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Commentary

TRUE NORTH IN CANADIAN PUBLIC POLICY

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Emergency powers and the rule of law: Why inquiries matter

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The Public Order Emergency proclaimed by the federal government on February 14, 2022, continues to vex many Canadians. It is the subject of multiple inquiries that are attempting to understand why the government invoked the *Emergencies Act* for the first time. The inquiries include a Parliamentary Special Joint Committee, several applications filed at the Federal Court of Canada, and – perhaps most importantly – the Public Order Emergency Commission (also known as the Rouleau Inquiry), established as required by the Act itself (*Emergencies Act* (R.S.C., 1985, c. 22 (4th Supp.), at para. 63).

There has already been considerable skirmishing over what these inquiries should seek to uncover. It is notable that the Order-in-Council that established the Rouleau Inquiry directed it to "examine and report on the circumstances that led to the declaration," that is, to focus on the so-called "trucker convoy." But the inquiry itself describes its mandate somewhat differently, beginning instead with its responsibility to "examine and assess the basis for the government's decision to declare a public order emergency," a description that brings the limits of governmental discretion to the forefront.

Doubtless these legal and legislative inquiries will turn on what the public will likely perceive to be tedious technicalities. The person in the street is much more likely to want to know the answer to far simpler questions: What was it all about? Did the government do the right thing? The question

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that lies at the bottom of this, which should be answered in as plain a manner as possible is this: Was the trucker convoy an emergency that warranted an extraordinary response from government? Was it a public emergency?

The most important piece of advice to those attempting to navigate the many twists and turns of the journey to a conclusion on the legitimacy of emergency powers is simple – start with the Constitution of Canada.

The most fundamental axiom of our legal order is a principle known as constitutionalism. Simply put: "all governmental action must comply with the Constitution.... The Constitution binds all governments... their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source" (*Reference re: Secession of Quebec*, [1998] 2 SCR 217, para 72). The Supreme Court reiterated the importance of this principle earlier this year, in which constitutionalism was again recognized as one of the "fundamental organizing precepts of the Constitution" (*R. v. Sullivan*, 2022 SCC 19, para. 61). This, we shall see, is the key that unlocks the question of how we should judge whether a public order emergency is justifiable, or if it was a dangerous abuse of power.

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This principle of constitutionalism forecloses an elementary but perilous misunderstanding about public emergencies. The usual manner this fundamental error is expressed is: "Necessity knows no law," although it is sometimes expressed as "the welfare of the people is the supreme law," or more pointedly, "the Constitution is not a suicide pact." These maxims, none of which have ever been part of our common law or our constitutional tradition, encapsulate the idea that the urgency of a crisis can in itself serve as a source of authority for the actions the government takes to protect the populace.

Initially, this assertion seems plausible to many people, especially when it is justified as a necessary means of protecting the constitutional order from those who would seek to destroy it. Yet the framers of our constitutional order never intended that public emergencies should grant the government special powers to go beyond what was permitted by the Constitution, even when there was a danger to the state that we can hardly even imagine: the invasion of Canada.

The founding of the Dominion of Canada was in part the response to the armed incursions known as the Fenian Raids. In 1866, the year before Confederation, approximately 1000 armed Irish-American revolutionaries crossed the Canada-US border in military formation near Buffalo. On June 2, they

defeated a similarly-sized force of Canadian militia at the Battle of Ridgeway. Although they withdrew as reinforcements were mobilized, similar incursions continued for another five years. The Fenians operated not only as raiders, but as terrorists, working through secret societies hidden in Canadian cities. In 1868, a Fenian shot and killed Thomas D'Arcy McGee, Member of Parliament for Montreal West and former Minister of Agriculture and Father of Confederation, on Sparks Street, mere blocks from Parliament.

Despite the clear and present danger of Fenian terrorism to the nascent dominion, Prime Minister Sir John A. Macdonald never claimed any power to suspend the Constitution of Canada. The most extreme measure taken was the passage of a statute that allowed suspects to be held without charge for time-limited periods. While many have labelled this a suspension of *habeas corpus*, it was not. Those held on warrants from Macdonald's Privy Council – the vast majority of whom were detained for no more than two weeks – retained the right to challenge the reasonableness and the conditions of their detention in the courts. This measure, while aggressive, was within the constitutional limits on emergency powers that prevailed throughout the British Empire before Confederation.

Macdonald's restraint, rooted in respect for constitutionalist principles, stands out all the more for its contrast with the actions taken by Abraham Lincoln six years earlier. At the outbreak of the American Civil War, insurrectionists in Maryland attempting to hinder the passage of Union troops were arrested and held without charge in the absence of a statute from Congress that would allow for executive detention. Lincoln continued to hold suspects like John Merryman in military custody even after the Chief Justice of the United States had held that Lincoln had no power to order him detained.

The Constitution of Canada, then known as the *British North America Act*, 1867, was enacted between the American Civil War and McGee's assassination. It bears considering why Macdonald felt bound to its strict terms in such a crisis when he had recent examples of statesmen elsewhere bending their constitutions to fit their will during public emergencies at hand. The answer is that the founding of the dominion was seen as a link in a constitutionalist tradition, one that defined our common national identity.

At Confederation, the preamble of the *British North America Act* promised us a "Constitution similar in Principle to that of the United Kingdom" (*Constitution Act*, 1867, Preamble). One of these principles, recognized by the great English jurist and judge Sir William Blackstone, was that "Parliament only... can authorize the crown... for a short and limited time to imprison suspected persons without giving reasons." Blackstone had also explained why the legislative authorization (which Macdonald had obtained, and Lincoln had not) was so important: "Confinement of the person, by secretly hurrying him to jail... [is a] dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is that it is not left to the executive power to

determine when the danger of the state is so great, as to render this measure expedient" (Blackstone 1765-1769/2009, ch. 1).

There is much to unpack in this dense passage. Blackstone identifies arbitrary government as the antithesis of our constitutional tradition. He notes that the solution is a constitution in which the government is always bound by terms set by Parliament. Even when there is a threat to the state itself, it cannot expand its own authority, even if only to imprison someone without charge for a short and limited time without legislative approval, as Lincoln had ordered. To this day in every country with a Westminster system of responsible government, the Cabinet is always bound by the law, even during a public order emergency. Most essentially, emergency powers are limited to the circumstances and terms established by statute. It is not, Blackstone noted, the greatness of the crisis or the expediency of the emergency measures that makes them legal; were that the case, the Cabinet would be the judge of the limits of its authority in the circumstances. That is not constitutionalism – it is arbitrary government.

By the time of Confederation these principles had been at the heart of the Constitution of the United Kingdom for almost two centuries as they were entrenched by an often overlooked constitutional instrument equal in importance to *Magna Carta* and the *Habeas Corpus Act* – namely, the *Petition of Right, 1628*. The petition was a response to the executive (in the person of King Charles I) declaring emergencies so that he could impose taxes without parliamentary authorization. Blackstone describes the effect of this statute as establishing "that no commission shall issue to proceed within this land according to martial law" (Blackstone 1765-1769/2009, ch. 13).

Put simply, for almost 400 years, it has been unconstitutional for the executive to assert the power to dispense with constitutional limits on its authority, even if the military is willing to carry out its commands. The *Bill of Rights, 1689*, reiterated that the executive (soon in practice to be the Cabinet) did not have any power "to subvert the… laws and liberties of this kingdom… by assuming and exercising a power of dispensing with and suspending of laws and the execution of the laws without the consent of Parliament."

Recognition of legal limits on emergency powers was fundamental to the development of constitutionalism. Naturally, this does not prevent the abuse of power. Governments can (and do) abuse the powers entrusted to them by Parliament. This is especially true when these grants of authority are excessively broad, as was the case with the *War Measures Act*. The treatment of the Japanese-Canadian population of the West Coast under its provisions was appalling, but because the government was acting pursuant to a statute, it was possible to challenge its actions in court.

Accordingly, the decision in the case styled *Reference re: Persons of Japanese Race* might well be the nadir of the Supreme Court of Canada, but the court did hold that the deportation and de-naturalization of the wives and children

and deportees was beyond the government's powers. In essence, while there were very few limits on what the government could do under the *War Measures Act*, there still was a boundary that was absolute. The government was bound to respect it as instructed by the courts, regardless of the seriousness of the emergency – or indeed the threat from the enemy power.

Constitutionalism can be further illuminated by contrasting it against the dark backdrop of the legal theories that had prevailed within the borders of Canada's enemies during the Second World War, before they were defeated and brought to justice at the Nuremberg and Tokyo Tribunals. Nazi Germany had been governed since 1933 under the terms of the *Decree of the Reich President for the Protection for the People and State*, commonly known as the Reichstag Fire Decree, as it had been enacted in response to a mysterious arson attack on the German legislature building. This decree suspended the German constitution. In the government's opinion, the necessity of mounting a "defence against Communist state-endangering acts of violence," meant that it was "permissible to restrict the personal freedom, freedom of expression, including the freedom of the press, the freedom to organize and assemble, the privacy of postal telegraphic and telephonic communications" (Germany 1933).

The emergency had been declared by the government, not by the legislature; it expanded its own powers while removing any constitutional restraints that would allow for this expansion to be challenged in the courts. It was justified by the legal theory of Carl Schmitt, who shortly after the decree was issued became the president of the Association of National Socialist German Jurists and the editor-in-chief of the Nazi legal newspaper, *Deutsche Juristen-Zeitung*. Schmitt argued that a state of emergency needed to be a "state of exception," in which there are no legal or constitutional restraints on the executive's authority – which is therefore wholly arbitrary (Schmitt 1921/2014). He argued further that the essence of executive power was the ability to declare this state of exception on its own authority.

The contrast with the principle of constitutionalism could not be clearer. What ensued underlines the importance of being clear on the differences between constitutionalist and anti-constitutionalist theories of emergency powers. As the Third Reich embraced Schmitt's state of exception, those emergency powers were used to authorize crimes against humanity. As the tribunal held in the *IG Farben Trial*,[1] not even the threat of the total destruction of the state could possibly serve as a justification for these atrocities; it was also immaterial that these acts had allegedly been authorized by emergency decrees that had the form of law.

The importance of understanding why the Constitution is more important than the safety of the state was the subject of the film *Judgment at Nuremberg*, which was inspired by the *Judges' Trial*,[2] in which Nazi judges who had sentenced people to death for political crimes were themselves judged. In the film, Spencer Tracy delivered the rejection of Schmitt's theory in a

monologue: “A decision must be made in the life of every nation at the very moment when the grasp of the enemy is at its throat. Then, it seems that the only way to survive is to use the means of the enemy, to rest survival upon what is expedient, to look the other way. Well, the answer to that is ‘survival as what’? A country isn’t a rock. It’s not an extension of one’s self. It’s what it stands for. It’s what it stands for when standing for something is the most difficult!” (Mann 1961).

The recognition that sacrificing a country’s ideals can only preserve a dry, valueless husk underlines the importance of the constitutionalist tradition that we inherited at Confederation. If one grants arbitrary power to the executive, we have already destroyed what we seek to preserve. Furthermore, if we abandon all hope of holding accountable those who govern us, it is inevitable that expediency will be used to justify the worst human rights abuses imaginable. Power tends to corrupt, but absolute power corrupts absolutely.

In order to maintain the all-important distinction between a state of emergency authorized by the Constitution and a state of exception justified by necessity, we must always examine whether a government that invoked it was scrupulous in observing the letter and the spirit of its legal authority. This was reinforced by the failure to investigate the justification for Canada’s 1970 Oc-

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tober Crisis. It remained unclear for almost a decade whether Prime Minister Pierre Trudeau had any basis for claiming that Quebec had been in a state of apprehended insurrection, that is, whether it had been true that student and trade union activists were preparing to rise up to seize power from Quebec Premier Robert Bourassa to force a negotiated settlement with the FLQ terrorist group, or whether Trudeau had induced Bourassa and Montreal Mayor Jean Drapeau to make claims that would justify his deploying the armed forces and invoking the *War Measures Act* – while Canada just watched him.

The report of the inquiry held almost 10 years later (the McDonald Commission) concluded that there had been considerable abuses of power, including the unjust detention of over 100 people who ultimately received compensation. The commission recommended the repeal of the *War Measures Act* and its replacement with the *Emergencies Act*, which created clearer and more stringent limits on when and how the federal government could use certain specified powers. The subsequently enacted *Emergencies Act* makes it clear that the onus is on the government to demonstrate that it has a reasonable basis to conclude that a public order emergency that threatens the security of the nation as a whole exists and that no other law or set of laws is sufficient to end it.

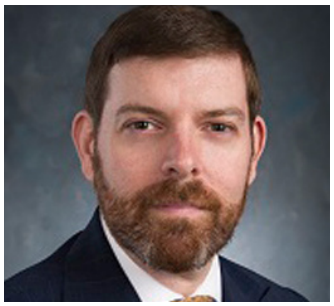
The replacement of the *War Measures Act* with the *Emergencies Act* was a significant step forward for constitutionalism. It allows Canadians who are the subject of emergency powers to use the courts to hold the government accountable. The joint parliamentary committee and public inquiry mandated by the Act helps to ensure that the government observes the limits on its own powers, and allows Canadians to hold it accountable if it does not.

Considering whether the government scrupulously complied with the *Emergencies Act* in the trucker convoy case may initially seem a dry and thankless task, especially as it considerably less telegenic than the government's claims about threats to the nation. The principle of constitutionalism is essential to maintaining the focus on what truly matters. When considering whether a commission of inquiry into a public order emergency has fulfilled its mandate, one should consider what light it sheds on our government's attitude towards constitutionalism when it matters most. Does it continue to understand that any action it takes outside of what is squarely authorized by parliament would be an unlawful abuse of power, regardless of how necessary the government might believe it to be? If it does not, it poses as great a threat to Canada's survival as might be presented by any enemies, foreign or domestic.

If the dangers of a crisis are accepted as a source of authority for the exercise of power (especially after the fact, when cooler heads should prevail), governments will assume the ability to declare a state of exception. For this reason, we should recall the words of the first prime minister of the United Kingdom: "Necessity is the plea for every infringement of human freedom" (Pitt 1783). Whenever a government points to the dangers presented by a crisis as a reason to expand its powers, rather than justifying its actions by virtue of its punctilious and scrupulous adherence to the constitutional and statutory preconditions for doing so, we must remember this and bear in mind what is at stake – nothing less than our nation itself, if it is to be anything more than a lump of the Canadian shield.

The principle of constitutionalism is like a sacred flame passed down across the generations, without which liberty can be extinguished. It will soon be snuffed out if we accept the argument that the constitution – the law that governs those that govern us – becomes no more than a guideline for the powerful during the times when its protections matter most, that is, whenever we face a crisis that threatens them. If Canadians do not continue to grasp the importance of determining whether it was the nation that had been in danger or merely a government that had been in difficulty (or indeed, of observing if the government is incapable of understanding that distinction), then we will in great peril of surrendering our birthright. After every emergency, we must consider this country's heritage of freedom and renew our pledge to uphold it.

About the author



Ryan Alford received his doctorate in public, constitutional, and international law from the University of South Africa. He was awarded his master's degree from the University of Oxford and his law degree from New York University. Previously, he earned a master's degree from the University of Amsterdam and a bachelor's degree from Carleton University. After entering practice he worked for the firm of Cleary, Gottlieb, Steen & Hamilton in their New York and Brussels offices, focusing on international arbitration, transnational litigation, and cross-border mergers and acquisitions, before returning to academia. Prior to joining Lakehead University where he is now a faculty member, he was a Visiting Assistant Professor at the University of Victoria Faculty of Law, where he was awarded the First Year Class Teaching Award. He was awarded tenure and promoted to the position of Associate Professor at the Bora Laskin Faculty of Law at Lakehead University in 2018. In that capacity, he teaches classes in constitutional law, administrative law, and seminars in legal history. He is also a Senior Fellow at the Macdonald-Laurier Institute.

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Endnotes

1 The trial of the directors of a leading German chemical company for its manufacture of Zyklon B gas that the Nazi regime used in its gas chambers.

2 The third of the 12 Nuremberg trials for war crimes that the United States held after the end of World War II.

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>
> – Sir Wilfrid Laurier

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