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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

government from any form of court action (see Schedule G, sections 30 and 31).

Another example of this kind of retroactive immunity are the Bill 26 provisions dealing with certain agreements between the government and the Ontario Medical Association (see Schedule I). The cabinet is permitted to "designate" obligations of the Crown in these agreements; once designated, the obligations become unenforceable, and no proceeding to enforce them may be brought against the government. Notice, however, that the government can continue to enforce all of its rights against the OMA because it is only the obligations of the Crown (but not those of the OMA) that are affected by the designation.

These kinds of immunity provisions are Draconian and one-sided. They also overturn the norm established in Ontario for at least the past 50 years — namely, that the government must abide by the same laws as everyone else. Although some exceptions to this basic principle of government accountability remain embedded in the law, we have come to expect that the government must answer in the courts for wrongs committed against citizens. Bill 26 undermines this basic principle. It also moves Ontario in a direc-

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BILL 26 PROVISIONS IMMUNIZING GOVERNMENT FROM LIABILITY FOR WRONGFUL ACTIONS

Provision	Impact
Schedule F, section 1 (*Ministry of Health Act*, section 8(12))	Immunizes the Health Services Restructuring Commission and any of its employees or agents from any liability for acts done in good faith in the execution of their powers or duties; the duties of the commission are to be defined by regulation.
Schedule F, section 8 (*Public Hospitals Act*, section 9.1(2))	Immunizes the Crown and the minister from any liability for decisions or directions (regardless of whether made in good faith) respecting payments to hospitals, directions to cease hospital operations, to amalgamate hospitals, to increase or decrease the extent or volume of specified services, to appoint an investigator or a hospital supervisor, and in respect of acts or omissions of investigators or hospital supervisors. (Note, however, that section 9.1(2) provides that legal proceedings permitted by section 10(2) of the Act are not barred, and section 10(2) permits the Crown to be sued for torts committed by investigators or hospital supervisors; this appears to contradict the statement in section 9.1(2) that the Crown cannot be sued for acts of investigators or hospital supervisors.)
Schedule F, section 11 (*Public Hospitals Act*, section 13)	Provides for immunity to (1) committee members of the medical staff of a hospital or of a hospital board or of the Appeal Board for acts done in good faith in the execution of duty and (2) witnesses in proceedings before such committees for anything done or said in good faith. (Note that (1) 13 of the existing Act provides the second kind of immunity, but not the first, for things done or said in proceedings in good faith.)
Schedule F, section 14 (*Public Hospitals Act*, section 44(5))	Immunizes hospital corporations from liability for acts done in good faith in implementing decisions made by the hospital or the minister to cease hospital operations, including revoking physician appointments or cancelling or altering substantially the privileges of any physician.
Schedule F, section 15.6 (*Private Hospitals Act*, section 15.6)	Immunizes Crown and ministers for any acts done (regardless of whether done in good faith) in revoking licences, terminating or reducing payments, or assuming control of and operating a private hospital for a period of up to six months.
Schedule F, section 35 (*Independent Health Facilities Act*, section 38)	Existing legislation immunizes the director, registrar, council of the college or a committee established by the council, the board, or a committee thereof for liability for acts done in good faith, *but provides for a right of action against the Crown*; amendment would abolish all recourse against the Crown for actions taken in good faith, despite sections 5 and 23 of the *Proceedings Against the Crown Act*, for anything done by anyone acting under any provision of this Act.
Schedule F, section 36 (*Independent Health Facilities Act*, section 36)	Denies any right to compensation for decisions to revoke, suspend, refuse to issue or renew, or amend licenses under the Act, regardless of whether the decisions were taken in good faith. (The main purpose of this provision is to remove the "good faith" requirement in section 35 with respect to decisions on licensing.)

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SAVINGS AND RESTRUCTURING ACT, 1995 (BILL 26) AND THE RULE OF LAW *from page 63*

tion that is precisely opposite to that being pursued by governments around the world since the fall of the Berlin Wall in 1989.

There has been very limited public discussion of the need for these Draconian and one-sided immunity provisions contained in Bill 26. In my view, they are totally unjustified. It might be thought that because the province is facing a huge deficit, absolute powers need to be granted to government officials. But the need to reduce the deficit cannot serve as a justification for trampling on the rights of citizens. Whenever absolute power has been conferred on government in the past, it has led to tyranny.

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BILL 26 PROVISIONS IMMUNIZING GOVERNMENT FROM LIABILITY FOR WRONGFUL ACTIONS *table continued from page 63*

Provision	Impact
Schedule G, sections 30 and 31	Court orders made in certain named proceedings are deemed to be of no force and effect. (The named proceedings concern decisions made by the minister of health with respect to the pricing of certain drugs manufactured by Apotex; the Ontario Court of Justice has declared that the minister's decisions were invalid and has ordered the minister to comply with the court's decision; these amendments nullify the court's order. The amendments also nullify the court's decision in a second proceeding that has been argued and is currently under reserve by the court.) The amendments also state that no compensation is payable for any acts or omissions of the minister with respect to certain drug pricing decisions taken any time after May 19, 1993, whether or not the decisions were taken in good faith.
Schedule H, section 22 (*Health Insurance Act*, section 29)	Immunity for any person giving information to the general manager, regardless of whether given in good faith.
Schedule H, section 28 (*Health Insurance Act*, section 29.6)	No proceeding may be commenced in which compensation is sought for any loss relating to the coming into force of sections 29.1 to 29.5 (which deal with decisions by the minister respecting numbers of eligible physicians, imposing moratoriums during which no physician is entitled to become an eligible physician, declaring certain physicians ineligible, etc.)
Schedule I, section 1(3), (4), and (5) (*Physician Services Delivery Management Act, 1995*)	Cabinet may "designate" obligations of the Crown, or rights of persons who have entered into agreements with the Crown, under agreements entered into with the Ontario Medical Association between 1991 and 1993; upon "designation," the obligation or right becomes unenforceable, and *no proceeding based on the right or obligation may be brought against the Crown* (the Crown, however, may bring proceedings against any other person); any decision or order made in any proceedings relating to a dispute about the right or obligation is of no force an effect, *regardless of whether the decision or order was made prior to the designation of the right or obligation by the Cabinet.*
Schedule L, section 1 (*Public Service Pension Act*, section 6.1(5))	No proceeding may be commenced against any person for any actions taken or not taken pursuant to certain restrictions on the winding up of the Public Service Pension Plan, or for the breach of any fiduciary duty in connection with the windup of the plan, or for damages in connection with the breach of an agreement in connection with a windup of the plan. (On windup of a pension plan, the employer is required to fully fund any unfunded liability relating to affected plan members.)
Schedule L, section 2 (*Ontario Public Service Employees' Union Pension Act, 1994*, section 14.1(4))	Provides an immunity similar to that provided with respect to the *Public Service Pension Act*, except that immunity is provided also for damages for breach of an agreement by virtue of the enactment of the section. (Note that in July 1995, the government attempted to exempt itself from the consequences of partial windup of its pension plans through regulations. These regulations were challenged by OPSEU in court, and the court has reserved its decision on the challenge. These amendments purport to render that proceeding meaningless.)