SUBMISSION TO

THE LEGISLATIVE COMMITTEE ON BILL C-77

by

The National Association of Japanese Canadians

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President

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Review of the use of emergency powers must be independent of the Cabinet.

RECOMMENDATION 17:

(a) Within three days of the proclamation of an emergency the Steering Committees of the House of Commons and the Senate must appoint an all-party Special Parlimentary Committee to monitor the implementation of the orders passed by the Cabinet under its emergency powers and to make motions to Parliament for the amendment or revocation of orders or regulations;

(b) To carry out its mandate the Special Committee shall have full power to investigate the implementation of the orders including the right to compel testimony from Ministers of the government and all servants and agents of the Crown and all military personnel;

(c) Debate upon a motion to amend or revoke an order or regulation shall be without closure;

(d) A vote on a motion to amend or revoke an order or regulation affecting civil or human rights must be a free vote.

RECOMMENDATION 18:

In any review of the use of emergency powers, or in any trial of an accused charged under an emergency order, the onus of proving that the emergency exists and the order is reasonable must rest with the Cabinet.

RECOMMENDATION 19

Compensation must be determined by a tribunal, headed by a Superior Court Judge, which tribunal is appointed independently of the Cabinet by the Special Parliamentary Committee for the Review of Orders and Regulations Under the Emergenies Act

RECOMMENDATION 20

There must be no limitation on the time for making a claim for compensation under the Emergencies Act.

SUBMISSION TO THE
LEGISLATIVE COMMITTEE ON BILL C-77

by the
NATIONAL ASSOCIATION OF JAPANESE CANADIANS

March, 1988

The Minister of National Defence has stated that the Emergencies Act is intended to replace the War Measures Act under which Japanese Canadians were denied their civil and human rights during and after the Second World War. The National Association of Japanese Canadians, which represents those victimized by Orders-in-Council under the War Measures Act, has long urged that Canada's laws be changed to control the exercise of emergency powers by the Cabinet and to create safeguards that will prevent others being abused.

Odd # pages

Regrettably, however, we are forced to conclude that the Emergencies Act will not accomplish this objective. While it attempts to fetter power and add safeguards, the changes it makes are not effective. They fail to protect Canadians from abuse of emergency powers by the Cabinet.

We object particularly to the following:

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Regrettably, however, we are forced to conclude that the Emergencies Act will not accomplish this objective. While it attempts to fetter power and add safeguards, the changes it makes are not effective. They fail to protect Canadians from abuse of emergency powers by the Cabinet.

We object particularly to the following:

Since the Emergencies Act fails to safeguard against executive abuse, we urge:

SUBMISSIONS

1. That Bill C-77 be withdrawn; the War Measures Act be abolished immediately; and, the task of drafting general emergencies legislation which balances emergency powers and civil liberties in accordance with the principles of fundamental justice and international law be referred to the Law Reform Commission of Canada.

2. Alternatively, that the Recommendations attached as Schedule A to this Submission be adopted by this Committee to ensure that this Emergencies Act will contain all proper and necessary safeguards.

Emergency Powers Historically Abused

What was done to Japanese Canadians during the Second World War proves each of the above presumptions is wrong. Between 1942 and 1949, the King Cabinet used its emergency powers under the War Measures Act to uproot from their homes on the Pacific Coast over 20,000 men, women and children of Japanese ancestry, over 75% of whom were Canadians; to confine them in detention camps in British Columbia; to strip them of all their real and personal property; to make them pay for their own incarceration from the proceeds of these sales; to force them to move east of the Rocky Mountains on pain of being shipped to a starving Japan; to exile them from British Columbia until 1949; and, in 1945 after Japan had surrendered, to try - against the will of Parliament - to deport 10,000 Japanese Canadians: See A. G. Sunahara, The Politics of Racism, Lorimer, 1981; and K. Adachi, The Enemy That Never Was, McClelland and Stewart, 1976.

What was done to Japanese Canadians was done to accomplish political objectives unrelated to the war emergency facing Canada. That emergency provided only the opportunity to use broad emergency powers to achieve unsavory political ends. It was done in the full knowledge that Japanese Canadians were innocent, and posed no threat to Canada's security.

all Japanese Canadian property, both real and personal: See Sunahara at 106.

Judiciary Paralyzed

Not only is there no effective Parliamentary review of orders under the Emergencies Act, judicial review is also at best a hollow exercise. The Emergencies Act is better than the War Measures Act, which limits review by the courts to the question of whether an emergency in fact exists, because the Emergencies Act also permits the courts to review the reasonableness of the cabinet's action. However, the onus is on the victim of an order to prove to the court either the absence of an emergency or the unreasonableness of the order: See p 50-51 below.

Putting the onus on the victim was what kept the King Cabinet safe from judicial review under the War Measures Act. A bona fide emergency existed in 1942; Canada was at war. However, Japanese Canadians, incarcerated in detention camps, were in no position to obtain the evidence that would prove their incarceration was unreasonable. That evidence could be found only in privileged Cabinet documents, documents that remained classified for 30 years.

Had the Cabinet been required to justify its actions in 1942, its claims that Japanese Canadians were uprooted for

p. 31 below. One of the things Parliament can do is to pass laws that ignore certain Charter rights, including the right to life, liberty and security of the person.

It is not yet known whether Parliament can delegate to the Cabinet this power to pass laws that overide the Charter, or whether it has done so in s. 38 of the Emergencies Act. There are arguments both ways: See p. 32 - 35 below. If the overide power has been delegated, then skillful drafting of orders which ignore Charter rights would cut off enforcement by the courts of the Charter rights of the victims of those orders, because there would be no rights to enforce: See Mayrand J.A.'s comments in Alliance des Professeurs de Montreal et al v. Attorney-General de Quebec (1985) 21 D.L.R. (4th) 354 at 356.

Cabinet Not Accountable

To presume that the Cabinet would always use its emergency powers properly is, at best, naive. To make that presumption it is necessary to ignore the realities of history: that in emergencies, errors and abuses occur, and that the wise nation erects safeguards by making the Cabinet accountable. The Emergencies Act fails to make the Cabinet accountable to the Canadian people. Until we make the

Nowhere is the term "well-being" explained. We are of the view that not only must any definition of "national emergency" be put in the body of the Act, but also, that the definition chosen must conform to international law.

Definition Offends International Law

The International Covenant on Civil and Human Rights (hereafter the "Covenant") to which Canada is a signatory, permits derogation of rights only where an emergency "threatens the life of the nation": Article 4. While we note that the Covenant is acknowledged in the preamble of the Emergencies Act, we are of the view that this acknowledgement is not sufficient to restrict the definition of "national emergency" within that Act to emergencies that in fact threaten the existence of Canada as a nation.

Our objections arise from inconsistencies within the Act. A preamble to an Act cannot be used "to restrict or extend the otherwise plain meaning of the body of the Act": A.I. MacAdam and T.M. Smith, Statutes: Rules and Examples, Butterworths, 1985, at 46. The definitions of international emergency (s. 25) and war emergency (s. 35) in the proposed Act on their plain meaning contradict the Covenant. Both permit emergency powers to be invoked when the alleged emergency involves only a threat to the security of a country in which one of Canada's allies has "political,

by South Africa to the "security" of Zambia to be sufficient to permit the Canadian Cabinet to declare a 120 or 360 day emergency with all their attendant powers, even where that threat raises no risk to Canadian sovereignty?

We are of the view that "national emergency" must be defined within the body of the Act as "a direct threat to the continued existence of Canada as a nation." Further, since the declaration of an emergency is normally an admission that the regular institutions of the society cannot cope with the crisis, we feel that the definition of "national emergency" should include an acknowledgement that the normal institutions have failed or are about to fail.

A clear definition of "national emergency" is necessary if Parliament and the courts are to safeguard Canadians. A definition provides a standard against which Parliament and the courts can measure the claims of a Cabinet that they need emergency powers. The onus must be on the Cabinet to prove that there is an emergency justifying the transfer of Parliament's powers to the Cabinet.

RECOMMENDATION 2.:

> "National emergency" should be defined as a threat to the life or independence of Canada of such intensity that the normal administrative institutions have failed, have been rendered incapable of continuing to function, or are unable to handle the specific threat.

A: PUBLIC WELFARE EMERGENCY:

It is our position that not only is the definition of a public welfare emergency unclear, but also the powers granted the Cabinet during this type of emergency seriously encroach on provincial powers, duplicate existing provincial measures, and, are unnecessary and without historical precedent.

Definition Unclear

The "public welfare emergency" includes natural disasters, disease, accidents, pollution, and "breakdown in the flow of essential goods, services or resources" that "may result in a danger to life or property, or social disruption so serious as to be a national emergency.": Section 3, Emphasis added. It would seem, therefore, that any disruption, or only the potential for disruption, in the Canadian economy would permit Cabinet to encroach on provincial powers and confiscate property.

We understand that amendments have been proposed that attempt to restrict the application of this Part of the Act to "breakdowns" that result from disasters. While we urge that this amendment be adopted, we are at a loss to discover what a federal Cabinet could do to end such "breakdowns"

sponsored database of trained disaster relief personnel and the equipment they would need would be less expensive and would avoid the danger of abuse of emergency powers.

No Precedent

Further there has been no demonstrated historical need for such powers. It has been suggested that the purpose of this section is to enable federal authorities to compel service from Canadians during a national disaster. Yet there is no suggestion that Canadians have ever refused to provide such service. The historical record is to the contrary. Moreover provincial laws already exist that cover this difficulty. If the existing laws are inadequate, and we note no suggestion or evidence of such inadequacy, then the proper course of action is not to give arbitrary emergency powers to the Cabinet. If existing laws are inadequate they should be reformed so that all Canadians know at all times what is expected of them.

RECOMMENDATION 3:

> Since there is no demonstrated need for special "public welfare emergency" powers such powers should not to be included in any emergency powers legislation. Rather such emergencies should be handled under normal criminal and regulatory legislation and by federal-provincial agreements.

the government to support the need to invoke the War Measures Act, apart from a quote from a letter written by Premier Robert Bourassa: Commons Debates, October 27, 1975, p. 8557. We note also that Bourassa has since denied the need for such extreme measures, and that the government of the day refused to permit any public inquiry into the causes of and justification for the invocation of the War Measures Act in October 1970: Ibid and at 8657 and 8689-8690. The refusal to provide justification, we suggest, implies that there is none.

The terms of the Public Order (Temporary Measures) Act, 1970, supra, also reinforce the absence of demonstrated need for "public order emergency" powers. That Act outlawed the Front de Liberation du Quebec (F.L.Q.) and made membership in it or assistance to its members a criminal offense. It strengthened some police and prosecution powers, but did not expand the powers of the Cabinet.

Powers Already Exist

We are also of the view that the powers to cope with this type of emergency already exist. The Criminal Code has ample provision for dealing with those who do or conspire to do terror, espionage, murder, arson, theft, extortion, assault, fraud or treason. Ample investigative powers already exist, powers which are exercised by our police

control of assembly and movement; the use of property; the designation of "protected areas" and the compulsion of service. Disobedience of such orders is a criminal offense punishable by up to five years imprisonment: Section 17.

The powers given the Cabinet under a "Public Order Emergency" seem to be directed more at controlling the general public, or groups within it, than at halting espionage or "foreign influenced activities detrimental to the interests of Canada." Peaceful demonstrations against government policies can be prohibited. Public services, again undefined, can be placed under the police or military. (Quaere: do "public services" include the media?) Any individual or group of people could be conscripted for "essential services" and in that capacity shipped out of designated "protected areas."

Similar Powers Abused In the Past

Similar powers have been abused in the past. During the Second World War, powers like those granted to the Cabinet in a "public order emergency" were used against Japanese Canadians, for reasons totally unrelated to any emergency. Before the King government decided to uproot all Japanese Canadians in 1942, it toyed with a plan to conscript all Canadian-born males of Japanese ancestry into a Civilian Service Corps which would perform "essential

C: INTERNATIONAL EMERGENCY:

We are of the view that the definition of an international emergency is so broad that it offends international law. Further the powers given the Cabinet under an international emergency include powers that breach the Charter, and, are unnecessary and without precedent.

Definition Offends International Law

As noted above, the definition of an international emergency is very broad. An international emergency can be declared where an act of intimidation or coercion or the real or imminent use of serious force or violence threatens the security or territorial integrity of Canada, of an ally of Canada or of any country in which the "political, economic or security interests of Canada or any of its allies are involved": Section 25 (Emphasis added). Even after this definition is amended to refer only to Canada and its allies, Canadians could be subjected to broad and far-reaching abrogations of their rights and freedoms for 120 days on the basis of a threat which does not place Canada in peril.

As discussed earlier, this definition, on its face, offends the International Covenant on Civil and Human

Korea, and the oil crisis of the mid-1970's. The former was handled by the Emergency Powers Act, 1951, S.C. 1951, c. 5. That Act expressly forbade the Cabinet from passing orders censoring the press, spending money without Parliamentary authorization, and arresting, detaining, excluding or deporting any person: Section 2(2). Parliament had 40 days to annul any order, without closure on debate, and the whole Act automatically expired 14 months later. Ten Orders-in-Council were passed under this Act. Only one dealt with any "security" matter: the Great Lakes Seamen's Security Regulations: SOR/51-121. The rest dealt with matters like the issuance of a steel five-cent coin, and the duty free status of personal gifts from members of the armed forces: SOR/51-136 and SOR/51-567.

The oil crisis also was handled by narrowly drafted legislation passed by Parliament and directed specifically to the needs of Canada at the time. The Energy Supplies Emergency Act, S.C. 1974, c. 52 authorized the Cabinet to impose gas rationing if it concluded that the oil crisis threatened Canada's national security, welfare or economic security: Section 11(1). The order imposing rationing had to be approved by Parliament, which would have three days to debate the issue: Sections 11(2) - 11(9). The 1974 Act strictly limited the duration of rationing orders and provided that the entire Act would expire in two and one-half years: Sections 35 and 37. It was never used.

industry or service; control all property including ordering it forfeit to the government; arbitrarily enter any premises to search for and seize anything therein; conscript any individual or group for "essential service"; designate "protected areas" and exclude people from them; prevent Canadians from leaving Canada; deport anyone who is not a Canadian or a permanent resident of Canada; control the Canadian end of international finance; spend money in excess of limits imposed by Parliament; and delegate powers to any Minister to take political, diplomatic or economic actions: Emphasis added.

It does not take much imagination to envision how each power could be misused, particularly when exercised in secrecy. Two are particularly draconian. The ability to delegate powers to any Minister could legalize a dictatorship by one Minister. Consider how much worse things could have been for Japanese Canadians if all the powers available under an international emergency had been delegated to the only Minister from British Columbia in the King Cabinet, a virulently anti-Japanese racist who believed that ridding Canada of Japanese Canadians would guarantee the election of his party in B.C.: Sunahara at 101 and 140.

The power to spend money in excess of limits set by Parliament suggests "Irangate"-like operations especially, when combined with the ability to pass secret orders. The

orders without Parliamentary approval, and to arrest, detain, exclude or deport any person: See p. 24, supra.

Powers Offend Charter of Rights

In addition, the Emergencies Act tries to give the Cabinet powers not even Parliament possesses. The Act tries to prohibit Canadians from travelling outside Canada. Section 6 of the Charter of Rights gives Canadians the right to leave Canada which right cannot be abridged under section 33, the override section of the Charter. The power in Section 28 of the Emergencies Act preventing a Canadian leaving Canada, therefore, is outside the power of Parliament and would be struck down by the courts. Parliament cannot delegate to the Cabinet what it cannot do itself.

Since the powers of Cabinet under the Emergencies Act can only be those of Parliament, there is no need that they be exercised by any body other than Parliament. Granting far-reaching and uncontrolled powers to the Cabinet is unnecessary and a dangerous invitation to the Cabinet to abuse its powers, as it has in the past.

RECOMMENDATION 6:

The "international emergency" part of this Act should be withdrawn. The usual practice of having Parliament

We repeat our recommendation on that occasion:

RECOMMENDATION 7:

> Any delegation of emergency powers by Parliament to the Cabinet must be predicated upon a threat to the continued existence of Canada itself.

Powers Offend the International Covenant

The proposed Emergencies Act offends the the International Covenant on Civil and Human Rights because the powers given to the Cabinet in a war emergency are unrestricted. The Covenant limits derogation of civil and human rights in time of emergency to those "strictly required by the exigencies of the circumstances" and which do not involve discrimination "solely on the ground of race, colour, sex, language, religion or social origin": Article 4. In contrast the Emergencies Act empowers the Cabinet to make whatever orders and regulations it deems "reasonably necessary or advisable for dealing with the emergency": Section 38. Reasonableness, not strict necessity, is the only limit on the use of war emergency orders. Moreover, because in a war emergency the Cabinet may be able to make orders that override Charter rights, the Cabinet may be able to discriminate on the basis of race, religion etc..

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 its 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

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

Parliament should not strip itself of its control over Canadian law by handing broad powers to the Cabinet in the absence of a demonstrated need. Our criminal law and the C.S.I.S. Act provide our elected officials, our police and our security officials, with ample powers to control the enemies of the state. History has shown that the Canadian people will readily cooperate with their government in time of emergency. There is no need to give the Cabinet special war powers beyond economic and administrative powers. Powers that encroach on the rights of the provinces or on the rights of individuals should be retained by Parliament.

RECOMMENDATION 8:

> "War emergency" powers should be limited to economic and administrative powers. Parliament should retain any powers that could be used to abrogate civil and human rights.

RECOMMENDATION 9:

> If war emergency powers are to be granted to the Cabinet, then:
>
> > (a) the orders and regulations exercising such powers must be limited to measures strictly necessary and directly related to the emergency in question; and,
> >
> > (b) the burden of proving that the orders are strictly necessary and directly related to the emergency must rest with the Cabinet.

RECOMMENDATION 10:

> The Emergencies Act must expressly state that the powers delegated to the Cabinet do not include a power to make laws overriding Charter rights.

these alleged safeguards will not work. Each of the Orders stripping Japanese Canadians of their rights and freedoms was placed before Parliament, although Parliament under the War Measures Act had no power to revoke them. On each occasion the Minister responsible provided Parliament with a plausible reason for the order, or an assurance that the order was intended for a specific, benign purpose. In each case the reason given Parliament turned out to be not quite accurate, and on occasion a bald lie.

Take for example of the Order-in-Council that stripped Japanese Canadians of all they owned. When it was placed before Parliament in January of 1943 the impression was given that the order would cause only a few minor administrative changes in the handling of Japanese Canadian property, changes that would protect Japanese Canadians from predatory buyers and permit the sale of rapidly depreciating properties which the owners wished to sell. The real purpose only became clear two months later when the government made it clear that it intended to sell not only all real property owned by Japanese Canadians, but also their personal possessions: A.G. Sunahara, The Politics of Racism, 1981: Lorimer at 101 -106.

It was the same story with the Orders-in-Council under which the government tried to deport 10,000 Japanese Canadians in 1946. Parliament had refused in November 1945

The draft Act limits the duration of each type of emergency. But, while Parliament must confirm each extension of emergency power, debate on the confirming motion is limited to the question of whether there is, in fact, an emergency. The Orders-in-Council that automatically continue upon confirmation of an emergency are not open for review.

Consider again the Japanese Canadian example. If the new Act had existed in 1941, Parliament would have been asked every 360 days while the war continued and every 120 or 60 days thereafter, to confirm the continued existence of an emergency. Since a state of war existed until September 2, 1945, and the "emergency" of postwar adjustment continued thereafter, undoubtedly Parliament would have continued the Cabinet's emergency powers and with them, automatically, the orders abusing Japanese Canadians.

Unless the safeguards are vastly improved, Parliament will remain as ineffective under the Emergencies Act as it was under the War Measures Act.

RECOMMENDATION 11:

No order or regulation should take effect before it is approved by Parliament;

RECOMMENDATION 12:

Parliamentary debate on any order or regulation affecting Charter rights of individuals or any group definable on the basis of age, race, ethnicity, sex,

The new Act tries to temper the oppressive implications of secret orders with a Parliamentary Review Committee. It requires that secret orders be referred to that Committee within 15 days, or, if the Committee does not exist, within 5 days after it is established: Section 59(2). The Committee then has 30 days to review and to amend or revoke the secret orders: Section 60(4).

The Parliamentary Review Committee is a sham. It does not have to be in existence during the tenure of a secret order. The Emergencies Act uses the permissive "may" when referring to the establishment of the Review Committee, not the mandatory "shall": Section 60(1). The Emergencies Act also allows the referral of a secret order to the Review Committee to be delayed until 5 days after the Review Committee is established: Section 59(2). There is nothing to prevent a Cabinet from delaying the appointment of the Review Committee until after the purpose of the secret orders has been accomplished.

The Parliamentary Review Committee also has only one chance to strike a secret order and it has only 30 days in which to do it. Unless a Minister responsible for an order is so stupid as to tell the Parliamentary Review Committee the real reason for a bad order, how is the Review Committee to find out the truth in a mere thirty days in order to stop such orders? Once the 30 days is up, no matter what the

6.NO INDEPENDENT REVIEW

Independent review of the use of emergency powers has long been advocated by those concerned with civil liberties: See Canadian Civil Liberties Association, Emergency Powers and the War Measures Act: Submission to the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, October 3, 1979. Yet it is completely ignored and expressly excluded from the draft Emergencies Act.

Review Controlled by the Offending Cabinet

The only review permitted is an internal review by the Minister: Section 46(1). An internal review is obviously intended to minimize scrutiny of Cabinet conduct after the fact. It is not intended to achieve justice for the victims of bad orders. Like the review of the sale of Japanese Canadian property by the King government after the Second World War, the Minister will look at the administration of an order, not the propriety of the order itself: See Sunahara at 151 - 160.

Moreover, whether any review is made at all is entirely within the control of the Cabinet that made the bad orders in the first place: Section 47. The Cabinet has a strong

Parliament Must Monitor And Censure Use of Emergency Powers

The Emergencies Act excludes all practical Parliamentary review of the use of emergency powers. As noted above Parliament has one chance to amend or revoke an order, a chance it must exercise within 20 days. After that Parliament can do nothing, except to bring down the government and precipitate an election, a highly unlikely occurrence. It is our position that Parliament must retain at all times the power to monitor and censure the administration of emergency orders and regulations.

RECOMMENDATION 17:

(a) Within three days of the proclamation of an emergency the Steering Committees of the House of Commons and the Senate must appoint an all-party Special Parliamentary Committee to monitor the implementation of the orders passed by the Cabinet under its emergency powers and to make motions to Parliament for the amendment or revocation of orders or regulations where warranted;

(b) To carry out its mandate the Special Committee shall have full power to investigate use of all orders and regulations, including the right to compel testimony from Ministers of the government and all servants and agents of the Crown and all military personnel;

(c) Debate upon a motion to amend or revoke an order or regulation shall be without closure;

(d) A vote on a motion to amend or revoke an order or regulation shall be a free vote.

7. NO PRACTICAL ACCESS TO THE COURTS

case on emergency powers: "Who could dispute [that a Minister acted in good faith] and disputing it prove the opposite.": Liversidge v. Anderson [1942] A.C. 206 (H.L.) at 226.

Again the Japanese Canadian example proves how such immunity can be abused. When Japanese Canadians were uprooted from their homes in 1942 they were required to turn over to the Custodian of Enemy and Evacuee Property all property in excess of the 75 pounds per person that they were permitted to take with them. The Custodian accepted that property "in trust". He later sold it against the instructions of its owners. When Japanese Canadians sued the federal government to stop the sales the whole case was delayed three years while the judge, a former Minister in the King Cabinet that uprooted Japanese Canadians, deliberated a preliminary issue. While he procrastinated all Japanese Canadian property was sold off: See Sunahara, at 109.

The circumstances reek of bad faith. But any evidence to prove that bad faith was locked away for 30 years in classified documents. By the time it was known those who had acted in bad faith were dead.

Legal Challenges Slow And Expensive

The problem is that not only is the onus of proof on the victim, but it is a very heavy onus. To win he or she would have to prove by "very clear evidence" that no emergency existed, or that there is no "rational basis" for the declaration of the emergency: Cooperative Committee on Japanese Canadians v. Attorney-General of Canada etal. [1947] 1 D.L.R. 577 (J.C.P.C) at 585 - 586 per Lord Wright; and, Reference Re Anti-Inflation Act (1976) 68 D.L.R. (3d) 452 (S.C.C.) per Laskin C.J. at 498.

Since the Emergencies Act is silent as to who bears the onus of proving the unreasonableness of an order, it will rest with the party contesting the law. That is, the victim of a bad order will be the party that must produce very strong evidence that the order was not reasonably connected to the emergency. In all previous cases here, in England, and in Europe, the courts have always assumed that the government has acted reasonably: See R v. Halliday [1917] A.C. 260 (H.L.) at 268-269; Ireland v. United Kingdom (1978) I.L.R. 190.

Insurmountable Evidentiary Problems

The victim also faces insurmountable evidentiary problems. The victim does not have access to government documents. He or she, especially if incarcerated, has no way to find out the real facts. There is no discovery

In any review of the use of emergency powers or any trial of an accused charged under an emergency order, the onus of proving that the emergency exists and the order is reasonable must rest with the Cabinet.

Habeus Corpus

There is one final way a person could challenge his detention under a war emergency order: the ancient writ of habeus corpus. The Minister of National Defence has stated that "We will not be suspending the right to habeus corpus.": Minutes, the Legislative Committee on Bill C-77, February 23, 1988. What the Minister forgets is that this Act is not being written for his government only. It may last a century. Habeus Corpus is a Charter right that can be overridden. Historically it is one of the first rights suspended in a war emergency, at least in Canada: See Re Beranek (1915) 24 C.C.C. 252. This government may have no intention to suspend habeus corpus, but it cannot speak for future governments.

8. NO PRACTICAL COMPENSATION

Compensation Controlled By Cabinet

The proposed Emergencies Act leaves the issue of compensation for the misuse or abuse of emergency powers in the hands of the Cabinet that misused or abused those

Court Judge, who must satisfy himself that the victim is fully aware of his rights and not under duress. Upon payment or settlement, the Crown should become subrogated to the victim's claim, and thereby, obtain a right of action against the offending Minister or other defendant.

Finally there should be no limitation period for claims for compensation under this Act. Like Japanese Canadians, the victims of orders or regulations under the Emergencies Act may not learn the whole facts supporting their claim for years after the wrong is committed. To deny compensation because those who misuse their power are able to hide the evidence, would not only be horribly unjust, it would repeat the wrong done Japanese Canadians, a wrong that continues so long as redress continues to be denied them.

RECOMMENDATION 19

> Compensation must be determined by a tribunal, headed by a Superior Court Judge, which tribunal is appointed independently of the Cabinet by the Special Parliamentary Committee for the Review of Orders and Regulations Under the Emergenies Act

RECOMMENDATION 20

> There must be no limitation on the time for making a claim for compensation under the Emergencies Act.

SUMMARY:

(b) Any delegation of powers must be coupled with strong safeguards and practical procedures for the review of the use of emergency power and for ex post facto redress.

Since the Emergencies Act fails so badly to safeguard against executive abuse, we request:

1. Bill C-77 be withdrawn; the War Measures Act be abolished immediately; and the task of drafting general emergencies legislation which balances emergency powers and civil liberties in accordance with the principles of fundamental justice and international law be referred to the Law Reform Commission of Canada.

2. Alternatively, that the Recommendations attached as Schedule A to this Submission be adopted by this Committee to ensure that the Emergencies Act contains all proper and necessary safeguards.

Since there is no demonstrated need for special "public welfare emergency" powers such powers should not to be included in any emergency powers legislation. Rather such emergencies should be handled under normal criminal and regulatory legislation and by federal-provincial agreements.

RECOMMENDATION 4:

The "public order emergency" section of this act should be withdrawn and criminal aspects within it be dealt with by way of amendment of the Criminal Code or the C.S.I.S. Act.

RECOMMENDATION 5:

Any delegation of emergency powers by Parliament to the Cabinet must be predicated upon a threat to the continued existence of Canada itself.

RECOMMENDATION 6:

The "international emergency" part of this Act should be withdrawn. The usual practice of having Parliament deal with each international emergency as it occurs should be retained.

RECOMMENDATION 7:

Any delegation of emergency powers by Parliament to the Cabinet must be predicated upon a threat to the Hcontinued existence of Canada itself.

RECOMMENDATION 8:

"War emergency" powers should be limited to economic and administrative powers. Parliament should retain any powers that could be used to abrogate civil and human rights.

RECOMMENDATION 9:

If war emergency powers are to be granted to the Cabinet, then:

(a) the orders and regulations exercising such powers must be limited to measures strictly

1. The presumption that the Cabinet should be given broad emergency powers when there is no demonstrated need for such powers;

2. A definition of "national emergency" that offends international law;

3. Very broad definitions of emergencies, some of which offend international law;

4. Emergency powers so broad they breach international covenants and invite abuse;

5. Illusory and impractical Parliamentary supervision of the exercise of emergency powers;

6. The power to make secret orders and regulations;

7. Extremely limited recourse to the courts;

8. Immunity from liability for those who abuse or misuse emergency powers;

9. No independent process for awarding compensation for government errors or abuse of power.

In view of these multipl[illegible] view that Bill C-77 solves none of the [illegible]om the history of the War Measures [illegible]f that history we feel that:

1. No emergency powers should be delegated to the Cabinet except in carefully circumscribed legislation tailored to the actual emergency facing the nation;

2. Alternatively, if emergency powers are to be delegated in general emergency legislation, then:

(a) Only economic and administrative powers should be delegated; and,

(b) Any delegation of powers must be coupled with strong safeguards and practical procedures for the review of the use of emergency power and for ex post facto redress.

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9. No independent process for awarding compensation for government errors or abuse of power.

In view of these multiple flaws we are of the view that Bill C-77 solves none of the problems evident from the history of the War Measures Act. On the basis of that history we feel that:

1. No emergency powers should be delegated to the Cabinet except in carefully circumscribed legislation tailored to the actual emergency facing the nation;

2. Alternatively, if emergency powers are to be delegated in general emergency legislation, then:

(a) Only economic and administrative powers should be delegated; and,

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THE EMERGENCIES ACT:

A CRITIQUE AND RECOMMENDATIONS

In the following critique we, the National Association of Japanese Canadians, use our own history to show that the proposed Emergencies Act fails to protect civil liberties in time of emergency. We also make recommendations as to what must be included in any legislation dealing with emergency powers if others are to be spared the suffering experienced by Japanese Canadians during the Second World War.

1. THE UNDERLYING PRESUMPTIONS - ARE THEY SOUND?

The proposed Emergencies Act rests on presumptions that

(a) The federal Cabinet ought to be given broad emergency powers;

(b) Those powers should be minimally fettered;

(c) All orders and regulations made by the Cabinet in time of emergency will be relevant to the emergency and intended to meet the emergency; and,

(d) Any misuse of power will be immediately detected by Parliament which will then quash it.

We find the above presumptions unsound, dangerous and irresponsible. They are the same presumptions that underlie the War Measures Act. To continue them is to deny the lessons of history.

Parliament Powerless

The King Cabinet was able to abuse Japanese Canadians because the War Measures Act, like the proposed Emergencies Act, stripped Parliament of any ability to control the use of emergency powers. Both, in a war emergency, transfer to the Cabinet all the powers of Parliament. However, neither Act provides an effective mechanism for controlling how these extraordinary powers are exercised. The proposed Emergencies Act attempts to improve the situation by giving Parliament one chance, and only one chance, to revoke a bad order or regulation made by the Cabinet.

But even this one chance can be easily circumvented. A future Cabinet, intent on concealing its true objectives, need only misrepresent its intentions for 20 days. Once 20 days has passed, Parliament has no power to review the Cabinet's actions: Section 59(4) and 59(7).

Our history proves how easy it is to hide the true objective. In 1943, the King government, which was intent on destroying the Japanese Canadian community, told Parliament that the order authorizing the sale of Japanese Canadian property was a minor administrative change intended to protect Japanese Canadians. Three months later, that minor administrative change was used to legalize the sale of

reasons of "national security" would have been exploded. Canada's chief military officers would have testified that at no time did they consider Japanese Canadians a threat to Canadian security: Sunahara, at 24, 33, 43, 48, 101-105, and 140. The Commissioner of the Royal Canadian Mounted Police would have acknowledged that the R.C.M.P. had searched diligently, and without success, for evidence of espionage or sabotage by Japanese Canadians: Letter from Comr. S.T. Wood, R.C.M.P., to William Stevenson, Director, British Intelligence, New York City Office, August 5, 1942, Department of External Affairs Archives.

Indeed, the Minister who engineered the abuse of Japanese Canadians relied on the impotence of the courts to accomplish his purpose. As he stated, when urging the Cabinet to buy Japanese Canadian farms at fire sale prices: "Any action we take under the War Measures Act cannot be challenged in the courts.": Sunahara, at 109. The Japanese Canadian experience proves that placing the onus on the victim to prove the unreasonableness of a government order, is, in itself, unreasonable.

Charter of Rights and Freedoms Overridden?

The paralysis of the judiciary will continue despite the Charter, at least in a war emergency. In a war emergency the Cabinet can do whatever Parliament can do: See

Cabinet accountable, our emergency laws will remain a cocked gun in the hands of an uncontrolled Cabinet.

RECOMMENDATION 1.

Emergency powers legislation must be based on the following principles:

1. No special powers shall be given to the Cabinet until and unless the Cabinet demonstrates a real need for such powers; that is, demonstrates that Canada faces a threat to her continued existence which cannot be handled using existing or amended laws and institutions.

2. Parliament, at all times, must be able to:

(i) revoke or modify any declaration of an emergency; and,

(ii) amend or revoke any order or regulation made by the Cabinet under emergency powers.

3. All orders and regulations made under emergency powers must be directly related to alleviating the particular emergency.

4. Whether emergency orders and regulations are, in fact, directly related to the emergency must be reviewable at all times in a court of law, and the burden of proving the direct relationship must rest with the government.

5. Any emergencies legislation must expressly deny the power to override rights guaranteed in the Charter of Rights and Freedoms.

2. DEFINITION OF NATIONAL EMERGENCY

The Emergencies Act is intended to meet four types of "national emergency". That term is defined in the preamble to include "threats to the well-being of Canada as a whole."

economic or security interests". We understand that these definitions may be changed to include only threats to the security of Canada and her allies "so serious as to be a national emergency". However, so long as "national emergency" is defined as a threat to Canada's "well-being", not its continued existance, the definition will continue to offend international law.

We are of the view that the proposed amendment does not go far enough. The event triggering the proclamation of an international or war emergency, emergencies which give immense powers to the Cabinet, still need not be a threat to Canada at all. Indeed, the revised definitions do not even require that the life of the ally nation be in peril. It is sufficient that its "security" is threatened. To conform with the Covenant only emergencies threatening the continued existence of Canada will permit the use of the powers granted the Cabinet under the international and war emergency parts of this Act.

Ally Not Defined

The Emergencies Act does not define "ally". Is this term to include only countries with which Canada has a mutual defence treaty? Does it included all our sister nations in the Commonwealth? Does it include all nations not formally aligned with the Communist bloc? Is a threat

3. EMERGENCY POWERS - ARE THEY REALLY NEEDED?

If Parliament is to fulfill its duty to protect the provinces and the rights of Canadians from abuse by the federal Cabinet, then the first question Parliament must ask is: "Are the emergency powers set out in this Act really needed?" Before Parliament surrenders its powers to the Cabinet, it must determine whether the Cabinet ought to be given those powers. Parliament must consider whether it is in the best interests of the Canadian people that Cabinet, not Parliament, wield these powers.

We submit that the answer here must be "No!" We are very concerned that the definitions of the "emergencies" to which the act applies are vague and broad. Anything out of the ordinary could precipitate the declaration of one or another of the four types of emergencies in this Act. Some emergency powers also duplicate provincial powers, and all seriously encroach upon both provincial rights and the rights of individuals. Further, some of the powers granted are unconstitutional and offend both the Charter and international law. Finally, as we will discuss in a later section, the safeguards against the abuse of emergency powers are totally inadequate.

that either Parliament or the relevant provincial governments could not do as easily.

Provincial Powers Duplicated

It is our view that this type of emergency power is duplicates existing provincial powers. It is a rare natural disaster that is interprovincial in nature or which cannot be handled by provincial organizations. The Criminal Code and provincial legislation already provide the police and disaster authorities with ample powers to control disorder and require service of the citizenry, which has historically been readily volunteered. There already exists provincial environmental legislation to handle pollution, and Parliament and the Legislatures each have the power to legislate the end to "breakdowns in the flow of essential goods, services or resources" in their respective constitutional domains. There is precedent for cooperation between provinces and for provinces to request federal assistance.

A federal "public welfare emergency" also implies a duplication of bureaucracy and hence of expense. We are of the view that Canadians would be better served by strengthening provincial disaster services and interprovincial agreements for mutual assistance in the event of disaster. Federal funding and a federally

B: PUBLIC ORDER EMERGENCIES:

The "public order" emergency part of this Act again raises the question: Should emergency powers be given in the absence of historical precedent or demonstrated need, particularly where the enumerated powers are inconsistent with the stated purpose for the emergency powers?

No Precedent or Demonstrated Need

Historically Canada has never needed special public order powers. Whenever the War Measures Act or some other emergency Act (The National Transition Powers Act of 1945, S.C. 1945, c. 25; the Emergency Powers Act of 1951, S.C. 1951, c. 5; the Public Order (Temporary Measures) Act, 1970, S.C. 1970, c. 2; the Energy Supplies Emergency Act, S.C. 1974, c. 52) has been in force in Canada, the normal authorities were fully functioning: the police, the courts and the military carried out their duties as required by law; Parliament and the Legislatures carried on business as usual. There has never been any civil disorder that ever threatened the existence of the state.

We acknowledge the "F.L.Q. Crisis" of October 1970. We note, however, that in the 17 years since that kidnapping and murder, not one shred of evidence has been produced by

forces and by C.S.I.S. under supervision. Again, if the powers in the Criminal Code or the C.S.I.S. Act are not adequate, which has never been suggested, then the proper procedure is to amend the Criminal Code or the C.S.I.S. Act.

Powers Inconsistent With Purpose

Our doubts about the need for public order emergency powers are reinforced by that fact that the powers given the Cabinet under a public order emergency are inconsistent with the stated purpose for declaring a public order emergency. A "public order emergency" can be declared when there occurs a "threat to the security of Canada." Section 14 For the definition of the "threats to the security of Canada" the new Act looks to the Canadian Security Intelligence Service Act S.C. 1984, c. 21. The C.S.I.S. Act defines threats as such things as espionage, foreign influenced activities detrimental to the interests of Canada, activities in support of the threat or use of serious violence, and activities directed at the overthrow by violence of the government of Canada, but not "lawful advocacy, protest or dissent": C.S.I.S. Act at Section 2.

The reference to the C.S.I.S. Act suggests that it is not intended that public order emergency powers be used to control legitimate protest. Yet the orders and regulations that can be made during this type of emergency deal with

services" "within and without" Canada: See Muriel Kitagawa, This Is My Own, Talonbooks, 1985. at 89 - 90. Japanese Canadians were uprooted under orders that designated a "protected area" 100 miles deep along the Pacific Coast: Order-in-Council P.C. 1486, February 24, 1942. Once expelled, all Japanese Canadians everywhere in Canada were denied freedom of movement and forbidden to travel more then 12 miles from their homes without a permit: P.C. 2483, April 4, 1942 and P.C. 8173, September 8, 1942. Japanese Canadian property was "temporarily" consigned in trust to a Custodian who later sold it all and took the cost of confining Japanese Canadians in the detention camps from the proceeds: P.C. 469, January 23, 1943; See also Sunahara, at 101-111.

The King government misused "national security" to try to justify its abuse of Japanese Canadians. That precedent, together with the the absence of demonstrated need for such powers, highlights the dangers inherent in giving unnecessary powers to the Cabinet.

RECOMMENDATION 4:

> The "public order emergency" section of this act should be withdrawn and criminal aspects within it be dealt with by way of amendment of the Criminal Code or the C.S.I.S. Act.

Rights. That Covenant requires that there be a threat to the life of Canada as a nation before civil or human rights can be abrogated. The Emergencies Act requires only the possibility (not probability) of a threat to the "security" (not the continued existence or life of) an ally of Canada, a threat which might affect the "well-being" of Canada.

This is totally unacceptable. We are of the view that emergency powers should only be exercised in the face of a threat to the sovereignty of Canada itself, and only where that threat cannot be handled by existing or amended laws, procedures, and institutions.

RECOMMENDATION 5:

> Any delegation of emergency powers by Parliament to the Cabinet must be predicated upon a threat to the continued existence of Canada itself.

Powers Contrary to Precedent

Further, we are of the view that the transfer of the powers described under this type of emergency are unnecessary and without precedent. Indeed, the precedent is to the contrary.

Canada has faced two "international" emergencies since the Second World War: the United Nation "police action" in

Both the Emergency Powers Act, 1951 and the Energy Supplies Emergency Act show how an international emergency should be handled. In both cases only minimal and necessary powers were transferred to the Cabinet, and Parliament maintained control over the exercise of those powers.

The contrast between these Acts and the Emergencies Act is striking. Where the practice has been to restrict Cabinet powers in international emergencies, the Emergencies Act gives the Cabinet vast and unprecedented powers, detailed below. It also cripples Parliament by giving Parliament only 20 days and three hours of debate in which to decide whether any order or regulation should stand or fall: Sections 59(4) and 59(7). More importantly, Parliament gets only one chance to stop a bad order. There is no provision for the review of orders or regulations when Parliament is asked after 120 days to continue the declaration of an international emergency: Section 58.

Powers Excessive and Unnecessary

The powers delegated under an international emergency are also excessive and unnecessary. They are so broad that using them the Cabinet could do everything that was done to Japanese Canadians during the Second World War, except the attempt to deport 10,000 Japanese Canadians. In an international emergency the Cabinet can take over any

Cabinet can pass secret orders under any type of emergency: Section 59(2). Under the international emergency powers, therefore, it would be perfectly legal for the Cabinet, or a Minister delegated by it, to divert money from the budget of his department to a Swiss bank account for the purpose of financing the sale of arms to Iran and to use the profits to fund insurrection in Nicaragua, even when Parliament had expressly forbidden such things. Indeed, as we will show later, neither Parliament nor the Canadian people would ever find out about the secret orders: See pp. 42 - 44 below.

Precedent Restricts Powers

Historically Parliament has usually kept firm control of its powers. The one aberration is the War Measures Act, an acknowledged travesty, rammed through Parliament in 3 days in a fit of misguided patriotism at the beginning of the First World War. Its flaws glaringly obvious by the end of the Second World War, it was expressly avoided by Parliament during the Korean War.

Indeed during the Korean War, Parliament expressly forbade the Cabinet to use some of the powers the Emergencies Act would automatically give the Cabinet upon declaration of an international emergency. During the Korean War the Cabinet was expressly forbidden to pass money

deal with each international emergency as it occurs should be retained.

D: WAR EMERGENCY

We are of the view that the definition of a war emergency, like that of an international emergency, is so broad that it offends international law. Further the powers given the Cabinet under a war emergency breach both the Charter and the International Covenant on Civil and Human Rights. Further only the economic powers have proved historically useful. Those affecting civil and human rights have been more abused than constructively used.

Definition Offends International Law

Assuming that the Emergencies Act will be amended as the Minister of National Defence indicated on February 23, 1988, a war emergency could be declared where there exists a war or other armed conflict, real or imminent, involving Canada, or an ally of Canada: Section 35. We have the same objections to this definition that we have made above with respect to the definition of international emergency. The definition of a war emergency would allow rights to be abrogated without a threat to the life or continued existence of Canada as a nation, while the Covenant permits derogation of rights only when Canada is itself in peril.

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

its original delegation of powers to expressly forbid the Lieutenant-Governor in Council to pass laws inconsistant 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.

administrative in nature: Consolidated War Orders and Regulations Vol 1, January 1943.

More importantly, non-economic powers under the War Measures Act have been more abused than constructively used. In the First World War they were used arbitrarily to incarcerate innocent Austrian, Hungarian, German and Ukrainian Canadians in response to public demands for "action against the Hun": James R. Carruthers, "The Great War and Canada's Enemy Alien Policy", 4 Queen's L.J. 43. In the Second World War, in addition to the abuse of Japanese Canadians, they were used to confiscate the property of Ukrainian organizations and of Canadians married to citizens of German-occupied countries: See Laurent v The Queen (1975) 66 D.L.R. (3d) 764.

The few examples of legitimate use of non-economic powers, such as the banning of the German Bund, a Nazi-infiltrated society for Germans living outside the Reich, could as quickly have been done in legislation passed by Parliament. Parliament could then have retained the power to amend or revoke such legislation. Parliament, with its broader base of interest and opinion, and with an Opposition whose job it is to scrutinize and criticize, is more likely to use its powers responsibly, as demonstrated by the legislation in force during the Korean War.

4. ILLUSORY AND IMPRACTICAL SAFEGUARDS

At first glance the proposed Emergencies Act appears to be full of safeguards. It has nice titles like "Compensation" and "Parliamentary Supervision". It has sunset clauses and Parliament must approve both the declaration of an emergency and the continuation of the Cabinet's emergency powers beyond the time limits for each type of emergency. It also improves upon the War Measures Act by allowing Parliament to revoke orders and regulations made by the Cabinet under its emergency powers.

Safeguards Easily Avoided

Unfortunately it is an illusion. The safeguards are totally inadequate. They do not work because they are not practical. Parliament gets only one chance to stop the declaration of an emergency and only one chance to stop bad orders or regulations. Parliament is hampered in its efforts by unrealistic time constraints that make impossible a meaningful review of use of emergency powers.

Historical Proof

The history of how Japanese Canadians were abused under the War Measures Act during the Second World War proves

to give the Cabinet the power to deport Canadians in the law that was to replace the War Measures Act in January 1946. The Cabinet passed the deportation orders in December 1945 in defiance of Parliament, and then told Parliament that those being deported had requested to be sent to Japan. It was not until three months later, after massive protests by civil rights groups, that the majority of Members of Parliament understood the alleged requests for deportation had been coerced: See Sunahara, supra, at 118 - 124, 127 - 128, 136 - 140.

Parliament Powerless After 20 Days

Under the new Act Parliament would be equally powerless. To amend or revoke an order under the new Act, Parliament has only 20 days in which to identify that the order is flawed, collect evidence of a contrary purpose for the order, organize a motion by 30 M.P.'s or 15 Senators, and, with only three hours allowed for debate, convince a majority of Parliamentarians that changes must be made or the order revoked: Section 59. Once this 20 days is passed, or a motion to revoke has failed, nothing can be done.

Orders Automatically Continue

Parliament cannot even stop a bad order when it confirms the continuation of the Cabinet's emergency powers.

language, religion, or national or social origin must not be subject to closure;

RECOMMENDATION 13:

Any order or regulation must be able to be revoked at any time upon a motion by a Special Parliamentary Committee.

RECOMMENDATION 14:

The operation of all orders and regulations must be subject to the review of a Special Parliamentary Committee with full powers of investigation and a duty to report all misuse and abuses to Parliament and to make motions to amend or revoke orders being abused or misused.

5. SECRET ORDERS AND REGULATIONS

Available in All Emergencies

The proposed Emergencies Act permits the Cabinet to treat Canadians worse than the King Cabinet treated Japanese Canadians, and neither Parliament nor the Canadian public would ever know anything about it. This draconian possibility arises from the fact that the Emergencies Act, unlike the War Measures Act, permits secret orders and regulations to be passed under all types of emergencies and at the sole discretion of the Cabinet: Section 59(2).

Review Committee A Sham

Committee subsequently discovers, it can do nothing. It cannot even report to Parliament.

The Perfect Scenario for Abuse of Power

The Emergencies Act sets up the perfect scenario for covert operations of dubious morality. For example, there would be nothing to stop the Cabinet from ordering that government funds be transferred to a Swiss bank account in order to finance covert "Irangate"-type operations.Since secret orders take effect before they are approved by the Parliamentary Review Committee, the deed would be done before the Committee ever sees the orders. Bound by their secrecy oath (which would no doubt be reinforced by heavy penalties), the Committee members could not even tell Parliament. Indeed, if the Cabinet has the ability to override Charter rights, the example could be much worse. The potential abuse of this power is limited only by the imagination of the Cabinet wielding it.

We find the prospect of secret orders repugnant and an anathema to the values of Canadian society.

RECOMMENDATION 15:

> Secret orders and regulations must never be permitted under emergency powers.

political interest in minimizing criticism of its actions. If any review is permitted at all, it will be structured to protect the Cabinet.

Review Powers Historically Abused

Again Japanese Canadian history provides proof. In 1947 the King Cabinet set up a Royal Commission into the sale of Japanese Canadian property. Cabinet documents now available show that the mandate of that Royal Commission was deliberately narrowed to exclude most of the economic losses the Cabinet knew Japanese Canadians had suffered. The mandate was narrow in order to minimize the awards to Japanese Canadians and the political implication that the whole policy of selling off all Japanese Canadian property was wrong: Sunahara, at 152 - 153.

Consider also October 1970. The Trudeau government refused to permit a public inquiry into the causes of and justification for the invocation of the War Measures Act in October 1970: Commons Debates, October 27, 29 and 30, 1975, at 8557, 8657, 8689 - 8690. One can only presume that that inquiry was refused because of what it might discover.

RECOMMENDATION 16:

Review of the use of emergency powers must be independent of the Cabinet.

The Emergencies Act effectively cuts off practical recourse to the Courts. There are only three ways victims of orders or regulations can appeal to the courts:

(i) they can sue under the Crown Liability Act;

(ii) they can contest the validity of the legislation in a long and very expensive reference to the courts; or,

(iii) if charged with breaching an order or regulation made under the Emergencies Act, they can defend on the grounds that there is no emergency or that the order is unreasonable.

None of these methods is practical.

Crown Liability Act Virtually Useless

The Crown Liability Act does not protect rights. It only permits tort actions against government officials. If a Japanese Canadian was injured in a motor vehicle accident while being transported to a detention camp and the accident was caused by the negligence of a driver employed by the government, then the Japanese Canadian could sue for compensation for his physical injuries, but not for his illegal detention.

Civil Suits Prohibited

Civil suits against the Crown are expressly excluded unless the allegation is that the government official being sued acted in bad faith: Section 45(1). But, as the eminent English jurist, Lord Atkin, remarked in a landmark

Neither a Reference contesting the validity of an order or regulation, nor a challenge by way of criminal defence, are practical methods to enforce civil and human rights in time of emergency. Both are extremely expensive. While the court can award part of the cost of a successful application in a reference, acquitted accused get nothing. Moreover, both procedures would take years to reach the Supreme Court of Canada and a definitive decision.

The Japanese American cases show best show this impracticality. Uprooted in 1942, Japanese Americans regained their freedom only in December, 1944 when the Supreme Court of the United States ruled that the American government could not exclude loyal Japanese Americans from any part of the United States open to other loyal Americans: Ex Parte Endo, (1944) 323 U.S. 283; See also Peter Irons, Justice At War, 1983, Oxford U. Press.

Impossible Onus of Proof

Anyone contesting an order or regulation, whether by a reference or a defence to a charge, faces an insurmountable difficulty: the onus of proof. To succeed the victims of an order would have to prove with credible evidence that there was no emergency, or, that the order or regulation was not "reasonably necessary or advisable for dealing with the emergency": Section 38(1).

process in criminal actions and the reference would very quickly run into claims of privilege on the basis of "Cabinet confidences" and "national security". Under the Access to Information and Privacy Acts, S.C. 1980-81-82, c. 111, Sch. I and II, all documents that have been considered by the Cabinet can be withheld for 20 years. There is not even a "harms test", as there is with "national security" documents, a test which would enable the court to determine whether disclosure would imperil national security: Access to Information Act, s. 69, Privacy Act, s. 70. There is also no obligation on the courts to accept statistical or other secondary or historical evidence the accused might be able to find in the public domain: See Reference Re Anti-Inflation Act, supra. These were exactly the problems facing the accused in Hirabayashi v. U.S.A. (1943) 320 U.S. 81 whose conviction was recently overturned on the basis of evidence discovered 40 years after the fact: Hirabayashi v. U.S.A., 9th Circuit Court of Appeals, September 24, 1987.

Independent review of the use of emergency powers requires that the onus of proving the existence of an emergency and the reasonableness of the orders made must be placed upon the only party capable of positive proof: the Cabinet. Requiring the victim of an emergency order to prove a negative is patently unreasonable.

RECOMMENDATION 18:

powers. The fact that the wrongs done Japanese Canadians remain uncompensated over 45 years after they began, is proof that leaving compensation solely in the hands of the perpetrator of the wrong, guarantees injustice. Wronged by a Cabinet advised by racists that believed it moral to win votes by discriminating against non-whites, Japanese Canadians still await an official acknowledgement of that wrong, reform of the laws under which they were abused, and a settlement that, by virtue of being a negotiated settlement, will acknowledge that they, and all non-whites in Canada, are first class citizens of Canada.

Criteria To Ensure Independent Review

If the victims of bad orders or regulations must depend upon the Executive to compensate them, they will wait forever in vain, as Japanese Canadians have waited. If justice is to be achieved, compensation must be awarded independently of the Cabinet. The tribunal that determines compensation must be headed by a Superior Court Judge, and given full investigative powers to ensure that no Cabinet again hides its transgressions. The Superior Court Judge should be selected by the Special Parliamentary Committee reviewing the use of emergency powers. Any award made by that Judge would be immediately enforceable against the Crown. Any settlement between the Crown and the victims of bad orders or regulations must be approved by the Superior

The Emergencies Act does not go far enough to prevent the problems shown in the history of the War Measures Act. It does not accomplish the government's stated objective of replacing the War Measures Act with legislation that would prevent a recurrence of what happened to Japanese Canadians during the Second World War. It ignores the historical fact, proved by the treatment of Japanese Canadians, that our politicians have acted improperly in the past and fails to safeguard against similar improper use of emergency powers.

At a time when other nations are cutting back the emergency powers of their governments and protecting the rights of their citizens, we are expanding our executive powers and leaving our citizens without effective protection. If the Emergencies Act is passed into law, and if we, like Germany in 1933, elect ourselves a leader who does not hesitate to use immoral means to achieve political ends, we will have only ourselves to blame for the resulting abuses of power.

Accordingly we urge:

1. No emergency powers should be delegated to the Cabinet except in carefully circumscribed legislation tailored to the actual emergency facing the nation;

2. Alternatively, if emergency powers are to be delegated in general emergency legislation, then:

    (a) Only economic and administrative powers should be delegated; and,

SCHEDULE A

RECOMMENDATIONS

RECOMMENDATION 1.

Emergency powers legislation must be based on the following principles:

1. No special powers shall be given to the Cabinet until and unless the Cabinet demonstrates a real need for such powers; that is, demonstrates that Canada faces a threat to her continued existence which cannot be handled using existing or amended laws and institutions.

2. Parliament, at all times, must be able to:

(i) revoke or modify any declaration of an emergency; and,

(ii) amend or revoke any order or regulation made by the Cabinet under emergency powers.

3. All orders and regulations made under emergency powers must be directly related to alleviating the particular emergency.

4. Whether emergency orders and regulations are, in fact, directly related to the emergency must be reviewable at all times in a court of law, and the burden of proving the direct relationship shall rest with the government.

5. Any emergency legislation must expressly deny the power to override rights guaranteed in the Charter of Rights and Freedoms.

RECOMMENDATION 2.:

"National emergency" should be defined as a threat to the life or independence of Canada of such intensity that the normal administrative institutions have failed, have been rendered incapable of continuing to function, or are unable to handle the specific threat.

RECOMMENDATION 3:

necessary and directly related to the emergency in question; and,

(b) the burden of proving that the orders are strictly necessary and directly related to the emergency must rest with the Cabinet.

RECOMMENDATION 10:

The Emergencies Act must expressly state that the powers delegated to the Cabinet do not include the power to make laws overriding Charter rights.

RECOMMENDATION 11:

No order or regulation should take effect before it is approved by Parliament;

RECOMMENDATION 12:

Parliamentary debate on any order or regulation affecting Charter rights of individuals or any group definable on the basis of age, race, ethnicity, sex, language, religion, or national or social origin must not be subject to closure;

RECOMMENDATION 13:

Any order or regulation must be able to be revoked at any time upon a motion by a Special Parliamentary Committee.

RECOMMENDATION 14:

The operation of all orders and regulations must be subject to the review of a Special Parliamentary Committee with full powers of investigation and a duty to report all misuse and abuses to Parliament and to make motions to amend or revoke orders being abused or misused.

RECOMMENDATION 15:

Secret orders and regulations must never be permitted under emergency powers.

RECOMMENDATION 16:

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