"Who's Asking?" The Evolution of Requesting Authorities in Canadian Military Aid to the Civil Power Operations
By Tyler Wentzell

October 2020 marks the fiftieth anniversary of a dark moment in Canadian history. "Black October" of 1970 began with two kidnappings in quick succession by the *Front de libération du Quèbec* (FLQ), first the British Trade Commissioner James Richard Cross and then the Quebec Minister of Labour, Pierre Laporte. On 16 October, the federal government invoked the *War Measures Act,* granting extraordinary powers of arrest and investigation, and 6,000 soldiers began patrolling the streets of Montreal. Such events have been blessedly rare in recent Canadian history.

The use of the *War Measures Act* (repealed in 1988) and the calling out of soldiers in aid to the civil power have often been conflated in popular discourse. Certainly, the state of insurrection initiated both, but they were in fact separate legal events. The military was not called out through the imposition of the *War Measures Act,* but by Sections 274-278 of the *National Defence Act* whereby a provincial attorney general submitted a request in writing to the Chief of Defense Staff (CDS). In addition to the *National Defence Act,* two orders in council presently create lawful authorities for the request of armed military force for purposes largely resembling aid to the civil power.

This paper employs a legal historical approach to examining the evolution of the Canadian request for assistance process. Canada, at the time of Confederation in 1867, held to the common law doctrine of "hue and cry," whereby a representative of the civil authority could press any able man into service, whether they be a bystander or the member of a military garrison. "Civil authority" was construed broadly and included police constables, magistrates, judges, and elected officials. A century and a half later, this authority is confined to fewer than 20 people. This paper asks how and why did this transition come to pass?

The first identified crisis regarding who could request military assistance in aid to the civil power operations took place following a string of expensive military operations to deal with strikes in the Nova Scotia coalfields during the 1920s. The requests were made by a local judge, and no one could reasonably be held to account to remunerate the federal government for the cost of the operations. The province of Nova Scotia and the federal government engaged in a lengthy dispute over who would pay for the operations, leading to a Supreme Court of Canada reference and several amendments to the *National Defence Act* during the 1920s and the 1930s.

Parliament amended the *National Defence Act* to remove a local authorities' ability to call upon a military garrison. The power was centralized with provincials attorney general. This centralization caused problems almost immediately. In October 1932, a prison riot erupted in Kingston, Ontario. Taken hostage, the warden placed a telephone call to the local garrison and requested immediate assistance. 200 soldiers arrived within 15 minutes to assist the guards in

putting down the uprising. The rapid show of force brought about a speedy end to the riot, but a second one broke out a few days later. This time, the garrison returned and did not leave until January 1933. When it came time to account for the cost of the operation, federal authorities realized that the operation had not been made pursuant to the *National Defence Act* or any other legislative scheme.

The response to the prison riot was not technically aid to the civil power. Outwardly, it looked the same: armed soldiers responding to a riot or other disturbance with the means and intent to use lethal force if necessary. However, the soldiers did not have peace officer status and they were not working with provincial authorities. Their presence had been requested by an officer of the penitentiary service which, in the Canadian system of division of powers, was a creature of the federal government like the militia itself. An order in council retroactively created a system by which a prison warden could make such a request and the Department of National Defence could recover the costs. After the Second World War, subsequent orders in council walked back this authority. Wardens could no longer make such requests; that authority was vested with the Minister of Justice.

In 1993, a new order in council known as the Canadian Forces Armed Assistance Directions (CFAAD) was issued in support of the establishment of the military's Joint Task Force 2 (JTF2) as a domestic counter-terrorism force. CFAAD gives the Commissioner of the RCMP the authority to request military forces for use at the site of an actual or apprehended disturbance. However, this authority is limited to deployment, not use, of these forces. The Solicitor-General (now the Minister of Public Safety) must submit a further request to the CDS to employ these forces. CFAAD therefore permits the operational commander of the RCMP to request the deployment of JTF2 (and theoretically any other force) where they may be needed, while retaining the decision to request the actual employment of that force at the cabinet level. As with prisons, operations under the CFAAD outwardly look like aid to the civil power operations, but do not automatically come with the granting of peace officer status to the military personnel involved.

The presenter concludes that the centralization of authority for the use of military force in aid to the civil power has occurred principally for budgetary reasons, but also to ensure that the use of military force is tightly controlled at the federal level. Local authorities have no means of requesting military forces for aid to the civil power operations; such requests must go up to the provincial cabinet level and on to the CDS, who retains all operational decision-making authority. Not even the Commissioner of the RCMP, the highest operational law enforcement officer in Canada, can request the *use* of military force, only its deployment.

This paper illuminates the Canadian legal evolution with aid to the civil power operations. It is my hope that in presenting this research at the IS of MS conference, it can form the beginning of a meaningful dialogue about how this approach compares and contrasts with other IS of MS members states. Such a dialogue may lead to useful insights into how democratic countries manage the use of military force domestically.