NOTES ON EMERGENCY POWERS IN CANADA

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1. Introduction

This note presents an overview of the use of emergency powers in Canada. I begin with a discussion of the threat that the extravagant use of emergency powers poses to constitutional government and then switch to a historical summary of the use of emergency powers in Canada. Finally, I consider Canada's new *Anti-terrorism Act* which effectively grants permanent "emergency" powers to both the executive branch of the legislature and law enforcement agencies.

All states in the world have constitutions, either written or unwritten. However, only a minority of these states have a system of government which can be described as "constitutional".[1] The challenge of constitutional government lies in ensuring that the state apparatus actually operates in accordance with the constitution. Many factors and pressures may lead to a constitution becoming "nominal" or "semantic".[2] Emergency powers are, in my view, the most destructive of these factors and pressures. The lavish and profligate use of emergency powers permitted by anti-terrorism legislation may become an irresistible threat to constitutional government. Yet, the invocation of emergency powers is an issue that arises inevitably in all constitutional democracies:[3]

> In the life of every nation there will arise occasions when peace and tranquility may be disrupted by natural or economic disasters or threatened by internal dissension or external aggression.

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[1] This question is discussed in the magnificent essay by Karl Loewenstein, "Reflections on the Value of Constitutions in our Revolutionary Age" in David E. Apter and Harry Eckstein, eds., *Comparative Politics*, New York, The Free Press, 1963, p. 149.

[2] *Ibid.* at 154.

[3] *Ibid.*

Many constitutions make express provision for both the invocation and the exercise of emergency powers.[4] Canada's does not. However, an emergency powers doctrine, whether set out expressly or not, probably inheres in all constitutions. In his judgment in *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*[5] Lord Haldane reasoned that the necessary power to permit the state to deal with an emergency could be implied from the very existence of a constitution.

The very notion of emergency powers is contradictory. The defining principle of constitutional government is the Rule of Law. This principle requires that the state always act in accordance with the law.[6] Section 52(1) of Canada's *Constitution Act, 1982* clearly establishes this principle by declaring that "the Constitution...is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is... of no force or effect." The notion of emergency powers contradicts the Rule of Law because it posits that, in times of national crisis, the state may act outside constitutional norms. The idea is that whenever the existence of the state is imperilled, it may take extraordinary steps in order to save itself. Lord Haldane spoke of "... some extraordinary peril to the national life ... such as the cases arising out of a war."[7]

While there is no universally accepted definition of emergency, it is generally understood that an emergency is, and must be, temporary. This is because an emergency involves conditions which are aberrant, atypical, and extreme emergency powers intended to deal with unusual situations must, by definition, be unusual and temporary.

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[4] Although the U.S. Constitution does not expressly deal with emergencies, the Supreme Court managed to elaborate something close to an emergency powers doctrine in *Korematsu v. United States*, 323 U.S. 214 (1944). For a full discussion of the U.S. jurisprudence, see Charles I. Lugosi, AThe Rule of Law or Rule by Law: The Detention of Yaser Hamdi@, (2003) 30 *American Journal of Criminal Law* 225.

[5] [1923] A.C. 695, [1923] 3 D.L.R. 629 (J.C.P.C.).

[6] *Roncarelli v. Duplessis* (1959), 16 D.L.R. (2d) 689 (S.C.C.). See also, R.F.V. Heuston, *Essays in Constitutional Law*, 2nd ed. (London: Stevens and Sons, 1964) at 32-57.

[7] *Toronto Electric Commissioners v. Snider* [1925] A.C. 396 at 412, [1925] 2 D.L.R. 5.

Article Four of the International Covenant on Civil and Political Rights of 1966 states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation ...

Ian Brownlie, ed., *Basic Documents on Human Rights* (Oxford, Clarendon Press, 1971) at 213.

The danger of using emergency powers as more than a temporary measure became evident in Asia and Africa where colonial governments used emergency powers lavishly.[8] In some parts of the world emergency powers have become a substitute for the normal system of government[9] and states of emergency have become permanent.[10]

During states of emergency, governments limit basic rights and freedoms.[11] The usual constitutional rules which constrain the exercise of state power are set aside.[12] The two most common infringements of rights and freedoms which governments impose during emergencies are censorship and a regime of arbitrary arrest and detention without trial. States equipped with such sweeping powers may well become dictatorial and oppressive.

2. The *War Measures Act*, Two World Wars and After

a. The *War Measures Act*

For many years the Canadian law of emergency powers was found in the *War Measures Act*, an ordinary federal statute. Originally enacted in 1914[13] to give the national government the powers it believed it needed to prosecute the war effectively, the *War Measures Act* remained law until 1988, though not normally in operation. The Act was unusual. It could only be invoked by a proclamation of the Governor-in-Council.[14] It dealt, per section 2, with "war, invasion or insurrection, real or apprehended", but the section precluded judicial review of the Governor-in-Council's decision to issue a proclamation. Section 2 actually stated that such a proclamation was to be "conclusive evidence" of the existence of war, invasion or insurrection. So, the answer to the question, "How do we really know that war, invasion or insurrection exists?" was, "Because the Governor-in-Council says so". One result of the invocation of the Act was to transfer plenary law-making authority from Parliament to the executive. Section 3 of the Act empowered the Governor-in-Council to make regulations having the force of law; a power that was, in a practical sense, unlimited. The section gave the Governor in Council authority to make "... such orders and

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[8] Denys C. Holland, "Emergency Legislation in the Commonwealth" (1960) *Current Legal Problems* 148.

[9] B.O. Nwabueze, *Constitutionalism in the Emergent States*, (London: C. Hurst and Co, 1973) at 174.

[10] See *Shamwana v. Attorney General*, Supreme Court of Zambia, Judgment No. 35 of 1980.

[11] *Visuvalingam v. Liyanage* [1985] L.R.C. (Const.) 909 (Supreme Court of Sri Lanka).

[12] *Ibid.*

[13] S.C. 1914 (2d Sess.), c. 2.

[14] *War Measures Act*, R.S.C. 1970, c. W-2, s. 2.

regulations as he may deem necessary ..." and such regulations could contradict and even overrule the express provisions of Acts of Parliament.[15]

A number of important legal and political questions arise with respect to emergency powers. These questions involve controlling the invocation, the duration and the use of emergency powers. The two institutions best positioned to control the use of emergency powers are the legislature and the judiciary. Notably, the *War Measures Act* was drafted in such a way as to exclude both legislative and judicial control. As we have seen, s. 2 effectively precluded judicial review of its proclamation. Section 6 created a possibility for limited legislative control. Under certain circumstances Parliament could debate the issuance of a proclamation within ten days and if it chose to do so, Parliament could adopt a resolution revoking the proclamation.[16] Once this opportunity had passed, Parliament had no further role to play. The Act would stay in operation until such time as the Governor-in-Council decided to revoke the proclamation. The Act, having been proclaimed in 1914, remained in effect until 1920, long after hostilities in the Great War had ceased.[17]

As we have seen, the language used in s. 2 of the *War Measures Act* made judicial review of any proclamation of that Act unlikely. The rule-making power given to the Governor-in-Council in section 3, therefore, was both sweepingly broad and, in a practical sense, unreviewable. Likewise, the decision to revoke the proclamation and end the emergency was that of the Governor-in-Council alone. A failure on the part of the Governor to end the emergency would also have been difficult to review. As Lord Haldane stated:

> The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of law is loath to enter.[18]

b. The Great War

The *War Measures Act* received Royal Assent on August 22, 1914 and the government issued a proclamation to the effect that a state of war had existed since August 2. The government quickly promulgated regulations which allowed persons to be arrested arbitrarily and interned.[19] New regulations also allowed for sweeping cen-

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[15] *Re Gray* (1918), 57 S.C.R. 150. In recognizing such an extraordinary power, the Supreme Court of Canada stated, "...we are living in extraordinary times which necessitate the taking of extraordinary measures." (at 182).

[16] *War Measures Act, supra* note 15, s. 6(4).

[17] *Fort Frances Pulp and Paper Co. v. Manitoba Tree Press Co.* [1923] A.C. 695 (J.C.P.C.) [*Fort Frances Pulp and Paper*].

[18] *Ibid.* at 706.

[19] D.E. Smith, "Emergency Government in Canada" (1969) 50 *Canadian Historical Review* 429.

sorship[20] and prohibited a wide range of publications,[21] including both German-language and Irish Republican publications. In 1918 an *Unlawful Associations Order*[22] declared a number of organizations to be unlawful. The organisations named included Communist, Socialist and Social Democratic groups. In the same year, government expanded and brought together the censorship orders in the *Consolidated Orders Respecting Censorship*, 1918.[23] These orders were directed largely towards publications believed to be of a leftist or Bolshevik nature.

c. Emergencies and Federalism

Federalism is a fundamental element in the Canadian constitutional system. Until 1982, Canada's main constitutional instrument was a U.K. statute of 1867 called the *British North America Act*. This statute divided law-making authority between the Parliament of Canada and the provincial legislatures. Thus, until 1982, constitutional litigation tended to raise division of powers issues. While, as we have seen, regulations adopted pursuant to the War Measures Act during the Great War definitely infringed basic liberties, such questions did not arise directly. Legal questions related to civil liberties tended to be framed as division of powers issues.[24]

In normal times, Parliament could only legislate with respect to those matters entrusted to it by the *British North America Act*. The *Act* similarly circumscribed the powers of the provincial legislatures. Section 91 of the *British North America Act* is the section which defines the law-making authority of Parliament. The opening words to s. 91 give Parliament the authority to make laws for the "peace, order and good government of Canada". The courts accepted that these words conferred upon Parliament the authority to make exceptional laws in the event of a national emergency.[25] Subsequent case law established that this exceptional Parliamentary authority included the power to legislate in respect of matters normally within the jurisdiction of the provinces. In the aftermath of the Great War, the Judicial Committee of the Privy Council was prepared to uphold regulations made pursuant to the *War Measures Act* which interfered with "Property and Civil Rights in the province".[26]

This issue of federal intrusion into the provincial jurisdiction over property and civil rights arose once in peace time. In 1975 the Government of Canada came to

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[20] *Consolidated Orders Respecting Censorship* P.C. 1917-146 (January 17).

[21] P.C. 1914-94 (November 6).

[22] P.C. 1918-2384 (September 23).

[23] P.C. 1918-1241 (May 22).

[24] See *Re Alberta Statutes*, [1938] S.C.R. 100.

[25] *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396.

[26] *Fort Frances Pulp and Paper, supra* note 18.

believe that an annual inflation rate in excess of 10% constituted a national crisis. Consequently, Parliament enacted a statute called the *Anti-Inflation Act*.[27] This Act purported to establish a national system of wage and price controls. This system interfered with matters normally within the jurisdiction of the provinces and so the constitutionality of the Act was open to serious question. The Act was referred to the Supreme Court of Canada for a determination of its constitutionality.

In a questionable decision, the Court upheld the validity of the Act.[28] However, it was immediately apparent that the Act addressed a number of matters which were within the jurisdiction of the provinces in normal times. How, then, was its validity to be upheld?

The Supreme Court appeared to accept that the Act might be upheld as emergency legislation. However, the Court suggested that, even if it was emergency legislation, it was not essential for Parliament actually to have used the word "emergency" in the statute.[29] It would suffice to establish that Parliament had a "rational basis" for believing an emergency existed when it enacted the legislation. Actual proof of the existence of an emergency would not be necessary.[30] It seems that the Court upheld the *Anti-Inflation Act* on the basis that it addressed a "matter of serious national concern".

d. The Second World War

The *War Measures Act* was reviewed and revised in 1927 and 1938. An Interdepartmental Committee on Emergency Legislation stated in its report in 1939,

> ... this statute confers upon the Executive ample authority to take pretty well whatever action might be found to be necessary to meet the exigencies of war or other emergency.[31]

The Act was proclaimed again on September 1, 1939 and backdated to August 25 of that year. On September 3, the *Defence of Canada Regulations* were promulgated.[32] These regulations were revised and repromulgated later in September.[33] *Regulation*

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[27] S.C. 1974-75-76, c. 75.

[28] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

[29] *Ibid.* at 422.

[30] *Ibid.*

[31] *Report*, Ottawa, July 1939.

[32] P.C. 1939-2483 (September 3).

[33] P.C. 1939-2891 (September 27).

39A, which was adopted during the revision of the regulations, effectively abolished free expression in Canada. *Regulation 39C* declared various organisations to be illegal. Many of these organisations were communist, which may be odd given that Canada and the Soviet Union were both, at least after the summer of 1941, at war with Nazi Germany. Regulation 21 made provision for internment of enemy aliens and of suspected Nazi sympathisers.

The government of Canada exercised extraordinary powers under the *War Measures Act* for the duration of the war, and made literally thousands of regulations. It was pursuant to the Act that the government evacuated Japanese-Canadians from the Pacific coast.[34]

e. Igor Gouzenko

In late 1945, Igor Gouzenko, a cipher clerk at the Soviet Embassy in Ottawa, informed the R.C.M.P. that a spy ring was being operated out of the embassy. Although hostilities involving Canadians had ended several months earlier, the *War Measures Act* was still in operation. Acting under regulations adopted pursuant to the *War Measures Act*, the R.C.M.P. arrested a number of people. These people were held incommunicado, denied legal representation and forced to appear before a Royal Commission consisting of two Supreme Court of Canada judges: Mr. Justice Kellock and Mr. Justice Taschereau. They were obliged to give evidence against themselves without first consulting a lawyer. Some were charged with breaches of the *Official Secrets Act*,[35] while others were charged with conspiring to breach the Act.[36]

f. October 1970

Radical nationalism had been on the rise in Québec throughout the 1960s.[37] The decade began with the electoral defeat of the Union Nationale government by the liberals under Jean Lesage. Thus began what came to be called *la révolution tranquille*. The aims of this quiet revolution were to end the corruption of Duplessis-style poli-

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[34] See Joy Kogawa, *Obasan* (Toronto: University of Toronto Press, 1981).

[35] R.S.C. 1985, c. O-5. This statute is still with us, but in 2001 its name was changed to the *Security of Information Act*, see *Anti-Terrorism Act*, S.C. 2001, c. 41, s. 25(1). This change of name in no way affected the substance of the Act. For a detailed discussion of the Act, see Robert Martin, *Media Law*, 2nd ed., (Toronto: Irwin Law, 2003) at 61-65.

[36] *R. v. Mazerall*, [1946] O.R. 762 (C.A.), Rose v. R., [1947] 3 D.L.R. 618 (Que.C.A.).

[37] Accounts of the events leading up to the Proclamation of 16 October can be found in R. Haggart and A. Golden, *Rumours of War*, 2d ed. (Toronto: Calligraph, 1979); G. Pelletier, *The October Crisis*, trans. J. Marshall (Montréal: Mont Royal, 1971); D. Smith, *Bleeding Hearts ... Bleeding Country: Canada and the Québec Crisis* (Edmonton: University of Alberta Press, 1971) and W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed., (Toronto: McClelland and Stewart, 1975) at 321-351. I have relied on all four.

tics and to change the neo-colonial[38] status of Québécois and make them *maîtres chez nous*. But not everyone in Québec was happy with the Lesage government, especially as it began to show it was as prone to corruption as its predecessors. Many wanted to see Québec break away from Canada and, at the same time, begin a process of radical social and economic transformation.

In early 1963 a group calling itself *le Front de Libération du Québec* (F.L.Q.) made its first appearance. We still do not know a great deal about the F.L.Q..[39] We do not know how many people belonged to it or to what extent it was organized. We cannot be certain how much coordination existed between the different units or "cells" which used the name F.L.Q.. We cannot even be entirely sure that, as a coordinated organisation, the F.L.Q. ever existed. We do know that the members of the F.L.Q. saw it as an anti-colonial liberation movement and that its ideas and objectives could loosely be described as Marxist-Leninist.

Nonetheless, there were bombings and thefts, most of them in Montréal. By 1970 three people, one of them apparently an F.L.Q. bomber, had been killed. The number and intensity of these incidents increased throughout 1968 and 1969.

Militant demonstrations and the use of inflammatory language in speeches and pamphlets became commonplace in Québec. Pierre Vallières' book *White Niggers of America*[40] remains the most extreme and inflammatory expression of this period. However, it is important to remember that by 1970 militant demonstrations and inflammatory language were almost everyday occurrences in most Western countries.[41] What was happening in Québec was not unique. Indeed, Pierre Vallières' book was quickly translated into English and marketed extensively outside Québec.

On October 5, 1970, the "Libération" cell of the F.L.Q. kidnapped James Cross, the U.K.'s Trade Commissioner in Montréal. They threatened to kill Cross unless certain demands were met. Then on October 10, the "Chenier" cell of the F.L.Q. kidnapped Pierre Laporte, the Minister of Labour in the Government of Québec. Similar threats and demands followed Laporte's kidnapping.

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[38] For a definition and elaboration of the meaning of neo-colonialism, see Kwame Nkrumah, *Neo-Colonialism, The Last Stage of Imperialism* (London: Nelson, 1965).

[39] A version of the events of October 1970, written by a member of the F.L.Q.'s "Chenier" cell, can be found in F. Simard, *Talking it Out: The October Crisis from Inside*, trans. D. Hamel (Montréal: Mont Royal, 1987).

[40] Trans. J. Pinkham (Toronto: Underground, 1971). Vallières was closely linked to the F.L.Q. and was detained in October 1970.

[41] This situation, as it manifested itself in Montr?al, was discussed by the Supreme Court of Canada in *A.G. Canada v. Dupond*, [1978] 2 S.C.R. 770.

Negotiations ensued. An F.L.Q. manifesto was broadcast over radio and television. There were several large demonstrations in Montréal in support of the F.L.Q. Negotiations bogged down. The Premier of Québec, the Mayor of Montréal and the Montréal Chief of Police all called upon Prime Minister Pierre Trudeau to take action. At 4:00 am on the 16th of October the Government of Canada proclaimed the *War Measures Act*. Pierre Laporte was murdered the next day.

The official proclamation[42] claimed there was "a state of apprehended insurrection within the Province of Québec." Issued along with the Proclamation were the *Public Order Regulations*, 1970[43] (the "P.O.R."). These regulations were made under the *War Measures Act*. They gave the authorities in Québec the extraordinary powers they had requested. However, the proclamation of the Act and the P.O.R. were not limited to Quebec. They also gave extraordinary powers to authorities outside Québec.

Montréal and Québec police, assisted by units of the Canadian Armed Forces, immediately began making arrests. These three agencies arrested 350 people within the first four days. In all, 497 people were arrested. Formal control of the operation remained throughout with the government of Québec.

The Preamble to the P.O.R. claimed that one of the P.O.R.'s purposes was to "ensure the continued protection of human rights and fundamental freedoms in Canada." How did the P.O.R. achieve this? The simple answer is: by denying just about every human right and fundamental freedom anyone might think of.

The P.O.R. deemed the F.L.Q. to be an unlawful association. Membership in this unlawful association was made a crime. Advocating the "unlawful acts, aims, principles or policies of the unlawful association" was, likewise, made a crime. Thus, the P.O.R. recognised guilt by association and punished the expression of opinion.

The P.O.R. defined both police officers and members of the armed forces as "peace officers" and granted both groups extraordinary and unprecedented powers. In ordinary times in Canada persons may only be arrested without a warrant when the arresting police officer has "reasonable and probable grounds" to believe an offence has been committed. Under the P.O.R., a peace officer needed only have "reason to suspect" that one of the offences specified in the regulations was being committed, or was about to be committed, in order to make an arrest without a warrant. That is, peace officers had virtually unlimited powers of arrest. Persons arrested under the P.O.R. could be held in custody without bail and without being brought before a court for up to ninety days.

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[42] S.O.R./1970 -443.

[43] S.O.R./1970 -444.

The powers of entry, search and seizure were also greatly expanded. The normal rule in Canada is that, in order to enter and search premises without the consent of the owner or occupier thereof, a police officer requires a warrant signed by a Justice of the Peace. Before granting the warrant, the Justice must be satisfied by evidence given on oath that there is a reasonable basis for believing the search will reveal material pointing to the commission of a crime.[44] Under the P.O.R., suspicion alone was enough to permit a peace officer to conduct a search. As with powers of arrest, powers of entry and search were virtually unlimited.

Sweeping powers like these almost cry out to be abused. And they were. In the first place, the authorities jumped the gun and began rounding people up before the *War Measures Act* was actually proclaimed. Thus, although the proclamation was issued on October 16, it was backdated to October 15.[45] Secondly, it was reported in October 1970 that police and soldiers were instructed to arrest anyone found to be in possession of literature or posters that could be described as "extreme left[ist]."[46] Finally, in Vancouver, far removed from extreme manifestations of Québécois nationalism, the authorities were able to use the P.O.R. to "get at their favourite targets."[47]

Fortunately for everyone, the state of emergency did not last long. The proclamation of the *War Measures Act*, and the P.O.R., were revoked on 2 December 1970. This did not mean the end of the extraordinary powers which had been created. The substance of the P.O.R. was restated in the *Public Order (Temporary Measures) Act, 1971*.[48] The Act lapsed automatically on 30 April 1972. By February 1971, 465 of the people arrested had been released. Only two people were ever convicted of offences under the P.O.R. or the *Public Order Act*. All outstanding charges under the Act were dropped in August 1971. In spite of this, a court eventually upheld the validity of the P.O.R.[49]

On December 4th the kidnappers of James Cross handed him over to the authorities and were given safe passage to Cuba, pursuant to an agreement with the authorities. Three members of the "Chenier" cell were arrested on December 27th and charged with the kidnapping and murder of Pierre Laporte. Two were subse-

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[44] *Criminal Code*, R.S.C. 1985, c. C-46, s. 487.

[45] This was expressly stated in the proclamation. See S.O.R./1970-433.

[46] See H. Marx, "Human Rights and Emergency Powers" in R.St.J. MacDonald and J.P. Humphrey, eds., *The Practice of Freedom* (Toronto: Butterworths, 1979) at 456.

[47] Haggart and Golden, *supra* note 3738 at 111.

[48] S.C. 1970-71-72, c. 2.

[49] *Gagnon and Vallières v. The Queen* (1971), 14 C.R.N.S. 321 (Que. C.A.).

quently convicted of murder. These members of the cell were arrested as the result of a normal police investigation.

October 1970 was a shocking experience for Canada and for Québec. Part of the shock lay in having to confront history, which, in Denis Smith's incisive observation, Canadians believed "... happened elsewhere but not at home".[50] But a part also lay in having to recognise that both our national unity and our basic liberties were fragile. Was the shock worth whatever the P.O.R. might have accomplished? The P.O.R. were truly repressive, the stuff of a police state. Can their imposition be justified?

The argument in support of the actions of the Government of Canada is most clearly set out in Gérard Pelletier's 1971 book *The October Crisis*.[51] Pelletier was a Minister in the Trudeau government. He was also a long-time friend of the Prime Minister, a Québécois, and an intelligent and thoughtful person. His justification for what happened is roughly as follows. Political violence in Québec had been increasing over many years. The kidnappings of Cross and Laporte were simply the climactic acts in a process which had come to directly threaten the social order. Furthermore, the situation had deteriorated to the point where the police in Québec could no longer keep it under control. Only decisive and timely action by Ottawa could restore order. Since the Government of Canada had been democratically elected, it could legitimately intervene in Québec in the way it did to uphold the public interest.

There are some serious flaws in Pelletier's argument. Some of these flaws are empirical; some involve issues of principle.

At an empirical, or practical, level Pelletier's argument contains its own justification: it worked. We crushed political terrorism in Québec. The argument is also self-serving and misleading. Bombing, kidnapping and murder were all crimes in Canada and could have been dealt with under existing Canadian law. More to the point, the P.O.R. did not prevent Pierre Laporte's murder and the Armed Forces did not, as we have seen, catch his murderers. The proclamation of the *War Measures Act* and the promulgation of the P.O.R. did not result in the permanent incarceration of large numbers of dangerous political terrorists

The F.L.Q. might have been crushed, but at what price? Certainly what happened in October 1970 did not mean the end of Québécois nationalism nor of the desire of many Québécois for independence. In fact, these were strengthened. The

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[50] Smith, *supra* note 3738 at xi.

[51] Pelletier, *supra* note 3738. One of the great ironies of Canadian history is that Pelletier, Trudeau and Pierre Vallières were all involved in the production of *Cité Libre* in the early 1960s.

acts of the Government of Canada and the spectacle of armed English-speaking soldiers[52] enforcing repressive laws, operated as a validation of the perspective argued by the F.L.Q. and by Pierre Vallières. The truth of their analysis of the relationship between Québec and Canada was being demonstrated daily in the streets of Montréal. The legacy of the P.O.R. was bitterness and resentment, a strengthening of the climate which has seen a rejection of Canada on the part of many Québécois.

The damage to the principles of constitutional government was grave. Pierre Trudeau treated the constitution of Canada as if it were his personal possession.[53] Other states have experienced far more serious threats to order than two kidnappings and one murder and yet managed to keep their constitutions and basic liberties intact. Many Canadians today feel alienated from their institutions and I believe that October 1970 was an important milestone in the process of alienation. Canadians saw how easy it was for the government to set aside rights they had long imagined to be fundamental. They also saw that institutions which they thought belonged to them actually belonged to Ottawa.

The F.L.Q. was a group of bumbling amateurs who could not possibly have been a real danger to any social order.[54] In other words, Ottawa imposed a repressive law to deal with what I believe was a non-existent crisis. Certainly, kidnapping and murder were serious things in October 1970. But kidnapping and murder are just as serious today. We do not declare a national state of emergency every time either occurs.

g. The War Measures Act and Democracy

Speaking in the House of Commons in May 1940, M. J. Coldwell, M.P., the leader of the C.C.F., dealt eloquently with the effect of the *War Measures Act* on democracy. He said:

> We are prepared to support the struggle against aggression and for the preservation of democratic institutions, but we insist that democratic institutions be respected and safeguarded in our own country... Ever since the outbreak of war we have been governed by decree, largely in secrecy.[55]

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[52] This is not entirely correct. Of the 7500 troops who were deployed in Montréal, many were francophones from the Royal 22ième Regiment (the "Van Doos"). See J. L. Granatstein, *Canada's Army: Waging War and Keeping the Peace* (Toronto: University of Toronto Press, 2002) at 365-366.

[53] The most powerful critique of the events of October 1970 remains Smith, *supra* note 37.

[54] This is brought out very clearly in Haggart and Golden, *supra* note 38. The F.L.Q. was, by no means, the equivalent of the Provisional I.R.A.

[55] Canada, Parliament, *House of Commons Debates*, 9 (20 May 1940) at 51.

3. The Emergencies Act

In 1988 Parliament repealed the *War Measures Act* and replaced it with a fresh statute called the *Emergencies Act*.[56] The new statute was a considerable improvement on its predecessor. A major problem with the *War Measures Act* was its all-or-nothing nature. Once the Act was proclaimed, the entire country was subject to an all-out, full scale emergency. As we have seen, the earlier Act was drafted in such a way as to limit the possibility of legislative or judicial control over its use. Finally, an emergency under the *War Measures Act* would last until the Governor-in-Council decided that it should end.

The *Emergencies Act* addressed, and overcame, many of these deficiencies in the *War Measures Act*. The new Act created four different levels of emergency, each of which is defined as a "national emergency." These are:

1. Public Welfare Emergency;[57]
2. Public Order Emergency;[58]
3. International Emergency;[59] and
4. War Emergency.[60]

A Public Welfare Emergency would, I suspect, be the result of either a natural disaster or a human-made disaster, while a Public Order Emergency might be declared in response to something like a general strike. It is far from clear precisely what constitutes an International Emergency. The most severe form of emergency, a War Emergency could be declared in response to "... war or other armed conflict, real or imminent."[61] Both a Public Welfare Emergency and a Public Order Emergency may be declared in a specific region of Canada.

In each case, the emergency is to be declared by the Governor-in-Council. Before doing so the Governor must believe on "reasonable grounds" that an emergency exists.[62] This wording leaves open the possibility of judicial review of the invocation of emergency powers. In each case, the declaration must be laid before

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[56] S.C. 1988, c. 29.

[57] *Ibid.* part I.

[58] *Ibid.* part II.

[59] *Ibid.* part III.

[60] *Ibid.* part IV.

[61] *Ibid.*, s. 37.

[62] *Ibid.*, s. 6(1).

Parliament, which is given broad authority to revoke it.[63] In each case, the state of emergency is to lapse automatically after a specified period of time.[64] Again, in each case, the Governor-in-Council may make regulations to deal with the emergency.[65] In the first three categories of emergency, this authority is limited and would likely not extend to the imposition of internment or censorship.

However, the powers given to the Governor-in-Council during a War Emergency are nearly as broad as those that were created under the *War Measures Act*. The Governor-in-Council is authorized to make "... such orders or regulations as the Governor-in-Council believes, on reasonable grounds, are necessary or advisable for dealing with the emergency."[66] The langauge of this provision suggests that the Governor's rule-making power is not intended to be as limitless as that found in s. 3 of the *War Measures Act*.

What about a War Emergency and the *Canadian Charter of Rights and Freedoms*? Given the broad language of s. 40 of the *Emergencies Act*, it seems inevitable that there would be derogations from *Charter* rights during a War Emergency. Given this likelihood, Parliament might have been expected to invoke s. 33 of the *Charter* when it enacted the *Emergencies Act*, and thus declare that the Act operates notwithstanding the *Charter*. Given that this was not done, it would be for the courts to determine, on a case by case basis, whether particular derogations from *Charter* rights pursuant to a War Emergency could be justified in a free and democratic society.

The only reference to emergencies in the text of the *Charter* is oblique and indirect. Section 4(1) of the *Charter* states that the maximum life of a House of Commons or a provincial legislative assembly is to be five years. Section 4(2) adds that,

> "in time of real or apprehended war, invasion or insurrection,[67] the life of a House of Commons or a legislative assembly may be extended beyond five years."

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[63] *Ibid.*, s. 7(1).

[64] With a War Emergency, the period is 120 days. (*Ibid.*, s. 39(2)).

[65] *Ibid.*, s. 8(1).

[66] *Ibid.*, s. 40(1).

[67] These words were evidently borrowed from the *War Measures Act*.

4. *The Anti-terrorism Act*

September 11, 2001 was a dark day in human history. Many people, especially media commentators, appear to believe that history began on that date. The same people also apparently believe that "horrific" is a real word. In response to those events, Parliament enacted the *Anti-terrorism Act* (the "*ATA*").[68] The Act contains a preamble which states, in part, "... while continuing to respect and promote the values reflected in and the rights and freedoms guaranteed in the *Canadian Charter of Rights and Freedoms*."[69] This preamble is, for me, reminiscent of the preamble to the P.O.R., in that the substance of the *ATA* appears to contradict the preamble.

The *ATA* is a questionable statute. It appears to be an attempt on the part of the state to cloak itself with emergency powers through the back door, without actually declaring an emergency under the *Emergencies Act*. The *ATA* recognizes guilt by association.[70] It also proscribes what would once have been regarded as normal political activity.[71] The Act substantially broadens the power of peace officers to arrest persons without a warrant.[72] It also allows peace officers to detain persons where the peace officer "suspects" such detention to be necessary to prevent "terrorist activity".[73] Persons may also be detained where their detention is "necessary for the safety of the public."[74] The *ATA* allows a judge to make an order for the "... investigation of a terrorist offence." This order may also authorize the "gathering of information."[75] Persons may be required to answer questions even if the questions are incriminating.[76] Property may be seized pursuant to the Act on the *ex parte* application of the Attorney General.[77] The Act is also badly drafted. It is unreasonably long and contains barbarisms such as the use of "they" as a third-person singular pronoun.[78]

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[68] S.C. 2001, c. 41. For a discussion of the ways other Commonwealth states have responded to 11 September, see (2002) 9 *Commonwealth Human Rights Initiative News*, no. 1 at 8-18.

[69] S.C. 2001, c. 41, Preamble.

[70] *Ibid.*, s. 83.01(1)(b)(i).

[71] *Ibid.*, s. 83.01(1)(b)(i).

[72] *Ibid.*, s. 83.3(4).

[73] *Ibid.*

[74] *Ibid.*, s. 83.3(7)

[75] *Ibid.*, s. 83.28(4).

[76] *Ibid.*, ss. 83.28(8) and (10).

[77] *Ibid.*, s. 83.13(1).

[78] *Ibid.*, s. 16(3). For academic analysis of the A.T.A., see, Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

The *ATA* was designed ostensibly to deal with a crisis.[79] It abrogates, as we have seen, a number of the rights which Canadians enjoy in normal times. For these reasons, the *ATA* can be characterized as emergency legislation. Unfortunately, the *ATA* seems to create a permanent state of emergency. The *ATA* does contain a "sunset clause", according to which the Act is to lapse shortly after December 31, 2006.[80] However, despite its "sunset" clause, the *ATA* will stay in operation far longer than would have been the case with a War Emergency declared pursuant to the *Emergencies Act.*

Some sense of how the courts might deal with the *ATA* can be gleaned from the Supreme Court of Canada's decision in *Suresh v. Minister of Citizenship and Immigration.*[81] Suresh was a citizen of Sri Lanka who had been granted refugee status in 1991. He was a member of the Liberation Tigers of Tamil Eelam (L.T.T.E.) and had raised funds for a group associated with the L.T.T.E. The Minister of Citizenship and Immigration issued a certificate under s. 40.1 of the *Immigration Act*,[82] alleging that there "...were reasonable grounds to believe that Suresh had engaged in terrorism or was a member of an organisation that had engaged or would engage in terrorism" and was, as a result, inadmissible to Canada.[83] On this basis the Minister ordered that Suresh be returned to Sri Lanka. Suresh applied to the Federal Court for judicial review of this deportation order. This application was dismissed. The Federal Court of Appeal upheld this decision. The Supreme Court of Canada allowed an appeal from the decision of the Federal Court of Canada and remitted the matter to the Minister. The Court accepted Suresh's argument that:

> ...he [had] not been involved in actual terrorist activity in Canada, but merely in fundraising and support activities that may, in some part, contribute to the civil war effort of Tamils in Sri Lanka.[84]

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[79] *Ibid.*, Preamble.

[80] *Ibid.*, s. 83.32.

[81] (2002), 208 D.L.R. (4th) 1 (S.C.C.).

[82] R.S.C. 1985, c. I-2.

[83] (2002) 208 D.L.R. (4th) at 3.

[84] *Ibid.*, at 8. Martin Loney has noted that,

> "Many" Tamils who had sought "refugee" status remained active partisans, raising an estimated $7 million a year in funds to support the conflict in Sri Lanka. Fund-raising was assisted by extortion. Loney quoted the *Globe and Mail* about a "disturbing escalation of crime" in the Tamil community in Toronto and the apparent increase in intimidation to silence critics of the L.T.T.E.
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> Martin Loney, *The Pursuit of Division: Race, Gender and Preferential Hiring in Canada* (Montreal and Kingston,: Mcgill-Queen's University Press, 1998) at 224. For further discussion of the L.T.T.E. in Canada, see Robert Fife "Canada is Helping Tamils, Expert" National Post (10 September 2003).

Thus, it appears that the Supreme Court of Canada does not equate raising money for terrorists with engaging in terrorism. As I read the judgments in the Supreme Court, it seems the judges were more concerned with ensuring that human rights norms from international law were applied, than with protecting Canadians of Tamil origin.[85]

Conclusion

The current Canadian position with respect to emergency powers is unsatisfactory. Canada's constitution should expressly address the use of emergency powers. Were we to amend our constitution so that it included express provisions governing both the invocation and the use of emergency powers, we would be doing ourselves a real service. The struggle against terrorism may well be a protracted one. While I believe that Canadians should take part in this struggle, I also believe that we must be vigilant to ensure that we do not sacrifice our system of constitutional government to it.

[85] It often seems that, in what passes for public policy discourse in Canada, human rights is the dominant, if not the only, consideration. It has been argued that the real problem with the ATA is that it might subvert our human rights culture. Stephen J. Toope, "Fallout from '9-11': Will a Security Culture undermine Human Rights?" (2002) 65 Sask. L. Rev. 281. In a similar vein, see Joanna Harrington, "Punting Terrorists, Assassins and Other Undesirables: Canada and the Human Rights Committee and Requests for Interim Measures of Protection", (2003) 48 *McGill Law Journal* 55. Kent Roach, *September 11: Consequences for Canada* (Montréal and Kingston: McGill-Queen's University Press, 2003) is a highly ideological discussion of these matters. Roach's book argues against doing anything about the attacks on the United States.