The War Power of the Dominion

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> Meanwhile we may possibly have to fight the Bolsheviks before we have done with wars."[1]

There is a great deal of talk, in these days of armed truce and "police action", of the imperative necessity for taking stock of war supplies and for re-tooling industry for war production. For the Canadian or American lawyer, this talk has a two-edged significance. As a private citizen, he is reminded of the possibility that he may be obliged once again to live in a war economy or bear arms for his country. As an officer of the court, he is warned that for the third time in living memory the system of constitutional jurisprudence he serves may be virtually engulfed by that mammoth among federal powers, the war power. From the lawyer's point of view, this is a time for taking stock of the constitutional principles under which the Dominion wages war; and perhaps a time for re-tooling some of the judicial precedents that have restricted the exercise of the war power in the past.

I

If the British North America Act made no mention of the war power, it would seem reasonable to assume that it comes within the legislative sphere of the Dominion. National defence is not specified in section 92 as a category of legislation that falls exclusively within the sphere of the provinces. Nor would it appear to be included in the catch-all class of section 92, "Generally all matters of a merely local or private nature in the Province". It would seem to fall into the apparent residuary power of the Dominion to legislate for the "peace, order, and good government of Canada". The framers, however, did not relegate the war power to the residuum. Among the twenty-nine specific classes of sub-

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[1] Letter of Sir Frederick Pollock to Mr. Justice Holmes, February 3rd, 1930: Howe (ed.), The Pollock-Holmes Letters (Cambridge, 1942), Vol. II, p. 259.

jects that are assigned *exclusively* to the Dominion Parliament is "Militia, Military and Naval Service, and Defence". The centralized nature of the Canadian war power is affirmed by section 15 of the B. N. A. Act, which asserts that "The Command-in-Chief of the Land and Naval Militia and of all Naval and Military Forces of and in Canada, is hereby declared to continue and be vested in the Queen".

The picture that emerges from a consideration of the text of the B. N. A. Act, without regard to its judicial construction, is of a quasi-federal system in which legislative powers are carefully divided between the Dominion and the provinces. Besides the residuum of all legislative powers that are not specifically granted to the provinces, the Dominion seems to possess exclusive legislative authority over certain enumerated classes of subjects, including national defence.

The generalization has frequently been made that the Dominion and the provinces together possess the totality of legislative power that is necessary for governing a modern state.[2] One significance of that statement is that the federal division of power between the provinces and the Dominion is not complicated by the setting of broad limitations on the extent to which either may legislate. The United States Constitution contains several such limitations, for example, the due process clause and the guarantee of freedom of speech. They are less numerous in the Australian Constitution. Their effect is to create legislative vacuums into which the central government or the regional governments, or occasionally both, are forbidden to enter. Broad constitutional limitations frequently form a more formidable obstacle to the exercise of a federal war power than does the division of legislative power between the central and the regional governments. The absence of such limitations in the Canadian Constitution, therefore, simplifies the problem of the war power.

Of course, the Canadian Constitution imposes minor restrictions on the legislative power of the Dominion, and it is possible to imagine a war measure running afoul of them. Suppose, for example, that to meet an urgent deficiency in the defence budget Parliament should pass an emergency appropriations bill, which originated in the upper house or had not been recommended by the Governor-General, as required by section 54.[3] Or that legis-

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[2] See Clement, The Law of the Canadian Constitution, pp. 20-22. See also *In Re Bowater's Newfoundland Pulp and Paper Mills*, [1950] S.C.R. 608, at pp. 619-21, 633-34, 658-61.

[3] See the judgment of Duff C.J. in *In the Matter of a Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1, at p. 10.

lation, reciting a wartime need to save printing materials, should purport to suspend the minority language rights guaranteed by section 133. The Supreme Court, in reviewing such legislation, would be obliged to decide whether conditions of emergency justified a departure from the legislative procedure ordained by the constitution or the minority freedoms it sets up. The court would have to judge between the affirmative war power, on the one hand, and a negative limitation of legislative power, on the other.

So far no review of war legislation has imposed this duty on the court. The problem has always been whether the measure in question was a legitimate exercise of the war power of the Dominion or an unconstitutional attempt to invade the field of provincial legislation. The court has only been asked to judge between the affirmative war power of the Dominion, on the one hand, and the affirmative legislative power of the provinces, on the other.

With only the text of the B. N. A. Act in mind, therefore, one would imagine the formulation of the Dominion war power to be a relatively simple task. In the first place, the residuum of legislative power is described as belonging to the Dominion, so that it includes rather than restricts the war power. A contrasting position is observed in the United States and Australia, where the war power is granted to the central government as one of several enumerated powers that are carved out of the residuary powers of the states. Moreover, the war power in Canada is specifically mentioned in an illustrative list of exclusive powers of the Dominion. Finally, in Canada there are no sweeping constitutional limitations, as are found in the United States and Australia, to interfere with the exercise of the war power.

II

The opinions in which the Privy Council has interpreted the constitutional division of legislative power between the Dominion and the provinces, however, do not reflect the literal simplicity of the text of sections 91 and 92. The Dominion residuary power, in its normal application, has been given a restrictive construction, and the scope of the enumerated powers of the provinces has been correspondingly broadened. Only in time of emergency is the Dominion considered to possess authority to legislate for the "peace, order, and good government" of Canada as a whole. The war power has become identified with this general Dominion emergency power rather than with the illustrative class of subjects of section 91 (7), "Militia, Military and Naval Service, and De-

fence". Although it is conjecturable to what extent the actual scope of the war power has been affected by this interpretation, its constitutional basis undoubtedly has been altered.

One Canadian jurist noted three primary changes the Privy Council decisions have made in the division of power as it is expressed in the constitution: (1) the residuary power of the Dominion to legislate for the "peace, order, and good government" of Canada as a whole may be invoked only in certain emergencies, such as war or famine; (2) although the Dominion is forced to base non-emergency legislation on the so-called "specific" clauses of section 91, one of the most useful of them, "the regulation of trade and commerce", has been qualified into insignificance; and (3) one of the enumerated classes of provincial legislation, "property and civil rights in the Province", has been expanded to the point of becoming the *de facto* residuum of legislative power under the Canadian Constitution.[4] He concluded that the cases reveal "the perpetuation of judicial over-concern for Provincial autonomy, and of the vital misreading of the main branches of sections 91 and 92 induced by that attitude in the nineties".[5]

The author of the O'Connor Report has also criticized the Privy Council's interpretation. So long as the "specific" subjects of section 91 are considered more important than its residuary clause, he warned, "Dominion legislative authority will be restricted in frustration of the text of the B.N.A. Act".[6] But regardless of the merit such strictures may have, the construction the Privy Council has placed upon sections 91 and 92 is authoritative. In order to understand the war power we must consider it in context as one aspect of the general emergency power of the Dominion.

The principle upon which this emergency power has been based is that matters of unusual concern to the nation as a whole relax the normal federal division of authority between the Dominion and the provinces, and enable the Dominion to legislate under the "peace, order, and good government" clause rather than under a specifically-enumerated power of section 91. This principle was presented germinally in *Russell* v. *The Queen*,[7] in which the Privy Council held that the Dominion did not usurp provincial powers by enacting the Canada Temperance Act of 1878, which authorized the Governor-General to prohibit the retailing

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[4] MacDonald, The Constitution in a Changing World (1948), 29 Can. Bar Rev. 21. Compare 2 Cameron, The Canadian Constitution, p. 15.

[5] MacDonald, *op. cit.*, p. 41.

[6] O'Connor, Property and Civil Rights in the Province (1940), 21 Can. Bar Rev. 331, at p. 361.

[7] (1882), 7 App. Cas. 829.

of liquor throughout Canada on a local option basis. Laws "deemed to be necessary or expedient for the national safety . . . to prohibit the sale of arms, or the carrying of arms" or restricting "the sale or custody of poisonous drugs, or of dangerously explosive substances" [8] were described as *intra vires* the central government. The inference is that the Dominion possesses something akin to a federal police power, which may be invoked to meet an emergency or an evil that factually transcends the jurisdiction of an individual province.

The generous terms in which the *Russell* opinion interpreted the "peace, order, and good government" clause and postulated a general Dominion police power, however, have been strictly limited in the course of subsequent Privy Council decisions. In *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [9] Lord Watson rather reluctantly accepted the *Russell* opinion as binding. He urged that recognition of the "peace, order, and good government" clause as a peg for Dominion legislation "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance". [10] In *Attorney-General for the Dominion* v. *Attorney-General for Alberta* [11] it was reasoned that legislation based on the "general" Dominion power of the "peace, order, and good government" clause, unlike that based on an enumerated power of section 91, may not "trench" on the classes of provincial legislation listed in section 92. Viscount Haldane warned that the principle of the *Russell* case "ought to be applied only with great caution". [12] The same attitude may be seen in judgments rendered between the two world wars, in which the emergency doctrine was rejected as a basis for the social legislation of the Bennett New Deal. [13]

Conceding the soundness of the emergency doctrine, it does not necessarily follow that the war power is merely one facet of the emergency power. For one of the "specific" subjects of section 91 is "Militia, Military and Naval Service, and Defence"; and from that enumeration the Dominion must derive some legislative

[8] *Idem.*, at p. 838.
[9] [1896] A. C. 348.
[10] *Idem.*, at p. 360.
[11] [1916] 1 A. C. 588.
[12] *Idem.*, at p. 596.
[13] *E.g.*, *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A. C. 326, *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 355, *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1937] A.C. 377. *Accord: Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396. See Scott, Consequences of the Privy Council Decisions (1937), 15 Can. Bar Rev. 485; MacDonald, The Constitution and the Courts in 1939 (1940), 18 Can. Bar Rev. 147. See also Laskin, "Peace, Order, and Good Government" Re-examined (1947), 25 Can. Bar Rev. 1054.

power, independently of the emergency power of the "peace, order, and good government" clause. It would have been possible to formulate both a Dominion emergency power, based on the general clause, and a Dominion war power, based on the specific subject of section 91 (7), the former to deal with evils and exigencies not related to war, and the latter to deal with war emergencies. But that interpretation was not followed. In two leading cases, *In Re The Board of Commerce Act*[14] and *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*,[15] the Privy Council described the war power as part of the emergency power rather than as a separate legislative power of the Dominion.

The *Board of Commerce* case dealt with the Dominion Combines and Fair Prices Act of 1919, which was designed to keep down inflation following World War I. The act prohibited the operation of a "combine" and required persons who had stocked excessive amounts of basic commodities to release them at a fair price. The Supreme Court of Canada divided on the issue of the authority of the Dominion Board of Commerce under the statute to limit the profits of retail clothiers.[16] The Privy Council held the legislation *ultra vires*.[17] The general words, "peace, order, and good government", are limited by the enumerated subjects of section 92, Viscount Haldane reminded, and only in "special circumstances, such as those of a great war,"[18] may the Dominion interfere in an otherwise provincial field of legislation. Although the *Russell* case seemed to recognize this as "constitutionally possible, even in time of peace", the principle has "always been applied with reluctance and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal".[19] The Combines Act was considered *ultra vires* because it was not passed "to meet special conditions in wartime" and was "not confined to any temporary purpose" but was to "continue without limit in time".[20]

In the *Fort Frances* case the Privy Council sustained the regulation of prices under the War Measures Act, directing recovery by a newsprint buyer of a rebate the administrator had ordered on sales made during 1919. The Dominion cannot "ordinarily" legislate in interference with "property and civil rights in the

[14] [1922] 1 A.C. 191.
[15] [1923] A.C. 695.
[16] *In the Matter of the Board of Commerce Act and the Combines and Fair Prices Act of 1919* (1920), 60 S.C.R. 456.
[17] *In Re the Board of Commerce Act*, [1922] 1 A.C. 191.
[18] *Idem.*, at p. 197.
[19] *Idem.*, at p. 200.
[20] *Idem.*, at p. 197.

province", said Viscount Haldane, but "sudden danger to a social order arising from the outbreak of a great war" may require section 91 to be interpreted as providing for "'such an emergency".[21] The impracticability of co-operative provincial action was thought to make such an "implied" power necessary. Although hostilities had ended, "consequential conditions arising out of war, which may obviously continue to produce effects remaining in operation after war itself is over",[22] were within the ambit of the emergency power.

In both the *Board of Commerce* and the *Fort Frances* opinions the war power is described, not as a separate Dominion legislative power, but as one aspect of the Dominion emergency power. Consequently the constitutionality of war legisltaion is discussed in relation to the "peace, order, and good government" clause of section 91 rather than in relation to subsection (7), "Militia, Military and Naval Service, and Defence". Significantly, the emergency power is classified as an *implied* power, recognition of which is made necessary by the fact of emergency itself. The point was made clearer in *Toronto Electric Commissioners* v. *Snider*: explaining why "some extraordinary peril to the national life of Canada" will support action under the emergency power, Viscount Haldane gave as the reason, "*simply because such cases are not otherwise provided for*".[23]

One question persists. If the war power is to be explained as merely one facet of the emergency power, which in turn is thought of as an "implied" power, of what significance is section 91 (7), "Militia, Military and Naval Service, and Defence"? Has that subsection been swallowed up by the emergency power and interpreted out of existence by the Privy Council? The problem has not been explored judicially. But it seems that an attempt should be made to formulate the legislative war power of the Dominion so as to retain subsection (7) as an operative part of the constitution. Even those decisions that restrict most severely the residuary power of the Dominion would affirm that each "specific" class of section 91, including subsection (7), represents a viable Dominion power.

Perhaps the most satisfactory way of interpreting subsection (7) as an operative source of the war power is to distinguish between two types of war legislation. The Dominion is generally considered to be within its powers in procuring personnel for the

[21] *Fort Francis Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A. C. 695, at pp. 703-04.
[22] *Idem.*, at p. 707.
[23] [1925] A.C. 396, at p. 412 (italics supplied).

armed forces, erecting forts and military hospitals, and acquiring munitions, in peacetime as well as in wartime. On the whole this activity does not usurp the authority of the provinces, for they have no direct responsibility for the maintenance of a central military establishment. On the other hand, certain measures — price control, rent control, and rationing, for example — are generally thought to be within the power of the Dominion only in time of emergency. In normal times these measures are within the purview of the provincial legislatures. It would seem reasonable to construe subsection (7) as relating to the former type of war legislation — defence measures that are appropriate to the Dominion at all times, and never appropriate to the provincial legislatures. The emergency power that is implied from the "peace, order, and good government" clause would then be seen to cover the other type of war legislation — measures that are within the legislative sphere of the provinces except in time of a war emergency. This analysis suggests that the Dominion war power is really composed of two separate elements: a permanent war power over the military establishment, based upon the express terms of section 91 (7); and a transitory war power to deal with war emergencies, implied from the "general" clause of section 91.

III

One fortunate result of identifying the Dominion war power with the implied emergency power is that courts are thereby reminded of the flexibility the war power must possess. We have seen that one element of the war power, the power to maintain a central military establishment, remains static. But the element of the war power under which the Dominion may enter the provincial legislative sphere must be ever responsive to variations in the degree of war emergency that is present. This elastic war power develops as the Dominion prepares to meet the threat of war; convulsively shrinks and expands with the vicissitudes of waging war; and gradually subsides as war emergencies fade away. The period of war emergency is not necessarily bounded by such formal acts of state as the declaration of war and the proclamation of the end of hostilities. At any given instant the constitutionality of a war measure depends upon the degree of emergency that in fact exists.

The principle is established that Parliament must be given leeway sufficient to effect de-control as gradually and painlessly as possible, lest the sudden lifting of all restrictions in itself create an emergency. If a temporary, war-borne emergency continues after hostilities have ended, it may be dealt with under the war

power. For example, a price control order was enforced that covered sales made after the armistice and the proclamation of peace in World War I, because an inflationary emergency was conceded to persist.[24] A more striking instance of transitional legislation was presented by leasehold regulations, first promulgated in 1941, which were kept in effect through March 1950 by a series of statutes that recited the continuance of a temporary emergency. The Supreme Court upheld the regulations,[25] although they affected matters normally within provincial jurisdiction, because of insufficient evidence that the war-created housing crisis had passed. It was noted with approval that the Dominion had allowed many controls to expire and that the leasehold regulations themselves had been relaxed progressively as conditions returned to normal.

Transitional control under the war power is not limited to the continuance of those regulations that were inaugurated during hostilities. Given a sufficient emergency attributable to war, a transitional measure may be enacted for the first time after the fighting is over. That was the case of an order in council (issued in December 1945 after the Japanese surrender of August 1945, and continued through 1946) that authorized the deportation for security reasons of certain persons of Japanese descent. Although a majority of the Supreme Court found the programme *ultra vires* in one or more respects,[26] the Privy Council held it wholly *intra vires*.[27] Once the judiciary concedes the existence of a "sufficiently great emergency, such as that arising out of war",[28] the Board declared, it may not question the wisdom of a particular measure or the practical ability of the executive to enforce it. From the evidence at hand the board could not say that the postwar threat to Canadian security was insufficient to support the deportation programme.

Of course, effective postwar legislation must be framed with reference to a relatively temporary, war-borne emergency.[29] And it is likely that a court will consider the fact that hostilities have ended as evidence that a statute or regulation was not *intended* by

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[24] *Fort Francis Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A. C. 695.

[25] *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950], S.C.R. 124.

[26] *In the Matter of a Reference as to the Validity of Orders in Council . . . in Relation to Persons of the Japanese Race*, [1946] S.C.R. 248.

[27] *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*, [1947] A.C. 87.

[28] *Idem.*, at p. 101.

[29] *In Re the Board of Commerce Act*, [1922] 1 A.C. 191.

its author to extend war controls.[30] But these corollaries only illustrate by contrast the general principle that some aspects of a war emergency—and therefore some war controls—may extend far into the postwar period.

The judicial reasoning that supports the application of the war power after hostilities have ended also supports its application in the pre-war period. Whenever a war measure is questioned—before, during or after hostilities—the issue for the courts is whether the measure is justified by an existing war emergency of sufficient relevance and intensity. That issue, perhaps in a less explicit form, is one that individual legislators have already faced, and decided to their satisfaction. Frequently they have embodied their conclusions, in the form of a recital of emergency conditions, within the text of the legislation itself. That the courts are "bound" by such a recital is a misconception which dies hard.[31] Of course the judiciary has made it clear that the estimate which legislators make of an emergency will carry great weight. Parliament must have "considerable freedom to judge"[32] conditions for itself; and "very clear evidence that an emergency has not arisen, or that the emergency no longer exists"[33] will be required to disprove the recital. But ultimately the factual question is incorporated into the legal question of the sufficiency of the war power, and must be answered by the courts.

It is implicit in the reasoning of the *Fort Frances* and the *Board of Commerce* opinions that the factual question of emergency must be answered as of the time when the cause of action arose — or, in the case of a legislative reference, the period the reference is phrased to cover. Otherwise, the elastic war power is not really made to vary with the changing degree of emergency. Just because a war measure was once sustained as proportionate to the then-existing emergency, its application at a subsequent date is

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[30] See *In Re Price Bros. & Co. and the Board of Commerce of Canada* (1920), 60 S.C.R. 265

[31] See the opinions of Duff C.J. and Kerwin J., *In the Matter of a Reference as to Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1; and the opinion of Mignault J., *In Re Price Bros. & Co. and the Board of Commerce of Canada* (1920), 60 S.C.R. 265, at p. 299. Note the language of the Exchequer Court in *Nakashima* v. *The King*, [1947] Ex. C. R. 486, at p. 501: ". . . it is clear that the Court has no right to question the decision of the Governor in Council as to the necessity or advisability of the measure".

[32] *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695, at p. 705.

[33] *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*, [1947] A.C. 87, at pp. 101-2. Compare the language of Kerwin J. *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124, at p. 135 ("very clear evidence" or "clear and unmistakable evidence"); and that of Taschereau J. at p. 142 of the same decision ("unmistakable evidence").

not necessarily constitutional. For, strictly speaking, a measure which depends upon the elastic war power is never "held constitutional". Rather its application in certain circumstances is sustained. The measure is still subject to challenge whenever the emergency upon which it was based has subsided.

IV

It is unrealistic to speak of the scope of the Dominion war power as though it could be plotted as mechanically and precisely as the period of a statute of limitations. Of the static element of the war power we may say with accuracy that it includes setting up and maintaining the Dominion military establishment: conscription, discipline, procurement of supplies, and the like. But the only generalization that fits the elastic element of the war power is that it includes preparing the nation for war, waging war, and effecting the transition from war to peace. The boundary of the static war power is set up by the concept of what the Dominion military establishment ought to include. But the only limit of the elastic war power is the time's necessity, as that necessity is evaluated judicially. A court may decide, for example, that at a given time there exists an emergency with regard to subversive activity, but not with regard to inflation; or that the existing economic emergency is serious enough to support price regulation "A", but not the more encompassing price regulation "B".

The best way to describe the substance of both elements of the war power is to catalogue the decisions in which their application has been sustained or rejected. The few decided cases provide no more than a scant outline of the Dominion war power, but they show that it covers three general subjects for legislation: the Dominion military establishment, the internal security of Canada, and the economic well-being of Canada in time of war emergency.

Unquestionably, the Dominion may create and maintain a central military establishment. The decisions assume, rather than discuss, a power to conscript members of the armed forces.[34] They support the conclusion that the relationship of the soldier to the Dominion, once formed, may be protected by further legislation. A statute has been enforced, for example, that placed the Dominion in the position of a common law master for the recovery of damages *per quod servitium amisit* for the negligent injury of a soldier.[35] The Exchequer Court has upheld the constitutionality of

[34] See *In Re Gray* (1919), 57 S.C.R. 150; *Greenlees* v. *Attorney-General of Canada*, [1946] S.C.R. 462. Cf. *Cooke* v. *King*, [1929] Ex. C.R. 20, at p. 23.

[35] *The King* v. *Richardson*, [1948] S.C.R. 57, *reversing* [1947] Ex. C.R. 55. But cf. *Attorney-General of Canada* v. *Jackson*, [1946] S.C.R. 489.

a gratuity scheme for ex-servicemen.[36] By analogy at least, the Supreme Court has conceded that the civil courts may be denied jurisdiction over members of the armed services to the extent that they are disciplined through military tribunals.[37]

Unlike other discussions of the war power, opinions involving the Dominion military establishment do not give detailed consideration to the question of constitutional power. One reason is the absence of broad limitations in the Canadian Constitution. Draftees in the United States have objected to conscription on the ground of due process and, unsuccessfully, on the ground of freedom of religion. The problem of military jurisdiction in the United States has been treated as complementary to the problem of procedural due process, the problem of the rights of criminal defendants, and the problem of the guarantee of habeas corpus. But the Dominion may legislate in this field unhampered by constitutional limitations.

Another reason why these cases do not elaborate on the issue of constitutional power may lie in a distinction between the static and elastic elements of the war power. For the emergency doctrine — that the Dominion may invade the provincial legislative field when the occasion demands — has not been applied to legislation concerning the military establishment. Usually it is assumed without discussion that the Dominion may enact such legislation. Occasionally section 91 (7) is cited as authority.[38] The inference is that the subsection represents a static element of the war power, under which the Dominion may legislate for the military establishment regardless of the degree of emergency at hand.

The Dominion may also use the war power to promote the internal security of Canada. As one judge observed, the *Fort Frances* decision[39] "puts beyond question the powers of the Dominion to provide for the defence and security of the country. . . . In the aspect of measures for the country's safety, questions of the distributed normal peace powers seem somewhat irrelevant. . . . In any other view, Constitutional formalities might bind us to impotence in the supreme effort of self-preservation."[40]

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[36] *The King* v. *Powers*, [1923] Ex. C.R. 131; *The King* v. *Richards*, [1930] Ex. C.R. 222.

[37] See *In the Matter of a Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483.

[38] See *e.g.*, opinion of Kellock J. in *Attorney-General of Canada* v. *Jackson*, [1946] S.C.R. 489.

[39] *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695.

[40] Rand J., *In the Matter of a Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from*

The security function of the war power was involved in orders in council promulgated after World War II that authorized the deportation of certain Japanese nationals and Canadians of Japanese descent (including those found disloyal by an examining board), plus their dependents. A majority of the Supreme Court held that the deportation of dependents whose loyalty was not questioned was beyond the war emergency power.[41] But the Privy Council found the deportation scheme constitutional in its entirety, reasoning that the post-war threat to Canadian security brought the legislation within the emergency doctrine.[42] The same reasoning was applied to the disposition of property of persons of Japanese nationality and descent who were evacuated from British Columbia during World War II. Originally the property was vested in the Dominion Custodian, subject to his "control and management", "as a protective measure only". The Exchequer Court sustained subsequent legislation that empowered him to "liquidate, sell, or otherwise dispose of" the property, similarly relying on the emergency doctrine.[43]

The Dominion government, like the federal government of the United States, has used other legislative powers to supplement the security function of the war power. Probably the most useful of these, potentially, is the enumerated power of the Dominion over the criminal law of Canada.[44] It is without parallel in the United States and Australia, where the security function of the war power conflicts with the reserved "police power" of the states to enact local criminal law. The Dominion power over naturalization and aliens has also been put to a security use.[45] But to the extent that a security measure depends upon the Dominion war power alone, it is an example of the elastic element of the war power and is supported by the emergency doctrine.

A third purpose for which the Dominion may enact war legislation is the economic well-being of Canada during war or an emergency attributable to war. In formulating this phase of the war power the courts have applied the emergency doctrine most con-

Criminal Proceedings in Canadian Criminal Courts, [1943] S.C.R. 483, at p. 526.

[41] *In the Matter of a Reference as to the Validity of Orders in Council . . . in Relation to Persons of the Japanese Race*, [1946] S.C.R. 248.

[42] *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*, [1947] A.C. 87.

[43] *Nakashima* v. *The King*, [1947] Ex. C.R. 486. The security aspect of the war power was also mentioned as a reason for allowing the Dominion to regulate civil aviation throughout Canada: *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

[44] B. N. A. Act, s. 91 (27). See generally, Jenks, Dominion Jurisdiction in Respect of Criminal Law (1935), 13 Can. Bar Rev. 279.

[45] *Vaaro* v. *The King*, [1933] S.C.R. 36.

sistently. It was held that during hostilities the Dominion may license the sale, consumption, import and export of chemicals that are of importance to the war effort.[46] A price control programme that began during World War I was allowed to continue after the armistice and the peace treaty had been proclaimed, to counteract a temporary inflation that resulted from the war.[47] But the Dominion was denied authority to institute in 1919 a permanent system of price control restrictions addressed to the general economic condition of Canada rather than to a temporary, war-borne inflation.[48] Following World War II, however, the Dominion was permitted to maintain certain leasehold regulations in effect through March 1950, the court recognizing that sudden decontrol might of itself precipitate an economic crisis.[49] The import of these decisions, taken together, is that under the elastic element of the war power the Dominion may regulate the domestic economy of Canada to the extent that the emergency dictates.

V

It is clearly established that the legislative war power of the Dominion may be delegated from Parliament to the Dominion executive. A contrary doctrine would have emasculated the War Measures Act, which has provided the legal master plan for the Canadian war effort since its enactment in 1914. The statute gives to the Governor-in-Council power to make any regulation he deems advisable for the "security, defence, peace, order and welfare of Canada" by reason of "real or apprehended war, invasion, or insurrection". There follows an illustrative list of appropriate subjects for legislation, including:

(a) censorship. . .;
(b) arrest, detention, exclusion and deportation;
(c) control of the harbours;
(d) transportation. . .;
(e) trading, exportation, importation, production and manufacture;
(f) appropriation, control, forfeiture and disposition of property and of the use thereof.

"More comprehensive language it would be difficult to find",[50] remarked one judge. Acting under such a broad grant of authority,

[46] *In the Matter of a Reference as to the Validity of the Regulations in Relation to Chemicals*, [1946] S.C.R. 1.
[47] *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695.
[48] *In Re the Board of Commerce Act*, [1922] 1 A.C. 191.
[49] *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124.
[50] Anglin J. in *In Re Gray* (1918), 57 S.C.R. 150, at p. 178.

it is obvious that the Governor-in-Council wields the real war power of the Dominion.

A measure that is promulgated by the Governor-in-Council under the War Measures Act has all the effectiveness of a statute, and repeals any act of Parliament with which it conflicts. This principle was illustrated during World War I. The Military Service Act of 1917, reciting an intent not to impair the power of the Governor-in-Council under the War Measures Act, inaugurated the policy of drafting men according to occupation and family status. But an order in council of 1918 (issued under the War Measures Act) authorized the drafting of all men of a certain age and family group, regardless of their prior exemption by the 1917 Act. A majority of the Supreme Court held that the subsequent order in council prevailed, reasoning that Parliament may delegate to the Governor-in-Council sufficient legislative power to repeal an intervening act of Parliament.[51]

Once powers are delegated from Parliament to the Governor-in-Council under the War Measures Act, they may be re-delegated on down the administrative hierarchy. During World War II, for example, the Governor-in-Council re-delegated to the Ministry of Munitions and Supply the power to allocate scarce commodities. In turn the ministry delegated to the Controller of Chemicals the power to make certain regulations. The Supreme Court sustained the entire chain of delegation, although the War Measures Act had not specifically authorized it.[52] "It is manifest", one judge observed, "that the business of government in war time cannot be effectively carried out without delegation by the Executive of a very great part of its duties."[53]

Unfortunately, the notion has persisted that because administrative action under the War Measures Act has been held *intra vires*, every measure deemed necessary by the Governor-in-Council or his delegate, acting under the act, must be enforced by the courts.[54] Such a view fails to take into account the position of the judiciary under the emergency doctrine. The War Measures Act as a whole has been found to be constitutional only so far as its system of delegation is concerned. Every order made by virtue of delegated authority under the act is legislation in its own right, and must

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[51] *In Re Gray* (1918), 57 S.C.R. 150. For discussions of the effect that will be given to such delegated legislation, see also *The King* v. *Singer*, [1941] S.C.R. 111, and *Dallman* v. *The King*, [1942] S.C.R. 339.

[52] *In the Matter of a Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1; noted (1943), 21 Can. Bar Rev. 141.

[53] *Idem.*, at p. 36.

[54] See, *e.g.*, *Nakashima* v. *The King*, [1947] Ex. C.R. 486, *passim*.

be examined independently to determine whether it is sustained by a war emergency or not.

Retaining the emergency doctrine and applying it correctly is a matter of far more than academic importance to Canadians. For within that doctrine lies all the vigour, all the complexity, and all the constitutional safeguards of the war power of the Dominion: the vigour, because it is the emergency doctrine that permits the elastic element of the war power to expand to meet the time's necessity; the complexity, because by identifying the Dominion war power with the "implied" doctrine of emergency rather than with section 91 (7), the Privy Council engrafted a subtle and tenuous interpretation upon a relatively simple constitutional provision; the safeguard, because the emergency doctrine is the only weapon the judiciary possesses for effecting a judgment independent of that of Parliament and for preventing the wartime centralization of power in the Governor-in-Council from persisting indefinitely into the post-war years.

They Have Very Few Lawes

Elles as touchinge the vulgare sort of the people, whiche be bothe mooste in number, and have moste nede to knowe their dewties, were it not as good for them, that no law were made at all, as when it is made, to bringe so blynde an interpretation upon it, that without greate witte and longe arguynge no man can discusse it? To the fyndynge oute whereof neyther the grosse judgement of the people can attaine, neither the whole life of them that be occupied in woorkinge for their livynges canne suffice thereto. These vertues of the Utopians have caused their nexte neiboures and borderers, whiche live fre and under no subjection (for the Utopians longe ago, have delivered manye of them from tirannie) to take magistrates of them, some for a yeare, and some for five yeares space. Which when the tyme of their office is expired, they bringe home againe with honoure and praise, and take new againe with them into their countrey. These nations have undoubtedlye very well and holsomely provided for their common wealthes. For seynge that bothe the makinge and marringe of the weale publique doeth depende and hange upon the maners of the rulers and magistrates, what officers coulde they more wyselye have chosen, then those which can not be ledde from honestye by bribes (for to them that shortly after shall depart thens into their own countrey money should be unprofitable) nor yet be moved eyther with favoure, or malice towardes any man, as beyng straungers, and unaquainted with the people? The whiche two vices of affection and avarice, where they take place in judgementes, incontinente they breake justice, the strongest and suerest bonde of a common wealth. (Sir Thomas More: Utopia (1515). Ralphe Robyson's translation)