

National Association of Japanese Canadians  
National Executive Office  
735 Ash Street,  
Winnipeg, Man.,  
R3N 0R5

May 25, 1988,

The Honourable Perrin Beatty,  
Minister of National Defence,  
House of Commons,  
Ottawa, Ontario,  
K1A 0A6

Dear Sir,

Thank you for your reply of May 5, 1988 to our concerns about a possible Charter override in the Emergencies Act. We note your comment that, in your view, "there is very little basis for concern" and your reasons for holding that view.

However, having read those reasons, our legal counsel is of the view that they are seriously flawed in law. Please find attached a copy of her reasons.

Further, even if our legal counsel is wrong, we are of the view that any possibility that the Act would permit the Governor-in-Council to override Charter rights by Order-in-Council is too great a risk to the civil and human rights of Canadians to be left undecided and unknown. The Canadian people have a right to know the extent of the powers of the executive in time of emergency, and to know the boundaries of those powers with certainty.

Again we reiterate that this question is too important to all Canadians to be left to the opinion of lawyers. Accordingly, we urge you to immediately make a reference of this important issue to the Supreme Court of Canada for a definitive ruling. Further, we urge that, should the Supreme Court find that override powers have been given to the Governor-in-Council, that the appropriate amendment be made to ensure that only Parliament can override Charter rights in time of emergency.

Sincerely yours,  
The National Association of  
Japanese Canadians

per: Art Miki,  
President.

National Association of Japanese Canadians  
National Executive Office  
735 Ash Street,  
Winnipeg, Man.,  
R3N 0R5

April 20, 1988,

The Honourable Perrin Beatty,  
Minister of National Defence,  
House of Commons,  
Ottawa, Ontario,  
K1A 0A6

Dear Sir,

The National Association of Japanese Canadians applauds the constructive changes to Bill C-77, the Emergencies Act, which have recently been proposed by your department and by the Legislative Committee on Bill C-77.

Unfortunately, we are of the view that they are not sufficient.

In our submission of March 15, 1988, we raised serious concerns about the possibility that the proposed Act might unwittingly give the Governor-in-Council the power to override the Charter. We are aware that this is contrary to your intention.

We are also informed that you have an opinion from the Department of Justice stating that the proposed Act does not include a Charter override. Since we have not seen that opinion, we cannot judge either how complete it is or the strength of its ultimate conclusion. Our own legal counsel are of the view that the question remains moot, given the law arising from the use of the War Measures Act.

We are of the view that this question is too important to all Canadians to be left to the opinion of lawyers, who may not be correct. Accordingly, we urge you to immediately make a reference of this important issue to the Supreme Court of Canada for a definitive ruling. Further, we urge that, should the Supreme Court find that override powers have been given to the Governor-in-Council, that the appropriate amendment be made to ensure that only Parliament can override Charter rights in time of emergency.

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Mr. Art Miki,  
President,  
National Association of Japanese Canadians,  
National Executive Office,  
735 Ash Street,  
Winnipeg, Manitoba,  
R3N 0R5

Dear Mr. Miki,

Re: Charter Override and the Reasons of the  
Minister Responsible for Emergency Preparedness

1.0 The following legal opinion comments upon the reasons cited by the Minister Responsible for Emergency Preparedness in his letter of May 5, 1988, for his belief that "there is very little basis for concern" about a Charter override in the Emergencies Act.

1.1 While my analysis is hindered by the summary nature of the Minister's reasons, I am forced to conclude that the Minister's legal counsel appear to have made the following errors:

(a) they have confused the concepts of subdelegation and intradelegation;

(b) they have failed to appreciate the legal basis for the Emergencies Act itself; and,

(c) they have misconstrued the Chemicals Reference [1943] S.C.R. 1 and the other War Measures Act cases.

(a) DELEGATION OF POWERS:

2.0 The Minister's reasons are predicated upon the assertion in reasons 2, 4 and 5 that Parliament cannot delegate its powers under s. 91 of the Constitution Act, 1867 to the Governor in Council. This assertion is patently wrong in law. There is nothing express in the Constitution Acts, 1867-1981, which includes the Charter, about delegation of powers: Bora Laskin, Canadian Constitutional Law, 4th Ed., 1975, at 2. It has long been accepted that

Parliament, as our sovereign body, can enact any law it chooses within the sphere of its powers, and therefore can enact a law delegating legislative powers to any subordinate body whether that body is the Governor in Council, a Minister of the Crown, or any other official or body: Peter Hogg, Constitutional Law of Canada, 1977, at 214; 217-218.

2.1 This delegation of powers to a subordinate is called subdelegation. Because the Governor in Council (in fact, the Cabinet or executive) is inferior to Parliament, and holds its powers from Parliament (with the exception of those powers it holds in common law or by royal prerogative), Parliament can delegate to the Governor in Council/Cabinet/executive whichever of its powers it wishes and with whatever restrictions it wishes.

2.2 The only bodies Parliament cannot delegate to are the Provinces. This is because Parliament and the provincial Legislatures are separate but equal entities under the Constitution Act, 1867 and subordination is necessary for subdelegation. Intradelegation between Parliament and the Provinces, therefore, is not possible, but subdelegation from Parliament to the executive is.

2.3 Therefore, contrary to the statements of the Minister, Parliament can constitutionally confer legislative powers upon the executive : Ibid at 216 and Laskin, supra, at 2 and Hodge v. The Queen (1883) 9 A.C. 117.

2.4 Indeed, Parliament has done so on several occasions in the past. The most notable examples of such subdelegation are the Northwest Territories Act R.S.C. 1970, c. N-22, ss. 8, 13; the Yukon Act R.S.C. 1970, c. Y-2, ss. 9, 16, as am; and the War Measures Act R.S.C. 1970, c. W-2.

2.5 The validity of the first two mentioned delegations of legislative power has never been challenged. The third has. In Re Gray (1919) 57 S.C.R. 150 the Supreme Court of Canada found that Parliament had the ability to delegate law-making powers, and that it had done so validly in the War Measures Act notwithstanding that that delegation was very broad. Since Parliament retained the power to restrict or withdraw the grant of power to its delegate, the Governor in Council, the delegation of legislative power to the executive in the War Measures Act was constitutional: See Ibid at 215 - 216 and Re. Gray at 171.

2.6 In the War Measures Act, as the Minister's reasons acknowledge, Parliament delegated to the Governor in Council "plenary powers of legislation as large as and of the same nature as those of Parliament itself.": Chemicals Reference [1943] S.C.R. 1 at 17. At that time Parliament's powers were defined in ss. 91, 94 and 95 of the then British North America Act, now the Constitution Act, 1867. Those powers

included the powers in the preamble to s. 91 to make laws for the "Peace, Order, and good Government of Canada" (P.O.G.G.). On three occasions the courts have upheld legislative Orders-in-Council under the War Measures Act which, but for the delegation of P.O.G.G. powers, would otherwise have been unconstitutional as infringing on matters assigned exclusively to the Provinces in s. 92: See Fort Frances Pulp and Power Co. v. Manitoba Free Press [1923] A.C. 695 at 705; Wartime Leasehold Reference (1950) [1950] S.C.R. 124; and Co-operative Committee on Japanese Canadians v. Attorney-General of Canada et al [1947] A.C. 87.

2.7 This does not mean that the powers of the executive under the War Measures Act are equal to those of Parliament. They cannot be. Parliament must always retain the power to withdraw its grant of power from the executive. Otherwise the delegation of powers would amount to an abdication and hence would be illegal: See Re Gray, supra, at 171.

2.8 What it does mean is that under the War Measures Act the executive could make Orders-in-Council having the force and effect of statutes on behalf of and as if the executive were Parliament. Such Orders were valid in law so long as the executive was acting in good faith within the limits of the War Measures Act; that is,

(a) where a state of war or apprehended insurrection existed;

(b) where, in the opinion of the Governor in Council, the Order was necessary; and,

(c) where the Order "could be enacted by Parliament, in the execution of its emergency powers, or otherwise; and, further more, that Parliament is not precluded by the British North America Act or by any other lawful enactment concerning legislative powers, from committing the subject matter of it to the Executive Government for legislative action.": Chemicals Reference, supra, per Duff C.J. at 10 - 11.

2.9 In summary, therefore, not only does Parliament have the power to delegate legislative power, but in the past it has delegated to the executive powers that were so broad that the executive was thereby authorized to make any order that Parliament, "in the execution of its emergency powers, or otherwise," was capable of making (Emphasis added).

(b) THE LEGAL BASIS OF THE EMERGENCIES ACT

3.0 The Emergencies Act has the same legal basis as the War Measures Act, which it replaces. Its stated purpose is to enable the government of Canada to respond quickly to emergencies without the cumbersome procedure of Parliament. As in the War Measures Act, Parliament in the Emergencies Act empowers the Governor in Council to make orders and regulations in its stead.

3.1 The question is: How broad are the powers given the executive in the Emergencies Act? On the plain reading of the Act they appear very broad indeed. In time of war emergency the Act expressly grants the executive the power to make:

"such orders or regulations as the Governor in Council believes on reasonable grounds are necessary or advisable for dealing with the emergency.": s. 38(1).

As with the War Measures Act, the only restrictions are that there be an emergency; that the Governor in Council believes on reasonable grounds that the orders are necessary; and that Parliament be constitutionally capable of passing the order and is not barred from delegating the particular matter to the executive.

3.2 In the other three types of emergencies, the exercise of the powers is limited only by the subject matter of the orders and not by the breadth of powers exercised in the orders: See ss. 6(1), 17(1) and 28(1). In each case the Governor in Council is empowered to make:

"such orders or regulations with respect to the following matters, as the Governor in Council, believes on reasonable grounds are necessary for dealing with the emergency": 6(1), 17(1), 28(1)

3.3 Even in the least encompassing emergency, the public welfare emergency, the enumerated subject matters on which the executive may make orders and regulations make it clear that the executive is exercising s. 91 powers, including the "Peace, Order and good Government" (P.O.G.G.) powers. The enumerated subject matters include matters exclusively within the s. 92 powers of the Provinces, such as "the requisition, use or disposition of property": s. 6(1)(c). Such intrusions into provincial powers by the executive can only be legal where the powers delegated by Parliament to the Governor in Council include its P.O.G.G. powers.

3.4 The listed subject matters also evidence an intention to delegate other s. 91 powers. The ability to prescribe a sentence not exceeding five years imprisonment (s. 6(1)(j)) requires s. 91(27) criminal law powers. The "regulation of the distribution and availability of essential goods, services and resources" (s.6(1)(e)) requires s. 91(2) trade and commerce powers.

3.5 Finally, some of the enumerated subject matters require infringement of Charter rights. Section 17(1)(a) contemplates prohibiting the right to public assembly in section 2 of the Charter. Section 28(1)(g) permits prohibiting Canadians from leaving Canada, contrary to section 6 of the Charter. Section 28(1)(d) permits search and seizure without a warrant contrary to section 8 of the Charter.

3.6 Finally, there are the comments of the Minister himself. The Minister stated on February 23, 1988, to the Legislative Committee on Bill C-77 [the Emergencies Act] that "We will not be suspending the right to habeus corpus". The right to have the validity of detention determined by way of habeus corpus and to be released if the detention is not lawful, is a protected Charter right: s. 10(c). To imply that it can be suspended under the Emergencies Act is to imply that the executive under the Emergencies Act could infringe or override a Charter right.

3.7 The powers given in the Emergencies Act are very broad indeed, and, I submit, may be as broad as those of the War Measures Act. In short the Emergencies Act also appears to vest the executive "with plenary powers of legislation as large as and of the same nature as those of Parliament itself": Chemicals Reference, supra, at 17. The limitations placed on those powers are essentially the same:.

(a) that a state of national emergency exist;

(b) that, the Governor in Council believes on reasonable grounds that the Order is necessary; and,

(c) that the Order "could be enacted by Parliament, in the execution of its emergency powers, or otherwise; and, further more, that Parliament is not precluded by the British North America Act or by any other lawful enactment concerning legislative powers, from committing the subject matter of it to the Executive Government for legislative action.": Chemicals Reference, supra, per Duff C.J. at 10.

In other than a war emergency the executive's powers are further limited by the requirement that the order deal with

a subject matter enumerated under section 6(1), 17(1) or 28(1) respectively.

(c) MISCONSTRUCTION OF WAR MEASURES ACT CASES

4.0 The Minister's counsel have misconstrued the War Measures Act cases, and in particular the Chemicals Reference case and the distinctions within it between the exercise of powers under the War Measures Act by the executive and the exercise of s. 91 powers by Parliament. Counsel have failed to appreciate that the War Measures Act empowers the executive to make laws in Parliament's place and based on Parliament's constitutional powers. The Chemicals Reference stands for the principle that where Parliament

(i) has the constitutional ability to enact the order the executive has made; and,

(ii) has not been precluded from committing the subject matter of that order to the executive,

then the order of the executive is legal and of the same force and effect as if it had been enacted by Parliament itself: per Duff C.J. at 10.

4.1 The application of these principles to the issue of whether Parliament can or has delegated its powers under s. 33 of the Charter to the executive in the Emergencies Act produces the following analysis:

1. Parliament has the constitutional power to pass orders that override sections 2, and 7 - 15 of the Charter: s. 33.

2. Parliament has the ability to delegate its constitutional powers to subordinate body: Re Gray, supra at 171.

3. Parliament in the past has delegated "plenary powers of legislation" to the Governor in Council in the War Measures Act: Chemicals Reference, supra at 17.

4. The powers delegated under the Emergencies Act are as broad as those under the War Measures Act: paragraphs 3.1 to 3.6.

5. Parliament is not precluded by any lawful enactment from committing a Charter override to the executive: Laskin, supra at 2.



6. Therefore, Parliament is able to and, under the Emergencies Act, has empowered the executive to make Orders in Council which override Charter rights.

CONCLUSION:

With respect, the Minister's reasons are without substance in law. Indeed, if he were correct and Parliament were not capable of delegating legislative power, then the Emergencies Act would be illegal in its entirety and without force and effect.

Since Parliament can delegate legislative powers to subordinate bodies, and since the executive is such a subordinate body, then where that delegation is broad enough to grant the executive plenary powers of legislation, and where Parliament is not precluded from delegating the matter to the executive, Parliament can delegate any of its constitutional powers, including its power to override Charter rights. Contrary to the statements of the Minister, there exists a very strong basis for concern that the Emergencies Act empowers the executive to make Orders that override Charter rights.

## Can the Cabinet Override Charter Rights?

This question arises because of the legal force and effect given to the the War Measures Act. In a case contesting the War Measures Act the courts held that Parliament not only could delegate its constitutional powers to the executive government, but also that Parliament, in fact, delegated unlimited powers to the Cabinet, including the power "supersede the existing law whether resting on statute or otherwise": Re Gray (1919) 57 S.C.R. 150, per Fitzpatrick, C.J. at 157 - 158 and per Duff J. (as he then was) at 168. The English courts reached a similar conclusion with respect to the British Act on which the War Measures Act was based: R v. Halliday [1917] A.C. 260. Under the War Measures Act, the Governor in Council (effectively the Cabinet) "is vested with plenary powers of legislation as large as and of the same nature as those of Parliament": Reference Re Regulations Relating to Chemicals [1943] S.C.R. 1 per Rinfret J. at 17- 18. An order properly passed under that Act, therefore, "may have the effect of an Act of Parliament": Ibid, per Duff C.J. at 9.

Under the general emergency powers in the War Measures Act, therefore, Parliament could not only delegate its constitutional powers without limit, but the orders and

regulations passed by the Cabinet are equivalent to Acts of Parliament. Section 33 of the Charter permits Parliament to declare in an Act of Parliament that the Act shall operate notwithstanding the fundamental freedoms set out in Section 2 and the legal and equality rights set out in Sections 7 through 15 of the Charter. If Parliament can delegate this power to the Cabinet, and if wording of section 38 of the Emergencies Act transfers unlimited powers to the Cabinet in a war emergency, then the Cabinet would have the power to override important Charter rights when making emergency orders.

The counterarguments are that Parliament cannot delegate its Charter powers or that it must do so expressly. Both these arguments were rejected in Re Gray, supra, in Canada, and in R v. Halliday, supra, in England. Indeed, in Re Gray the Chief Justice put the onus on Parliament to expressly limit the powers it confers on the executive if that is its intention: at 160.

There is nothing in the Charter that prevents Parliament from delegating its powers to the executive. Legal precedent suggests that it can delegate its constitutional powers and has done so in the past both in the War Measures Act and in the various Acts dealing with the government of the North West Territories: See S.C. 1871, c. 16. Indeed in the latter case, Parliament had to revise

its original delegation of powers to expressly forbid the Lieutenant-Governor in Council to pass laws inconsistent with those of Parliament: See S.C. 1873, c. 34.

We doubt that the intention of the drafters of the Charter was that the federal Cabinet should have an uncensored right to pass laws that override Charter rights. As Justice Mayrand noted in Alliance des Professeurs de Montreal et al. v. Attorney-General of Quebec (1985) 21 D.L.R. (4th) 354 (Que. C.A.), the Charter requires that a law overriding its provisions should specify precisely what provisions will be overridden in order to encourage "an enlightened and serious examination of the proposed legislation.": at 356. When Parliament overrides the Charter, it does so in the glare of publicity and public debate. If the Cabinet is able to override the Charter under war emergency powers, it will do so in the privacy and secrecy of Cabinet. Indeed, given the provisions for secret orders in the proposed Emergencies Act, it need not even tell Parliament or the Canadian people about the order overriding the Charter.

The use of such orders would be limited only by the imagination of the Cabinet. Property could be secretly confiscated. Special prisons could be set up. People could be incarcerated or executed without trial. Government money could be diverted for the private use of Cabinet members.

Not only could all these abuses occur in secrecy but, even if public, the judiciary can do nothing to protect the Charter rights. Where the clauses overriding the Charter are properly drafted, the courts cannot even require the government to prove the law overriding the Charter right was justifiable: Alliance de Professeurs de Montreal et al. v. Attorney-General of Quebec (1985) 21 D.L.R. (4th) 354 (Que. C.A.) per Mayrand J.A. at 356.

The wording of Section 38 of the Emergencies Act is very broad and may well give unlimited powers to the Cabinet. Because there is doubt about the delegation of the Charter override, we feel that this Committee should take to advice of the Chief Justice in Re Gray and expressly exclude the override power from Section 38.

#### Precedent Limits War Powers

During the First and Second World Wars, the vast majority of "emergency" orders and regulations were economic or administrative in nature. They were intended to control the production of war materiel, impose rationing, control the cost of goods and services, and appoint various administrative boards and officials. For example, between October 12, 1942 and January 5, 1943, the Cabinet published 33 Orders-in-Council only one of which (dealing with the re-internment of refugees) was not economic or

Minister Responsible  
for Emergency Preparedness



Ministre responsable  
pour la Protection civile

May 5, 1988

Mr. Art Miki  
President  
National Association of  
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735 Ash Street  
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R3N 0R5

Dear Mr. Miki:

Thank you very much for your letter of April 20, 1988 concerning the changes which have been made to Bill C-77, the Emergencies Act. I am gratified that you find the changes constructive and that they merit the applause of your organization.

I appreciate your wish to be reassured that Bill C-77 does not permit the Governor in Council to override the Charter of Rights and Freedoms. However, I am advised that there is very little basis for concern on this point, for the following reasons:

1. While it is true that the Supreme Court of Canada in the Chemicals Reference, [1943] S.C.R. 1 at 17, stated that the Governor in Council under the War Measures Act

"...is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself",

the Court also made clear that the Governor in Council only has that authority "when acting within those limits", that is when acting "within the ambit of the Act by which his authority is measured". It follows therefore that the powers of the Governor in Council under the War Measures Act are not to be treated as coequal with those of Parliament under the Constitution Act 1867.

.../2

2. As broad as the executive authority of the Governor in Council under the War Measures Act may be, and even though Re Gray, 57 S.C.R. 150, held there that an order in council under the War Measures Act could amend an Act of Parliament, the Supreme Court of Canada is clear that this was only possible so long as the order in question is "in conformity with the conditions prescribed by ...the provisions of the War Measures Act" (Chemicals Reference at page 9). Therefore, while one Act of Parliament may be read as authorizing the Governor in Council to amend or repeal another Act of Parliament, it is very different to suggest that Parliament could authorize someone else to exercise its constitutional powers.

3. S. 33 is part of the Constitution Act 1867-1981 and hence cannot be treated like an ordinary Act of Parliament that is potentially subject to War Measures Act jurisprudence. For example, the reference to Parliament in s. 33 is the same as the reference to Parliament's lawmaking function under s. 91 of the Constitution Act, and yet it has never been suggested that the Governor in Council could be delegated the latter authority. In fact, the Chemicals Reference makes it clear that the Governor in Council was exercising authority on the basis of the War Measures Act rather than on Parliament's constitutional legislative authority under s. 91 of the Constitutional Act.

4. The argument in question ignores the fact that the Charter clearly distinguishes between "Parliament" and "the government of Canada" (see ss. 32(1)(a), 36(1)) and "Parliament" and "the executive government of Canada" (S. 44). The necessary implication of this is that the powers or authority of the one were never intended to be exchanged with or delegated to the other.

5. Governor in Council powers under the War Measures Act or its successor must be exercised in conformity therewith. However, there is not the faintest suggestion in either that Parliament's power under s. 33 of the Charter may be exercised by the Governor in Council.

.../3

The thoughtful study of Bill C-77 undertaken by your Association and the helpful suggestions which resulted were influential in making C-77 a much improved Bill. The positive contribution of the National Association of Japanese Canadians to this work has been very much appreciated by the Government, and I would like to convey my personal thanks to you and to your associates.

Sincerely,

A handwritten signature in black ink, appearing to read "Perrin Beatty". The signature is written in a cursive style with a large initial "P".

Perrin Beatty





May 5, 1988

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President  
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*limits are:*  
① emergency  
② open order  
③ ability of  
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Cheney  
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*see conditions (permits) para 1* ←

*→ Re Gray was on the issue of delegation of powers - Robb's powers*

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*Re Gray! delegated legit! wrong!*

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*of course gov of Canada subordinate to Parliament*

*Wrong Re Gray!*

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*pub del v intra del*

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