Chapter 24

HUMAN RIGHTS AND EMERGENCY POWERS

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I Introduction

In a survey of the practice of freedom under law it is appropriate that consideration be given to the limitation of such freedom in times of emergency. Because the courts permit certain interferences with civil liberties — whatever the constitutional or legislative foundation of those liberties — Parliament can take whatever measures it deems necessary to safeguard the integrity of the body politic. This chapter will focus on the measures that governments can employ to deal with national emergencies (arising from war, insurrection or other crises) and local emergencies (arising from the inability of the civil authorities to control disorder).

During emergencies of war or insurrection in Canada, legal and political freedoms have been severely curtailed or even completely eradicated. Freedoms of speech, of the press, of assembly and association, and the protection from arbitrary detention and unreasonable bail, have all vanished. In fact, Canada under the law of emergency is more akin to a constitutional dictatorship than to a constitutional democracy: effective power rests totally with the federal executive.

Federal authorities have at times manifested a patently unjust and unreasonable attitude toward civil liberties and fundamental rights, for instance, during the planned expulsion of Japanese-Canadians at the end of World War II, after hostilities had ended. It should be noted, however, that complete liberty has been restored at the conclusion of each emergency.

II The Legal Foundation of Emergency Powers

The constitutional foundation for parliamentary legislation of emergency powers is explicit — in s. 91 (7) of the British North America Act (the "Militia, Military and Naval Service, and Defence" are under exclusive federal jurisdiction) — and implicit — by judicial interpretation of the federal power founded on the "Peace, Order and good Government" clause of the same section.[1]

In times of emergency Parliament has almost unlimited legislative authority to adopt whatever measures it deems necessary or advisable to deal with a situation. At these times, freedom in Canada suffers restrictions. There are two statutes that permit the federal or provincial governments to act without delay: the National Defence Act provides for the dispatch of troops to maintain order anywhere in Canada,[2] and the War Measures Act gives the Federal government carte blanche to suppress disorder.[3] As well, martial law can be resorted to with or without statutory authority.

In the United States, national guards exist under state authority; in Canada the defence of the country and the militia are within exclusive federal jurisdiction. Under the National Defence Act, provincial governments can request military assistance from the federal government but they have no direct control over those forces. Soldiers sent to aid the civil authorities within a province have the duties and obligations of policemen; the provincial government is responsible for the expenses incurred.

The two most recent occasions when troops were called in to help the local authorities both occurred in Quebec. During the 1969 Montreal policemen's strike the military was called in to prevent looting, and during the October crisis of 1970 the troops were summoned by the Quebec Provincial Government to aid the police. On other occasions the military has been used to maintain public order: Soldiers were brought into Quebec City in 1873, and into Cape Breton in 1923, to quell disturbances arising from labour disputes. One of the most serious occasions when the troops were called in was during the Winnipeg General Strike of 1919. During this strike approximately 30,000 persons, out of a total population of 200,000, left their jobs. Bread, milk, and ice deliveries were stopped, and restaurants were closed unless they had a permit from the strike committee. Public transportation was halted and telephone services cut off. Even the police force had voted in favour of the strike; it was subsequently dismissed and replaced by "special" police. During the more than five weeks of the strike, in May and June of 1919, the normal life of the city of Winnipeg came to a standstill.

In a prosecution on sedition charges that arose from the strike, the Manitoba Court of Appeal characterized the strike "as a bold attempt to usurp the powers of the duly constituted authorities,"[4] in other words, an insurrection or rebellion. The strikers claimed they simply wanted improved working conditions, better wages, and bargaining rights. In any event, the federal

government did not use its powers under the War Measures Act, and government control was reestablished with the aid of the military.

When the military are aiding the civil authorities, those who violate the law are brought before the civil courts to face criminal charges as set out in the Criminal Code. There are no special criminal offences established and no special courts. Frequently, military aid to the civil authorities is confused with martial law. (For example, the Canadian edition of *Time* magazine, on October 26, 1970, mistakenly captioned a photo of troops patrolling in Montreal: "Montreal under martial law.") Martial law is not a law as such; it is not a law provided for in a statute adopted by Parliament. Perhaps the term "martial rule," used by some American commentators, is a more accurate expression.

Martial law can be proclaimed in two ways: by military discretion and by statutory authority. The first can be described as "the action of the military when, in order to deal with an emergency amounting to a state of war, they impose restrictions, and regulations upon civilians in their own country."[5] The power to declare martial law in Canada exists under a royal prerogative or under the common law. It is justified at common law by necessity — the necessity to suppress disorder and restore the rule of law. Again, the term "martial law" is a misnomer because it is not law at all, but simply the discretion of a military commander. During the Boer War the British authorities declared martial law by an executive act, without statutory authority. Martial law was also imposed in Ireland during the Irish Rebellion of the 1920s. In recent times many civilian populations throughout the world have found themselves under martial rule.

The doctrine of martial law was introduced to Canada with British rule. After the British conquest, both civil and criminal trials were held before military tribunals during the military regime of 1760-1764. Today, a proclamation providing for the trial of civilians before military courts would only be valid, according to the case law and commentators, if the civil courts were closed.

In Canada the last martial law trials of civilians were held in Montreal in 1838 after the rebellion in Lower Canada.[6] On November 4, 1838 Sir John Colborne, the administrator of the government and Commander in Chief of Her Majesty's forces in the province, proclaimed martial law in the District of Montreal. The proclamation stated that "there exists in the District of Montreal a traitorous conspiracy, by a number of persons, falsely styling themselves Patriots, for the subversion of the authority of Her Majesty, and the destruction of the established Constitution, and Government of the said Province," and that "the said Rebellion hath very considerably extended itself, in so much that large bodies of armed traitors have openly arrayed themselves, and have made, and do still make, attacks upon Her Majesty's subjects, and have committed the most horrid excesses and cruelties." It was further stated that "The Courts of Justice in the said District of Montreal have virtually ceased to exist, from the impossibility of executing any legal process or warrant of arrest therein."

On November 8, 1838 "An Ordinance for the Supression of the Rebellion" was adopted. This ordinance provided that the governor of the province could order the punishment according to martial law of any person who had taken

part in the rebellion since November 1, 1838 "whether the ordinary Courts of Justice shall or shall not at such time be open." Many persons were subsequently found guilty of treason and murder by courts martial, and some were executed.[7]

The second method of proclaiming martial law in force is under statutory authority as exemplified by the 1838 ordinance. Today, such a proclamation would be by an act of Parliament, or by virtue of the powers that the government has under the War Measures Act. The Canadian government used these powers in 1918. During the First World War the strong anticonscription sentiment in Quebec culminated in the Quebec City riots of 1918. The riot of March 29 was touched off by reaction to the Military Service Act of 1917.[8] It quickly escalated. A police station was burned to the ground and when the Dominion Police applied for military assistance they were referred to the civil authorities. Large crowds gathered in the streets and the mayor's appeals to disperse went unheeded. The mayor was hesitant to proclaim the Riot Act in force, nor was he prepared to call on the military.[9] By the following evening things had so worsened that the federal government sent in troops. Four civilians were killed and a number of civilians and soldiers wounded, before order was reestablished in the early hours of April 2.

The federal government wanted a deterrent to prevent future anticonscription rioting. Consequently, the order in council of April 4, 1918, adopted under the War Measures Act, legalized the action of the military in suppressing the Quebec City riots and permitted the army to legally hold prisoners then in custody.[10] This order in council further permitted a general officer or commanding officer in a military district to intervene to suppress a riot, insurrection, or civil disturbance, whether or not requested by the civil authorities, if he believed his military intervention necessary. If such action was taken while the Military Service Act was in effect, the governor in council could suspend the ordinary courts and institute court martial trials of civilians. However, if civilians were tried by court martial, the sentence imposed was to be like one that might be imposed by a civil court; and it was not to be executed until confirmed by the governor in council. The writ of *habeas corpus* was to be suspended for those in military custody. Finally, any male obstructing implementation of the Military Service Act or demonstrating against the Act was subject to immediate military induction.

The military — with clearly delineated powers — was to be the instrument for coercion and for repressing any civil disturbances that arose during the remainder of the war. Luckily, the war came to an end and these powers were never exercised.

The War Measures Act was first enacted by the Canadian Parliament in 1914. The Act is a wide, or blanket, delegation of power from Parliament to the government — that is, to the cabinet; it permits the government to legislate all matters without obtaining Parliament's consent. Under the War Measures Act, the issuance of a proclamation by the governor in council (that is, the governor general acting on the advice of the cabinet) is conclusive evidence that war, invasion or insurrection (real or apprehended) exists — and has existed for the

period specified in the proclamation — until terminated by a further proclamation. A proclamation making the War Measures Act operative must be laid before Parliament and it can be revoked by both Houses of Parliament.

Section 3 of the Act authorizes the governor in council to make such "orders and regulations, as he may . . . deem necessary or advisable for the security, defence, peace, order and welfare of Canada." Included (but only illustrative of the matters on which the government can legislate) are censorship, arrests, detention, deportation, and controls over transportation, trading, production, and manufacture as well as the appropriation, control, forfeiture, and disposition of property. All orders and regulations made under the Act have the force of law. As well, these orders and regulations are to be enforced "in such manner and by such courts, officers and authorities as the Governor-in-Council may provide." Penalties pursuant to the violation of any order or regulation made under the Act are not to exceed a fine of $5,000 and/or imprisonment for five years.

An amendment to the Act in 1960 provided that "any act or thing done or authorized or any order or regulation made under the authority of . . . [the War Measures Act] shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian Bill of Rights."[11] Consequently, when interference with civil liberties is most likely, protection of these liberties is least available.

In October 1970, the Canadian government proclaimed the War Measures Act in force to deal with the activities of the Front de Libération du Québec because: their "activities have given rise to a state of apprehended insurrection within the Province of Quebec." But what is an "apprehended insurrection?" Chief Judge Magruder of New York defined *insurrection:* "to constitute an insurrection or rebellion . . . there must have been a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof."[12] "Apprehended insurrection" has never been judicially defined. It would seem, however, that the phrase "apprehended insurrection" refers to a government becoming aware of, perceiving, or being fearful of an insurrection.

Does this mean that the War Measures Act can be proclaimed in force when the government apprehends that 10 or 20 armed men are about to overthrow the constituted authority? Or that a handful of men are urging others to overthrow the government? In October 1970 Prime Minister Trudeau received letters from both Mayor Drapeau and Premier Bourassa on the situtation in Montreal. The mayor wrote that help from the federal government was required to protect society from an "apprehended insurrection." The premier referred to efforts to intimidate and overthrow the government and democratic institutions by unlawful means, including "insurrection." In an interview in October 1975 Premier Bourassa stated that he had used such words only because he was juridically compelled to do so.[13]

For all practical purposes, "apprehended insurrection" is an open-ended term that permits the Canadian government to proclaim the War Measures Act in force for the most nebulous reasons. Considering the impact of such a

proclamation on all Canadians, especially on our civil liberties, the Act should contain more precise guidelines on the conditions under which it can be made operational.

Finally, Parliament can enact specific legislation to deal with an emergency situation. Such special legislation was in force during the Korean War, and during the October 1970 emergency. Most of the provisions of the regulations dealing with the Front de Libération du Québec adopted under the War Measures Act were kept in force from December 3, 1970 to April 30, 1971, by virtue of the Public Order (Temporary Measures) Act.[14]

III The Limitation on Freedom in Emergencies

Emergency powers curbing civil liberties have been invoked three times since Confederation under the War Measures Act: during the First and Second World Wars, and during the "apprehended insurrection" of October 1970. On all occasions certain organizations have been declared illegal, arbitrary detention has been legalized, and freedoms of speech and of the press have been severely limited.

During the Second World War many ostensibly communist, communist-front, or fascist organizations were banned. To see the impact of such bans on civil liberties we can examine the outlawing of the Canadian Watch Tower Bible and Tract Society, better known as Jehovah's Witnesses. This religious sect was declared illegal during World War II, presumably because the propagation of its pacifist beliefs would have affected the efficient prosecution of the war.

On June 4, 1940 Regulation 39C was adopted by an order in council. This regulation provided that an illegal organization was one the governor in council, by notice in *The Canada Gazette,* declared to be illegal. Every person who, after the publication of such a notice, continued to be or became a member of an illegal organization or who advocated or defended the acts, principles, or policies of such an organization was guilty of an offence. One month later, on July 4, 1940, the Jehovah's Witnesses organization was declared illegal by order in council.[15] Like other wartime orders and regulations adopted under the War Measures Act, this order was subject only to government discretion; it was immune to judicial review.

Subsequently, persons were convicted of being members of Jehovah's Witnesses.[16] In one case, a member of the sect was convicted for making statements prejudicial to the safety of the state. He had complained about the expulsion of his children from school for refusing to salute the flag or sing the national anthem. His letter to the school authorities explained why his religion forbade such practices. In quashing the conviction, the Manitoba Court of Appeal held that what he wrote was neither intended, nor likely, to affect the prosecution of the war, nor, it was emphasized, was it addressed to the public in general.[17] In another controversy over saluting the flag, "children of tender years . . . [were] summoned to give evidence against their parents on charges that the parents had made statements to the children 'likely to cause disaffection to His Majesty'."[18]

The ban on Jehovah's Witnesses was lifted on October 14, 1943. However, as late as March 31, 1946, approximately 550 conscientious objectors (out of nearly 11,000) were Jehovah's Witnesses, and of these, 126 were being held in work camps.[19]

In comparison, the rights and freedoms of Jehovah's Witnesses were better protected in both the United States and Australia. At the height of the war, the right of American Witnesses to enjoy freedoms of speech and of the press was affirmed. The United States Supreme Court upheld the group's right to distribute literature that condemned the war and the draft, and that opposed saluting the flag. The court held that such action was not "claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state" or to have threatened any clear and present danger to American institutions or government.[20] In Australia, the government's attempt to have Jehovah's Witnesses' association declared subversive and consequently dissolved, was held invalid by the High Court. Mr. Justice Williams stated that "such a law could not possibly be justified by the exigencies and course of the war."[21]

In England, the writ of *habeas corpus* has in the past been suspended, not to legalize an arrest but to suspend a remedy. A person could be held in custody without trial, until the emergency was over. The writ raises the question of the legality of the applicant's detention. Consequently, the "object of the suspension was to enable the government to take steps which, though politically expedient, were or might be, not strictly legal."[22] In fact, a formal suspension of the writ of *habeas corpus* is not necessary to provide for the effective arbitrary detention of persons. Canadian Wartime Regulation 21 authorized the minister of justice to detain any person if he was "satisfied" that it was necessary to prevent that person "from acting in any manner prejudicial to the public safety or the safety of the State." The regulation also provided that a detainee "be deemed to be in legal custody." Consequently, a writ of *habeas corpus* would not have offered relief to a detainee. The regulation permitted the minister to detain persons without being hampered by the courts. In one 1942 case a person was convicted of being a member of the outlawed Communist Party and given a 12 month sentence. When he was given a suspended sentence on appeal, the minister simply ordered that he be interned.[23]

The best example of the extremely wide emergency powers that can be exercised by the federal government became evident during the spy investigations of 1946. In December 1945 — to allow the government to cope with the immediate postwar problems — Parliament enacted the National Emergency Transitional Powers Act.[24] Substantial powers were delegated to the governor in council, and existing regulations adopted under the War Measures Act could be continued in force. Subsequently, it was discovered that a secret order in council, adopted on October 6, 1945, was continued in force under the

authority of the Transitional Powers Act. This order in council permitted the minister of justice to interrogate and/or detain "in such place and under such conditions as he may from time to time determine" any person who might in his opinion be likely to communicate secret information to an agent of a foreign power, or to act in any manner prejudicial to the public safety. Any person so detained was to be deemed in legal custody. Those detained were denied counsel, they were not permitted to communicate with anyone, and they were not warned about self-incrimination. No charges were laid against these persons. However, two judges of the Supreme Court of Canada were appointed to a royal commission to inquire and to report on the activities of the detainees. Of the persons detained, about half were acquitted during the spy trials that followed. Needless to say, this government action was severely condemned.

More recently, the 1970 Public Order Regulations permitted a peace officer to arrest without a warrant "a person who he has reason to suspect is a member" of the Front de Libération du Québec or "of any group of persons or association that advocates the use of force or the commission of crime as a means of or as an aid in accomplishing governmental change within Canada." Such arrest and detention could have continued for 21 days, when the detainee could have been released without ever having been charged with an offence. Further, detainees in Montreal were not permitted to contact their lawyers, even though this right is guaranteed by the Canadian Bill of Rights and was not suspended by the regulations.

About 465 persons were detained under the regulations. Sixty persons were eventually charged but less than 20 were convicted — with most of the convictions related to the kidnapping of British diplomat James Cross or the kidnapping and murder of Quebec cabinet minister Pierre Laporte. The Quebec Ombudsman subsequently recommended that 103 persons be compensated for their so-called illegal detention. A Quebec City lawyer, who had been detained, sued the Quebec Provincial Police and the minister of justice for damages. He was awarded $16,000 in an out-of-court settlement four years later.[25]

The first casualties of emergency legislation are freedom of the press and freedom of speech. In effect, dictatorial powers are exercised by the government, powers that escape the judicial review available in normal times. The Manitoba Court of Appeal has described the situation as follows: "In time of peace the civil rights of the people, the liberty of the subject, the rights of free speech, and the freedom of the press are entrusted to the Courts. In wartime this may be changed. Parliament may take from the Courts their judicial discretion and substitute for it the autocracy of bureaucrats."[26] During World War II, this bureaucratic autocracy resulted in the banning in Canada, a relatively secure country, of some periodicals and newspapers that were freely circulating in beleaguered Britain.

The sweeping powers that the government arrogated to itself are evident in the all-embracing scope of various Defense of Canada Regulations. Regulation 39 provided that no person shall spread reports or make statements "intended or likely to cause disaffection to His Majesty or to interfere with His Majesty's forces" or "to prejudice recruiting" or "to be prejudicial to the safety of the

state or prosecution of the War." Regulation 15(1) enabled the secretary of state for Canada to "make provision by order for preventing or restricting the publication in Canada of matters as to which he is satisfied that the publication, or, as the case may be, the unrestricted publication, thereof would or might be prejudicial to the safety of the state or the efficient prosecution of the War." An order could contain "such incidental and supplementary provisions as may appear to the Secretary of State to be necessary or expedient for the purposes of the order." The result of the regulation was that everybody and everything was potentially suspect and subject either to arbitrary government-imposed control or to punishment.

There were hundreds of prosecutions under these regulations but only a few cases were reported, and nearly all of these are found in the law reports of the early war years. The regulations and their enforcement can be most seriously faulted for the prosecution of chance remarks, often made in drunken brawls, that represented general grumblings of dissatisfaction or discontent, but it was this type of prosecution that was favoured by the government.

In 1940, the minister of justice explained in the House of Commons: "Some joyous friend may imbibe a little too much liquor in a tavern and think it smart, for instance, to say that the Germans are better soldiers than the British, or something like that. Such a man should not be treated as a real enemy who is plotting against the state. There the summary conviction [carrying a lighter maximum sentence] applies. But when a case is serious, the prosecution should be by way of indictment, and I believe that the choice should be left to the minister of justice or the attorney general."[27] It is questionable whether the prosecution of smart alecks contributed to the war effort. The least that can be said, however, is that government policy during the Second World War was more liberal and realistic than during World War I when persons making pro-German remarks in bars were prosecuted for sedition.[28]

The broadly drafted, all-embracing discretionary powers in the Wartime Regulations are found in the sections of their 1970 offspring on the Front de Libération du Québec. Section 3 of the Public Order Regulations (1970), provided that: "The group of persons or association known as Le Front de Libération du Québec and any successor group or successor association of the said Le Front de Libération du Québec, or any group of persons or association that advocates the use of force or the commission of crime as a means of or an aid in accomplishing governmental change within Canada is declared to be an unlawful association." Section 4 went on to specify that any person who was, or professed to be, a member or officer of such an unlawful association, or who communicated statements on behalf of such an association, or advocated or promoted "the unlawful acts, aims, principles or policies of the unlawful association," or advocated, promoted, or engaged in "the use of force or the commission of criminal offences as a means of accomplishing a government change within Canada" was guilty of an indictable offence.

Obviously the above provisions could cover groups and associations other than the Front de Libération du Québec and their members or hangers-on, in Quebec or elsewhere in Canada. This type of regulation has a chilling effect on

free speech, free association, and a free press. The regulations are often interpreted so broadly by enforcement agencies that one is unsure of what is permissible speech. Rather than unknowingly infringe ill-defined limits, many people simply keep quiet. Rampaging rumors and innuendo also help put the lid on activities.

On October 16, 1970 the press reported that the police "were instructed to detain any person found to be carrying literature, posters, stickers or pamphlets described as being of the extreme left."[29] What is *the extreme left?* Could a student go to his economics class with a copy of *Das Kapital* in his briefcase? This question may sound far-fetched, but it was reported that in a Montreal raid, police carried off books on cubism, because they thought it was about Cuba. Not surprisingly, the Alliance des professeurs de Montréal told its members to be very careful in their classroom remarks so as to avoid harming their families and their careers.

Does the ice thaw completely when the emergency measures are revoked? Perhaps. But those who have been chilled are probably more prone to be watchful and reserved in their future exercise of the liberty of speech. It is neither unlikely nor impossible that restraints on fundamental liberties will be imposed more than once during one's lifetime.

Probably the most regrettable infringement of civil liberties since Confederation was the treatment meted out to Japanese-Canadians during and even after World War II. This treatment can be divided into three phases: the evacuation of Japanese-Canadians from the west coast; the confiscation of their property; and their planned expulsion from Canada. These events have traumatized our collective psyche. They make up the skeleton in our closet that stalks out to haunt all our discussions on civil liberties. In 1960 Prime Minister Diefenbaker commented on these events: "One finds it difficult to forget the wrongs . . . committed in freedom's name but a few years ago." More recently, Prime Minister Trudeau called it " . . . one of the great scandals of Canadian history." Ironically, Japanese-Canadians felt that they knew the meaning of "British justice" and "British fair play," so that a Japanese-Canadian newspaperman at the time could write: "this squeezing us out isn't British."[30]

In June 1941 there were 22,096 persons of Japanese origin in British Columbia; 76.3 percent of them had been born in Canada, and many of the remainder had been naturalized. Japanese-Canadians were evacuated from the West Coast not because of their conduct, but because of festering prejudice and widespread racial discrimination. No Japanese-Canadian was ever charged with espionage or disloyalty. It should be noted that Canadians of German or Italian extraction were not similarily treated, although Canada was at war against Germany and Italy, as well as Japan.

After their evacuation from the West Coast, the property of Japanese-Canadians was vested in a "Custodian," who had wide discretionary powers to deal with their homes and land in any manner he thought proper. Often this property was sold by the custodian at unfair prices, without the permission of the owners — and indeed, over their protests. A single example: In July of 1943, Mr. and Mrs. E. Kitagawa wrote to the custodian opposing the

sale of their home. They said they were pleased that the house was rented to a soldier's family, that the property was in the hands of a good agent, and that they could certainly use the rent. "We cannot understand," they complained, "the official claim that it is necessary to sell over our heads the home from which we were forcibly rejected. We do not quarrel with military measure[s] but this act can scarcely be in accordance with any war measure." The custodian's reply was that policy was formulated in Ottawa.[31]

The orders in council providing for the deportation of all Japanese people from Canada — non-citizen or citizen — were adopted after hostilities had ceased. Further, they were passed in an underhand manner, and apparently contrary to the wishes of Parliament. On October 5, 1945 the government introduced the National Emergency Transitional Powers Act to continue in force measures adopted by virtue of the War Measures Act. The bill included the power to adopt orders in council dealing with "entry into Canada, exclusion and deportation, and revocation of nationality." Parliament did not want to adopt this provision so the government dropped it from the bill. The House sat until December 18. But on December 15 the government had adopted three orders in council under the War Measures Act providing for the deportation and denaturalization of Japanese persons, and these orders were later automatically continued in force under the Transitional Powers Act.

Criticism began mounting in Canada against the government's policy toward Japanese-Canadians. It was said at the time that the government hoped the orders would be held invalid by the courts. However, the courts did not accommodate the government, and the Judicial Committee of the Privy Council found all the orders in council completely valid.[32] The orders were finally repealed in April 1947. As Prime Minister Trudeau has pointed out, the forced deportation "didn't quite happen . . . but the fact it could have been contemplated [and legally carried out] is a frightening thing."[33]

Our attitudes toward our compatriots of Japanese origin have changed considerably since the war years. The *Montreal Star's* lead editorial of May 14, 1944 was well summarized in its headline: "Clear the Japanese Out of Canada." The last paragraph of the editorial suggested that "the future interests of Canada will best be served by rooting out entirely from the Canadian scene this definite and dangerous menace." The *Star* proposed that all persons of Japanese origin be recompensed for property losses and shipped "back to Dai Nippon." In contrast, the lead editorial of January 3, 1976 condemns former Prime Minister MacKenzie King for his racist attitude toward the Japanese race. He had written in his diary that: "It is fortunate that the use of the [atomic] bomb should have been upon the Japanese rather than upon the white races of Europe." The underlying rationale of an emergency regulation is not necessarily discernible on its face.

IV Conclusion

It is axiomatic that a sovereign state must have effective means at its disposal to deal with emergency situations. Some curtailment of civil liberties is perhaps also inevitable, depending on the gravity of the emergency. However, checks must be provided for unwarranted and excessive government interference with fundamental liberties.

During an emergency, people will put up with many restrictions that they would normally find unbearable. The average citizen does not feel an acute pinch to his civil liberties, and few will forcefully criticize an abridgement of civil liberties: the restrictions affect only "the other fellow" and "the government and the police know what they are doing."

After the October 1970 crisis the government was criticized for having adopted unduly harsh and repressive regulations. The government replied that it had no choice because the only emergency legislation in place permitting it to act was the War Measures Act. Legislation to deal with emergencies other than wars was promised. But the tenor of the regulations under the War Measures Act was solely subject to government intentions and policies. Obviously the government could have adopted less repressive regulations. The promised new legislation has not yet materialized and it probably will not be adopted in the near future.

In the light of governmental abuses during past emergencies, there are a number of safeguards that can be instituted. First an entrenched Canadian Bill of Rights would offer some guarantees. It would at least inhibit, or perhaps prohibit, Parliament or the government from riding roughshod over many civil liberties during an emergency.

Second, Parliament should restrict the powers delegated to the government under the War Measures Act or under analogous legislation. For example, the conditions under which the government can make operative its emergency powers should be more clearly delineated; and neither Parliament nor the government should have the power to deport Canadian citizens. A more vigorous and imaginative judiciary would also contribute to the checking of abuses.

There is, however, no panacea for the maintenance of civil liberties during emergencies. As Harold Laski wrote in 1942, in the long run the crucial factor in the preservation of civil liberties "is the existence of a citizen body which is conscious that civil liberties matter, and is willing, if need be, to fight for them."[34]

NOTES

1. (1867) 30-31 Vict., c. 3 (U.K.).
2. R.S.C. 1970, c. N-4.
3. R.S.C. 1970, c. W-2.

4. *R. v. Russell* (1920), 33 Can. Crim. Cas. Ann. 1 at p. 20 (Man. C.A.).
5. E. C. S. Wade and G. G. Phillips, *Constitutional Law,* 5th ed. (London: Longmans, Green & Co., 1955), p. 422.
6. On one rather bizarre occasion in the rebellious west, the "Provisional Government" of Louis Riel tried a Mr. Scott, by a "Council of War" presided over by "Adjutant-General" Ambroise Lépine, and duly sentenced him to death.
7. The Proclamation, the Ordinance, and the record of the trials can be found in the two volume *Report of The State Trials before A General Court Martial held at Montreal in 1838-39,* (Montreal: Armour and Ramsey, 1839).
8. (1917) 7-8 Geo. v., c. 19 (Canada).
9. The mayor could have asked for military assistance under ss. 82 and 83 of the Militia Act, R.S.C. 1906, c. 41. Now, however, a requisition for military aid from provincial authorities must come from the attorney general of the province. See the National Defence Act, R.S.C. 1970, c. N-4, s. 221.
10. See, *Canada Gazette,* vol. 51, no. 41, April 13, 1918, p. 3553; also reproduced in *House of Commons Debates,* 1918, pp. 378-80.
11. Canadian Bill of Rights, S.C. 1960, c. 44; R.S.C. 1970, Appendix III.
12. *Home Insurance Co. of New York v. Davila,* 212 F. (2d) 731, p. 736 (1st Cir. 1954).
13. See *Le Devoir,* October 27, 1975, p. 1. Prime Minister Trudeau replied that the apprehended insurrection had really existed (*Le Devoir,* October 31, 1975, p. 7).
14. S.C. 1970, c. 2; *Public Order Regulations,* S.O.R/70-444, 104, *The Canada Gazette* (Part II) 1128, October 16, 1970. During the Korean War the Emergency Powers Act of 1951, 15 Geo. VI, c. 5 (Canada) prohibited the governor in council from interfering with civil liberties. See s. 2(2) and the preamble to the Act.
15. Order-in-Council P-C. 2363, June 4, 1940, [1940] 1 Proclamations and Orders-in-Council Under the War Measures Act 108. The Witnesses were declared illegal by virtue of Order-in-Council 2943.
16. *R. v. Sutton,* [1941] 2 W.W.R. 60 (B.C.S.C.).
17. *R. v. Clark,* [1941] 4 D.L.R. 299 (Man. C.A.).
18. F. A. Brewin, "Civil Liberties in Canada During Wartime" (1941), 1 *Bill of Rights Rev.* 118.
19. *House of Commons Debates,* 1946, p. 1544.
20. *Taylor v. Mississippi* (1943), 319 U.S. 583, at 589-90.
21. *Adelaide Company of Jehovah Witnesses Inc. v. The Commonwealth* (1943), 67 Commw. L. R. 116, at 165.
22. Wade and Phillips, *Constitutional Law,* p. 383.
23. *Re Guralnick* (1942), 78 Can. Crim. Cas. Ann. 152 (Man. K.B.).
24. (1945) S.C. 9-10 Geo. VI, c. 25.
25. *Le Devoir,* February 10, 1975, p. 3.
26. *Yasny v. Lapointe,* [1940] 3 D.L.R. 204, at 205 (Man C.A.).
27. *House of Commons Debates,* 1940, p. 745.
28. See, for example, *R. v. Trainor,* [1917] 1 W. W. R. 415 (Alta. C. A.).
29. These citations can be found in: Canadian House of Commons Debates, 1960, p. 7544 (Diefenbaker); *Globe and Mail,* October 28, 1968, p. 12 (Trudeau); F. E. La Violette, *The Canadian Japanese and World War II* (1948), p. 55 (newspaperman).
30. *Ibid.*
31. La Violette, n. 29 at pp. 302-04. See also, *Nakashima v. The King,* [1947] Ex. C.R. 486; *Iwasaki v. The Queen,* [1969] 1 Ex. C.R. 281, aff'd [1970] S.C.R. 437.
32. *Co-operative Committee on Japanese-Canadians v. Attorney General for Canada,* [1947] A.C. 87.

33. *Globe and Mail*, October 28, 1968, p. 12.

34. H. Laski, "Civil Liberties in Great Britain in Wartime" (1942), 2 *Bill of Rights Rev.* 243 at 251.

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