Alberta's Bill 10: The Return of the King(s)?

Shocking headlines such as, "Ministers as Kings – Alberta's Bill 10 a dangerous overreach"[1], and "Alberta's Bill 10 is an affront to the rule of law"[2], raise concerns about the contents of *Bill 10: Public Health (Emergency Powers) Amendment Act, 2020* (Bill 10). News sources claim that Bill 10 gives individual ministers the power to mandate that Albertans install tracking devices on their cellphones or be vaccinated for COVID-19 without the approval of the Legislative Assembly.[3] Should you be worried? This article highlights the key concerns with the passage and the contents of Bill 10.

Democratic lawmaking process

People expect their governments to act democratically, even during emergencies. Canada uses a system of government where a body of elected representatives make decisions about our laws. These elected representatives must be responsible to the voters of Canada – that is our democratic process. Canada's democratic process for law-making includes public engagement, as well as robust debate in the legislature as bills are being passed. That means opposition from members of political parties other than the Premier or Prime Minister's political party (the executive). The opposition strengthens executive accountability to the Legislative Assembly and informs citizens how an alternative government might approach political issues. These activities are integral to the democratic process, and allow the public's interests and wishes to be integrated into government laws and policy.

Critics say that the Alberta government did not follow this democratic lawmaking process when the Legislative Assembly passed Bill 10.[4] On March 17, 2020, the Alberta Government declared a provincial state of emergency in response to the COVID-19 pandemic.[5] On March 31, 2020, Bill 10 was introduced in the Legislative Assembly as urgent emergency business,[6] and it came into force less than 48 hours later.[7] There were 21 out of 87 elected MLAs present during the vote in the Legislature. The result was 14 in favour for the UCP and 7 against for the NDP.[8] There was no consultation with the public about Bill 10 and legislative debate was limited.[9] The official opposition, the NDP, opposed Bill 10 during debate, but was unable to add an end date (sunset clause) or transparent public disclosure requirements to the Bill.[10] Without transparency requirements, the government does not have to publish ministerial orders, so the public may not be alerted to new or modified laws that have been passed using Bill 10's powers.[11] Without public consultation and with limited debate by a few members, the government's power to make or change laws is mostly unchecked. Even if the government felt it had little choice but to proceed in the way it did, the impression left with the public is that Bill 10 is an "anti-democratic"[12] and unnecessary "power grab"[13].

Bill 10 expands the Alberta government's powers under the *Public Health Act*

Bill 10 amended the *Public Health* Act, giving Cabinet ministers new powers to create laws and penalties without the approval of the Legislative Assembly during a public health emergency.[14] These new powers are retroactive to March 17, 2020, the date the government declared a public health emergency.[15] This retroactivity legalizes any laws or penalties created during the COVID-19 crisis prior to the date Bill 10 became operational, with the exception of new regulatory offences.[16] Bill 10 has also increased the maximum penalty for disobeying the *Public Health Act* from $2,000 to $100,000 for a first offence, and from $5,000 to $500,000 for a next offence.[17] Bill 10 allows Cabinet to reissue fresh declarations of emergency without input from the Legislative Assembly.[18] Cabinet is the Prime Minister's assembly of ministers who together set the federal government's priorities and policies.[19] Each minister is also typically responsible for a government department.[20]

One Cabinet minister has already used the new lawmaking powers granted by Bill 10. On May 4, 2020, the Minister of Health amended the *Public Health Act* to authorize the release of "information obtained by the Chief Medical Officer" to "any police service."[21] He unilaterally made this change through Ministerial Order and not as a legislative amendment. Ordinarily, the Legislature follows a procedure to ensure democratic process for the amendment of bills, and this process was not followed. Although the minister's action was permissible under Bill 10's powers, it raises concerns about the possibility of future autocratic lawmaking in Alberta.

Bill 10 is facing a constitutional challenge

The Justice Centre for Constitutional Freedoms (JCCF) filed a lawsuit on April 30, 2020 against the Government of Alberta challenging the constitutionality of Bill 10 .[22] The JCCF's President, John Carpay, describes Bill 10 as "a betrayal of the electorate and the rule of law."[23] He claims that Bill 10 allows "a single politician to behave as though he or she has the power of a legislative majority."[24]

Bill 10 may violate the constitutional framework for lawmaking

The contents of Bill 10 may violate the constitutional framework for lawmaking. The rule of law is an unwritten constitutional principle that shields the public from arbitrary government action by requiring that all Canadian laws must conform with constitutional principles and values. One aspect of the rule of law requires that legislators follow the constitutionally prescribed framework for lawmaking.[25] The rule of law works alongside another constitutional principle, known as the separation of powers, that operates in part as a system of checks and balances on lawmaking. The separation of powers sets out the separate and distinct functions of Canada's three branches of government - the executive, the legislative and the judicial - when it comes to making, implementing, and interpreting laws. Each branch has specific roles and responsibilities that limit the powers of the other branches of government to interfere with each other. In general, the executive prioritizes legislative issues and implements laws, the Legislature creates laws, and the judiciary interprets laws.

For a bill to become law, it must pass through the legislative process, which includes receiving three readings in the elected Legislative Assembly before it receives Royal Assent by the Lieutenant Governor. The three readings allow for debate in the Legislature between the government and the opposition – a process that ensures that the concerns about the bill are aired. Bill 10 gives individual ministers in the executive the power to create their own laws without going through this legislative process.[26] This potentially undermines the constitutional principles of the rule of law and separation of powers, and opens the door to what has been referred to in the media, as authoritarianism and the rule of "Kings".

JCCF claims that Bill 10 undermines the separation of powers and democratic process

In their constitutional challenge, the Justice Centre for Constitutional Freedoms (JCCF) claims that Bill 10 disrupts the separation of powers because it gives too much power to the executive. They argue that Bill 10 places "citizens at the mercy of uncertain, and potentially arbitrary and abusive law-making by Cabinet ministers".[27] Specifically, JCCF claims that Bill 10 bypasses the democratic process because provincial legislatures have "exclusive" authority to make laws under section 92 of the Constitution.[28]

Concerning the lawmaking process, JCCF claims that Bill 10 circumvented the democratic process because a "skeleton legislature" passed the Bill without discussion, debate, or deliberation.[29] They also assert that there is no end in place for new laws passed by ministers, meaning new laws may remain in effect until they are formally altered by the legislature sometime in the future. In other words, there is no 'sunset clause' built into them, as was requested by the opposition when the Bill was before the Legislative Assembly.[30]

The courts have postponed non-urgent matters due to the COVID-19 pandemic, so we do not know when this case will go ahead. In the meantime, the government has given itself enormous authority. We do not know what remedy a court will rely on if a court decides that the process for the Bill's passage, and Bill 10 itself are unconstitutional. A court may strike down Bill 10 in part or in its entirety because of the undemocratic way in which it was passed, or because it appears to be a fundamental breach of the separation of powers. But what would happen to the actions the government has taken to that point? Would the laws enacted under the power of Bill 10 remain in effect? Would individuals who were penalized under those laws receive remedies?

Conclusion

The rule of law and separation of powers are critical to Canada's democracy. The question is whether and to what extent governments may ignore the unwritten constitutional principles in an emergency. Does this public health emergency give the government the right to proceed as it has with Bill 10? It will be up to the courts to answer this question. In the meantime, we must trust that the government will act in the best interests of the citizenry, and not abuse the powers it has given itself.

[1] Jay Cameron, "Ministers as Kings – Alberta's Bill 10 a dangerous overreach" (11 June 2020) *Western Standard*, online: <https://www.westernstandardonline.com/2020/06/cameron-ministers-as-kings-albertas-bill-10-a-dangerous-overreach/> [Jay Cameron].

[2] John Carpay, "John Carpay: Alberta's Bill 10 is an affront to the rule of law" (14 April 2020) *National Post*, online: <https://nationalpost.com/opinion/john-carpay-albertas-bill-10-is-an-affront-to-the-rule-of-law> [John Carpay].

[3] *Ibid.*

[4] Jay Cameron, *supra* note 1; John Carpay, *supra* note 2.

[5] Bill 10, *Public Health (Emergency Powers) Amendment Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 2 April 2020), SA 2020, c 5.

[6] *Ibid.*

[7] *Ibid.*

[8] Alberta, *Alberta Hansard*, 30-2, No 14 (2 April 2020) at 429.

[9] Alberta, *Alberta Hansard*, 30-2, No 14 (1 April 2020) at 338.

[10] *Ibid.*

[11] Lisa Johnson, "UCP going 'back to the drawing board' on controversial Bill 10, Kenney says" (25 April 2020) *Edmonton Journal*, online: <https://edmontonjournal.com/news/politics/ucp-going-back-to-the-drawing-board-on-controversial-bill-10>.

[12] Jay Cameron, *supra* note 1.

[13] Canadian Civil Liberties Association, "The Alberta Government Covers its Tracks and Grabs Power in Bill 10", (14 April 2020), .

[14] *Ibid*, ss 52.1(2), 52.21.

[15] Bill 10, *Public Health (Emergency Powers) Amendment Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 2 April 2020), SA 2020, c 5, s 52.1(2.1).

[16] Bill 10, *Public Health (Emergency Powers) Amendment Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 2 April 2020), SA 2020, c 5, s 4(4)(c).

[17] *Ibid.*

[18] Bill 10, *Public Health (Emergency Powers) Amendment Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 2 April 2020), SA 2020, c 5, s 52.8(1).

[19] Government of Canada, “About Cabinet” (7 Dec 2017), online: <https://www.canada.ca/en/privy-council/services/about-cabinet.html>.

[20] *Ibid.*

[21] Jay Cameron, *supra* note 1.

[22] *Justice Centre for Constitutional Freedoms v The Queen* (30 April 2020) Calgary, Alta QB 2001-05843 (Originating Application), at para 14 .

[23] Justice Centre for Constitutional Freedoms, “Justice Centre v. Alberta Government”, online: <https://www.jccf.ca/court_cases/justice-centre-v-alberta-government/>.

[24] *Ibid.*

[25] Patrick J Monahan, "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33:3 *Osgoode Hall LJ* 411 at 419.

[26] *JCCF, supra* note 15.

[27] *Ibid*, para 26.

[28] *Ibid,* paras 14, 18.

[29] *Ibid,* para 20.

[30] *Ibid,* para 27.