The New Emergencies Act: Four Times the War Measures Act

Peter Rosenthal[*]

I. INTRODUCTION

THE *EMERGENCIES ACT*[1] ALLOWS the Canadian Governor in Council (*i.e.*, the federal Cabinet) to declare any of four different kinds of emergencies. Under a declaration of an emergency the Governor in Council can exercise extraordinary powers without getting the prior approval of Parliament.

The *Emergencies Act* recently[2] replaced the *War Measures Act*,[3] which had been invoked during the First and Second World Wars and during the 'October Crisis' of 1970. The Government's 1970 use of the *War Measures Act* to suppress civil liberties in Quebec does not have many defenders in retrospect, although few dared to oppose the imposition of war measures during the hysteria of the 'crisis' itself.[4] Subsequent widespread concern about the invocation of war measures during the 'October Crisis' formed the background for the enactment of the *Emergencies Act*. In fact, when Defence Minister Beatty introduced the legislation on behalf of the Government he claimed that its purpose was to prevent the abuses of civil liberties that had

[*] Member of the Ontario Bar and Professor of Mathematics, University of Toronto. I am grateful to Professors Lorraine Weinrib and Carol Rogerson for several useful discussions.

[1] The *Emergencies Act*, S.C. 1988, C. 29 [hereafter the "Act"].

[2] The *Act* was assented to on 21 July 1988.

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

[4] A brief summary of the "October Crisis" is given in P. Hogg, *Constitutional Law of Canada*, 2d. ed. (Toronto: Carswell, 1985) at 388. More extensive accounts can be found in R. Haggert & A. Golden, *Rumours of War* (Toronto: James Lorimer & Co., 1971) and in T. Berger, *Fragile Freedoms*, rev'd ed. (Toronto: Irwin, 1982) c. 7.

taken place under the *War Measures Act*,[5] and many others welcomed the new *Act* on that basis.[6]

The new *Act* provides for four different kinds of emergencies: a "public welfare" emergency to deal with natural disasters; a "public order emergency," for suppressing serious "threats to the security of Canada"; an "international emergency," to deal with a crisis that "arises from acts of intimidation" involving Canada and other countries; and a "war emergency" in case of real or imminent armed conflict. The powers that the Governor in Council can exercise under emergency decrees vary with the kind of emergency; the nature of the permissible orders and regulations is specified for each of the first three but not for "war emergencies."

The analysis of the *Act* which follows suggests that it creates an even greater threat to civil liberties than the *War Measures Act*. It is argued that, though there are significant improvements over the *War Measures Act* in certain respects, the provision of a sliding scale of "emergencies" substantially increases the likelihood of Canada being ruled by emergency decree. In particular, there is a serious danger that declarations of "public order emergencies" under the new *Act* will be used to suppress a variety of political movements. Moreover, it is suggested that if the *Act* had been in place in October 1970, the Government would have declared a "war emergency" (in spite of its being as inappropriate as the declaration of "apprehended insurrection" which it did make), the drastic effects of which would have been much the same as those of the *War Measures Act*.

The *Act* itself is described in some detail, and is compared with the *War Measures Act*. The relationship of the *Act* to the *Charter of Rights and Freedoms*,[7] to the *Canadian Bill of Rights*,[8] and to the *International Covenant on Civil and Political Rights*[9] is also examined.

---

[5] "Beatty out to defuse legislative 'bomb'," *The [Toronto] Globe and Mail* (12 March 1988) 5.

[6] Among those who critically welcomed the *Act* were N.D.P. defence critic Blackburn (see Canada, House of Commons, *Debates*, vol. 129, No. 207 at 10645 (2 November 1978), the Canadian Civil Liberties Association (brief to Defence Minister Beatty, 5 October 1987), and Professor R. Martin ("Is frightening new emergencies law really necessary?" *The Lawyers Weekly* (26 February 1988) 6.

[7] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[8] S.C. 1960, c. 44.

[9] *International Covenant on Civil and Political Rights*, adopted and opened for signature and ratification by General Assembly Resolution 2200 A(XXI) of 16 December 1966

The *Act* purports to give the federal Cabinet the authority to exercise many powers constitutionally reserved to the provinces. Certain aspects of the authority granted may be *ultra vires* the federal government; this will also be discussed.

The *War Measures Act* was in place for 75 years. It is unlikely that its 1914 framers could have conceived of its use during a situation like the 'October Crisis', and the *Emergencies Act* could undoubtedly have similar unforeseen consequences. It is concluded that those concerned about civil liberties, including the right of Canadians to organize strong opposition to governmental policies, should work toward amending this *Act*.

II. The Four Kinds of Emergencies

THE *ACT* SETS OUT four different kinds of emergencies in increasing order of severity: "public welfare" emergencies; "public order" emergencies; "international" emergencies; and "war" emergencies.

A. Public Welfare Emergencies

Part I of the *Act* concerns "public welfare" emergencies, defined as:

> . . . an emergency that is caused by a real or imminent
> a) fire, flood, drought, storm, earthquake, or other natural phenomena,
> b) disease in human beings, animals or plants, or
> c) accident or pollution
> and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.[10]

The *Act* was introduced in Bill C-77;[11] in its "Working Paper" drafted to support the introduction of this Bill, the Government stated that public welfare emergencies ". . . is an area where there appear to be important gaps in federal authorities."[12] The Government acknowledged that the role of the federal government in dealing with public welfare emergencies ". . . will, in jurisdictional terms, usually be

---

[hereafter the "*Covenant*"]. The *Covenant* is reproduced in *Human Rights: A Compilation of International Instruments* (New York: United Nations, 1983) at 8-15.

[10] *Act*, s. 5.

[11] *Bill C-77, The Emergencies Act*; introduced for first reading 26 June 1987 and for second reading 2 November 1987.

[12] *Bill C-77: An Act to Provide for Safety and Security in Emergencies*, Working Paper, Emergency Preparedness Canada, 1987 at 22 [hereafter "Working Paper"].

secondary to that of the province where the emergency occurs. . ."[13] but said that

> . . . this is not always the case. Where the scale of the disaster is such that it affects more than one province, or where it occurs on territory within the federal domain, the federal government will have primary if not exclusive responsibility to provide for public safety. . . . Even in circumstances where the role is, in a jurisdictional sense, shared, the federal government should still have available to it the ability to discharge its strict constitutional obligations and the means to provide support. . .[14]

Provincial jurisdiction over public welfare emergencies is somewhat protected:

> The Governor in Council may not issue a declaration of a public welfare emergency where the direct effects of the emergency are confined to, or occur principally in, one province unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it.[15]

While a declaration of a public welfare emergency is in effect, the Governor in Council may make orders concerning the regulation or prohibition of travel, the evacuation of persons and the removal of property, the requisitioning of property, the direction to any persons to render essential services, the distribution of essential goods and services, and several other matters.[16]

In the version of Bill C-77 that passed first and second readings, a "breakdown in the flow of essential goods and services or resources" was listed as an independent possible cause of a "public welfare emergency."[17] As pointed out by the Governments of Quebec and Alberta,[18] and others,[19] this would have allowed the Governor in Council to end strikes or lockouts by emergency decree. The Government indicated that such "was certainly never intended,"[20] and, in

---

[13] *Ibid.* at 20.

[14] *Ibid.* at 20-21.

[15] *Act*, s. 14(2).

[16] *Act*, s. 8(1).

[17] *Supra*, note 11, s. 3.

[18] *Notes for a statement by the Honourable Perrin Beatty, Minister Responsible for Emergency Preparedness, before the legislative committee on Bill C-77, the Emergencies Act, and proposed amendments* (23 February 1988) at 11-12.

[19] *Ibid.* at 13.

[20] *Ibid.*

addition to eliminating it as an independent cause, added the following provision to the final version of the *Act*:

> The power . . . to make orders and regulations . . . [under a public welfare emergency] . . . shall not be exercised or performed for the purpose of terminating a strike or lockout or imposing a settlement in a labour dispute.[21]

Although there might remain some concern about provincial rights,[22] the provisions concerning "public welfare" emergencies do not appear to represent unreasonable threats to civil liberties.

B. Public Order Emergencies

Unfortunately, however, the same cannot be said about the provisions relating to "public order emergencies." In Part II of the *Act*, a "public order emergency" is defined as ". . . an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency."[23]

The *Act* states[24] that ". . . threats to the security of Canada" has the meaning assigned by section 2 of the *Canadian Security Intelligence Service Act*, which reads:

> "threats to the security of Canada" means
>
> (a) espionage or sabotage that is against Canada or is detrimental to the interest of Canada or activities directed toward or in support of such espionage or sabotage,
>
> (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
>
> (c) activities within or relating to Canada directed toward or against persons or property for the purpose of achieving a political objective within Canada or a foreign state, and
>
> (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government of Canada,
>
> but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).[25]

This is a very broad definition. Many of the phrases used to define "threats to the security of Canada" seem to have been taken from the

---

[21] *Act*, s. 8(3)(b).

[22] See *infra*, text following note 68.

[23] *Act*, s. 16.

[24] *Ibid.*

[25] The *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 2.

United States during the McCarthy era, and there is a real danger that such phrases could be the basis of a future attack on left-wing movements.

The phrase, "but does not include lawful advocacy, protest or dissent" appears reassuring, until it is read in the context of the "unless" at the end of the definition. Read carefully, it clearly implies that lawful advocacy, protest or dissent *is* a "threat to the security of Canada" if it is carried on in conjunction with one of the activities listed in paragraphs (a) through (d).[26] Thus, for example, collecting funds to support the armed struggle of the African National Congress against apartheid in South Africa would be "activities . . . directed . . . in the support of the . . . use of acts of serious violence against persons or property for the purpose of achieving a political objective within . . . a foreign state," and would thus be a "threat to the security of Canada" within this definition.

(Of course, a situation arising from "threats to the security of Canada" must be "so serious as to be a national emergency"[27] to form the basis of a "public order emergency.")

While a declaration of a "public order emergency" is in effect the Governor in Council has the power to regulate or prohibit any public assembly "that may reasonably be expected to lead to a breach of the peace,"[28] as well as to exercise powers similar to those under Part I of the *Act*.[29]

What kinds of events are likely to lead to a declaration of a "public order emergency?" The main motivation for the introduction of the *Act* is said to have been to allow a less severe response than the *War Measures Act* to events like those of 1970. In the introduction to the Working Paper on the *Act* it is stated that:

> Shortcomings of the existing framework of federal emergency powers have been a matter of concern for some time. The October crisis of 1970 led to widespread dissatisfaction with the *War Measures Act* as a means of dealing with peacetime public order crises.[30]

---

[26] Therefore Defence Minister Beatty was incorrect when he wrote, at page 15 of his statement (*supra*, note 18), "Furthermore, the CSIS definition explicitly excludes 'lawful advocacy, protest or dissent' as a possible threat to the security of Canada."

[27] See *infra*, text following note 57.

[28] *Act*, s. 19(1)(a).

[29] *Act*, s. 19.

[30] *Supra*, note 12 at 2.

In discussing "public order emergencies," the Working Paper says:

> . . . the dividing line between a serious public order emergency that threatens the security of Canada and an apprehended insurrection can be a fine one, and it seems clear as a result of the events of October 1970 that the *War Measures Act* will not again be invoked during peacetime unless there is ample evidence of an urgent threat of a serious insurrection akin to a coup d'etat.[31]

This appears to be saying that the subsequent reaction to the use of the *War Measures Act* makes it politically very difficult to use such measures in future unless there is a genuine "apprehended insurrection." I agree. But I submit that this is as it should be: extraordinary measures should not be invoked except in extraordinary circumstances. The problem with the *Act* is that it lowers the threshold for emergency decrees.

Even Defence Minister Perrin Beatty, in introducing the *Act*, expressed the generally held view that

> The *War Measures Act* was extremely effective as a political device. As a criminal device, it wasn't effective at all. The killers of Laporte and the kidnappers of Cross were found through normal police methods.[32]

There are many "normal police methods" for dealing with "public order emergencies." The *Criminal Code*[33] contains offenses such as treason (which includes "using force or violence for the purposes of overthrowing the government of Canada or a province,")[34] sabotage,[35] sedition,[36] and riot and unlawful assembly,[37] as well as kidnapping[38] and murder.[39] Of course, it is also a crime to *attempt* to commit any of these offenses.[40] In addition, if there is a disturbance which a provincial government feels is beyond its powers to

---

[31] *Ibid.* at 23.

[32] *Supra*, note 5.

[33] R.S.C. 1985, c. C-34.

[34] *Ibid.*, s. 46(2)(a).

[35] *Ibid.*, s. 52.

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

[37] *Ibid.*, ss. 63-69.

[38] *Ibid.*, s. 279.

[39] *Ibid.*, s. 229.

[40] *Ibid.*, s. 24.

control, the province may call on the federal government to provide armed forces.[41]

Thus there are extensive ordinary powers for dealing with "public order disturbances," and such powers certainly sufficed to deal with any illegal acts committed in Quebec in 1970 (although they were evidently not sufficient for the Government's political purposes).

It is submitted that it would have been just as improper for the Government to declare a "public order emergency" to further its political aims with respect to Quebec separatism as it was to use the *War Measures Act* for such a purpose. In fact, however (as is discussed below),[42] it is likely that the Government would have used the greater powers under a "war emergency" had it been governed by the *Emergencies Act* instead of the *War Measures Act*.

"Public order emergencies" are likely to be declared even in situations much less serious than that of October 1970. The Working Paper says that the category of "public order emergency" includes

> . . . several varied kinds of contingencies, ranging from civil unrest to apprehended insurrection.[43]

The concept of "civil unrest" arising from "threats to the security of Canada" could be very broadly interpreted by any future Government wanting to crush a political movement. An example of a possible declaration of a "public order emergency" was suggested by a Member of Parliament who was one of the governmental supporters on the parliamentary committee which considered this *Act*:

> There are various scenarios where the government perhaps requires some legislation to act.
>
> I cite one. I am a British Columbian. There is at this time a lot of concern about the visiting of American ships at the port of Vancouver. The port of Vancouver is the second-busiest seaport in North America, certainly the busiest port in Canada. Its continued activity is essential. Suppose an American ship should visit and a number of citizens who are concerned about nuclear-propelled ships or nuclear weapons should decide they are going to demonstrate. Demonstrations are a normal part of Canadian life, but there are limits as to how long demonstrations go on and interfere with other activity.
>
> There may be a scenario where the government — on August 1, Parliament is not sitting — rather than saying war is being declared, which is quite obviously rubbish, yet the terms of Part I would not apply, might say under Part II that the citizens are to

---

[41] The *National Defence Act*, R.S.C. 1970, c. N-4, s. 233.

[42] See *infra*, text following note 195.

[43] *Supra*, note 9 at 22.

cease and desist. So the riot act is read, and the citizens are to vacate certain premises or not go to certain premises. Then the government might use this as some justification for declaring that legislation. That is not to say the concerns of citizens cannot properly be addressed in a normal way. It is a matter of controlling a specific situation, short of declaring that war has come and all of the other things that happen.

This legislation is intended to provide some orderly and graduated response, and I would suggest that the government would only invoke any part of this, having considered all the options available to it. The government at all times is expected to show some capacity to control events, to maintain public order and public safety and deal with public hysteria, without being able to anticipate each and every event in the future.

So I would ask your response. Do you see that Part II, being invoked for those specific reasons, is all that awful?[44]

Yes indeed, it *is* all that awful. And, unfortunately, the *Act* creates the very real possibility that declarations of emergencies will be used to suppress demonstrations in situations like the above.

C. International Emergencies

The third part of the *Act* is devoted to declarations of an "international emergency," defined as

> . . . an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real and imminent use of serious force or violence and that is so serious as to be a national emergency.[45]

The parameters of this definition are not clear. An "international emergency" does not require imminent armed conflict, since such would be the basis for a more serious "war emergency."[46] What does it require? The Working Paper suggests:

> . . . a state of heightened international tension accompanied by the rapid deterioration in relations among nations or blocks of nations . . .[47]

would be sufficient basis for the declaration of an "international emergency," if it created a situation "so serious as to be a national emergency."[48] Presumably, what is contemplated are events such as

---

[44] *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-77*, House of Commons Issue No. 7, Second Session of the Thirty-third Parliament (15 March 1988), at 7:32.

[45] *Act*, s. 27.

[46] *Infra*, text accompanying note 53.

[47] *Supra*, note 12 at 19.

[48] See *infra*, text accompanying note 58.

the Cuban Missile Crisis. If an "international emergency" is declared, the Governor in Council may make regulations similar to those in Parts I and II of the *Act* concerning control of services, appropriation of property, the designation and securing of protected places, and requiring people to perform essential services.[49] In addition, however, an "international emergency" allows the Governor in Council to conduct inquiries with respect to defence supplies, hoarding, and black marketing or fraudulent operations concerning scarce commodities,[50] and to authorize the entry and search of dwelling houses or other premises to search for anything relevant to such an inquiry.[51] Moreover, Canadian citizens and permanent residents can be prohibited from travelling abroad.[52]

It is hard for me to conceive of circumstances in which it would be appropriate and necessary to declare an "international emergency." I can only hope that future federal Cabinets also have difficulty.

D. War Emergencies

Part IV of the *Act* is a reformulation of the *War Measures Act*. A "war emergency" is defined to mean

> . . . war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency.[53]

This definition is very broad: it includes imminent armed conflict involving any of Canada's allies even if there is no potential that Canada itself be involved.[54] Thus a U.S. invasion of Panama, or Grenada, or Vietnam, could form the basis for a declaration of a "war emergency" in Canada.

Under each of the other kinds of emergency declarations the regulations that the Governor in Council may make are confined to certain categories. There are no such restrictions in a "war emergency":

---

[49] *Act*, s. 30.

[50] *Act*, s. 30(1)(c).

[51] *Act*, s. 30(1)(d).

[52] *Act*, s. 30(1)(g).

[53] *Act*, s. 37.

[54] Note that the definition of "international" emergency, *supra*, text accompanying note 45, is more restrictive in that it requires that Canada be one of the countries directly involved.

While a declaration of a war emergency is in effect, the Governor in Council may make such orders or regulations as the Governor in Council believes, on reasonable grounds, are necessary or advisable for dealing with the emergency.[55]

The relationship between the *War Measures Act* and Part IV of the *Emergencies Act* is discussed below.[56]

III. Limitations on the Use of Emergency Declarations Contained in the Act

In addition to whatever protection may be afforded by the *Charter* and similar restrictions,[57] the *Emergencies Act* itself contains several significant limitations on its use.

Most importantly, each of the four different kinds of emergencies that the Governor in Council may invoke must, in addition to satisfying the criteria peculiar to that kind of emergency, be "so serious as to be a national emergency." The definition of "national emergency" is given at the beginning of the *Act*:

For the purposes of this Act, a "national emergency" is an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.[58]

The fact that any declared emergency must satisfy this definition does place limitations on the invocation of emergency powers. It is certainly more restrictive than the definition contained in the version of Bill C-77 which passed first and second readings:

. . . an urgent and critical situation of a temporary nature that imperils the well-being of Canada as a whole or that is of such proportions or nature as to exceed the capacity or authority of a province to deal with it. . .[59]

---

[55] *Act*, s. 40(1). The one restriction on the Governor in Council's power to make regulations under a "war" emergency is that the power cannot be used to require persons to serve in the Canadian Forces - see *Act*, s. 40(1.1).

[56] *Infra*, text following note 153.

[57] *Infra*, text following note 103.

[58] *Act*, s. 3.

[59] *Supra*, note 11, preamble.

This latter, eventually discarded, definition was not very restrictive, since the first "or" allows the possibility of an emergency declaration even when the well-being of Canada is not imperilled; it would suffice that there simply be "an urgent and critical situation of a temporary nature that . . . is of such . . . nature as to exceed the . . . authority of a province to deal with it." Since "a province" never has the possibility to deal with imminent war, or any international situation, or with situations involving several provinces, the only limitation this places on the declaration of many emergencies is that they be "urgent," "critical" and "temporary." There are many such situations which would not "imperil the well-being of Canada" and would therefore not justify suspension of ordinary law.

The amended definition, though stronger, is not as confining as a quick glance might suggest. A crisis that satisfied part (b) of the definition would probably justify the use of emergency powers, but this is not necessarily true with respect to paragraph (a). For example, the Member of Parliament from British Columbia who suggested that the declaration of a "public order emergency" might be used to suppress anti-nuclear demonstrations in Vancouver[60] would undoubtedly claim that paragraph (a) encompassed such a situation. He might say that such a demonstration seriously endangered the health of Canadians by threatening the supply of food and medicines, and exceeded the authority of a province since the demonstrations affected trade and commerce[61] and property throughout Canada, not just within a province.[62]

Thus the limitation that emergencies are to be declared only in situations "so serious as to be a national emergency" does not offer much protection against a Government that wants to use emergency powers for some political purpose.

In the original draft of Bill C-77 the various emergency declarations could be made and regulations passed if "in the opinion of the Governor in Council" the emergency existed and the regulations were reasonably necessary.[63] The Canadian Civil Liberties Association and

---

[60] *Supra*, text accompanying note 44.

[61] Which is within the jurisdiction of the federal government by section 91(2) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[62] Section 92(13) of the *Constitution Act, 1867*, *ibid.* gives the provinces exclusive jurisdiction over property and civil rights in the province.

[63] *Supra*, note 11, sections 4, 15, 26 and 36.

others[64] argued that this phrasing precluded appropriate judicial scrutiny. This argument was accepted by the Government,[65] and the *Act* now requires that

> . . . the Governor in Council believes, on reasonable grounds, that a [named kind of emergency] exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council . . . may, by proclamation, so declare.[66]

As Defence Minister Perrin Beatty said in introducing this amendment,

> In circumstances where there might be some lingering doubt as to the reasonableness of the steps taken, the Government could, under such a changed formulation, be required to explain to the Courts the reasoning by which it concluded that a declaration of a national emergency was the appropriate action, and that the measures taken pursuant to the declaration were reasonably necessary in order to provide for the safety and security of Canadians and of Canada.[67]

The possibility of such judicial review might make the Cabinet at least a little cautious about declaring an emergency. It would have been very interesting to see the results of judicial scrutiny of the 1970 invocation of the *War Measures Act*.

During the Second World War, regulations under the *War Measures Act* provided for the internment of Japanese Canadians (including citizens of Canada) in concentration camps, solely on the basis of their race.[68] Representatives of the National Association of Japanese Canadians implored the Legislative Committee on Bill C-77 to preclude such use of the *Emergencies Act*.[69] As a result, the *Emergencies Act* now provides that nothing in it confers the power to make any regulations

---

[64] *Supra*, note 18 at 7-8.

[65] *Ibid.* at 8.

[66] *Act*, sections 6(1), 17(1), 28(10), 38(10).

[67] *Notes for a statement by the Honourable Perrin Beatty, supra*, note 18 at 8-9.

[68] See A.J. Sunahara, *The Politics of Racism* (Toronto: Lorimer, 1981) and K. Adachi, *The Enemy That Never Was* (Toronto: McClelland and Stewart, 1976). Judicial response to internment and deportation of Japanese-Canadians is typified by *Co-op Committee on Japanese Canadians v. A.G. Can.*,[1947] A.C. 87.

[69] *Supra*, note 44, at 7:37 - 7:52.

> . . . providing for the detention, imprisonment or internment of Canadian citizens or permanent residents . . . on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[70]

Also, under public welfare, public order, and international emergency declarations the Governor in Council is not empowered to interfere with provincial or municipal control of police forces,[71] although there is no such limitation in the case of war emergencies.

Limitations on the authority of the Governor in Council arising from Parliamentary supervision, provincial rights, and judicial review of infringements of fundamental rights are discussed in separate sections below.

IV. PROVINCIAL RIGHTS

THE *EMERGENCIES ACT* can be regarded as having two general functions. It first asserts the right of the federal Parliament to make certain kinds of regulations in given circumstances; it then delegates the right to declare the circumstances and to make the regulations to the Governor in Council.

The *Constitution Act, 1867* gives each provincial legislature exclusive authority to make laws in relation to "Property and Civil Rights in the Province."[72] Many of the regulations that the *Emergencies Act* purports to allow the Governor in Council to make would clearly be *prima facie* infringements of this constitutional authority.

The *Emergencies Act* requires certain consultations with the provinces. Before declaring a "public welfare" or "public order" emergency, the Governor in Council must consult the Lieutenant Governor in Council of each province directly affected,[73] although in the case of "public order" emergencies extending beyond a single province the consultation can be deferred if there cannot be adequate consultation "without unduly jeopardizing the effectiveness of the proposed action."[74] Before declaring "international" or "war" emergencies, the Governor in Council is merely to consult with the provinces to the extent that

---

[70] *Act*, s. 4(b).

[71] *Act*, ss. 9(1), 20(1), 31(1).

[72] *Supra*, note 58.

[73] *Act*, ss. 14(1), 25(1).

[74] *Act*, s. 25(2).

> . . . in the opinion of the Governor in Council, it is appropriate and practicable to do so in the circumstances.[75]

Thus there is little concern for provincial rights in the case of the more serious emergencies. Even with respect to the first two kinds of emergency, the right to be "consulted" does not appear to offer much protection of provincial rights.

However, if the effects of a "public welfare" or "public order" emergency are confined to one province, the Governor in Council may not issue a declaration of emergency

> . . . unless the lieutenant governor in council of the province has indicated . . . that the emergency exceeds the capacity or authority of the province to deal with it.[76]

This is a substantial restriction on the Governor in Council's authority to trench on provincial jurisdiction. Even when an emergency is confined to a single province, however, the provincial legislature has no power to revoke the declaration of emergency. Unless an emergency declaration is revoked by the Governor in Council or Parliament[77] it continues for its duration: 90 days for "public welfare" emergencies,[78] 30 days for "public order" emergencies,[79] 60 days for "international" emergencies,[80] and 120 days for "war" emergencies.[81] It is not hard to imagine a situation where a provincial government states that an emergency is beyond its capacity to deal with but subsequently (perhaps days later) feels that the emergency is over and the Governor in Council is exercising powers that unjustifiably interfere with civil rights in the province.

There is a long history of the federal Parliament encroaching upon provincial jurisdiction in times of emergency.[82] The "emergency doctrine" which developed held that Parliament's constitutional responsi-

---

[75] *Act*, ss. 35, 44.

[76] *Act*, sections 14(2), 25(3).

[77] *Infra*, text following note 96.

[78] *Act*, s. 7(2).

[79] *Act*, s. 18(2).

[80] *Act*, s. 29(2).

[81] *Act*, s. 39(2).

[82] See L. Weinrib, "Situations of Emergency in Canadian Constitutional Law" in *Contemporary Law: Canadian Reports to the 1990 International Congress of Comparative Law* (Montreal, 1990) at 466 for an excellent overview. A detailed discussion can be found in P. Hogg, *supra*, note 4 at 383-95.

bility "to make Laws for the Peace, Order and good Government of Canada"[83] gave it authority to override a province's control of "Property and Civil Rights in the Province"[84] in times of emergency.[85]

The most recent case concerning the scope of the emergency doctrine is the *Anti-Inflation Reference*[86] of 1976, which considered the constitutionality of federal wage and price controls. A plurality of the Supreme Court of Canada held that they

> . . . would be unjustified in concluding . . . that the Parliament of Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole.[87]

This "rational basis test" of the Supreme Court has been said by constitutional scholars Peter Hogg and Lorraine Weinrib to mean that

> . . . the federal Parliament can use its emergency power almost at will.[88]

The Working Paper makes it clear that the Government relied on the *Anti-Inflation Reference* in designing the *Emergencies Act*:

> The *Anti-Inflation Reference* has now clarified the application of the emergency doctrine to peacetime emergency situations in several important respects. First, while the Supreme Court of Canada was divided on the final outcome of the case, it was unanimous that the emergency doctrine could be invoked to deal with a national crisis arising from "highly exceptional economic conditions prevailing in times of peace" ([1976], 2 S.C.R. 373 at 436, per Beetz J.). Secondly, they all agreed that the emergency doctrine is open-ended in nature.
>
> . . . No mention was made in the *Anti-Inflation Reference* of national crises arising from man-made or natural disasters and emergencies resulting from the breakdown of public order, but it seems clear from the general tenor of all the judgments that these and any other contingencies may warrant the use of the emergency doctrine. The essential point is that the situation should amount to a "national emergency" or

---

[83] *Constitution Act, 1867*, U.K., 30 & 31 Victoria, c. 3, s. 91.

[84] *Ibid.*, s. 92(13).

[85] The *Constitution Act, 1867* need not have been interpreted so as to give the federal government such power. Read literally, s. 91 restricts the federal government's power "to make laws for the Peace, Order and good Government of Canada" to "Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

[86] *Reference Re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373.

[87] *Ibid.* at 425.

[88] Hogg, *supra*, note 4 at 390, quoted by L. Weinrib, *supra*, note 82 at 12.

"national crisis" and to determine this one must focus not on its specific cause but on its effects, whether apprehended, imminent or actual. And, as Ritchie J. stated in the *Anti-Inflation Reference*,

> "such conditions exist where it can be said to be an urgent and critical situation adversely affecting all Canadians and being of such proportions as to transcend the authority vested in the Legislatures of the Provinces and thus presenting an emergency exercise of the powers conferred upon it by s. 91 of the *British North America Act* 'to make laws for the peace, order and good government of Canada'."([1976], 2. S.C.R. 373 at 436)

The definition of a "national emergency" in the preamble of the *Emergencies Act* has been based on this definition.[89]

One aspect of the definition of "national emergency" in the *Act* appears to go beyond the scope of the above quote from the *Anti-Inflation Reference*: under the *Act* an "emergency" can be based on a situation which exceeds the "*capacity* or authority of a province,"[90] whereas Ritchie J. requires that it "transcend the authority vested in the . . . Provinces."[91] It seems that there could be situations which exceed the capacity of the provinces but nonetheless remain within their authority. On the other hand, it might be held that the "peace, order and good government" power applies to any situation which exceeds the capacity of the provinces.

Even accepting the broad emergency powers which the courts have given to Parliament, there may be a serious jurisdictional concern with the *Act*. In the case where the effects of a "public welfare" or "public order" emergency are confined to a single province, the Governor in Council cannot declare an emergency unless the lieutenant governor of the province has indicated that "the emergency exceeds the capacity or authority of a province to deal with it."[92]

This may, in some circumstances, create a situation where a provincial government is delegating its authority to the Governor in Council. In 1950 the Supreme Court of Canada held that the Canadian Constitution does not permit provincial legislatures to delegate powers to the federal Parliament,[93] on the ground that to alter the balance of power would require a constitutional amendment, not just a simple agreement between the two governments.

---

[89] *Supra*, note 12 at 7-9. The definition of "national emergency" was in the preamble of Bill C-77; it was changed and moved to s. 3 of the *Act* at Third Reading.

[90] *Act*, s. 3.

[91] *Supra*, text accompanying note 89.

[92] *Act*, ss. 14(2), 25(3).

[93] *A.G. N.S.* v. *A.G. Can.*, [1951] S.C.R. 31.

This decision has been criticized by Professor Hogg, on the basis that

> [a] delegation of power does not divest the delegator of its power; nor does it confer a permanent power on the delegate. The delegator has the continuing power to legislate on the same topic concurrently if it chooses, and more important, it can withdraw the delegation at any time.[94]

Whatever the merits of Professor Hogg's criticism, it would not apply to the *Act* because a province retains no power to withdraw a delegation.[95] Thus the *Act* permits delegation even beyond that suggested by Professor Hogg. This could become a crucial point in a situation where a province initially agreed that an emergency declaration was justified but then wanted the declaration revoked before the Governor in Council was willing to do so.

V. PARLIAMENTARY SUPERVISION

THE *ACT* PROVIDES for Parliamentary supervision of the Governor in Council's use of emergency declarations.

If a House of Parliament is sitting,

> . . . a motion for confirmation of a declaration of emergency, . . . together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, shall be laid before each House of Parliament within seven sitting days after the declaration is issued.[96]

If either House is not sitting, it ". . . shall be summoned forthwith to sit within seven days after the declaration is issued"[97] and if the House of Commons is dissolved it ". . . shall be summoned to sit at the earliest opportunity after the declaration is issued."[98]

In the latter two cases, the motion and report are to be laid before the House on the first sitting day after it is summoned.[99]

---

[94] P. Hogg, *supra*, note 4 at 297.

[95] See text following note 77 for the durations of the various declarations.

[96] *Act*, s. 58(1).

[97] *Ibid.*, s.58(2).

[98] *Ibid.*, s. 58(3).

[99] *Ibid.*, s. 58(4).

Parliament is to take up the motion on the sitting day after it is laid,[100] and debate the motion and dispose of it without interruption.[101] If either House votes against the motion for confirmation, the declaration is revoked.[102]

At any time, ten members of the Senate or twenty members of the House of Commons can file a motion that a declaration of emergency be revoked; that house must then consider the motion within three sitting days.[103]

Also, Parliament can quash any particular emergency order or regulation.[104] In addition, there is to be appointed a "Parliamentary Review Committee" to review the Governor in Council's performance of functions pursuant to a declaration of an emergency.[105]

Thus there is substantial Parliamentary supervision of the Governor in Council. On the other hand, it would probably be at least a week before the declaration of an emergency would be reviewed by Parliament, and a week can be a very long time under emergency rule. Moreover, in the hysterical atmosphere created by a declaration of emergency it is unlikely that Members of Parliament would evaluate the situation critically. The experience of October, 1970 is not reassuring in this respect.[106]

VI. FUNDAMENTAL RIGHTS

THE PREAMBLE TO THE *ACT* includes the following:

> AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* and must have regard to the *International Covenant on Civil and Political Rights*, particularly with regard to those fundamental rights that are not to be limited or abridged even in a national emergency . . .

It is very difficult to determine the limitations that these fundamental rights documents would actually place on the Governor in Council's exercise of emergency power.

---

[100] *Ibid.*, s. 58(5).

[101] *Ibid.*, s.58(6).

[102] *Ibid.*, s. 58(7).

[103] *Ibid.*, s. 59.

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

[105] *Ibid.*, s. 62.

[106] See *infra*, text following note 174.

A. *Charter of Rights and Freedoms*

The regulations the Governor in Council can make under the *Act* could obviously infringe virtually every one of the rights in the *Canadian Charter of Rights and Freedoms*. Thus the legal question with respect to the *Charter* is whether such infringements are "reasonable" and "can be demonstrably justified in a free and democratic society" within the meaning of section 1 of the *Charter*.

The Supreme Court of Canada set out the basic criteria that limitations of *Charter* rights must meet under section 1 in its decision in *R.* v. *Oakes*.[107] First, a measure that limits a *Charter* right must be sufficiently important "to warrant overriding a constitutionally protected right or freedom."[108] If, as suggested above,[109] the *Act* allows declarations of emergencies in situations which are not very serious then this criterion may not be satisfied in a given case. However, if the courts adopt the very deferential "rational basis test"[110] for the existence of an emergency, then this criterion will be satisfied almost by definition.[111]

Even if a measure is found to be sufficiently important to warrant overriding a *Charter* right, *Oakes* requires that the means used to achieve the objective must be proportional to that objective. This is divided into three components.

The first question is whether the means are "rationally connected to the objective."[112] This test will not be difficult to meet: the Governor in Council can choose means appropriate to deal with the situations described.

The second component requires that the means impair the infringed right as little as possible consistent with achieving the objective.[113] This may be the most difficult criterion for emergency regulations to satisfy. The main problem with the *Act* is its breadth. As discussed

---

[107] *R.* v. *Oakes*, [1986] 1 S.C.R. 103. A very interesting analysis of *Oakes* is given in L. Weinrib, "The Supreme Court of Canada and Section 1 of the Charter" (1988), 10 S.C.L.R. 469.

[108] *Oakes*, *ibid.* at 138.

[109] See especially text following notes 24 and 43, *supra*.

[110] *Supra*, text accompanying note 83.

[111] As Hogg has written, *supra*, note 4 at 390, ". . . the formulations in the *Anti-Inflation Reference* . . . make it almost impossible to challenge federal legislation on the ground that there is no emergency."

[112] *Oakes*, *supra* note 107 at 139.

[113] *Ibid.*

above,[114] the *Act* gives the Governor in Council extraordinary powers over individuals in many situations where ordinary police powers under the criminal law would suffice. It is easy to envision cases where regulations under the *Act* would impair rights much more than would be necessary for any legitimate objective.[115]

Similarly, in many cases it may be difficult for the government to show that the third component of the proportionality test is satisfied: that the deleterious effects of the *Act* are proportional to the importance of the objective.[116] This would also appear to require a demonstration that the broad emergency powers are really necessary.

Thus at least Parts II and III of the *Act*, providing for declarations of "public order" and "international" emergencies, might well be found to contravene the *Charter*.

There may be another obstacle in the way of justifying *Charter* infringements which could flow from the *Act* under section 1. Such limits must be "prescribed by law," and some judicial decisions indicate that provisions permitting wide discretion may not be "prescribed by law."[117] Because the powers given to the Governor in Council under the *Act* allow completely unfettered discretion, it could be argued that regulations made with such discretion are not "prescribed by law."

There is another concern as well. The Governor in Council might be able to use its unlimited power under a "war emergency"[118] to pass regulations notwithstanding sections of the *Charter*. Section 33 of the *Charter* gives such power to Parliament; it is reasonable to argue that the unlimited power the *Act* delegates to the Governor in Council includes all powers possessed by Parliament.[119]

---

[114] *Supra*, text following note 32.

[115] As happened, for example, during the "October Crisis"; see *infra*, text following note 175.

[116] *Oakes*, *supra*, note 107 at 139.

[117] See *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1984), 45 O.R. (2d) 80 (C.A.). A discussion of the meaning of "prescribed by law" can be found in L. Weinrib, *supra*, note 107.

[118] *Supra*, text accompanying note 53.

[119] In a case that challenged the *War Measures Act* the Supreme Court of Canada held that Parliament could delegate all its constitutional powers, and more, to the Governor in Council: see *Re Gray* (1919), 57 S.C.R. 150, especially at 157-58 and 168.

B. *Canadian Bill of Rights*

It is interesting that the Preamble to the *Act* specifies that the *Canadian Bill of Rights* also applies. This reveals an interesting problem, the scope of which goes far beyond the *Act*.

There are several essential differences between the *Charter* and the *Bill*,[120] including the fact that the *Bill*, like its American namesake, has no limitation provision analogous to section 1 of the *Charter*.

Of course, judicial interpretations of the American and Canadian Bills of Rights do not treat the enumerated rights as absolute, but build limitations into the definitions of the rights themselves. Thus, as Professor Hogg has written, "the position without a limitation clause is therefore not very different from the position with a limitations clause."[121]

However, in Canada we are in the unique position of simultaneously having and not having a limitations clause. Of our two documents setting out fundamental rights, the *Bill* and the *Charter*, only one has a limitation clause. Many of the rights enumerated in the two documents are identical (*e.g.*, freedoms of religion and association) or nearly identical (*e.g.*, freedoms of assembly, expression, and many legal rights). Thus the *Act* (and all other federal statutes)[122] can be evaluated against the standard of either document or both.

Generally, *Charter* rights have been interpreted much more broadly than rights protected under the *Bill*. The widely-accepted explanation for this is the difference in status of the two documents; as Mr. Justice Le Dain expressed it,

> . . . the courts have felt some uncertainty or ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament. The significance of the new constitutional mandate for judicial review provided by the Charter was emphasized by this Court in its recent decisions . . .[123]

Chief Justice Dickson made a similar statement concerning jurisprudence under the *Bill*: ". . . the Court was concerned with the

---

[120] The most important difference is the constitutional status of the *Charter* - see *infra*, text accompanying note 123.

[121] P. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights," in G.A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed., (Toronto: Carswell, 1989) at 8.

[122] Recall that the *Canadian Bill of Rights* applies only to federal statutes, while the *Charter* applies (s.32) to both federal and provincial governments.

[123] *R.* v. *Therens* (1985), 18 D.L.R. (4th) 655 at 676.

merely statutory status of the *Canadian Bill of Rights* and the declaratory nature of the rights it conferred . . ."[124] and then went on to indicate that the Court should not breathe new life into the *Bill*:

> I believe the day has passed when it might have been appropriate to re-evaluate those concerns and to reassess the direction this Court has taken in interpreting that document.[125]

Presumably the reason that the Chief Justice felt that reassessment of the *Bill* was not appropriate was the existence of the *Charter*. Nonetheless, the atmosphere created by the *Charter* seems to have somewhat resurrected the *Bill*.[126]

In all *Charter* cases to date where *Bill of Rights* jurisprudence has been considered, the difference in constitutional status and the fact of the limitation clause have been used to justify more generous interpretations of rights protected by the *Charter*. A problem that has apparently not yet arisen but undoubtedly will arise with respect to some federal statute can be illustrated by the following example involving the *Act*.

Suppose that the Governor in Council passes a regulation under Part II of the *Act* prohibiting a particular political group from calling meetings, on the grounds that any public assembly called by that group "may reasonably be expected to lead to a breach of the peace."[127] Suppose that the political group applies to a court of competent jurisdiction for a declaration that the regulation contravenes the *Charter*. One plausible outcome of such a challenge would be a finding that the regulation does infringe "freedom of peaceful assembly" under the *Charter*,[128] but that a limitation on that right in the context of the existing emergency is justified under section 1.

Suppose that the group then makes a new application to the courts, for a ruling that the regulation contravenes "freedom of assembly" within the meaning of the *Canadian Bill of Rights*. What can the court say? Presumably the court would like to hold that "freedom of

---

[124] *R.* v. *Beauregard* (1986), 30 D.L.R. (4th) 481 at 506 (S.C.C.).

[125] *Ibid.*

[126] Cf. *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *MacBain* v. *Canadian Human Rights Commission* (1985), 22 D.L.R. (4th) 119 (F.C.A.). An overview of the sad treatment of the *Bill of Rights* is given in *Beauregard*, *supra*, note 124 at 504-06.

[127] *Act*, s. 19(1)(a)(i).

[128] *Charter*, *supra*, note 7, s. 2(c).

assembly" under the *Bill* does not include the right of political groups that may provoke breaches of the peace to assemble in times of emergency. However, it would appear to be very awkward for the court to hold that the regulation does not infringe "freedom of assembly" under the *Bill*, although it does infringe "freedom of peaceful assembly" under the *Charter*.

Of course, the court could try to explain the effect of section 1 on the definition of the right. Indeed, this was done by Mr. Justice Le Dain in discussing different interpretations of the right to counsel:

> A significant distinction in the contexts of the right to counsel under the *Canadian Bill of Rights* and under the Charter is that under the Charter the right is made expressly subject by s.1 to such reasonable limits as are demonstrably justified in a free and democratic society. Thus the right is expressly qualified in a way that permits more flexible treatment of it.[129]

Le Dain J. made this statement in a case where he was allowing a *Charter* remedy where no remedy had been given under the *Bill* in a previous case involving precisely the same circumstances.[130] It would appear to be much more difficult to make a corresponding statement in a case where, following a *Charter* ruling that a regulation infringed "freedom of peaceful assembly," the court held that the same regulation did not infringe "freedom of assembly" under the *Bill*. The rationale put forward by Mr. Justice Le Dain would, of course, apply just as well in the latter case, but it would not appear so reasonable in such a context.

C. *International Covenant on Civil and Political Rights*

The fact that the preamble to the *Act* states that the Governor in Council "must have regard to the *International Covenant on Civil and Political Rights*" does not appear to be anything other than window dressing. First of all, what does "must have regard to" mean? In any case, the *Covenant* is not part of domestic law. The use of such international instruments in Canadian courts was described by Chief Justice Dickson (in a different context) as follows:

> In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source

---

[129] *Supra*, note 124.

[130] Both cases were concerned with whether a person who was ordered to take a breathalyser test was "detained."

for interpretations of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.[131]

The *Covenant* has been signed by Canada,[132] and thus would be of persuasive value in interpreting the *Charter*. This would be true whether or not it was mentioned in the Preamble. Similarly, its presence in the Preamble is irrelevant to any action concerning a violation of the *Covenant* that might be brought before an international court or that might be referred to the United Nations Committee on Human Rights.

Nonetheless, a brief look at the *Covenant* may be of some interest. The *Covenant* enumerates a host of rights similar to those in the *Charter*. It does not have a separate limitation clause like the *Charter*'s section 1, but analogous qualifications are made part of most of the fundamental rights. The following example is typical:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.[133]

Similar qualifications are placed on the rights to liberty of movement,[134] freedom of thought, conscience, and religion,[135] freedom of expression,[136] and freedom of association.[137] There are no such qualifications on equality before the law, equal protection before the law, and protection against discrimination based on race or other status.[138] Also, legal rights that arise upon being charged with a criminal offence have no such internal limitation.[139]

---

[131] *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 312 at 349-50.

[132] Canada also signed the optional protocol to the *Covenant*: see *Human Rights International Instruments, Signatures, Ratifications, Accessions, etc.* (New York: United Nations, 1982) at 4.

[133] *Supra*, note 9, art. 21.

[134] *Ibid.*, art. 12.

[135] *Ibid.*, art. 18.

[136] *Ibid.*, art. 19.

[137] *Ibid.*, art. 22.

[138] *Ibid.*, art. 26.

[139] *Ibid.*, art. 14.

Article 4 of the *Covenant* permits states to derogate from some of their obligations under the *Covenant*

> in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . .[140]

although derogation is not permitted from rights such as the right not to be subject to cruel or degrading punishment,[141] the right not to be held in slavery,[142] and the right not to be found guilty of any criminal offence that was not an offence at the time it was committed.[143]

The Working Paper on Bill C-77 refers to the *Covenant* as follows:

> The United Nations Human Rights Committee has already drawn attention to the fact that the *War Measures Act* does not embody the human rights guarantees called for by the *Covenant*, most notably those set out in Article 4 dealing with national emergencies. The Committee has asked Canada to give legislative effect to its own expressed intention of living up to these international obligations.[144]

To say in the Preamble to the *Act* that the Governor in Council "must have regard" to the *Covenant*[145] does not "give legislative effect" to the intention of living up to the obligations of the *Covenant*. Such legislative effect could easily have been achieved, either by adding a provision to the *Act* which stated that the *Act* is subject to the *Covenant*, or by otherwise incorporating the rights guaranteed by the *Covenant* into the *Act*.

As it now stands, there are respects in which the *Act* does not conform to the *Covenant*. First, the *Covenant* allows derogation from fundamental rights only when an emergency "threatens the life of the nation,"[146] while the *Act* empowers the Governor in Council to issue emergency decrees under much less serious circumstances.[147] Also, the *Act* seems to permit Cabinet to derogate from some rights that the *Covenant* states remain inviolate even in times of emergency. For example, under a "war" emergency the Governor in Council could

---

[140] *Ibid.*, art. 4.

[141] *Ibid.*, art. 7.

[142] *Ibid.*, art. 8.

[143] *Ibid.*, art. 15.

[144] *Supra*, note 12 at 48.

[145] *Supra*, beginning of this section of this paper.

[146] *Supra*, text accompanying note 140.

[147] *Supra*, text following note 58.

issue regulations making it a crime to belong to a given political group and immediately arrest members of that group;[148] this would violate the *Covenant's* non-derogable right not to be convicted of a criminal offence that was not a crime at the time it was committed.[149]

Presumably any person so convicted could make a complaint to the United Nations Committee on Human Rights. Such a complaint would take years to process, and thus would undoubtedly be adjudicated long after the "emergency" had passed.

D. Some Other Issues

This latter point underlines a basic difficulty in relying on any rights documents for protection from governmental excesses under declarations of emergencies. Emergencies, by definition, are of a temporary nature, and usually last at most several months (although there could be a war, for example, lasting several years). It is almost inconceivable that a court would issue an injunction, or even a declaration, limiting governmental activity while an emergency existed. Thus recourse to the *Charter*, the *Bill of Rights*, or the *Covenant* would generally be available only after the crisis was over.

Some issues would still be relevant after an emergency had passed. For example, the *Act* empowers the Governor in Council to make regulations imposing up to five years imprisonment for violations of emergency orders.[150] Thus it is quite possible that some people would remain in prison after an emergency declaration expired. Such people might make *Charter* or *Bill of Rights* arguments for their release.

Also, those whose rights are infringed during a declaration of emergency could seek damages or other remedies. The *Act* itself provides for compensation to "any person who suffers loss, injury or damage" as a result of anything done under the *Act*,[151] but the extent and amount of such compensation is determined entirely by the Governor in Council.[152] Anyone whose *Charter* rights had been violated could seek a monetary or other remedy under the *Charter*.[153]

---

[148] This was done during the "October Crisis" — see *infra*, text following note 189.

[149] *Supra*, note 9, art. 15.

[150] *Act*, ss. 8(1)(j), 19(1)(e), 30(1)(l), 40(2).

[151] *Act*, s.48(1).

[152] *Act*, s.49.

[153] *Charter*, s.24(1). There has been little jurisprudence so far concerning damages for breaches of the *Charter*, but clearly damages could be "appropriate and just" in some circumstances - see M. Pilkington, "Damages as Remedy for Infringement of the

However, I would suggest that there is no conceivable judicial remedy for the overall harm to society that could be caused by a Government using an emergency declaration for political purposes.[154] This suggests the possibility of an action before the *Act* is used, by an individual or group interested in civil rights, for a declaration that the *Emergencies Act* itself contravenes the *Charter* by giving the Governor in Council power to enact regulations which would violate the *Charter*. Even if standing were granted to bring such an action,[155] it is likely that the courts would hold that any connection between the *Act* and future harm that could result from a regulation made under it in some circumstances is too speculative to form the basis for a finding that the *Act* contravenes the *Charter*.[156]

Thus the only protection offered against the *Act* by documents guaranteeing fundamental rights is the putative moral force they may have in limiting the activities of Cabinet. A demagogic government which engineers a climate of hysteria for some political purpose is not likely to be substantially restrained by such moral considerations.

VII. COMPARISON WITH THE *WAR MEASURES ACT*

THE LAST SECTION[157] OF THE *ACT* repeals the *War Measures Act*.[158] Is the *Emergencies Act* an improvement over its predecessor?

The *War Measures Act* was a lot shorter and simpler than the *Emergencies Act*. Under the former, the determination of the existence of an emergency was within the unfettered discretion of Cabinet:

> The issue of a proclamation by Her Majesty, or under the authority of the Governor in council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of this continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.[159]

Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517.

[154] For example, it is difficult to quantify the harm that was done by the suppression during the "October Crisis" and it is even more difficult to design a judicial remedy.

[155] The granting of standing to public interest litigants seems to be very discretionary — see W.A. Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay" (1988) 10 S.C.L.R. 377.

[156] As was apparently the *ratio* in *Operation Dismantle* v. *R.*, [1985] 1 S.C.R. 441.

[157] *Act*, s.80.

[158] *Supra*, note 3.

[159] *Ibid*, s.2.

As we have seen, the *Emergencies Act* requires that the Governor in Council believe on reasonable grounds that an emergency exists,[160] and an emergency must satisfy certain criteria.[161] Thus there is a basis for judicial scrutiny of declarations of emergency under the present *Act* which was not provided by the previous legislation.

Upon a proclamation being issued under the *War Measures Act*, the Governor in Council

> . . . may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada . . .[162]

This gives unlimited powers similar to those granted during a "war" emergency under the present *Act*.[163] It is my submission that "war" emergencies under the new *Act* are essentially equivalent to the kinds of emergencies that could be proclaimed under the *War Measures Act*. The Working Paper on Bill C-77, one thesis of which is that the new *Act* offers greater protection to civil liberties than did the old one, states that

> . . . the main reservation about the scope of the *War Measures Act* is that its present reach may be too broad because it permits wartime powers to be invoked in certain peacetime crises. The *War Measures Act*, it will be noted, may be used not only in case of war, invasion or insurrection but also for "apprehended insurrection," which are really peacetime emergencies. There is a large body of opinion that the *War Measures Act* should be confined to war emergencies only, leaving peacetime crises, however severe, to be dealt with under peacetime emergency legislation.[164]

Yes. But a "war" emergency under the *Emergencies Act*, it will be noted, may be used not only in case of war or armed conflict but also for "imminent war" or "imminent armed conflict," which are really peacetime emergencies.[165] Moreover, the phrase "war or other armed conflict"[166] clearly includes more than war, and certainly includes

---

[160] *Supra*, text accompanying note 66.

[161] *Supra*, text accompanying note 58.

[162] *Supra*, note 3, s.3.

[163] The corresponding provision of the *Act* appears *supra*, text accompanying note 55.

[164] *Supra*, note 12 at 18.

[165] *Supra*, text accompanying note 53.

[166] *Ibid.*

invasion and insurrection. It might be argued that "apprehended," as used in the *War Measures Act*, is a little wider than the corresponding "imminent" in the *Emergencies Act*, but this distinction is unlikely to be significant in any actual case. Thus, in my view, the new *Emergencies Act* does not necessarily leave peacetime emergencies to be dealt with under lesser legislation.[167]

The main difference in Parliamentary supervision[168] is that the *War Measures Act* requires both Houses to resolve that a proclamation be revoked,[169] while the *Emergencies Act* is revokable by either House independently.[170]

When the *Canadian Bill of Rights* was introduced the *War Measures Act* was amended to include the following:

> Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement, or infringement of any right or freedom recognized by the *Canadian Bill of Rights*.[171]

There was no analogous amendment made when the *Charter* came into effect, so the *War Measures Act* was subject to the *Charter* from 1982 until its repeal. Of course, no emergency was proclaimed during this period, so the *War Measures Act* was never judicially tested against any rights document.

Overall, the *Emergencies Act* establishes greater supervision by Parliament and by the judiciary than was provided by the *War Measures Act*.

On the other hand, the *Emergencies Act* allows four different kinds of emergency declarations, not just one. As discussed,[172] 'public order' emergencies may well be a grave threat to civil liberties, and there seems to be no reasonable use for 'international' emergencies.[173]

Suppose that the *Emergencies Act* rather than the *War Measures Act* had been the governing legislation in October, 1970. What would the Government have done?

---

[167] See, *infra*, text following note 199.

[168] Also, the time periods for putting a declaration before Parliament are slightly different.

[169] *Supra*, note 3, s.6(4).

[170] *Supra*, text accompanying note 102.

[171] *Supra*, note 3, s.6(5).

[172] *Supra*, text following note 39.

[173] *Supra*, text following note 45.

To understand the 1970 use of the *War Measures Act* it is necessary to recall the context. Le Front de Liberation du Québec (FLQ) was a political movement espousing separatism and socialism.[174] In addition to other activities, small underground cells of the FLQ had engaged in some terrorist acts, especially the placing of small bombs, throughout the 1960s.

The late 1960s was a period of social unrest throughout the Western world. In such a period, Quebec's high rate of unemployment combined with nationalist sentiment to create fairly widespread support for much of the FLQ programme.

The political career of Prime Minister Trudeau had been devoted to combatting Quebec separatism. As his longtime associate Gerard Pelletier wrote,

> . . . The October crisis is part of a battle in which we have been engaged for several years . . .[175]

As part of the preparation for that battle, on 7 May 1970 the Cabinet secretly established a special committee to investigate the extent of support for Quebec separatism and to consider ". . . the steps to be taken in the event the War Measures Act comes into force by reason of insurrection."[176]

On 5 October 1970 a cell of the FLQ kidnapped British Trade Commissioner James Cross and presented demands that twenty-three people who had been convicted of FLQ bombings be released from prison. The kidnappers demanded that a manifesto of the FLQ be read on the radio and television network of Radio Canada, and this demand was met. The manifesto began:

> The Front de Liberation du Québec is not a messiah, nor a modern-day Robin Hood. It is a group of Quebec workers who have decided to use all means to make sure that the people of Quebec take control of their destiny.
>
> The Front de Liberation du Quebec wants the total independence of quebeckers, united in a free society, purged forever of the clique of voracious sharks, the patronizing

---

[174] See the books listed *supra* in note 4. For an account by an FLQ supporter, see "FLQ and the Lessons of the October Crisis" (1972) 51 Canadian Forum 12. A source I found very useful is B. Jorgensen, Emergency Powers in Canada and Northern Ireland (Ph.D. dissertation, Cambridge University).

[175] G. Pelletier, *The October Crisis*, (Toronto: McClelland and Stewart, 1971) at 191.

[176] *Canadian House of Commons Debates* (Third Session), December 23, 1971, pp. 10731-10732, 10740.

"big bosses" and their henchmen who have made Quebec their hunting preserve for "cheap labour" and unscrupulous exploitation.[177]

The manifesto calls on the workers of Quebec to "Make your own revolution in your own area, in your places of work."[178]

While the government of Quebec continued to negotiate with the kidnappers, on 10 October a different cell of the FLQ kidnapped Quebec Minister of Labour Pierre Laporte. On 12 October, federal troops were deployed to guard members of the federal and Quebec Parliaments.[179]

An FLQ supporter described the situation as follows:

Students are starting to move. Classes are boycotted in high schools, *Cegeps* (community colleges) and universities. The F.L.Q. manifesto is discussed everywhere, and everybody is following the match between the government and the F.L.Q. with the greatest interest. Support for the F.L.Q. is mounting in the masses of Quebec. Thousands of Quebecois support *the goals of the F.L.Q., although they may not endorse the means taken to achieve them.*[180] [emphasis added]

By 13 October it was clear that the Government was planning to do something other than allow the negotiations with the kidnappers to continue. Prime Minister Trudeau told a television reporter, with reference to those who were expressing alarm about the massive deployment of soldiers,

Well, there are a lot of bleeding hearts around, who just don't like to see people with helmets and guns. All I can say is, go on and bleed, but it is more important to keep law and order in this society than to be worried about weak-kneed people who don't like the looks of . . .[181]

Trudeau was interrupted by a reporter who asked:

At what cost? How far would you go with that? How far would you extend that?

His reply was chilling:

---

[177] See Haggert and Golden, *supra*, note 4 at 277.

[178] *Ibid*, at 281.

[179] As pointed out by Jorgenson, *supra*, note 174 at 105, the troops were sent to Quebec under sections 231 to 252 of the *National Defence Act*, R.S.C. 1970, c. N-4. This, in my view, is another indication that no emergency legislation was required.

[180] L. Bergeron, *The History of Quebec: A Patriot's Handbook* (Toronto: New Canada, 1971).

[181] Haggert and Golden, *supra*, note 4 at 42.

Well, just watch me.[182]

Canadians watched. At 3:00 a.m. on 16 October, a letter from Quebec Premier Bourassa was delivered to Prime Minister Trudeau; it appears likely that the letter had been solicited by Trudeau.[183] After referring to the kidnappings and the FLQ communiques, the letter said:

I request that emergency powers be provided as soon as possible so that more effective steps may be taken. I request particularly that such powers encompass the authority to apprehend and keep in custody individuals who, the Attorney General of Quebec has valid reasons to believe, are determined to overthrow the government through violence and illegal means. According to the information we have and which is available to you, we are facing a concerted effort to intimidate and overthrow the government and the democratic institutions of this province through planned and systematic illegal action, including insurrection.[184]

One hour later, at 4:00 a.m., the *War Measures Act* was proclaimed. The Public Order Regulations proclaimed by the Governor in Council under the authority of the *War Measures Act*[185] defined the FLQ and any other group advocating "the use of force . . . as an aid in accomplishing governmental change within Canada" as an "unlawful association."[186] Anyone who was a member of or supported the principles of an "unlawful association" was declared to be guilty of an indictable offence and liable to five years imprisonment.[187] In any prosecution under the Regulations,

. . . evidence that any person
(a) attended any meeting of the unlawful association, . . . is, in the absence of evidence to the contrary, proof that he is a member of the unlawful association.[188]

---

[182] *Ibid.* at 43.

[183] "Assumption of Emergency Powers Indicates Careful Stage Setting by Ottawa Officials" *The [Toronto] Globe and Mail* (17 October 1970).

[184] Haggert and Golden, *supra*, note 4 at 304.

[185] *Public Order Regulations 1970*, SOR/70-44; 104 Canada Gazette (Part II) 1128, October 16, 1970; reproduced in Haggert and Golden, *supra*, note 4 at 283-86.

[186] *Ibid*, s.3.

[187] *Ibid*, s.4.

[188] *Ibid*, s.8.

Moreover, a person suspected of membership in an "unlawful association" could be detained in custody for up to 21 days without being charged.[189]

The Regulations thus made membership in the FLQ a crime, and an hour later, at 5:00 a.m., hundreds of people were arrested and detained under the Regulations. A Quebec separatist described the situation as follows:

> The forces of repression behave like Hitler's SS troops. In the middle of the night, they knock doors down, wake up 'suspects' with machine guns in the ribs, brutalize them, cart them off like criminals and leave behind them terrified women and children.[190]

Robert Lemieux, a lawyer who had acted for the FLQ and undoubtedly supported some of its aims, was among those arrested. He wrote:

> One wants to laugh. The law was promulgated on October 16th at 4:00 a.m. I am sleeping. I am awakened. I turn on the radio and CKAC gives me the essential details. I am thrown in jail where I still remain.
>
> Let us hypothesize that I am a "member" at 4:00 a.m. The regulation not being retroactive and it being presumed that one knows and observes the law (if it is constitutional?!), I must have the opportunity to desist from the actions and activities that have just been declared illegal. I must have the opportunity to commit or not to commit an offence.[191]

The use of the Regulations seems to violate the provision of the *International Covenant on Civil and Political Rights* which prohibits convicting people of offenses that were not criminal at the time they were committed.[192]

In the days that followed there were statements by Prime Minister Trudeau and others that the FLQ possessed large quantities of stolen dynamite and rifles. There was never any evidence produced to justify such statements. Years later, published excerpts from the diary of a member of the Cabinet confirmed the belief that no such evidence had ever existed.[193]

---

[189] *Ibid*, s.9.

[190] *Supra*, note 181 at 232.

[191] Haggert and Golden, *supra*, note 4 at 301.

[192] *Supra*, text accompanying note 149. It should be noted that the *Covenant* had been opened for signature but was not yet in force in 1970.

[193] Donald Jamieson was Minister of Transport in October 1970. Excerpts from his diary were published in "Overkill" (April, 1988) *Saturday Night*.

There were close to 500 people arrested during the October Crisis, but only some 60 were charged and only about 20 were convicted.[194] The kidnappers of James Cross eventually negotiated safe passage to Cuba in exchange for releasing him unharmed. The kidnappers of Pierre Laporte executed him the day after the *War Measures Act* was proclaimed; they were eventually found and arrested using ordinary police methods. The proclamation of the *War Measures Act* was revoked on 3 December 1970 by the *Public Order (Temporary Measures) Act*.[195] This *Act* incorporated most of the regulations that had been made under the *War Measures Act*. The *Public Order (Temporary Measures) Act* expired automatically on 30 April 1971.[196]

Professor Peter Hogg expresses the general view of the Government's invocation of the *War Measures Act*:

> It was a remarkable suspension of civil liberties; and the facts which emerged later, especially during the trials of the kidnappers, suggested that there was never any possibility of an insurrection from the small and ill-organized F.L.Q. or from any other group.[197]

The main use of the proclamation of the *War Measures Act* was the arrest of hundreds of people very early in the morning on the grounds that they were suspected of membership in an "unlawful association." While these arrests played no role in apprehending the kidnappers they did have a very chilling effect on the movement for independence of Quebec.

If the current *Emergencies Act* had replaced the *War Measures Act* before 1970, the Government would have been able to invoke either a "public order" or a "war" emergency. As we have seen, one of the main reasons advanced for introducing the *Emergencies Act* was the claim that, in a situation such as existed in October, 1970, a "public order" emergency would have been declared and we would have been spared some of the excessive damage to civil liberties that occurred.[198] However, I submit that it is unlikely that the Government would have been satisfied with a "public order" declaration. To be sure, such a

---

[194] *Supra*, note 4.

[195] *Public Order (Temporary Measures) Act*, S.C. 1970-71-72, c. 2; also in Haggert & Golden, *supra*, note 4 at 286-93.

[196] As was specified in s.15 of the *Public Order (Temporary Measures) Act*, *ibid.*

[197] P. Hogg, *supra*, note 4 at 388.

[198] *Supra*, text accompanying and following note 31.

declaration would have allowed it to prohibit public assembly,[199] which was one thing it certainly desired. But a declaration of a "public order" emergency would not have allowed the immediate arrest of hundreds of people. As Bourassa's letter indicated,[200] and as the Government's actions showed, this was a vital part of the plan.

Of the four emergency declarations permitted by the *Emergencies Act*, only a "war" emergency would have given the power to make those arrests. I suggest that the Government would have declared a "war" emergency, saying that the armed kidnappers and the existence of many other armed members of the FLQ who were in the process of preparing to attempt to overthrow the government by force created a situation of "imminent armed conflict,"[201] and that the situation was so serious as to constitute a "national emergency."[202] In my view it is absurd to imply, as many supporters of the *Emergencies Act* did, that the Government was forced to use the full power of the *War Measures Act* because there was no authority to declare a lesser kind of emergency. The Government could have proclaimed the *War Measures Act* but then restricted itself to using only the lesser powers that are now allowed under a "public order" emergency. It was not necessary for the Government to use all the powers at its disposal. The political motivation that led it to invoke the *War Measures Act* would have led to the proclamation of a "war" emergency if the new legislation had been in place.

VIII. CONCLUSIONS

PROFESSOR LORRAINE WEINRIB has written:

> Canada's history, although not marred with many occasions of emergency, demonstrates that emergency powers are sometimes more fearful than the emergency against which they are exercised. The new *Emergencies Act* reflects this concern by allowing, to the extent possible, the review mechanisms which restrain abuse of power in ordinary circumstances to operate in times of crisis as well.[203]

---

[199] *Supra*, text accompanying note 28.

[200] *Supra*, text accompanying note 184.

[201] See *supra*, text following note 161 for a discussion of the breadth of this phrase.

[202] See *supra*, text accompanying note 58 for an indication of the scope of "national emergency."

[203] Weinrib, *supra*, note 78 at 479.

It is easy to agree with the first of these sentences. There does not appear to have been any instance in the history of Canada where a crisis was worsened in any way because a provincial or federal government lacked sufficient emergency powers, while there have been a number of cases where civil liberties were unjustly suppressed.

However, I have argued that the review mechanisms which comfort Professor Weinrib are not likely to actually provide substantial restraints on abuse of power under emergency declarations.[204] Moreover, the additional scope that "public order" and "international" emergencies give to the Governor in Council to rule by emergency decree suggests that Canada's future will probably be marred by many more "emergencies" than its past has been.

It would be interesting to attempt a *Charter* challenge to the parts of the *Emergencies Act* concerning "public order" and "international" emergencies, but, as suggested above,[205] such a challenge is likely to be regarded as too speculative if made before the *Act* has been invoked (and is likely to be ineffective if made afterward). Still, it might be worthwhile for a civil liberties group to try to make a case.

Since prospects of effective judicial control of the broad powers contained in the *Act* are slight, it is reasonable that those concerned about civil liberties lobby for the repeal of the parts of the *Act* that allow declarations of "public order" and "international" emergencies. If these parts of the *Act* were to be removed the *Act* would represent a significant improvement over the *War Measures Act*. As it now stands, however, it might well produce even more than four times the number of "October Crises" that would have eventuated under the *War Measures Act*.

---

[204] *Supra*, text following note 153. Those expressing confidence that the courts will protect fundamental rights during emergencies might consider the U.S. courts' several holdings that internment of Japanese-Americans solely on the basis of their racial origins was consistent with the U.S. *Bill of Rights*: see *Hirabayshi* v. *United States* (1943), 320 U.S. 81; *Korematsu* v. *United States* (1944), 323 U.S. 214; and *Ex parte Endo* (1943), 149 Fed. (2d) 289, leave to appeal denied (1945), 324 U.S. 885.

[205] *Supra*, text accompanying note 156.