LEGISLATION
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Repealing a Statute when the Legislature is Prorogued: The Practice in Ontario

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1. INTRODUCTION

The 40th Legislature of Ontario stood prorogued between its 1st and 2nd sessions on 3 January 2013, when the Minister of Education of Ontario, Laurel Broten, announced the McGuinty government's intent to repeal a controversial statute, *An Act to Implement Restraint Measures in the Education Sector*, but known more commonly by its short title, the *Putting Students First Act*.[1] It had received Royal Assent only four months earlier, on 11 September 2012, and superseded various collective agreements and an ongoing collective bargaining of unions representing public-school teachers. Naturally, it seemed that Premier Dalton McGuinty would therefore have to advise Lieutenant Governor Onley to recall the 40th Legislature and open its 2nd session — thus ending a controversial prorogation from October 2012 — so that the Legislature could repeal the *Putting Students First Act*. But the Premier announced no such plans. Instead, the Government of Ontario issued a press release explaining that the bill would be repealed on 23 January 2013 — but without recalling the Legislature into session.[2]

The McGuinty government portrayed the *Putting Students First Act* as such a resounding success that it no longer needed to exist. The McGuinty government issued regulations under the act to impose a new contracts on teachers' unions retroactive to 1 September 2012, even before the statute had

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[1] CTV Toronto, "Ontario To Impose Contracts on Ontario Teachers, Repeal Bill 115," 3 January 2013 [Accessed 24 February 2017].

[2] Ontario, Government of Ontario Newsroom, "Ontario to Repeal Putting Students First Act," 21 January 2013 [Accessed 24 February 2017].

received Royal Assent.[3] True to its word, the Government of Ontario repealed the *Putting Students First Act* through an executive instrument on 23 January 2013; the *Ontario Gazette* published the proclamation on 2 February 2013.[4] But how can a law be repealed when the legislature is not in session?

This article argues that there are limits to how extensively a legislature can delegate its authority to the executive and that delegating the authority to repeal a law to the executive violates the separation of powers and is unconstitutional.

2. THE LEGISLATURE DELEGATES THE AUTHORITY TO REPEAL A LAW TO THE EXECUTIVE

The Legislature of Ontario delegated the authority to repeal the *Putting Students First Act* to the Lieutenant Governor-in-Council. But this dubious practice might have rendered the *Putting Students First Act* unconstitutional. Delegating the authority to repeal a statute violates, in principle, the separation of powers and amounts to an abdication of legislative authority. However, even if this practice were found unconstitutional, there would probably also be no remedy in this instance because the said Act has been repealed. The only trace that remains are the contracts that the Government of Ontario imposed on teachers through regulations issued under the Act.

Through delegated legislation, the legislature grants the executive (formally rendered as the Lieutenant Governor or Lieutenant Governor-in-Council in most Acts) the authority to pass secondary legislation pursuant to the statute (the primary legislation), in the form of regulations or directives, which flesh out technical details and clarify the enforcement mechanisms of the primary legislation. The executive may normally amend or repeal secondary legislation from time to time. Many statutes also contain a provision that allows the Governor-in-Council to promulgate an Act into force of law on some date after Royal Assent. Occasionally, the legislature incorporates a "sun-set clause" into a statute, which specifies that certain provisions of the Act, or the entire Act itself, will automatically cease to exist on a given date, without any intervention on the part of the Lieutenant Governor-in-Council or further intervention by the legislature. But with the *Putting Students First Act,* the Legislature of Ontario delegated to the Lieutenant Governor-in-Council not only the routine authority to promulgate legislation into force upon a date of its choice, and to further promulgate regulations under the Act (which are both normal), but also the extraordinary authority to *repeal* the entire Act itself. In the United Kingdom, such authority contained in delegated legislation is referred to as a Henry VIII Clause. The moniker derives from

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[3] Ontario Regulation 313/12, made under the *Putting Students First Act*, 5 October 2012; Ontario Regulation 2/13, made under the *Putting Students First Act*, 2 January 2013; Ontario Regulation 3/13, made under the *Putting Students First Act*, 2 January 2013; Ontario Regulation 12/13, made under the *Putting Students First Act*, 21 January 2013.

[4] *Op. cit.,* 2.

Henry VIII's Act of Proclamations of 1539, through which Parliament delegated to the Sovereign broad authority to issue proclamations which took on the force of statute laws.[5]

Section 20 of the *Putting Students First Act* declares, "This Act is repealed," while s. 22 states that "This Act comes into force on a day to be named by proclamation of the Lieutenant Governor." On 12 September 2012, the Lieutenant Governor promulgated ss. 1 to 19 and 21 into force but left s. 20 inactive, on and in accordance with the advice of Cabinet. The McGuinty government later decided to repeal the Act in its entirety, and the Lieutenant Governor issued a separate proclamation that promulgated s. 20 into force on 23 January 2013.[6] But the proclamation of 12 September 2012 exceeded the authority that the Legislature delegated the Lieutenant Governor-in-Council.

The wording of s. 22 means that the Lieutenant Governor can only promulgate *the entire Act* into force by proclamation and not specific sections of the Act into force through separate proclamations. Promulgating the entire Act into force pursuant to s. 22 would, paradoxically, also promulgate s. 20 into force and thereby repeal the Act at the same time. This wording should have turned the *Putting Students First Act* into Schrodinger's Law: it is promulgated into force and repealed into oblivion at the same time in one swift stroke. But the McGuinty government simply avoided this paradox by ignoring the plain meaning of section 22, which probably ought to have delegated the power to promulgate sections 1 through 19 and 21 into force in one executive instrument and to promulgate section 20 into force through a separate executive instrument.

3. ONTARIO'S BROAD MANDATE FOR DELEGATED LEGISLATION

However, this logical and plain meaning does not apply in Ontario. The *Legislation Act* authorizes the paradoxical and arbitrary practice of proclaiming only certain sections of an act into effect, even if the act itself only authorizes the Lieutenant Governor-in-Council to promulgate the entire statute into force through only one executive instrument. Section 3(1) of the aforesaid statute says: "if an Act provides that it is to come into force on a day to be named by proclamation, proclamations may be issued at different times for different parts, portions or sections of the Act."[7] This provision of the *Legislation Act*, which transubstantiates the singular "day" into the plural "days", thereby justifies the form and process by which the McGuinty government repealed the *Putting Students First Act*. Sometimes common sense and law are at variance with one another.

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5 G.R. Elton, "Henry VIII's Act of Proclamations," *The English Historical Review* 75, no. 295 (April 1960): 208-222.

6 Ontario, *Ontario Gazette*, " > Proclamation: *Putting Students First Act, 2012*," 23 January 2013, vol. 146-05 (Toronto: Queen's Printer for Toronto, 2 February 2013), 203. [Accessed 24 February 2017].

7 Ontario, *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F

Craig Jones, Professor of Law at the University of British Columbia, has noted that the *Interpretation Acts* of British Columbia, Alberta, and Manitoba contain similar provisions that allow the Lieutenant Governor-in-Council of those provinces to proclaim individual provisions of a statute into force with the same reckless abandon as Ontario's *Legislation Act*.[8] Jones also argues that this practice violates the separation of powers between the executive and legislature by giving the executive a form of "line-item veto," whereby it could decide to keep certain provisions of a statute inactive indefinitely and, in effect, veto them.[9] For example, a new ministry could selectively promulgate the statute into force contrary to the legislature's intent.

Jones further argues that legislatures could easily remedy this probable violation of the separation of powers simply by specifying, within each statute, the date or dates on which the executive could promulgate each provision of the primary legislation into force.[10] This is precisely what the Parliament of Canada does at the federal level: within each statute, Parliament can authorize the Governor-in-Council to promulgate specific sections through various separate proclamations issued on different dates, such as through s. 115 of the *Jobs, Growth and Prosperity Act* of 2012:

> (1) Sections 68 to 85, 89, 90, 92 to 97 and 99 to 114 come into force on a day to be fixed by order of the Governor in Council.
> (2) Sections 86 to 88, 91 and 98 come into force on a day or days to be fixed by order of the Governor in Council.[11]

4. WHEN DELEGATED LEGISLATION BECOMES ABDICATING LEGISLATION

The *Putting Students First Act* surrenders an essential component of the legislature's law-making authority to the executive and thus probably violates the separation of powers entrenched in the Constitution. In other words, the Constitution of Canada can protect legislatures from themselves. Unlike in the United Kingdom or New Zealand, which are unitary states with uncodified constitutions, the codified portion of the Constitution of Canada ensures that the Parliament of Canada and provincial legislatures do not enjoy unfettered supremacy to legislate in all matters. At the very least, each is constrained by the division of powers between the two orders of government, as well as by the constitutionally entrenched bill of rights in the *Charter*. But the Constitution of Canada also entrenches a separation of powers of the executive, legislatures, and judicial branches of government and preserves spheres for each through prerogative authority, parliamentary privilege, and judicial independence.[12] In

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[8] Craig Jones, "The Partial Commencement of Acts: A Constitutional Criticism of the Lieutenant Governor in Council's 'Line-Item Veto' Power," *Review of Constitutional Studies* volume 5, no. 2 (2000): 173-194.

[9] *Ibid.*

[10] *Ibid.,* 194.

[11] *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19)

[13] Dale Gibson, "Monitoring Arbitrary Government Authority: *Charter* Scrutiny of

the United Kingdom and New Zealand, the constitution is, rather tautologically, what parliament says it is, and it can always repeal or amend previous statues, and thus change the uncodified constitution. But in Canada, all components of the system of government – the executive, the legislature, and the judiciary – must operate within the confines of the constitution and their respective spheres. Justice McLaughlin declared in 1993 in *New Brunswick Broadcasting Co. v. Nova Scotia*:

> It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[13]

In principle, Parliament should not delegate to the executive the power to repeal legislation; in practice, it certainly should not delegate such an inherent and fundamental legislative power through ambiguous and imprecise wording. In 1919, the Judicial Committee of the Privy Council struck down Manitoba's *Initiative and Referendum Act* as unconstitutional because this direct democracy allowed the electorate to pass bills into law through its popular will alone, thus bypassing both the standard legislative process within the Legislative Assembly and the Royal Assent of the Lieutenant-Governor. By enacting this direct democracy, the Legislature of Manitoba thus abdicated the authority of both its constituent parts, the Legislative Assembly and the Lieutenant-Governor.[14] The Law Lords explained:

> Sect[ion] 92 of the [British North America] Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies [...]but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.[15]

The legislature's authority to repeal statutes forms part of its exclusive legislative power under section 92 of the *Constitution Act, 1867*, and it should not be allowed to delegate said authority to the executive. Furthermore, the Supreme Court ruled in 1918 that, "the Parliament of Canada can validly delegate but cannot abandon its Legislative powers."[16] The court added:

> Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive

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Legislative, Executive, and Judicial Privilege," *Saskatchewan Law Review* 61 (1998): 297-321.

13 *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.) at para. 85.

14 *Re Initiative and Referendum Act*, [1919] A.C. 935 (Jud. Com. of Privy Coun.).

15 *Ibid.,* at para. 14.

16 *In Re George Edwin Gray* (1918), 57 S.C.R. 150 (S.C.C.).

> government. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.[17]

Section 20 of the *Putting Students First Act* does not meet the standard of a "valid delegation" set out the in the *Grey* decision. Through this provision, the Legislature of Ontario did indeed "abdicate its function" of repealing laws. Second, s. 20 is not "subject to determination at any time by Parliament"; if the executive invokes this section, then the legislature can no longer amend the Act — because it would no longer exist! As Ruth Sullivan states in *Sullivan's Construction of Statutes*: "So long as [legislatures] remain able to withdraw the delegated power, the delegation falls short of impermissible abdication."[18] Notwithstanding the *Legislation Act*, the proclamation that the Lieutenant-Governor issued on and in accordance with the advice of Cabinet does not "fall within the ambit of the legislative pronouncement by which its authority is measured" because s. 22 only makes provision that the entire Act enter into force as one unit; it does not delegate to Cabinet the authority to promulgate only certain sections through separate orders-in-council. Through the *Putting Students First Act*, the Legislature of Ontario abdicated its law-making authority — which also necessarily includes the authority to *un*make, or repeal, statutes — to the executive.

Furthermore, the *Putting Students First Act* goes even further than the so-called "Henry VIII Clauses," whereby the legislature delegates to the executive the authority "to make legislation that amends statute law or prevails over it in the event of a conflict."[19] The Westminster Parliament goes further and defines a Henry VIII Clause as a statutory provision that delegates to the executive the authority to amend or to repeal the statute outright.[20] The name derives from the Proclamation by the Crown Act, which the English Reformation Parliament passed in 1539. Parliament later repealed it in 1547, but its legacy has endured over the centuries.[21]

5. CONCLUSION

The idea that the legislature can abdicate its authority to repeal a statute to the executive subverts the separation of powers. When the legislature seeks to repeal a law, the repeal bill follows the same standard legislative process as the original bill. As Ruth Sullivan explains:

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17 *Ibid.*

18 Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6 th Ed (Markham, Ontario: LexisNexis, 2014), 412, at para. 13.16.

19 *Ibid.,* 363, at para. 11.57.

20 United Kingdom, Parliament, Glossary, "Henry VIII Clauses," [Accessed 25 February 2017].

21 See Geoffrey Elton, *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII* (Cambridge University Press, 1953).

> ***Rules governing repeal.*** When legislation provides that it is to come to an end at a designated time, it is said to "expire." When legislation is ended by an Act of the legislature, it is said to be "repealed." [...].
> ***Repeal techniques.*** In principle, the legislature has a range of techniques available to effect a repeal. In practice, however, the usual method of repeal in Canadian jurisdictions is highly stylized. Using a standard form of words, the legislature enacts a provision that declares certain legislation to be repealed. [...][22]

Nowhere did Sullivan contemplate the possibility that the legislature would delegate its authority to repeal a law outright to the executive. Yet, according to Philip Kaye of the Legislative Research Service of Queen's Park, the *Putting Students First Act* has followed a pattern not unknown to Ontario, particularly in labour relations. For instance, the *Fairness is a Two-Way Street Act (Construction Labour Mobility), 1999* authorized the executive to not only to promulgate it into force, but also to repeal it. It did so through a similar sleeper-cell clause, "The Lieutenant Governor may, by proclamation, repeal this Act or any section or subsection of it," in s. 27, which the McGuinty government invoked on 30 June 2006.[23] Kaye described this practice of the legislature abdicating its authority to repeal statutes as "an infrequent occurrence."[24]

The Legislature of Ontario has taken the Henry VIII Clauses, which in modern terms refer to "secondary legislation amending or repealing primary legislation,"[25] as a means of redundantly repealing spent statutes through the suspect practice of including 'This Act is repealed' sleeper-cell clauses. Through the *Bill of Rights, 1689*, the English Parliament abolished "the pretended prerogatives of dispensing with and suspending of laws" that James II had invoked in order to undermine Parliament's legislative authority.[26] These defunct prerogative authorities of the Crown allowed the King to enforce laws only at his discretion (which, in effect, normally meant exempting favoured subjects from the statute law in question) and to stop enforcing laws altogether — and thus usurp Parliament's supreme law-making authority to legislate in all matters. In the 20th and 21st centuries, the Legislature of Ontario has devised new methods of usurping its own legislative authority and

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22 Sullivan 2014, 732-733, at paras. 24.30 and 24.34.

23 Ontario. Legislative Assembly of Ontario. *When Do Ontario Acts and Regulations Come Into Force? Research Paper B31*, by Philip Kaye (Toronto: Parliamentary Copyright, November 2011), 10; Ontario, *Ontario Gazette*, "Proclamation: *Fairness Is a Two-Way Street Act (Labour Construction Mobility, 1999)*," 24 June 2006, vol. 139-25 (Toronto: Queen's Printer for Ontario, 24 June 2006), 1288. The proclamation entered into force on 30 June 2006.

24 Kaye 2011, 10.

25 United Kingdom, House of Lords, Select Committee on the Constitution, 9th Report of the Session 2016-17: "The 'Great Repeal Bill' and Delegated Powers," (London: House of Lords, 7 March 2017), 16.

26 *Bill of Rights* [1688] 1 William & Mary, Session 2, chapter 2.

supplicating itself to the political executive with such ruthless efficiency that even the Tudor and Stuart Sovereigns could never have imagined.