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The Amendments to Bill 1

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Matter commented on: The Government Amendments to Bill 1, *Alberta Sovereignty within a United Canada Act*

As anticipated at the time that we posted our original critique of Bill 1, the Smith administration tabled a set of amendments to Bill 1 that were adopted in the Committee of the Whole and included in the version adopted on third reading early in the morning of December 8, 2022. The amendments were tabled in the form of a single document and included two main changes: (1) a change to the harm trigger; and (2) the removal of the Henry VIII provisions.

The Harm Trigger

It will be recalled that Bill 1 authorizes a legal mechanism for the government of Alberta to combat federal legislative and policy initiatives. As first introduced, Bill 1 contemplated that the Legislative Assembly, acting by way of a simple Resolution (at s 3), could authorize a broad range of executive action if the Legislature identified federalism concerns or *Charter* concerns, or if the Legislature considered that a federal initiative "causes or is anticipated to cause harm to Albertans" (the harm trigger). It was our view that the harm trigger, while unduly subjective, was not itself unconstitutional.

The amendment retains a separate harm trigger but in a more nuanced form. The amendment defines harm in terms of actual or anticipated

> … harm to Albertans on the basis that it
>
> (A) affects or interferes with an area of provincial legislative jurisdiction under the Constitution of Canada, or
>
> (B) interferes with the rights and freedoms of one or more Albertans under the *Canadian Charter of Rights and Freedoms*… (at s 3(b)(ii))

At first glance, it looks as if the harm trigger completely overlaps with the federalism and *Charter* triggers, but this is not quite the case.

In the case of the federalism and *Charter* triggers, the Legislative Assembly may only adopt a Resolution if the Resolution expresses the opinion that the federal measure is unconstitutional (at s 3(b)(i)). The harm trigger, as reframed, has a lower threshold. It does not require an opinion as to the constitutionality of the federal initiative, it merely requires an opinion that the federal

initiative "affects or interferes with" provincial legislative jurisdiction, or "interferes with" *Charter* "rights and freedoms". It is probably worth nothing that, according to settled constitutional doctrine, federal laws may affect and even interfere with provincial jurisdiction without being unconstitutional: *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 (CanLII) at para 38. *Charter* rights are also not absolute but rather may be infringed where such infringement is reasonable and demonstrably justified (at s 1).

Henry VIII

As first introduced, Bill 1 contained sweeping Henry VIII provisions that allowed cabinet, once authorized by way of a Resolution of the Legislative Assembly under s 3, to adopt orders that could have the effect of substituting for not only other orders or regulations, but also for provisions of an Act of the Legislature itself (indeed, whole Acts could have been replaced). While the Supreme Court of Canada seems to accept the validity of limited-scope Henry VIII clauses (see our original post), such clauses are widely seen as undemocratic. We took the view in our earlier post that the sheer breadth of the original Henry VIII provisions might well have persuaded the Supreme Court to qualify its position on the validity of Henry VIII clauses that potentially applied to the entire statute book.

The Henry VIII provisions of Bill 1 were widely condemned, and many commentators regarded these provisions as the most problematic element of Bill 1 (see e.g. here, here and here).

The Smith administration heard these concerns and responded by proposing a completely new text for s 4. This might suggest that the government was proposing a new approach, but that is not the case. The amendments are in fact quite surgical. Cabinet will still have massive powers to amend other regulations and orders adopted under other enactments, as well as to issue directives to an incredibly broad array of provincial entities; the only power that cabinet will not have is the power to amend or substitute for another Act of the Legislature.

Conclusions

In our original post, we questioned the constitutional validity of Bill 1 on three grounds: (1) separation of powers and s 96 of the *Constitution Act, 1867*, (2) division of powers (i.e. does the matter of Bill 1 really fall within s 92?), and (3) the breadth of the Henry VIII provisions. We also offered comments on the judicial review provisions and immunity provisions of the Bill.

The amendments to Bill 1 address the main concerns associated with the breadth of the Henry VIII provisions (although we observe that cabinet will still have massive powers in relation to delegated legislation adopted under other enactments). The amendments do not address the separation of power issues or the division of powers issues that we identified in our initial post. In sum, we believe that Bill 1 is still unconstitutional and creates tremendous uncertainty for provincial agencies and their "members, officers and agents".

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