By eliminating its risk, the Province is able to take unreasonable positions simply to increase a plaintiff's costs and discourage actions. This will likely be an effective tactic, although the Province would never admit it.

Additional protections are available to the crown. All trials are by judge alone; there is no jury option. When the crown is a party, it is not required to provide any documents regardless of whether those documents are relevant. This may well impair the just resolution of cases.

The bill is a dramatic departure from the current rules of procedure for actions involving the crown. First, leave is not currently required. Second, affidavits of documents and examinations for discovery occur in the course of an action, not before commencement of the action. Third,

[9] *Reference Re Secession of Quebec*, *supra*, at para. 76.

the plaintiff has the right to examine a crown representative to completion prior to undergoing examination. Indeed, given that the entire purpose of the discovery process is to discover information, one wonders how a plaintiff is expected to provide a comprehensive affidavit of documents and statement of facts ahead of the action. Fourth, courts have wide discretion to award costs. And fifth, the bad faith requirement shifts focus from whether a recognized legal wrong occurred to the intent of the party who committed the wrong.

This shift in focus is particularly troubling. Many individuals who sue governments belong to classes that probably do not vote or have favour among a majority of voters. Prisoners are a good example. I have handled numerous cases in which the Province has failed to take reasonable steps to obtain or provide proper medical care. Sometimes the lack of funding is such that the provincial employee simply cannot arrange transport to hospital for several days. The bill would preclude civil liability against the crown, despite unreasonable delay, provided the employee acted in good faith. It is not difficult to see that this will allow the Province to dismantle some social programs and grossly underfund others at no risk.

As indicated above, the bill also inoculates the Province by vastly increasing the cost and risk of litigation. Many cases against the crown are brought on a contingency basis, meaning the plaintiff pays their lawyer a percentage if and when funds are obtained. Contingency arrangements serve an important access to justice function because, without such an arrangement, many plaintiffs (such as prisoners) cannot afford litigation.[10] The bill makes it too risky for many lawyers to pursue claims against the Province. It is reasonable to estimate a lawyer spending $20,000.00 worth of time and disbursements to prepare an affidavit of documents, attend at discovery, and prepare for and argue a motion to obtain leave to sue. If the court finds the crown acted in good faith, the lawyer has no compensation because, even if successful, the bill prevents the court from awarding costs. In other words, unless courts are going to greatly increase damage awards, lawyers now have to do significantly more work at significantly more risk to earn the same income. Many rational economic actors will find less onerous and risky ways to earn income.

While it is true that the bill does not, and cannot, circumscribe *Charter* claims, "constitutional torts" is a vastly undeveloped area of Canadian law. Indeed, it was only in 2010 that the Supreme Court of Canada definitively concluded that plaintiffs can obtain compensatory damages under the *Charter*.[11] These damages are only available as a last resort; *i.e.*, if tort damages are not available. If the bill withstands *Charter* scrutiny, I suspect we will see tort claims against government reframed as constitutional claims. The traditional indicia of negligence and its analysis will probably be bent into constitutional terms, leading to an expansion of constitutional protection. Here it is important to ask some basic questions: is the current tort system so broken that we need to reimagine it in constitutional terms? From a consequential perspective, is there any real difference or advantage to constitutionalizing these issues? I would suggest not on the basis that the system we have, while far from perfect,

[10] Not just inability to afford legal representation, but inability to finance it. Litigation is expensive. Expert reports, for instance, can cost thousands of dollars. Lawyers commonly pay these fees on a client's behalf and obtain reimbursement through proceeds of the litigation.
[11] *Vancouver (City) v. Ward*, 2010 SCC 27.

works well enough. I would further suggest that Canadian courts will not allow governments to shirk liability and will essentially constitutionalize negligence. Anyone who has observed our *Charter* jurisprudence to-date would bet on an expansion rather than limitation of protection.

In summary, the bill offends the democracy principle by essentially immunizing the government from civil liability. Suing a government for negligence has a valid and important democratic function: it is part of a dialogue between courts and legislatures. It allows unpopular populations to achieve socio-legal and political goals that cannot be achieved at the ballot box. Encouraging more reasonable medical care of prisoners through damage awards is a good example as the majority of Ontarians are probably not overwhelmingly concerned with this issue. Our democracy is richer than majority rule thanks in part to civil litigation.

It also offends the rule of law. By making government a privileged tier of defendant, the bill discriminates against plaintiffs and defendants alike. Plaintiffs who are harmed by government are worse off than plaintiffs who are harmed by private parties: it is far less onerous and risky to be injured by a private party and therefore these plaintiffs have greater access to justice. Private defendants are also discriminated against because a government defendant enjoys vastly superior protection. The bill therefore offends the pillars that there is one law for all and that legislation embodies the more general principles of a normative order.

CONCLUSION

The *Crown Liability and Proceedings Act* offends the constitutional principles of democracy and the rule of law by silencing often unpopular voices and privileging government over other defendants and plaintiffs. Principles are vital to our constitutional structure but sometimes forgotten about in legal argument. This article has therefore reminded lawyers of these principles in the hope of contributing to the invalidity of the bill.