gence of the apparent tax cost of programs around the country as Ottawa reduces interregional transfers has a positive side. There is nothing wrong if Canadians in various regions differ in their appetites for government programs, as long as those differing tastes are not driven by transfer-distorted price tags. More comparable government program prices across the country may make future national debates about public finances more reasonable.

GETTING LESS THAN WE PAY FOR

The other striking trend over the next few years, however, will be a dramatic switch from bargain-basement to premium-priced government programs in Canada. Canadians suffering from government program sticker shock will be irritable and increasingly ill-disposed toward all public sector services.

It may be a good thing not to get all the government we pay for — but this may be too much of a good thing.

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THE EXERCISE OF PUBLIC POWER UNDER THE *SAVINGS AND RESTRUCTURING ACT, 1995* (BILL 26)

BY LORRAINE E. WEINRIB

In proposing to concentrate vast, largely unreviewable powers in ministers of the Crown, Bill 26 raises important questions as to the exercise of public power in late 20th-century liberal democracy.

In our system of government, legislatures notionally make the law, which the executive then carries out. The complexity and range of modern governance requires, however, that legislatures delegate extensive power to ministers of the Crown, administrative tribunals, and other specialist or local bodies. These delegates create sublegislative rules and exercise discretion to apply legislation and sublegislative rules to particular circumstances. In so doing, they are constrained by specific legislative directive and by legislative reliance on judicial oversight to assure legality as well as to promote fair and informed decisions. These constraints constitute the legitimation of modern governance.

Democratic legitimation is essential because ours is a system of self-government, built on the idea of equality of all members of society, and not simply on the provision of equal voting power at election time. Elected governments must represent all the people, not just their supporters. Indeed, it is the legislative process, in its full complexity, that transforms a victorious political party into a government. In Bill 26, however, we see a narrower idea of both the constituency and the democratic process. It vests power in the executive, with minimal or vague directives from the legislature, and provides a reduced role for administrative officers or bodies that operate in a quasi-independent fashion, and even ministerial authority to act free from legislative prescription and to override court decisions.

We must ask: Does the Harris government believe that we can no longer afford a fully developed democratic process?

SELF-GOVERNMENT AT RISK

Bill 26 places in jeopardy the legitimacy of our democratic system of self-government, the link between good process and good substance in lawmaking and its application, and our opportunity, as citizens, to observe and participate in our governance. It precludes the necessity of prior public explanation, justification, or debate of new policy and, thus, forecloses the additions, modifications, exceptions, qualifications, or transition measures that such a process induces. It eliminates the requirement of formal committee proceedings that provide the input of members of the public, including experts, those particularly affected by the local impact of decisions, as well as those who can inform us how to consider questions of age, gender, social class, race, colour, religion, disability, and poverty. Such participation, whether it changes policy or merely registers concerns, makes change more widely acceptable. Bill 26 assures consideration by only one political party — indeed, only its elite. Such closed-door executive policy determination will mean less depth in media and academic commentary, the analysis by which we come to understand complex public issues, their interaction with other measures, and their long-term significance.

When cabinet ministers, rather than quasi-independent local or expert bodies, apply rules to particular instances, there are additional losses of specialized expertise, accumulated expertise, research, and wide consultation. We also lose institutional memory — long-term familiarity with the substantive and administrative history of a particular policy, knowledge of the workings of government, and finely honed intuitions as to the imperfect fit between purpose and effect. We lose the dignifying benefits of wider participation by members of the public, particularly those who use, rely on, and benefit by programs in jeopardy, and who have no access to cabinet ministers or their political entourage.

At risk is a deep understanding of the long-term value of public policy choices beyond what we can count and measure as immediate expenditure — an understanding that includes concerns about things such as personal well-being, quality of social life, the

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safety of our cities, the personal and societal costs of reducing quality of life for the disadvantaged and the vulnerable, and the implications of reduced public investment in the well-being and productivity of future generations.

WHAT'S AT STAKE

This is not to say anything negative about cabinet ministers, other than they are, as they should be, political actors. They must focus on their electoral mandate, the polls, and the time period until the next election. They must act when a variety of political considerations compel action, sometimes without deep regard for — or, indeed, in spite of — long-term, broad-based public policy concerns. They must prove themselves to their premier; they must be faithful to the promises they have made; they must look decisive, directed, and in control. For these reasons, they are not to be masters of the legislative process, but its servants. What the system demands of them is law, not simply legislated politics.

Bill 26 undeniably sets aside a costlier, less efficient, slower, and messier process, forwarding its stated purpose of achieving "fiscal savings" and promoting "economic prosperity through public sector restructuring, streamlining and efficiency." But it does so by implementing a revolutionary, retrograde transition to an autocratic, centralized, backroom, top-down government. We must ask: Does the Harris government believe that we can no longer afford a fully developed democratic process? That the over-expenditure of the past is the inexorable result of a fully democratic approach to governing? Or are we to understand that the policies that are to come, like Bill 26 itself, are so burdensome for the government to explain and so difficult to justify that they would not easily withstand public input, scrutiny, and debate?

What is at stake is nothing less than the assurance of self-government ensconced in the *British North America Act, 1867*, affirmed and extended in the *Canadian Charter of Rights and Freedoms* promises of the rule of law; equality before, and equal benefit of, the law; security of the person; and respect for the multicultural heritage of Canadians. Through its neglect of the legislative role in honouring these values, the Harris government will free itself of the vicissitudes of the legislative and administrative processes only to find itself bogged down in the courts.

Our fiscal problems may well claim emergency stature; they may demand nothing less than the painstaking reconceptualization of the welfare state. The question, however, is whether the fiscal situation necessitates a dismantling of our established modes of public democratic debate and deliberation. This is as important a question as any other in our public life. We should be wary of the call to sacrifice the democratic process and accountability to secure fiscal equilibrium. Let us remember that our predecessors preferred self-government by the few, not as a way to keep us all busy, but to promote human flourishing and self-fulfillment.

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SAVINGS AND RESTRUCTURING ACT, 1995 (BILL 26) AND THE RULE OF LAW

BY PATRICK J. MONAHAN

"The idea of legal equality," wrote A.V. Dicey in 1885, "means that every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."

Another way of expressing this idea is simply to state that government is subject to law. If the government acts wrongfully and causes harm to a citizen, that citizen is entitled to hold the government accountable through the courts.

Because this kind of government accountability has been the norm in Canada for many decades, it is easy to lose sight of its importance. A society that permits the state to trample on the rights of its citizens while denying them access to the courts is a society that has embraced absolute state power as opposed to the rule of law. Citizens are forced to trust that government officials will not abuse their absolute power. If that trust is betrayed (whether next month, next year, or later) and the state infringes the rights of the citizens, they are denied all recourse through the courts.

This is precisely the philosophy reflected in Bill 26. There are 13 separate provisions in the Bill that limit or deny access to the courts (see the attached table for a detailed listing of the relevant provisions). These immunity provisions cover most of the new powers that are conferred on the government under the legislation, including decisions to close hospitals, to limit the number of physicians, to license independent health facilities, to set drug prices, or to rewrite the terms of binding agreements with the Ontario Medical Association (OMA) or the Ontario Public Service Employees Union (OPSEU). In all these cases, citizens are denied access to the courts for government actions that, otherwise, would be found to be wrongful and entitling the citizen to some form of redress.

It also moves Ontario in a direction that is precisely opposite to that being pursued by governments around the world since the fall of the Berlin Wall.

In some cases, the immunity applies only to actions taken "in good faith" by government officials, but in many instances, no such limitation applies. Moreover, in a number of cases, the immunity is conferred on a retroactive basis. For example, the courts have recently found that the minister of health acted unlawfully in fixing the prices that could be charged for certain generic drugs produced by Apotex Inc. The minister has refused to comply with the court ruling. The legislation purports to nullify the court ruling and to retroactively immunize the Minister and the