SUBMISSIONS TO - The Legislative Committee on
Bill C-77 (The Emergencies Act)

RE - Emergency Powers

FROM - Canadian Civil Liberties Association

DELEGATION - A. Alan Borovoy
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OTTAWA March 1, 1988

The Canadian Civil Liberties Association appreciates the amendments which the Minister has introduced to Bill C-77. These amendments will help to reduce the dangers of abuse that inevitably accompany the application of emergency powers. Unfortunately, however, the Bill still contains a number of vague definitions, overbroad powers, and inadequate safeguards. In its present form, the Bill could create serious and unwarranted threats to the civil liberties of the Canadian people. We seek, therefore, the adoption of the recommendations in our October 5th brief to the Minister (attached as appendix number one) as modified by this brief. The following represent some of the more serious of the problems that remain.

1. It is not enough simply to relocate the definition of "national emergency" from the preamble to the text. The components of the definition must also be addressed. In its present form, the definition fails to specify in what ways or in respect of what interests the "well-being of Canada" needs to be imperilled. Since this concept appears in a number of places throughout the Bill, consider the following possibilities:

(a) Could a public order emergency include a situation in which a group of multi-national companies secretly conspire to raise the prices of certain vital commodities in Canada? This could arguably satisfy the definition of foreign-influenced activities within the meaning of the CSIS Act and it could imperil some of Canada's critical economic interests. The terms of the Bill appear insufficient to preclude the invocation of emergency powers for such an injury to our economic well-being.

(b) Could the "intimidation or coercion" in the

definition of an "international emergency" include a threat by the United States to expand its tariffs against Canadian goods? Since this definition refers also to "real or imminent use of serious force or violence", it would appear that "intimidation or coercion" could include the application of a lower level of pressure. The terms of the Bill appear insufficient to preclude the invocation of emergency powers for such an injury to the well-being of our trade position.

(c) Could a "war emergency" include armed conflict involving the United States in, let us say Central America, so that we are clogged with refugee applications? Last summer, Parliament was reconvened in order to deal with the way a perceived crisis in refugee applications was imperilling the well-being of this country. The terms of the Bill appear insufficient to preclude the invocation of emergency powers for the situation described here.

2. There appears to be a basic conceptual error in the power to revoke emergency declarations. The amendments say that the Governor in Council may revoke these declarations if it believes on reasonable grounds that the emergency no longer exists. This confuses what it takes to revoke a proclamation with what it takes to invoke one. There should be no fetters at all on the power of the Government to revoke a declaration.

3. We appreciate the requirement that the Government compensate those whose labour it commandeers. Unfortunately, however, this provision still lacks some important ingredients:

(a) A requirement that an independent arbitrator be empowered to set the terms of compensation.

(b) A requirement that the Government indemnify those performing conscripted labour for damage that they may cause to others.

(c) A right to refuse to perform such conscripted labour in the event that there are reasonable grounds to anticipate danger to the life, limbs, or health of the potential conscriptee.

(d) Some limits on the nature and duration of the duties which may be ordered.

4. The proposed limit on the power to prohibit and regulate public assemblies seems to be misconceived. The mere fact that an assembly is "directly related" to the emergency should not, by itself, make it a candidate for prohibition. Suppose the assembly were a peaceful one protesting the declaration of the emergency itself? Even if the necessity for such a power were assumed, there should be a requirement of reasonable grounds to believe that the impugned assemblies would likely exacerbate the emergency. In any event, the Government has not yet provided a sufficient explanation as to why the ordinary law could not adequately deal with the anticipated problems from public assemblies.

5. In response to our criticism about the power to authorize and conduct inquiries for international emergencies, there is now an amendment that requires such power to be "in relation to defence contracts or defence supplies... or to hoarding, overcharging, black marketing or fraudulent operations in respect of scarce commodities". This tells us what the power is designed to address, but it does not tell us why there is a need for a power greater than what exists in the ordinary law.

6. The Bill should require an appropriate warrant-granting mechanism for any new power of entry, search, and seizure which is created during international emergencies.

7. The periods of invocation are too long. 360 days, for example, is too long even for a war emergency. During a period of time as long as this, it is hard to imagine why Parliament could not enact a special statute narrowly tailored to the particular emergency. In any event, declarations for shorter periods can always be continued. In our view, war emergencies should not endure for longer than 90 days and the others should be scaled down accordingly.

8. The following provisions should be included in the Bill:

(a) The removal of the power to exclude certain classes of people from obtaining compensation or, at least, a generic description in the Bill of those who might attract such a disentitlement.

(b) The inclusion of a description in the Bill of those classes of persons who might be entitled to priority treatment for compensation.

(c) A requirement of reasonable grounds in the section empowering the Government to withhold emergency orders and regulations from public disclosure.

(d) A requirement that no person will attract liability or culpability under any emergency regulation or order unless the relevant provisions were adequately published in advance.

(e) The inclusion of additional opportunities for Parliament to revoke or amend emergency orders and regulations - this should arise at least on those occasions when emergency declarations are continued. (In its present form, the Bill limits such opportunities to a single period within twenty days

after orders and regulations are tabled in Parliament.)

(f) The inclusion of a specific requirement that the Government will use the least intrusive measures which can reasonably be expected to achieve its legitimate objectives and the power in the courts to revoke or reduce any emergency measures which fail this test.

APPENDIX NO. 1

Copy of CCLA Brief to the Minister

SUBMISSIONS TO - The Honorable Perrin Beatty
Minister of National Defence

RE - Bill C-77 (Emergency Powers)

FROM - Canadian Civil Liberties Association

DELEGATION - A. Alan Borovoy
(General Counsel)
Kenneth P. Swan
(Vice-President)

OTTAWA October 5, 1987

General Observations

The Canadian Civil Liberties Association appreciates the initiative which the government has taken to replace the War Measures Act. No conceivable emergency, including bloody war, could justify such unfettered powers and inadequate safeguards. In this regard, we appreciate particularly the fact that there is no attempt here to remove the application of the Charter.

In fairness, our organization cannot object in principle to the existence of some special powers to deal with certain extraordinary situations. But we must recognize that such powers can endanger the viability of free institutions. In this connection, there is reason to suspect that the 1970 invocation of the War Measures Act contributed substantially to the subsequent illegalities committed by the RCMP. Note, for example, the testimony that RCMP Sergeant Robert Potvin gave to the McDonald Commission.

> "And so, in our minds, while the Act had been revoked, the situation had not changed, and that to some extent many of the same measures that had been used at that time seemed to us to be still necessary. And so there was a kind of attitude, if you will, that prevailed among those of us that were doing the work".

It is essential, therefore, that the powers be tailored as narrowly as possible to emergencies that can reasonably be anticipated. And safeguards must be fashioned that can deal as effectively as possible with abuse and excess.

While CCLA welcomes the demise of the old Act, we are concerned that some of its most regrettable features could be resurrected with the birth of the new one. Unfortunately, Bill C-77 contains vague definitions, overbroad powers, and inadequate safeguards. There is too little effort to link the powers it would create with the perils for which they are designed. There is too little effort to achieve proportionality between available powers and anticipated perils.

This leads us to make what is perhaps the most important of the recommendations which follow.

> Before the Parliamentary process goes any further, the government should provide for M.P.s and the public a working paper which describes the kind of emergencies about which it is concerned, the kind of powers it seeks to deal with those emergencies, and some statement as to the ways in which the ordinary laws lack what is needed.

This would finally enable both Parliament and the public to conduct an informed and intelligent debate regarding the subject matter of this Bill.

In view of the speed with which this meeting was arranged, it will be appreciated that the ensuing submissions do not cover all of the issues that may be in contention. It is our hope, however, that this will serve as a helpful opening for the discussion. We trust that there will be further exchanges with the Minister, the relevant civil servants, and the Parliamentary Committee.

The Triggering Circumstances

One of the central weaknesses of the Bill is the failure to include a definition for the word "emergency" itself. As a consequence, many of the provisions become exercises in tautology. A "public welfare emergency" means an emergency that is caused, inter alia, by fire, flood, drought, storm etc.. This section tells us about possible causes of an emergency, but it does not tell us what an emergency is. The problem is not adequately resolved by the subsequent requirement that there be "danger to life or property, or social disruption, so serious as to be a national emergency". This is simply an escalation of tautologies.

We are concerned that the explication in the preamble will not be enough to overcome this problem. There is some doubt whether the courts would apply a preamble to supply definitions that do not appear in the body of a statute. In any event, the language in the preamble is no less vague than that in the Bill itself.

How far, for example, could the government rely on the impact of that which "imperils the well-being of Canada", "danger to property", "social disruption", and "breakdown in the flow of essential" goods or services to end certain inconvenient strikes? Significantly, the Bill nowhere attempts to define what constitutes "essential". Despite the economic disruptions which may be inflicted by strikes in the post office, the railways, or even the auto industry, we would be loathe to

see them become ready targets for emergency powers. While there may be some circumstances in which some strikes have to be terminated in the public interest, we believe it is preferable that such action be taken in the context of well-balanced labour legislation or by specific statutes narrowly addressed to the specific circumstances.

The problem is exacerbated by the provisions that permit the declaration of an emergency when it is considered to exist in the opinion of the Governor in Council. For many practical purposes, we fear this might mean that an emergency could be deemed to exist when the government says it does.

While no one can predict with complete certainty the scope of the latitude that a court applying the Charter might grant to the government under these sections, the risk is simply not worth taking. No public interest necessitates the existence of such open-ended terminology. The word "emergency" should be defined. And such definition should be confined to the gravest threats to our most fundamental interests - imminent and serious perils to the lives, limbs, and health of widespread numbers of people. The Bill should ensure that emergency powers will not be used for the kind of strike situations outlined above.

Moreover, as presently constituted, these sections might effectively preclude judicial review of emergency declarations for statutory purposes. So long as the government was "of the opinion" that an emergency existed, the courts might feel they have no business probing the issue.

Even though the Charter will continue to apply in the case of such emergency declarations, we believe that the courts have an important role also to play in ensuring that the government does not exceed its statutory mandate. After all, the Charter would invoke judicial scrutiny in order to promote government compliance with the fundamental precepts of our constitutional system. But violations of Charter principles do not represent the only way that governments can abuse their powers. In view of the dangers to our democratic system that emergency powers create, we believe that the Bill should be amended so that the courts can exercise the appropriate degree of supervision over compliance with the statute as well. If emergency declarations fail to comply with statutory requirements, they should be subject to judicial revocation.

In anticipation of the criticisms that this recommendation might provoke, we hasten to point out that the judicial role need not include a substitution of judicial discretion for that of the government. Essentially, the judges would do here what they so often do in other contexts - determine whether, on the facts and proper interpretation of the law, the government had reasonable grounds to believe that it faced the statutory prerequisites for an emergency.

Nor would a judicial revocation necessarily paralyze a government which believed that it faced an emergency. In such circumstances, the government could always invoke the declaration afresh but with a more elaborate recitation of the facts.

Conceivably, the additional material could persuade the courts that this time the statutory conditions were there. If the government said too little, it would risk judicial revocation. If the government said too much, it could risk political contradiction. The idea is to make the invocation of emergency powers as politically vulnerable an exercise as we can make it.

It is important also that the Bill should set a premium on handling emergencies through narrowly focused statutes enacted at the time by Parliament. For a democracy, this would be better than relying on regulations promulgated by government, through general powers created ahead of time. At least in that way, the measures adopted would more likely be linked to the problems involved and affected parties would enjoy whatever safeguards flowed from an open Parliamentary debate.

This leads us to recommend that the Bill should contain a requirement that the emergency proclamation explain why the circumstances in existence necessitated such bypassing of Parliament. The government would be effectively required to spell out the magnitude of the perils it anticipated, how delay would likely exacerbate such perils, and why Parliament could not be expected to enact an appropriate statute with sufficient speed. Once more, the role of the courts in such circumstances would be to determine whether the position taken by the government was based upon reasonable grounds.

While the definition of a "public order emergency" contains many of the above problems, it suffers from the additional disability

of being tied to the over-broad and vague definitions of "threats to the security of Canada" that are found in the CSIS Act.

For such purposes, a threat to the security of Canada includes "activities within... Canada... in support of... acts of serious violence... for the purpose of achieving a political objective within Canada or a foreign state". This is arguably broad enough to have included the actions of Candian citizens who, without any foreign direction whatever, took up collections for the state of Israel after the Yom Kippur invasion.

Similarly, the CSIS Act refers to "foreign influenced activities... that are detrimental to the interests of Canada". "Influence" covers a lot of territory. Suppose a Canadian citizen were employed by a foreign corporation which was involved in commercial negotiations with the government of Canada? That could likely qualify as foreign influence. Moreover, since it might be in the interests of Canada to sell high and buy low, would any opposite interest be considered "detrimental"? The subsequent requirement that such activities be "clandestine" or "deceptive" may not adequately reduce the problem. There is an element of the "clandestine" in virtually all commercial transactions.

For the reasons indicated above, we are not much consoled by the additional requirement in this Bill that a threat must be "so serious as to be a national emergency". In the absence of a definition for the word "emergency" and so long as the government can declare an emergency when, in its opinion, such exists, the

powers at issue are simply not adequately fettered.

Indeed, our concern about facile declarations of such emergencies prompts us to recommend the adoption of a particularly tough test. In this connection, the 1979 CCLA brief to the McDonald Commission made a suggestion which we believe it would be useful for the government to consider now. Our brief would have permitted the government to invoke emergency power "at the point where it could reasonably anticipate the outbreak of illegal violence, so intense, so widespread, and so continuous that the government itself would be overthrown or it would be powerless to govern". In our view, no public order emergency of the kind contemplated by this Bill should be subject to invocation unless these kinds of circumstances prevailed. Extraordinary powers should require dire emergencies, not simply unusual abnormalities.

There are serious flaws in the definitions of both international and war emergencies. It is one thing to invoke emergency powers for a situation that directly threatens Canada or Canadians. But we must question how far such powers should be subject to invocation in the event of comparable threats to Canada's allies. Indeed, for these purposes, it is not clear what constitutes an "ally". Moreover, how far should such considerations be extended to countries "in which the political, economic or security interests of Canada or any of its allies are involved"? Would an insurrection in, let us say, Indonesia justify emergency powers in Canada if there was a threat to the economic interests of our

NATO ally, Holland?

This definition could conceivably be wide enough to include almost every country in the world. There will be precious few places where at least one of our allies does not have some such interests. In view of the fact that every day some country in the world is subject to intimidation, coercion, and even armed conflict, this could become a mandate to invoke emergency powers at any time and to sustain them in perpetuity.

The Scope of the Powers

In most of the emergency situations contemplated by this Bill, there is a power to direct people to perform "essential services" for which they are competent. While some such power may have an arguable justification in certain circumstances, the provision in the Bill is unduly broad. There are no specified limits in nature or duration and no requirement to compensate people for their services or to indemnify them if they cause compensable damage to others.

Moreover, suppose certain people were directed to perform the kind of service that might endanger their lives, limbs, or health? At the very least, the Bill should equip them with defences in the event that they are prosecuted for failing or refusing to perform in such circumstances.

Again, we are concerned that this provision could lead to the promiscuous emasculation of some vital freedoms concerning work and working conditions. As a further measure to reduce this risk, the government should not enjoy a unilateral power to regulate the terms of compensation. Instead, the Bill should repose this power in an independent adjudicator who would be chosen at the time by the Canada Labour Relations Board. Thus, the government would know in advance that, to whatever extent it wished to designate a situation as a national emergency, its power to compel assistance would be governed according to such pre- existing guidelines. The only way that the government could change these arrangements would be to introduce legislation into

Parliament to address the circumstances then in existence.

The Bill would also permit the government to regulate or prohibit "travel to, from or within any specified area". Again, it is not hard to conceive of an argument for some such power. But it does not have to be as open-ended as this. To whatever extent people's normal liberties are curtailed, the governing statute should attempt to link the curtailment to the problem. It should not bar any travel to or from any area; it should indicate what kind of areas might be rendered off limits. Comparable specificity should be used regarding the use of property and the securing of protected places.

During the course of a public order emergency, the government would acquire the power to regulate or prohibit public assemblies. This is a particularly dangerous power. In so many ways, the right of peaceable assembly serves as a prerequisite to the existence of other freedoms. It represents one of the most potent ways that citizens can challenge excesses of government power. Indeed, one of our concerns is that this power might be used to prevent legitimate critics from effectively calling into question the very declaration of a public order emergency.

Under the normal law, the police have very wide powers to control and regulate assemblies that might be turning violent. They may arrest without warrant anyone who they have reasonable grounds to believe is about to commit an indictable offence and they may detain any person who commits or is about to join in or to renew a breach of the peace. They may also direct the flow of

pedestrian and vehicular traffic. And they may interpose themselves between potential assailants and their victims. Moreover, to the extent that an assembly does become unruly, there are special powers to deal with it (unlawful assembly) and perhaps there could even be a "reading of the Riot Act".

In view of the substantial powers available under the normal law, it is hard to justify the power to prohibit assemblies that is being sought in this Bill. Significantly, there is no attempt to describe with any specificity the kind of assemblies that might be curtailed and the kind of circumstances in which such a measure might be adopted. It is unacceptable that the mere declaration of a public order emergency would, by itself, authorize the government to ban any and all public assemblies at whim.

No such power should even be contemplated without an elaborate explanation by government as to why the normal law would not be adequate to address anticipated emergencies. Even at that, the government should address the feasability of less drastic measures before considering more drastic ones. It would be less bad, for example, for the government to acquire a power to regulate rather than a power to prohibit. And it would be less bad for a prohibitory power to be narrow and specific rather than broad and general.

During the course of an international emergency, the government would be authorized to create new entry and search powers even where dwelling-houses are concerned. We do not question the

potential seriousness of some conceivable international emergencies. Nor, however, do we unduly minimize the potential seriousness of a public order emergency. But we have great difficulty understanding why it might be appropriate for the government to create new entry and search powers during international emergencies when there is no apparent need for them during public order emergencies. Indeed, it is possible that there could be situations where the latter would threaten our society more than the former. Accordingly, we would recommend that no such additional power be created for international emergencies.

For similar reasons, we believe that the government should not acquire the new powers that are contemplated for establishing inquiries. This recommendation is buttressed by our awareness of the enormous powers that exist for such purposes in the normal law.

In the event of a war emergency, the government would acquire the power to do what, in its opinion, would be reasonably necessary or advisable. Again, we fear that such a provision could preclude any judicial review beyond what is contemplated by the Charter. Apart from the Charter, are there no limits on this government power? Could this power authorize deportations, exiles, or even executions? Indeed, to what extent could this power authorize a repetition of the kind of infamy that was perpetrated against the Japanese Canadians during World War II? In our view, it is not enough to rely on the Charter and the

international convenants to restrict such possibilities.

In any event, it is possible to give the government wide powers to deal with a war emergency without letting the government do whatever it believes is necessary.

Moreover, any regulation creating specific powers for such purposes should require a recitation of why that power is needed to achieve the statutory objective. Again, the courts don't need to acquire a power to substitute their judgment for that of the government. Their review might be limited to determining whether the governmental explanation lies within the ball park of reasonable judgment. At the very least, the courts should scrutinize the situation in order to prevent arbitrary excess.

Indeed, the courts should be empowered to revoke or reduce any and all emergency powers for which the government fails to provide a reasonable explanation. In no case, should the government's opinion of its own correctness settle the issue.

Special Safeguards

We appreciate the fact that the Bill provides for a system of compensating those who are injured by the exercise of emergency powers. In our view, however, the government should not merely be allowed to provide for compensation; it should be required to do so. The Bill should set out a minimum frame work for compensating those who are injured and then it might permit the government to go beyond such standards.

The Bill would also empower the government to exclude certain classes of people from compensation claims. This could represent the kind of arbitrary power that would cause injustice and create divisions among the public. To whatever extent the government anticipates needing to exclude people from being able to enjoy such rights, the Bill should describe, at least generically, the kind of people who might attract such a disability. Similarly, the Bill, not simply the government, should define the classes of persons, beyond those distinguished by loss or injury, who might enjoy priority treatment.

The Bill contemplates situations in which regulations or orders might be withheld from public disclosure. There is no reason why the government should acquire an unfettered discretion to keep the public in the dark about such vital matters. To whatever extent the government believes that there is a case for some discretionary secrecy, the Bill should specify the applicable criteria. Our growing experience with both access and privacy

legislation demonstrates that statutory language is quite capable of drawing the appropriate distinctions.

In any event, however, no persons should attract liability or culpability under any emergency regulation unless the relevant provisions were adequately published in advance.

The dangers to civil liberties posed by emergency powers require the adoption of yet another basic safeguard. It is not unusual for governments who face such problems to create, invoke, and apply powers that are significantly greater than are required in the circumstances. Canadians will not soon forget, for example, the spectacle of police raids against peace and student activists in Winnipeg and Guelph that were made possible by the powers created to deal with the 1970 "apprehended insurrection" of violent separatists in Quebec.

It is critical, therefore, that an emergency powers statute explicitly provide for proportionality between ends and means. The Bill should be amended so as to oblige the government to use the least intrusive measures which could reasonably be expected to achieve its legitimate objectives. And the courts should be empowered to revoke or reduce any and all emergency powers which fail this test.

Summary of Recommendations

Before further Parliamentary action is taken, the Canadian Civil Liberties Association calls upon the government to create and circulate a special working paper for M.P.s and the public. The paper should link the kinds of anticipated emergencies which provoked this Bill with the kinds of powers the government seeks to address those emergencies. It should also explain in what ways our ordinary laws lack what is needed.

In addition, CCLA recommends that the Bill be amended to provide for the following:

1. A definition for the word "emergency" which, in all the circumstances contemplated by the Bill, would require imminent and serious perils to the lives, limbs, and health of widespread numbers of people.

2. A judicial power to revoke an emergency proclamation for failing to meet the statutory prerequisites regardless of the government's opinion that the proclamation is valid.

3. A requirement that emergency proclamations explain why, in the circumstances, it was necessary to avoid the enactment of a special statute.

4. A judicial power to revoke an emergency proclamation for failing to provide a reasonable explanation as to why the enactment of a special statute was unworkable in the circumstances.

5. A re-definition of public order emergencies so as to eliminate the reference to the CSIS Act and to require that the government reasonably anticipate the outbreak of illegal violence, so intense, so widespread, and so continuous that the government itself would be overthrown or it would be powerless to govern.

6. A re-definition of international and war emergencies so as to avoid situations made possible by the current Bill in which emergency powers could be invoked in Canada in response to innumerable and various circumstances elsewhere in the world that only remotely, if at all, affect Canadian interests.

7. The inclusion of limits on the nature and duration of the duties that can be ordered pursuant to emergency powers.

8. The inclusion of danger to life, limb, or health as a defence to the refusal or failure to perform duties that have been ordered pursuant to emergency powers.

9. A requirement to indemnify those who inflict compensable injury on others as a consequence of performing duties that have been ordered pursuant to emergency powers.

10. A power in an independent adjudicator appointed by the Canada Labour Relations Board to set compensation for those who are ordered to perform duties pursuant to emergency powers.

11. The inclusion of restrictions on the government's powers over travel in order to ensure that such powers extend no further than what is required to address the emergency.

12. The inclusion of restrictions on the government's powers over property and protected places to ensure that such powers do not exceed what is necessary for the emergency.

13. The elimination of the power to prohibit and regulate public assemblies during public order emergencies.

14. The elimination of the provision enabling the government to create new entry and search powers during international emergencies.

15. The elimination of the new power in the government to establish inquiries during international emergencies.

16. A requirement that a war proclamation contain a recitation of why each of the powers created is necessary or advisable in order to achieve the statutory objective.

17. A judicial power to revoke or to reduce any war emergency power, or indeed any other emergency power, for which the government fails to provide a reasonable explanation, regardless of the government's opinion about the matter.

18. A duty, not merely a power, on the part of the government to provide compensation for those injured by the exercise of emergency powers.

19. The removal of the power to exclude certain classes of people from obtaining such compensation or, at least, a generic description in the Bill of those who might attract such a disentitlement.

20. A description in the Bill of those classes of persons, beyond those distinguished by loss or injury, who might enjoy priority treatment for compensation.

21. The inclusion of specific criteria to restrict the power of government to withhold emergency orders and regulations from public disclosure.

22. A requirement that no person will attract liability or culpability under any emergency regulation or order unless the relevant provisions were adequately published in advance.

23. A requirement that the government will use the least intrusive measures which could reasonably be expected to achieve its legitimate objectives and a power in the courts to revoke or reduce any emergency measures which fail this test.