

SUBMISSIONS TO -

The Standing Joint Parliamentary Committee
on
Regulations and Other Statutory Instruments

RE -

The Emergency Planning Order

FROM -

The Canadian Civil Liberties Association

DELEGATION -

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May 27, 1982

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Introduction

The Canadian Civil Liberties Association is a national organization with more than 5000 individual members, nine affiliated chapters across the country, and some 30 associated group members (churches, synagogues, trade unions, etc.) which, themselves, represent several thousands of additional people. A wide variety of persons and occupations is represented in the ranks of our membership - lawyers, professors, housewives, trade unionists, journalists, media performers, minority group leaders, etc.

Among the objectives which inspire the activities of our organization is the quest for legal safeguards against the unreasonable invasion by public authority of the freedom and dignity of the individual. It is not difficult to appreciate the relationship between this objective and the issue of emergency planning. The mere mention of emergency creates a predisposition of deference to authority. There is a tendency for the powers of government to be increased and the safeguards for citizens to be relaxed.

In this regard, we note the description of this Emergency Planning Order which was reportedly made by William Snarr, Secretary of the Cabinet Emergency Planning Committee.

"There is no authority for action at all. This Order does not deal with implementation, it's only planning".

Indeed, there appears to be agreement on this point. Apart from the War Measures Act, there is little legal authority to use the wide panoply of powers which are contemplated in the Order. And, of course, the powers under the War Measures Act cannot be used unless the Act is invoked by a special proclamation of Cabinet. On the basis of the Order alone, the citizen is not subject to imprisonment; his property is not subject to confiscation.

Notwithstanding these considerations, the Canadian Civil Liberties Association regards the Emergency Planning Order as a threat to the liberty of the Canadian people. In certain respects, the threat is current; in other respects, the threat is potential. In too many respects, the threat is unwarranted.

What must be borne in mind, of course, is that the Emergency Planning Order does not arise in a vacuum. It has been conceived in the context of an unfortunate history - a history marred by unconscionable abuse. In the light of this history, governmental undertakings of future restraint are simply devoid of credibility. Until this very day, more than four years after we were told that the RCMP had committed scores of illegalities against the citizens of this country, not a single charge has been laid outside the Province of Quebec. And, several months after the government promised to dispose of dossiers which had improperly been gathered on some 800,000 Canadians, the Solicitor General has announced that the promise has not been kept. The general inaction on RCMP wrongdoing can only exacerbate the feelings of insecurity which have been generated among dissenters and minorities. From the very administration which has failed to rectify all this misconduct, we now get a plan for civilian internment camps.

Even if an argument might be made for the necessity of preventive detention during conditions of extreme emergency, we do not believe that the potential benefits of such advance planning are worth the chilling impact on the contemporary community. Indeed, the benefits involved are likely to be questionable at best. The public has been told that it would be wise to develop a program for identifying potential internees during a period of calm when such issues are more likely to be handled in a thoughtful and rational manner. If such decisions were postponed to the time of an actual emergency, it is thought that they would more likely be characterized by panic, passion, and irrationality. As between the calm of peace and the panic of war, the delicate distinctions between dissenters and subversives are thought more likely to be made in the former context than in the latter. Indeed, so the argument goes, many of the mishaps of the past were largely attributable to the emotional climate of the emergencies then in existence.

As seductive as this argument may be, the Canadian Civil Liberties Association must reject it. We simply do not believe that, in such matters, calm planning now will significantly reduce panic action later. Emergencies have a way of altering the thought patterns and value structures which precede them. No matter

The Special Plans for Civilian Internment Camps - A Current Threat

The most disquieting issue in the Order is the requirement that the Solicitor General make plans to "establish, administer, and operate civilian internment camps" in the event of war. Even though this provision cannot authorize the actual internment of anyone, we believe that it is likely to have a current chilling impact on dissenters and minority groups. There are people in this country who have been prisoners of the civilian internment camps of other countries. Consider, for example, our many refugees from Nazism, Fascism, and Communism - Jews, Poles, Ukrainians, Chileans, Vietnamese, etc. There are also living in our midst many survivors of the internment camps of this country - the Japanese-Canadians. How can these people be expected to welcome the knowledge that such institutions are to be resurrected in Canada?

A concomitant concern is that political dissenters will increasingly be intimidated into silence or conformity. As much as we appreciate the government assurances that intelligence on people will be gathered only on the basis of an approved mandate, our disquiet is not appeased. The existing mandate for security intelligence is so wide that legitimate dissenters are unduly susceptible to government surveillance. Indeed, the McDonald Commission has reported that throughout the years large numbers of democratic dissenters have been caught in the RCMP's surveillance net. Whatever anxiety legitimate dissenters may feel about all this unjustified surveillance can only be compounded by government planning for civilian internment camps.

Moreover, once such plans are made, what is to prevent them from being used for purposes beyond those initially contemplated? During the Quebec crisis of 1970, this country experienced the functional equivalent of civilian internment camps - the preventive detention of large numbers of people. With that precedent firmly embedded in the community psyche, it is not hard to imagine how certain political dissenters will respond to the government's present planning activity.

how comprehensive and considered a list of potential internees may be, the advent of an actual emergency will likely create a compelling propensity for expansion. In short, we fear the worst of both worlds. The current planning for internment camps creates an unacceptable chill today and it will contribute little to the reduction of panic tomorrow.

This is not to suggest, of course, that no attempts should be made to reduce the kind of panic incarcerations which tend to occur during emergencies. It is simply to recognize that the attempt will not significantly be enhanced by the advance identification of potential internees. We believe it would be more helpful in this regard to focus on curtailing the powers and expanding the safeguards which are available in the War Measures Act.

In any event, for precisely what war are civilian internment camps being planned? Today, our most likely adversary in a war would be the Soviet Union. In the 1960's, it was thought to be Communist China. The list of potential internees must certainly be influenced by the identity of our likely adversary. Unfortunately, it is not inconceivable, as the British have learned, that we could even find ourselves facing a non-Communist adversary. How does the internee identification program propose to handle the wide variety of unforeseen crises that the international situation could thrust upon us? To what extent will this involve the continued expansion, in perpetuity, of the hypothetical candidates for internment? At what point does the exercise become so speculative as to be unworthy of the effort?

For all these reasons, we return to our basic position. Where the planning for civilian internment camps is concerned, the possible future benefits cannot justify the probable current costs. Whatever else may survive the scrutiny of this Committee, this provision should not.

The General Scope of the Order - A Potential Threat

Unfortunately, there are additional threats to liberty in this Emergency Planning Order. Cabinet Ministers are required to "take such measures as are necessary to prepare for" the control of virtually everything - essential telecommunication facilities; the movement and allocation of manpower; conditions of work, prices and production; rental and sales of property; the production, distribution, and rationing of food, etc. Everything seems to be included; nothing seems to be omitted. In short, the Emergency Planning Order requires that the government prepare to intrude itself virtually everywhere.

All this pervasive planning activity is designed to deal with what the Order calls "emergency" situations. But what constitutes an "emergency"? For purposes of the Order it is defined as an "abnormal situation that requires prompt action beyond normal procedures to prevent or limit injury to persons or damage to property or the environment".

A definition as broad as this could find some application almost every day. Consider, for example, the following situations: a steel strike, a highway traffic tie-up, a heavy snowfall, and a further increase in the rate of inflation. At any given time, any of these circumstances might arguably be characterized as "abnormal" and they might also be seen as requiring "prompt action beyond normal procedures". Does this mean that any or all of them could justify any or all of the plans which the government has been mandated to prepare? To what extent, for example, will a traffic tie-up justify food rationing? Or, how far will a steel strike justify government control of telecommunication facilities? Admittedly, these are extreme examples. But nowhere does the Emergency Planning Order attempt to link or limit the response mechanisms it contemplates to those emergencies for which they would be appropriate. Any abnormality appears capable of excusing a whole host of intrusive measures.

It is hard to be consoled by the fact that the Order, as drafted, does not mandate the use of the powers it contemplates. When the machinery of government is mobilized so comprehensively behind the preparation to use these powers, this,

in itself, represents a potential threat of significant proportions. And this threat is magnified by the legal vehicle through which the government is directing this activity. Instead of simply assigning certain civil servants the task of identifying and drawing up plans for various emergencies, the government chose to enact an Order in Council. There is a great risk that such a procedure will confer an aura of apparent authority on the activities involved. It is not unusual for government officials, faced with certain tasks, to arrogate to themselves the exercise of powers beyond what the law provides. The consequent danger here is that the naturally intrusive propensities of bureaucracy will be encouraged by the ritual and trappings of an official Order in Council.

It is likely that some anxious feelings will be assuaged by the advent of Canada's new Charter of Rights and Freedoms. Along with others, we too hope that the Charter could be used to challenge the unwarranted intrusions perpetrated by government. But, in such circumstances, fond hope will not suffice. We simply do not know how effective the Charter will be in protecting civil liberties and human rights. Ultimately, of course, the decisive power is reposed in the courts of law. To date, the judicial performance in such matters does not inspire great confidence. Despite the opportunities afforded by the last 20 years of the Canadian Bill of Rights, the courts declined, time and again, to create a libertarian jurisprudence. Regrettably, they are even less likely to do so in the circumstances of an alleged emergency. The more a situation is perceived as a crisis, the greater the reluctance of the courts to second guess the government in power. The better part of wisdom, therefore, is not to rely on the Charter. Rather, it is to take the requisite action in the political and legislative arenas so that resort to the Charter will not be as necessary.

The Range and Form of Acceptable Planning

The foregoing comments should not be construed as an attack on the idea of emergency planning. Certainly it is appropriate for a government to anticipate and plan for emergency situations. But the planning at issue should not require the public to buy a pig in a poke.

This Order simply sets out machinery for the virtually total control of Canadian society in the event that we face some ill-defined emergency. In our view, the process should be turned around. To whatever extent government planners apprehend emergency circumstances, they should publicly identify them and publicly indicate what government responses each of them might provoke. The idea should be to tailor the response mechanisms as narrowly as possible to the kinds of emergencies which can realistically be anticipated.

Such an approach would make possible the development of competent public scrutiny and evaluation. Questions could be asked and discussions could be held. Are the governmental apprehensions overblown or understated? To what extent do the planning mechanisms reflect sensible priorities both in terms of the possibility of the dangers involved and the importance of the interests imperilled? Are the proposed responses sufficiently effective or needlessly intrusive? Subject to very few exceptions, these matters can and should be the subject of comprehensive and thorough public debate.

By adopting such a procedure, the government would denude this issue of most of its ominous overtones. Emergency planning would cease to look like a conspiracy against parliamentary democracy. Under the impact of such a public debate, there would be a better chance that the resulting response mechanisms would minimize the intrusions on the freedoms of the citizen. Indeed, the involvement of the public in this way could well produce a consensus of support behind whatever plans are ultimately forged. This would serve not only the interests of personal freedom and democracy but also the effective implementation of the plans themselves. It

stands to reason that a plan which enjoys public support is likely, when implemented, to receive public cooperation.

A curious paradox has characterized the proceedings to date. In a letter to this Committee, Privy Council President Yvon Pinard defended the government's decision to handle this matter by Order-in-Council rather than through intra office instructions to civil servants. His explanation was as follows:

"Canadians generally should be given, in an accessible document, a complete and thorough listing of current responsibilities".

Although the government wants to make accessible the list of responsibilities, it has been apparently less forthcoming about the nature of the plans involved. In this regard, we note the frustrated comments of Opposition Critic Ray Hnatyshyn in the House of Commons,

"We do not have access to government documents in the matter. We do not know what the plans are and what funds are being expended, and the government has stonewalled every reasonable attempt to obtain this information".

There is simply no basis for this distinction. What possible harm would flow from revealing such government plans? Is there any reason to believe that the Mississauga evacuation, for example, would have been impeded if the people concerned had known in advance what might have been done in such circumstances? For the reasons we have indicated, we believe the contrary is true. Public knowledge increases the likelihood of public support and with it public cooperation. We believe, therefore, that the Canadian people should be much more fully informed about the planning involved and much more forthrightly encouraged to participate in it. Not through the medium of ominous Orders-in-Council, but by the widest possible disclosure of plans and proposals.

The Question of Additional Legislation for Emergencies

Privy Council President Yvon Pinard has called for new emergency powers legislation. Since the use of the War Measures Act is confined to war-related emergencies, something else is said to be needed for the wide variety of other contingencies which could arise - floods, earthquakes, famines, health epidemics, etc. Warning that government might have to respond extra legally if such eventualities should arise, Mr. Pinard has said that it would be "preferable to place entirely new emergency legislation before Parliament". An understandable concern about sanctioning government illegalities has led numbers of M.P.'s to press the government for such legislation.

The Canadian Civil Liberties Association has deep misgivings about a legislative response to this problem. What we fear is a statutory legitimization of civil liberties violations. So often, when government introduces such legislation, it seeks needlessly to expand its powers at the expense of its citizens' freedoms. The demand for such legislation, therefore, could well produce a legal monster.

This is not to say that new legislation in this area must inevitably be resisted. It is simply to say that the case for it has not been demonstrated. Emergency legislation is not justified simply because, without it, a planning order would be rendered unworkable. Nor is it justified because, without it, government might behave illegally. The only justification for new legislation in this area is a demonstration that it is necessary for a reasonable government response to a crisis situation. It is not possible for us or anyone else rationally to say that such a demonstration could never be made. What we do assert, however, is that, to date, it has not been made.

One area of possible emergency legislation is worthy of special comment. Among the functions which Mr. Pinard sees such legislation performing is a broadening of government power to deal with those classes of emergency which threaten the rule of law or constitutional government. This would involve such matters as terrorism or urban violence of a lesser magnitude than what is contemplated in the War Measures Act. Mr. Pinard has said that "during public order emergencies,

the normal limitations on police power in relation to search, seizure, arrest, and detention may temporarily have to be modified".

This sounds very much like a resurrection of the position enunciated by the government during the 1970 October crisis. On that occasion, the Prime Minister expressed his view that it would be desirable to enact a special peace-time emergency law "between the Criminal Code and the War Measures Act".

Presumably, such legislation could be invoked with less political repercussion than the War Measures Act. In our view, however, the invocation of such emergency powers should be made less, rather than more, easy. The survival of civil liberties requires that we aim in the direction of minimizing the use of such weapons to deal with the problems confronting our society. Even if some extraordinary powers might arguably be justified in order to cope with an overriding threat, we should make every effort to confine their use to extreme situations. For these reasons, we believe that it is preferable not to have a mini War Measures Act. One way to minimize the invocation of emergency powers is to force the government that wishes them to sustain the political consequences of invoking the ultimate weapon. For the very reason that such invocation will be more difficult, it is preferable that a government have to choose between the enforcement of the existing criminal law and the proclamation of the War Measures Act. The only other alternative, of course, would be to introduce new legislation at the time. But that would involve the normal parliamentary processes.

Many of the proponents of new emergency powers in this area have rather blithely assumed that the Criminal Code and our regular law are not adequate to deal with the threat of urban terror and violence. But the Criminal Code is far from an impotent document.

Substantively, the Code makes it illegal to commit a violent act, to attempt to commit a violent act, to conspire to commit a violent act, to counsel to commit a violent act, and even to advocate a violent act if the purpose is governmental change. Procedurally, the Criminal Code gives the police immense powers. They

may arrest, without warrant, anyone who they have reasonable and probable grounds to believe has committed or even is about to commit an indictable offence. Moreover, the police may enter, without warrant, any place where they have reasonable and probable grounds to believe they will find someone they are entitled to arrest.

With few exceptions such as electronic surveillance, the normal police powers of secret detection and information gathering are virtually unlimited. Almost nothing in the regular law prevents the police from infiltrating, spying, paying informers, and even maintaining comprehensive dossiers on their targets. While a valid case might be made that a good number of these powers should be curtailed and controlled, it is impossible to argue for their expansion. Even if such limits were imposed upon intelligence gathering, they would not be likely to affect the ability to cope with emergencies. Intelligence gathering normally contemplates a longer term exercise. Coping with emergency usually contemplates powers of immediate counter attack.

In any event, in a sufficiently serious situation, the authorities might well be able to take extraordinary action under the common law defence of necessity. Moreover, the regular law already provides a mechanism for the introduction of additional police and the army to reinforce existing police activity.

Apart from a clear and present danger of the illegal seizure or destruction of government, why can't we rely on normal police powers to provide society with a realistic level of adequate protection? Indeed, the skillful use of these powers can do much to prevent the emergence of such a clear and present danger. With the War Measures Act to deal with the threat of ultimate catastrophe and the Criminal Code to deal with dangers of less urgency, where is the need for something in between?

Again, the onus must be on those who seek the enactment of such additional legislation to demonstrate the size of the evil to be purged and the need for the means to be used. This simply has not been done. No one has demonstrated the magnitude of the perils we face or the inadequacy of the powers we have. Until and unless this onus is discharged, Parliament should resist the lure of more emergency powers legislation.

What is required, in response to the kind of dangers identified by Mr. Pinard, is not new emergency legislation but rather new amendments to the existing emergency legislation, the War Measures Act. Indeed, we should move in the direction of restricting the powers, not extending them. No conceivable emergency, including bloody war, requires so many government powers and so few citizen safeguards. In this connection, we are providing you copies of our brief on the subject to the McDonald Commission. It should be noted that the Commission also proposed a number of amendments to the War Measures Act.

Conclusions

On the basis of all the foregoing, the Canadian Civil Liberties Association believes that the following objectives should be promoted:

1. The termination of planning activity in respect of civilian internment camps.
2. The rescission of the Emergency Planning Order.
3. The public identification of the emergencies apprehended by government and the public disclosure of most of the government plans for dealing with such emergencies.
4. The fullest possible public scrutiny and participation in the development of emergency planning.
5. The tailoring of plans to emergencies in order to narrow as much as possible the consequent intrusions on people.
6. The discouragement of further emergency legislation until and unless the need for it has been demonstrated.
7. The encouragement of amendments to the War Measures Act so as to reduce the powers for the government and expand the safeguards for the citizen.