The Special Council of Lower Canada and the Origin of Canadian Sovereignty

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Abstract:
Following Giorgio Agamben's theory that the decision of the "state of exception" is the fundamental act of sovereignty, this article traces the origin of Canadian sovereignty through a review of the suspension of *habeas corpus* in Lower Canada to its first autonomous declaration on Canadian soil. This article fills an important gap in the historiography of the Special Council and demonstrates the significance of Governor Colborne's declaration of martial law in response to the 1837-38 rebellions in Lower Canada. By underlining this genesis-moment of Canadian sovereignty, I offer a critical alternative to traditional narratives of Canadian sovereignty.

Keywords Giorgio Agamben, Sovereignty, Canada, State of Exception, Special Council of Lower Canada

Résumé:
Suivant la théorie de Giorgio Agamben que la décision de l'état d'exception est l'acte fondamental de la souveraineté, cet article identifie l'origine de la souveraineté canadienne par une revue de la suspension de l'*habeas corpus* au Bas-Canada à sa première déclaration autonome en sol canadien. Cet article rempli un vide important dans l'historiographie du Conseil spécial et démontre l'importance de la déclaration de la loi martiale par le Gouverneur Colborne en réponse aux rébellions de 1837-1838 au Bas-Canada. En soulignant ce moment-genèse de la souveraineté canadienne, j'offre une critique alternative au discours traditionnel de la souveraineté au Canada.

Mots-clés: Giorgio Agamben, souveraineté, Canada, état d'exception, conseil spécial du Bas-Canada

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Introduction

"Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the exceptio*: it nourishes itself on this exception and is a dead letter without it."* —Giorgio Agamben (1998: 27).

Giorgio Agamben has developed a large following internationally through his publication of the Homo Sacer project, a decades-long investigation into the political foundations of the contemporary West. His mastery of the canon of Western political philosophy, theology, linguistics, and many other fields weaves a rich tapestry of interdisciplinary insight, yet—even now that we have reached the "end" of the project—he offers only broad strokes towards what may be called a solution. Instead of a prescriptive project, his aim is an "archaeology of politics" answers a descriptive call to action—namely, to "call into question the place and the very originary structure of politics" (Agamben 2016: 263). As Agamben (2016) has endeavoured to "bring to light the *arcanum imperii* that in some way constituted [the] foundation" of the contemporary West (263), so shall we seek to uncover the great *arcanum* of Canadian sovereignty—its grim origin. Following Agamben's focus on practices and performances of sovereignty rather than official declarations, this article will argue that the origin of Canadian sovereignty is found in the vengeful declaration of martial law by the Special Council in response to the 1837-1838 rebellions in Lower Canada. Not only did Governor Colborne suspend the normal juridical order, but he ensured that the means by which he suspended the order preserved the potentiality of that normal juridical order under the aegis of a distinctly Canadian sovereign executive power.

This article builds on the work of other Canadianists who have found Agamben's theory useful to explain relations of sovereignty and power across Canadian political history. Kevin Bruyneel (2010) engages Agamben's theory of the *homo sacer* to explain the relationship of Louis Riel to the early Canadian state, revealing "the imposition of disorder, contingency and violence upon subject peoples who remain the exception that must continue to be part of the settler story so as to prove the rule of the sovereign state" (714). Casting Riel as the subject of the settler state sovereign exception establishes the inherent violence of settler-colonial sovereignty. In a similar vein, Dennis Moinaro (2015) examines the "Halifax 10," a group of communist immigrants who were "reduce[d]…to the status of *homo sacer* on the basis of nativity and political ideology" (145). In such a decision, the Canadian state reaffirms its sovereign right to exclude.

The largest body of work engaging Agambenian approaches to sovereignty within the field of Canadian politics has come from investigations of the War on Terror. The introduction of "security certificates," imposed through a process that (among other egregious limitations on legal rights) "operates on the basis of secret evidence and non-disclosure, that omits cross-examination…suggests the erasure of the rule of law" (Bell 2006: 75). Colleen Bell (2006) demonstrates how the logic of the exception can help explain how these limitations on rights and freedoms stand "as the condition of possibility for juridical rules" (78). Tina Managhan (2012) examines the role of Maher Arar alongside the figure of the hearse travelling down the Highway of Heroes to analyze the production of Canadian sovereignty. This reveals two different performances by Canadian citizens: both as individuals "separated from their own bare life and (re)cast as *the lucky ones*" when reflecting upon the torture of Maher Arar, and in groups during the "staged re-enactment of the moment of sovereign revelation" performed by the crowds along the Highway of Heroes overpasses (Managhan 2012: 115). The Maher Arar case resurfaces as an example of subjection to sovereign power (Salter 2008: 373) and the problematic relationship of racialized decisions on the exception (Abu-Laban & Nath 2007: 81). In sum, many Canadian political theorists and International Relations scholars have used Agamben's work to investigate the limits and transgressions of sovereign power (e.g., Best 2007; Johnson 2013; Murphy 2017; Nyers 2006; Salter & Mutlu 2011; Walker 2006). While scholars have engaged Agamben to discuss various elements of Canadian sovereignty, there has not yet been an investigation into its origin.

This paper begins with a discussion of Agamben's archaeological method, including developing a proper definition of "origin." Secondly, Agamben's sketching of the relationship between sovereignty and the state of exception will be expanded. The perspective on sovereignty that Agamben offers is particularly useful in an archaeology such as ours because he looks beyond formal declarations and official histories to examine the practices and performances of sovereign power.

Given the limited literature on the Special Council of Lower Canada, this article situates the Council in both historiography and history, reflecting on the state of scholarship of the Special Council of Lower Canada and situating the Council within the history of martial law and the suspension of *habeas corpus* in Lower Canada, before examining the role of the Council vis-à-vis the Agambenian critique of sovereignty. This historical contextualization of the Special Council fills an important gap in the literature surrounding the Special Council, as well as in studies of martial law in Canadian colonies. Finally, with a foundation established in the history of the Special Council and

the decisionistic logic of sovereignty, I will argue that—by suspending the rule of law and thus performing the signature act of the sovereign—the Special Council is the first appearance of Canadian sovereignty. By taking up Agamben's critique of sovereignty and applying it to the particular case of Canada, we open up a critical discursive space for a discussion of the legitimacy of claims to sovereignty. Though it would be beyond the scope of this article to analyze all rightful interlocutors in such a discursive space, Indigenous claims to sovereignty offer one important example.

Archaeology: Origin and Method

The concept of "origin" is central to any archaeological methodology, as the *arche* of a given entity—for which the archaeology searches—is the place where that entity comes into being. Finding this moment can illuminate future developments. Therefore, to follow Agamben's method of the archaeology, we must first establish the *arche* for the subject under investigation. The search for an origin of sovereignty, especially in opposition to the official dictum of the date of Confederation, entails a methodological move towards the operations of power. Before discussing the method of inquiry, it is crucial that we understand this distinction between beginning and origin.

Agamben begins his discussions of the origin by reference to *The Origin of German Tragic Drama*, where Walter Benjamin defines the origin at length. He notes that "The term origin is not intended to describe the process by which the existent came into being"—which in German would more precisely be *Entstehung* (genesis)—"but rather to describe that which emerges from the process of becoming and disappearance" (Benjamin 1998: 45). Thus, "origin" is not bound to a particular historico-chronological node, but "is an eddy in the stream of becoming, and in its current swallows the material involved in the process of genesis" (Benjamin 1998: 45). Thus it is insufficient to limit the origin to "the examination of actual findings," as its substance obtains from the moment of genesis across both "their history and their subsequent development" (Benjamin 1998: 46). Thus, Benjamin advocates that analysis of the origin must be dialectical in logic: as "in such investigations this historical perspective can be extended, into the past or the future, without being subject to any limits of principle. This gives the idea its total scope" (Benjamin 1998: 47). Benjamin separates the dialectical and active origin from the fixed, historico-chronological genesis, and notes that a reduction of origin to genesis will hamper the ability of the researcher—or "critic"—to appreciate the total scope of the entity.

When Agamben, then, picks up the idea of the origin, it is always and already distinct from the concept of genesis. Agamben refers origin back to its Greek root, *arche*, to set up his discussion of the archaeology. In *Nudities*, Agamben engages in a discussion of the *archaic*—that is, that which is linked to the *arche*—as foil to the "contemporary." Reaffirming his connection to Benjamin, Agamben (2011a) notes that the archaic is able to link to the *arche* across historico-chronological time by virtue of the continued present activity of the origin within the entity, offering the examples of the embryo's continued effect on the tissues of the mature organism and the childhood experiences on the psychical life of the adult (17). The strength of the connection to the origin changes, and an entity may at times be more archaic than at others; however, at any moment of change, "it is [nevertheless] contemporary with historical becoming and does not cease to operate within it" (Agamben 2011a: 17). Just as we saw in Benjamin, Agamben views origin as a process of becoming rather than an instance of being(-created).

Agamben (2017a) later adopts the image of the vortex to explain the constant presence of origin within an entity. "Like the whirlpool in the river's flow, the origin is simultaneous with the becoming of phenomena, from which it derives its matter but in which it dwells in a somehow autonomous and stationary way" (Agamben 2017a: 59). The vortex-force "is separated from the flow of water…and somehow still is part…It is an independent being, yet there is no drop that separately belongs to it, and its identity is absolutely immaterial" (Agamben 2017a: 58). Knowledge of the origin of an entity is essential for the understanding that entity, as "the vortex of the origin remains present until the end and silently accompanies…existence at every moment" (Agamben 2017a: 60). Knowledge of that vortex is prerequisite for knowledge of the entity itself, as the force of origin immanent informs its changes, from past to present to future.

Though he dedicates an entire volume to a reflection on method*ology*, Agamben's method is still best accessed through his frequent interlocutor, Michel Foucault. The method of inquiry which Foucault (1990) calls for "must not assume that the sovereignty of the state, the form of the law, or the over-all unity of a domination are given at the outset; rather, these are only the terminal forms power takes" (92). Investigations into power—and any investigation into sovereignty is necessarily concerned with the *power* of sovereignty—should have for primary concern "the point where power surmounts the rules of right which organize and delimit it and extends itself beyond them" (Foucault 1980: 96). Origin is not limited to the genesis-moment, because it remains always present (to different degrees). Because of the constant presence of the origin, seeking out the beginning of Canadian sovereignty is only the first step, because it identifies the genesis—the

archaeological impact is in revealing the origin that remains present throughout the continued existence of Canadian sovereignty. Our lesson here is that, rather than assuming the narrative of "Canada at 150" and thereby uncritically accepting Confederation as a magical genesis-moment of sovereignty, we ought to examine the real practices of power that—by surmounting the accepted normal situation's rules as well as prior practices of martial law—brought about a Canadian articulation of sovereign separate from the flag flying at the Governor's residence.

Agamben famously examines a terminal form through his investigations into the state of exception, and use of the extreme paradigm to explain the normal situation. He notes that "just as the state of exception allows for the foundation and definition of the normal legal order, so in light of the extreme situation—which is, at bottom, a kind of exception—it is possible to judge and decide on the normal situation" (Agamben 2002: 48). This analysis of the limit—where we "learn to gaze...upon the Gorgon" (Agamben 2002: 52)—allows a glimpse at the uncovered becoming: when a power surmounts rules of right, it moves with the force of its vortex without its cloak of formalities provided by "rules" and "rights" of the normal situation. Therefore, in analyzing the exceptional, we can hope to uncover the logic of the thing itself.

Throughout his decades-long Homo Sacer Project, Agamben frequently employs this methodological move—identify an exceptional (terminal) act or entity, then draw back from the exceptional situation to reflect on the normal one. In *Homo Sacer: Sovereign Power and Bare Life* (1998) and *State of Exception* (2005a), Agamben examines the imposition of martial law and the suspension of the rule of law: the state of exception. In *The Sacrament of Language*, Agamben takes the case of the juridical-religious institution of the oath to reflect upon the normal experience of language (2011b), and in *Opus Dei*, Agamben examines the sacramental work of the priest to explain human being and will (2013). Each of these inquiries is an archaeology of the origin of being, or language, or law. By examining the limit figure instead of the over-all unity of the normal rule, Agamben turns to the exception that nourishes the rule. Therefore, for our investigation into the origin of Canadian sovereignty, we will look for the genesis-moment that, as an origin that remains in relation, sustains the sovereign order.

The Sovereign and the Exception

Agamben's critique of sovereignty builds on the work of German legal theorist Carl Schmitt, who defined the sovereign as "he who decides on the exception" (2005: 5).[1] For Agamben, this exception—and, more specifically, the decision on the exception—represents the internal logic of sovereignty. This decision on the exception is necessarily undefined in applicability, and "can at best be characterized as a case of extreme peril, a danger to the existence of the state" (Schmitt 2005: 6) to which the sovereign responds with "principally unlimited authority…[justified] on the basis of its right to self-preservation" (Schmitt 2005: 12). In this way, the sovereign uses the exception to establish the boundaries and limits to the normal political order (Murphy 2017: 88). This power of inside and outside leads to what Agamben terms the paradox of sovereignty: "the sovereign, having the legal power to suspend the validity of the law, legally places him outside the law," meaning that "the sovereign is, at the same time, outside and inside the legal order" (Agamben 1998: 15). Therefore, "the state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept" (Agamben 2005a: 4). Where Schmitt saw the power of the sovereign in the moments of decision on the exception, Agamben takes a step further, identifying the problematic and paradoxical relationship to the legal order that the sovereign necessarily occupies.

Agamben's sustained reflections on the results of a sovereign decision on the exception represent important contributions to theorizing sovereignty. The result changes depending upon the focal point: for the individual subjected to the exceptional power, this decision is one of abandon and abjection (Agamben 1998: 59; Murphy 2017); however, for the sovereign, the state of exception is an act of maintenance through impotentiality (Agamben 2005b: 104; 1998: 45). The individual subject loses the protections of the normal legal order—the clearest example here is the suspension of legal rights such as *habeas corpus* (Agamben 1998: 124)—when that order is suspended, yet remains related to the sovereign because of the ban to which that individual is subjected (Murphy 2017: 88). Subjected to the exception, the individual cannot engage in the political community and engage in a "form or way of living proper to an individual or group," expressed in Greek as *bios*, but only in the "simple fact of living," *zoe* (Agamben 1998: 1). The experience of the exception for the individual subjected to the exception is negative and limiting—a markedly different experience from that of that of the sovereign.

[1] Agamben focuses on Schmitt in *Homo Sacer* in place of Walter Benjamin's discussion of the sovereign. A closer balance between Schmittian and Benjaminian conceptions of sovereignty is present in the discussion of gigantomachy in *State of Exception.* For a discussion of the Schmitt/Benjamin relation in Agamben's critique of sovereignty, see Kotsko (2008).

The logic of sovereignty, as mentioned above, is rooted in the ability to decide on the exception. The logic of the exception, in turn, is that of the Hegelian *aufhebung*; that is to say, the suspension of the normal legal order does not annihilate the potentiality of that normal order but displaces the position of the normal legal order. The normal situation of the law is "applied, so to speak, to the exception in dis-applying itself, in withdrawing itself from it" (Agamben 2005b: 104). The decision to dis-apply, or to displace, is the sovereign decision to suspend the rule of law and enact the state of exception. This act that only a sovereign can execute reaffirms—or, as Agamben says, "nourishes"—the power of the sovereign in the normal situation.

When executing an archaeology of a particular state's sovereignty, the impact of identifying the genesis-moment on the lasting origin of that sovereignty offers an opportunity for engagement with Agamben's discussion of the distance between legitimacy and legality. If we are to take seriously Agamben's claim that we are all always subject to the pure force of sovereign power, we must not only "call into question the *legality* of institutions, but also their *legitimacy*; not only…the rules and modalities of the exercise of power, but the very principle that founds and legitimates it" (Agamben 2017b: 2). Opening up critical discursive space here entails focusing precisely on a broadly-conceived question of legitimacy as opposed to a narrow question of legality does not claim that only an Agambenian perspective is suited to this critique. As mentioned above, Indigenous critiques of Canadian sovereignty occupy a similarly critical perspective, and would enrich the critical discursive space opened up by this Agambenian critique. This means that, to understand the actions of the Canadian sovereign that overreaches into the day-to-day lives of law-abiding Canadians, we must question the origin—the foundation and legitimation—of that sovereign power. The "emergency measures" invoked always for "security reasons" at airports, borders, and by surveillance agencies, are examples of "the powers of state act[ing] openly as outside the law" (Agamben 2017b: 34)—yet admonishing the extrajuridical measures of the government does not explain why that capacity to overreach resurfaces time and again. If we are to recognize the crisis of legitimacy—the crisis that "nowhere on earth today is a legitimate power to be found" (Agamben 2012: 40)—we must peel back the official declarations. We must identify the genesis and trace the problematic origin of sovereignty. To do so in Canadian history, that means a turn to the turbulent times following the rebellions in Lower Canada.

The Special Council of Lower Canada

The Special Council of Lower Canada is an obscure executive body that managed the affairs of Lower Canada following the 1837-1838 Rebellions until the 1841 Act of Union. As Fecteau first noted in 1987, the historiography of the Special Council is minor (466), and the limit that this places on discussion of that body is worth reflecting upon (cf. Goldring 1976: 235). For decades after its dissolution, the Special Council was largely ignored, receiving only passing mention, in legislative records (Desjardins 1902: 74-81), discussions of responsible government (Bradshaw 1903), or legal histories (Perrault 1943). While a number of theses and dissertations have been written on the subject (e.g., Dagenais 2011; Duncan 1965; Goldring 1976; Henderson 2010; McCulloch 1985; Thorburn 1996; Watt 1997), there is yet to be a comprehensive monograph of the Special Council published by an academic press. Further, considering that many of these documents were written decades ago and some are masters-level theses, it is unlikely that one will emerge in the near future. The Special Council received greater attention from academic historians starting in the 1980s (Fecteau 1987; Goldring 1980; Greenwood 1980; Greenwood 1988; Kenny 1984; see also Masciota 1987), and more direct attention in edited collections such as *Colonial Leviathan* (see Greer 1992; Greer & Radforth 1992; Radforth 1992; Young 1992) and *Canadian State Trials, Volume II* (see Boissery 2002; Fecteau 2002; Greenwood 2002; Greenwood & Wright 2002; Watt 2002; see also Fecteau & Hay 1996; Fecteau et al 1996; Greenwood & Wright 1996b). The last decade has seen a shift back to articles as the primary medium engaging the Special Council (Curtis 2008; Dagenais 2013, 2015, 2016; Gunn 2007; Henderson 2013; Phillips 2016); however, this recent literature has not filled the void of a comprehensive monograph on the topic.

The Special Council, as mentioned above, came into being in the wake of the 1837-1838 rebellions in Lower Canada. In its final session before the rebellions began in 1837, the deadlocked Lower Canadian Assembly did not pass a single piece of legislation (Watt 1997: 7), and the British Colonial office required swift action to respond to the crisis, and to carry on with political and social reforms attempted before the rebellions (Garon 1970: 74, 80; Arsenault 2013: 137). Thus, they suspended the constitution of 1791 and turned to an authoritarian council, which was able to pass a great deal of unpopular legislation that "allowed for the liberal state to be kick-started" (Fyson 2014: 417; see also Greer 1995: 16; Watt 1997: 7). This period of unelected rule between the violence of the rebellion and the restoration of an elected assembly (of the united Province of Canada) in 1841, positions the Special Council as "the median separating the road to rebellion from the road to responsible government" (Watt 1997: 11). Indeed, as mentioned above, the link between the Special Council and the development of responsible government was one of the first ways the body entered into discussions of Canadian history. Much of the legislation passed by the

Council was "inspired by the mercantile interests of Montreal" (Goldring 1976: 248; see also Curtis 1997: 31*ff*; Tremblay 2013; Watt 2006: 237-8), and the Montreal Constitutional Association (Watt 1997: 56; McCulloch 1991: 201-2). The impressive amount of business included the establishment or expansion of new banks, roads, civil offices, canals, postal services, land registry systems, and, perhaps most importantly, police forces (Ducharme 2005: 359-60; Goldring 1976: 253; Greer 1992: 21, 23-4; Masciotra 1987: 723; McCulloch 1990: 101, 109; Radforth 1992: 78, 85, 95; Young 1992: 52). The infrastructural advancement of Lower Canada during this period paved the way for the development of industry in the region, and prepared the market for greater integration with Upper Canada following the Act of Union.

The most impactful legislation, however, was Governor Colborne's suspension of *habeas corpus*—or, in Agamben's terms, his declaration of the state of exception. This decision of the exception is an overlooked watershed moment in Canadian juridical history. Through a bill sent personally by Governor Colborne to his Special Councillors, he declared that the *habeas corpus* act of Lower Canada was not, as the judicial branch had argued, "part of the criminal law of England, established in the colony by the Quebec Act of 1774 and so beyond the reach of the Special Council" (Goldring 1976: 249). Instead, Colborne decreed that the reference for the right of *habeas corpus* in Lower Canada was a "local ordinance of 1784"—thus under the purview of the council—and promptly suspended both *habeas corpus* and the judges who spoke out against the original decision (Goldring 1976: 250; Phillips 2016: 719; Watt 2002). This led to what F. Murray Greenwood (1980) called "le pire exemple, dans l'histoire du Canada, de l'abus de l'appareil judiciare [the worst example, in the history of Canada, of the abuse of the judicial apparatus]" (81). Whatever progressive reforms made for the mercantile interests were overshadowed by the end of a decade of positive legal reforms, including right to counsel (Greenwood & Wright 1996b: 429; Thorburn 1996: 2; Phillips 2016: 715-7), and replaced with a lack of even elementary fairness before the court (Greenwood 1988: 258-9). The Special Council jailed editors and shut down newspapers (Dagenais 2013: 6; Greenwood & Wright 1996b: 435), and often used collective punishments and armed investigations of villages (Curtis 2012: 379). The state of exception declared by Colborne was, in short, an extreme, terminal and a paradigm example of authoritarian abuses of power. The case of 1838-1841, however, was not the first time that martial law and brutal force were engaged in Lower Canada—not even the first time in the 1800s. What separates Governor Colborne's state of exception from earlier uses of martial law or extended security powers is its relationship to the sovereign decision.

States of Exception up to Colborne's Decree, 1670-1838

Before Colborne's decree of 1838, there were a number of instances of martial law, suspension of *habeas corpus*, and exceptional powers; however, as we will see, these decisions reified imperial sovereignty rather than inaugurating a distinctly Canadian one. The historic difference of Colborne's decree will only become clear after recognizing the less-exceptional invocations of emergency powers that preceded his moment of sovereign decision. In New France, the Great Criminal Ordinance of August 1670 proclaimed in France defined the terms of trial and juridical proceedings (Moogk 1996, 55), with juridical power occasionally being devolved from France to delegates, such as Champlain (61). Thus, in face of serious emergency, such as the Louisbourg Mutiny of 1744, the mutineers were brought to the port of Rochefort in France for courts-martial (Greer 1977: 316; Moogk 1996: 65), reaffirming the sovereignty of France over the colonial territory. Following the British Conquest, a military regime was appointed, lasting from 1759 until the 1764 constitution of a new British government (Hay 1996: 114). In its first month, the military regime established a system of military courts for the territory, where thirteen British officers "filled the roles of both judge and jury…the prosecutor was another officer; the sentence, if one was passed, was confirmed by the local commanding officer" (Hay 1996: 116). While this arrangement was clearly different from the norms practiced in the English common law system, the military officers received legitimacy from their British commissions, and the declaration of the military regime appears as a post-bellum management tool decided by imperial officials concerned with British interests. Whether a French or a British colony, the territory that would become Lower Canada only saw exceptional powers enacted from decisions made overseas.

After Quebec is established as a part of the British colonies, the suspension of law during the American and French Revolutions serve as examples of how the British reinforced their sovereignty and control through emergency powers. After a raid by Benedict Arnold in May 1775, Governor Carleton declared martial law, "even though there was no open rebellion in the colony and the civil and criminal courts were sitting regularly" (Fecteau & Hay 1996: 139). This decree of Governor Carleton, however, was not in response to an emergency threat, but primarily to raise a militia in support of the King (Fecteau & Hay 1996: 142-3). And in the case of Governor Haldimand, from 1778-1786, who "justified his many arrests and detentions as crucial to the security of Quebec" (Fecteau & Hay 1996: 159), it was not a declaration of martial law that preceded the use of emergency power, but Haldimand's "publish[ing of] a 1777 act of the British Parliament authorizing arrest and detention without bail of anyone suspected or accused of high treason in America" (151).

What Haldimand invoked is, then, not an exceptional state at all, but a governor following a statute of normal politics! Similarly, following fears of the French Canadians raising a militia against the British during the French Revolution (Greenwood 1996: 243) led to an extended use of treason laws in Lower Canada in 1797 (263). While the use of the Court to assert that "any violent, generalized resistance to law enforcement…amounted to levying war" (Greenwood 1996: 264) clearly resulted in a muzzling of political dissenters, this was in no way an act independent of British wishes. In fact, "the concept of a politically independent judiciary in colonies was simply not of importance to imperial politicians" (Greenwood 1996: 277). Thus, just as in Haldimand's inquisition two decades earlier, this extended use of powers occurred within the normal sphere of the law.

The "Reign of Terror" led by Sir James Craig is the last major use of military courts and *habeas corpus* suspension before Governor Colborne's declaration, and in many ways it sets the stage for Colborne's sovereign decision. It is important to keep in mind that Craig's rampage arises from a "hop[e] to transform Lower Canada into an essentially British, subservient colony" (Fecteau et al 1996: 325). Following the original British military regime of 1759-64, "colonial authorities…learned the advantages of adding martial law to the panoply of instruments of royal power over the people" (Fecteau et al 1996: 364). After a *patriote* newspaper "published an electoral song suggesting the people exterminate the…officialdom," Sir James Craig responded swiftly, to "gather evidence of high treason or treasonable practices" (Fecteau et al 1996: 338). Warrants for "treasonable practices" were issued for a number of *parti canadien* leaders and immediately executed (Fecteau et al 1996: 339). These leaders remained in prison, with no access to their parliamentary privilege to be free from molestation of the Crown, which Craig ignored (Fecteau et al 1996: 346-7). Still unsatisfied, Craig ordered a detention of mail, and "special military patrols…up and down the streets of a perfectly peaceful capital" (Fecteau et al 1996: 340) despite a lack of evidence for this action being necessary. While these events were extraordinary, they were not necessarily exceptional in Agambenian terms. The detention of political dissidents in this case was the very action that led to decades of hatred for Sir James Craig by the *patriotes*; however, there are two mitigating factors that lessen the exceptionality of his actions. First, the simple act of suspending *habeas corpus* was not uncommon for the British colonial officers between the Conquest and the Act of Union (Fecteau et al 1996: 333), so the suspension of *habeas corpus* was not a departure from the normal situation—a state exception, by definition, must be outside of the normal legal order. Secondly, while some speculated afterwards that the arrests themselves might have been of questionable legality, "the prisoners were actually detained on charges, not merely on

suspicion," as they had been in some earlier suspensions of *habeas corpus* (Fecteau et al 1996: 339). The "Reign of Terror," a source of animosity that fuelled the fires of rebellion in 1837-8, was merely another means of reaffirming imperial sovereignty over a colonial territory.

Colborne's action of altering the *habeas corpus* referent in Lower Canada, and the subsequent suspension is a moment of sovereign becoming. Not only did Colborne's actions fundamentally alter the role of colonial legislatures in the British empire—but before Colborne, "no colonial legislature could then enact laws contravening the fundamental principles of the common law" (Fecteau et al 1996: 377n134)—but also, he created, claimed, and then acted upon his own right to declare the state of exception—and "it is precisely the exception that makes relevant the subject of sovereignty" (Schmitt 2005: 6). Before this declaration, there was no sense that this kind of sovereign power rested in a colonial legislature or a particular colonial legislator (Fecteau et al 1996: 362). While historians disagree on 1760, 1763, or 1774 serving as the best date to "officially" mark the date of British law applying to Quebec (Greenwood & Wright 1996a: 19-20), all of these options occur before the reaffirming ordinance passed by the Legislative Council of Quebec in 1784, and the subsequent reaffirmation in the imperial parliament in 1791 (Greenwood & Wright 1996a: 32). By changing the referent to the 1784 ordinance, however, Colborne asserts sovereignty in the executive power of Lower Canada. When the writs were restored, this right proceeded from the 1784 affirmation and was thus not subservient to British juridical norms but Canadian—thus fulfilling Agamben's (1998) characterization that "through the state of exception, the sovereign 'creates and guarantees the situation' that the law needs for its own validity" (17). In 1841—after the 1838 declaration ceased to be in effect—the new "normal" juridical situation could be Canadian, nourished by a Canadian sovereignty that could suspend the rule to preserve it. Colborne's declaration thus marks the genesis of juridical sovereignty on Canadian soil.

Conclusion

The force of the origin of Canadian sovereignty has waxed and waned over the last 180 years. At more archaic times, such as the military response to the FLQ or Oka crisis, we see the ongoing influence of Colborne as an eddy in Canadian sovereignty's stream of becoming. At other moments the *arche* is more hidden: the logic of exception at the heart of sovereignty is glossed over by a veneer of rights and freedoms. Through this archaeology of Canadian sovereignty, we have searched for the exercise of power in its terminal form, where it actually exists and acts in the world, rather than where ink has spilled on paper. By understanding sovereignty within questions

of legitimacy rather than legality, we can open up discursive space to other critical projects in Canadian studies of sovereignty.

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