THE WAR MEASURES ACT

A SUMMARY OF THE CASES REPORTED

A series of cases involving the construction of the War Measures Act[1] and the Defence of Canada Regulations have been reported during the past year and a half, a number of which have been the subject of some comment. One writer, in a note in the Canadian Bar Review,[2] suggests that these decisions illustrate a degree of judicial self-restraint in the face of executive action which finds no parallel in time of peace. Also, if a recently reported decision[3] exemplifies the attitude of the English Courts toward similar emergency regulations, one might think that judicial abnegation varies directly with the distance from the actual theatre of war. This is a rather severe judgment, considering the well known if somewhat short history of the legislation concerned, and one that scarcely does justice either to the judiciary or to the executive.

The validity of various orders and regulations made during the first world war under the Defence of the Realm Act in England and the War Measures Act in Canada could hardly fail to come before the Courts for consideration. It was desirable and necessary that the extent to which Parliament might go in delegating its powers be made known. The problem was considered here by the Supreme Court of Canada in *In re Gray*,[4] in which certain principles lately enunciated in a number of English cases, and notably in the important case of *Rex* v. *Halliday; Ex parte Zadig*,[5] were followed. In view of the similar regulations in force in both countries *Rex* v. *Halliday* was of particular interest to Canada.

The appellant Zadig was born in Germany of German parents but became a naturalized British subject in 1905. In 1915 he was interned under an order of the Home Secretary made pursuant to the provisions of Regulation 14B of the Defence of the Realm (Consolidation) Regulations, 1914, issued under the Defence of the Realm Act, 1914. Regulation 14B empowered the Home Secretary to order the internment of any person where, on the recommendation of a competent naval or military authority, or of an advisory committee, it appeared

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[1] R.S.C. 1927, c. 206.
[2] (1940), 18 Can. Bar Rev. 814.
[3] *E. H. Jones (Machine Tools) Ltd.* v. *Farrell and Muirsmith*, [1940] 3 All E.R. 608.
[4] 57 S.C.R. 150, [1918] 3 W.W.R. 111.
[5] [1917] A.C. 260.

to him, in order to secure the public safety or the defence of the realm, expedient in view of *the hostile origin or associations* of such person. If such person was not a subject of a State at war with His Majesty, any appeal against the order was to be considered by an advisory committee to be presided over by a person who held or had held high judicial office. Zadig contended that the regulation was *ultra vires*. It was held by the majority of the House of Lords that, under the power conferred by the Defence of the Realm Act upon the King in Council during the continuance of the war "to issue regulations for securing the public safety and the defence of the realm", the order made in accordance with Regulation 14B was valid.

It had been contended by the appellant (1) that some limitation must be put upon the general words of the statute; (2) that there was no provision for imprisonment without trial; (3) that the provisions made by the Defence of the Realm Act for the trial of British subjects by a civil court with a jury strengthened the contention of the appellant; (4) that general words in a statute could not take away the vested rights of the subject or alter the fundamental law of the constitution; (5) that the statute was in its nature penal and must be strictly construed; and (6) that a construction said to be repugnant to the constitutional traditions of the country could not be adopted. Further, although the operation of the Habeas Corpus Acts had been suspended on several occasions, no general power had ever been given to the Executive to imprison on suspicion.

The Court was unable to accede to any of these arguments. Said Lord Finlay: It is beyond all dispute that Parliament has power to authorize the making of such a regulation. The only question is whether on a true construction of the Act it has done so. It may be necessary in time of great public danger to entrust great power to His Majesty in Council, and Parliament may do so feeling certain that such power will be reasonably exercised. The measure was not punitive, it was precautionary. The object of the regulations was for preventive purposes. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. That appeared to him to be the meaning of the statute. It was urged that if the Legislature had intended to interfere with personal liberty, it would, as on previous occasions, have provided for suspension of the rights of the subject under the Habeas Corpus Acts. But the Legislature

selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted in previous wars. The application of the appellant had been rejected by the Divisional Court and by the Court of Appeal, and in his (Lord Finlay's) opinion the appeal ought to be dismissed. Lord Dunedin, Lord Atkinson and Lord Wrenbury delivered judgments to the same effect, Lord Shaw dissenting.

Similar decisions were reached in England in a number of subsequent cases.[6] But there is no doubt that many of the regulations issued under the Defence of the Realm Act were wholly illegal, and the Courts, by so declaring them, enhanced their reputation for impartiality and courage in withstanding the arbitrary actions of the Executive.[7] In one of these judgments, *Chester* v. *Bateson*,[8] it was said :

> One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension.[9]

The argument in the leading Canadian case[10] followed closely that in *Rex* v. *Halliday*. This was an application to the Supreme Court of Canada by way of *habeas corpus ad subjiciendum* for the discharge of the applicant from military custody and service. His claim for discharge from military custody was based solely on the ground that he had been granted exemption under The Military Service Act, 1917, and that two orders in council of April 20th, 1918[11] purporting to cancel or set aside exemptions granted to men of class A between the ages of 20 and 23 were invalid. Counsel representing the Attorney-General frankly conceded that if these impugned orders in council not be upheld, the applicant would

[6] *Ronnfeldt* v. *Phillips* (1918), 35 T.L.R. 46; *Ernest* v. *Metropolitan Police Commr.* (1919), 89 L.J.K.B. 42, 35 T.L.R. 512; *Rex* v. *Wormwood Scrubbs Prison (Governor)*; *Ex parte Foy*, [1920] 2 K.B. 305, 89 L.J.K.B. 759, 36 T.L.R. 432.

[7] THOMAS AND BELLOT: LEADING CASES IN CONSTITUTIONAL LAW (6th ed.) p. 104.

[8] [1920] 1 K.B. 829. See also *Newcastle Breweries, Ltd.* v. *The King*, [1920] 1 K.B. 854.

[9] Per Scrutton J. in *In re Bouler*, [1915] 1 K.B. 21, 36, quoted with approval by Darling J.

[10] *In re Gray*, *supra*, note 4.

[11] Nos. 919 and 962.

be entitled to his discharge. The orders in council referred to had been issued pursuant to the authority conferred by section 6 of the War Measures Act, 1914, the provisions of which have been substantially reproduced in section 3 of the War Measures Act now in force.[12] The Act was held to be a limited delegation of legislative power to the executive government and, therefore, *intra vires*. Reasons for judgment were delivered by Anglin J., Sir Charles Fitzpatrick C.J., Davies and Duff JJ. concurring, Idington and Brodeur JJ. dissenting. The following passages are taken from the notes of Duff J.—

> It is a very extravagant description of this enactment to say that it professes (on any construction of it) to delegate to the Governor in Council the whole legislative authority of parliament. The authority devolving upon the Governor-in-Council is, as already observed, strictly conditioned in two respects: First—It is exercisable during war only. Secondly—The measures passed under it must be such as the Governor in Council deems advisable by reason of war.
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> There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, while parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. Maitland's Constitutional History, pp. 1, 15 *et seq.*
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> . . . . In the case of the *War Measures Act* there was not only no abandonment of legal authority, but no indication on any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence.

The experience gained from the consideration of the problems that arose during 1914-1918 and in the post-war period had resulted in the recognition and establishment of certain fairly well-defined principles that were to be of value when the second world war broke out in September, 1939. A body of precedent, small in volume but of high authority, had become available and, as the approaching clouds were plainly discernible for a considerable time in advance, it may be assumed that

[12] R.S.C. 1927, c. 206.

neither the judiciary nor the executive was taken unawares. In Canada, a standing inter-departmental committee had been set up in March, 1938,[13] to inquire into and report upon the whole question of the legislation that would be required in the event of grave emergency. An extensive inquiry was made by this body into the practical problems that might arise in time of war, and the committee's final recommendations, which included a draft of the proposed Defence of Canada Regulations, were submitted to the government in July, 1939. In the course of its inquiry the committee appears to have covered a fairly broad field, keeping in mind "the experience in 1914–18" and, presumably, the tactical methods that have been developed since that period by certain powers. In this way, the government was ready to act as soon as a situation arose which enabled the provisions of the War Measures Act to be invoked[14] and the Defence of Canada Regulations to be established.[15]

A reflection of the earlier decisions is noted, however, prior to the outbreak of war in the report of a judgment of the Exchequer Court of Canada. This was an action taken by the transferee against the Custodian of Enemy Property for the recovery of certain shares transferred to him by an alien enemy during the first world war. It was here said that, in the interpretation of Consolidated Orders, or any other war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment and the conditions prevailing at the time. In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside.[16]

The number of cases under the War Measures Act reported since September, 1939, is not large, and although all such decisions are usually of interest from a legal viewpoint, they do not always present new legal problems. For instance, two of the decisions reported merely affirm the right of enemy aliens to bring action in our courts, so long as they continue to peacefully pursue their ordinary avocations.[17] In another, proceedings instituted against an accused under Regulation 39 were

[13] P.C. 531, March 14, 1938.
[14] September 1, 1939.
[15] P.C. 2483, September 3, 1939.
[16] *Arpad Spitz* v. *The Secretary of State of Canada*, [1939] Ex. C.R. 162.
[17] *Trefnicek* v. *Martin et al.*, [1939] 4 D.L.R. 737; *J. G. White Engineering Corp. et al.* v. *Canadian Car and Foundry Co.*, [1940] 4 D.L.R. 812.

declared to be without any legal force or effect since the consent required by the Regulation was not obtained until after the "proceedings" had been instituted.[18] In a further case a school teacher was convicted for having made statements which, in their cumulative effect, were likely to be prejudicial to the safety of the State.[19] The circumstances of this case are of particular interest, as are also certain principles therein stated regarding the substance of "prejudicial" statements, the responsibility of persons making them, the possible cumulative results of isolated statements, and the meaning and intent of the Regulations.[20]

Rex v. *Singer*[21] was an appeal by the Crown from a decision of the Court of Sessions dismissing an information for violation of a regulation (restricting the sale of codeine) made by the Governor in Council under sec. 3 of the War Measures Act, such violation constituting wilful disobedience to an Act of Parliament of Canada contrary to s. 164 of the Criminal Code It was held by the Court of King's Bench that since sec. 3(2) of the War Measures Act merely enacts that orders and regulations made by the Governor in Council under sec. 3 "shall have the force of law," *without adding that such orders and regulations shall be deemed to be a part of the Act,* the violation of a regulation made under this section which prescribes no sanction for its enforcement is not punishable under section 164 of the Criminal Code, which relates only to violations of Acts of Parliament or of Provincial Legislatures. Barclay and Francoeur JJ. dissented on the ground that having regard to the object of the War Measures Act the words "shall have the force of law" are equivalent to "shall have the force of statute, *viz.*, the War Measures Act." Said Sir Mathias Tellier C.J. (translation) :

> Parliament has gone to the trouble of defining, in s. 2, *Cr. Code*, English text, the meaning of the word "Act" in the *Cr. Code.* If such word were intended also to include every regulation or order made by the Governor in Council under a power delegated to him by Parliament, surely the Legislature would have taken the trouble to say so. As it has not done so, however, I do not think it is for the Courts to do so in its stead. In criminal or penal matters, enactments, when they are equivocal, must be interpreted restrictively rather than in a manner to extend their provisions.

[18] *Rex* v. *Kluge*, [1940] 3 W.W.R. 57, 74 Can. C.C. 261. The defect appears to have been cured by an amendment to Regulation 39B(1) which came into force on September 16, 1940.
[19] *Rex* v. *Coffin*, [1940] 2 W.W.R. 592.
[20] (1940), 18 Can. Bar Rev. 738.
[21] [1940] 4 D.L.R. 151, 74 Can. C.C. 290.

On appeal taken to the Supreme Court of Canada the above judgment was affirmed. Said Rinfret J.:—"I agree with the trial judge and with the majority of the Court of Appeal that, in the premises, s. 164 of the Criminal Code has no application. Of course, the War Measures Act enacts that the orders and regulations made under it 'shall have the force of law'. It cannot be otherwise. They are made to be obeyed and, as a consequence, they must have the force of law. But that is quite a different thing from saying that they will be deemed to be an Act of Parliament. . . . A regulation made under an Act, and in particular a regulation under the War Measures Act, is not an enactment passed by Parliament; it is an enactment made by the Government."[22]

Two important decisions should now be noted, *Rex* v. *Stewart*[23] and *Rex* v. *Bronny*.[24] The decision in *Rex* v. *Stewart* is said to be the first judgment of an appellate court, and the first reported judgment of any court, on the construction of Regulation 39A. The appellant, business manager of a weekly publication, appealed from the conviction on his trial and from the sentence imposed for offences against this Regulation. It was held that the business manager of a periodical which contains an article contravening Regulation 39A may be convicted of the offence although he was unaware of the article until after the distribution of the periodical. Having regard to the object of Regulation 39A, and of the War Measures Act itself, namely, the safety of the State during the prosecution of the war, *mens rea* is not a constituent element of the offences created by the Regulation. Said Robertson, C.J.O.: "It will be observed that the object of the Regulations and the warrant for making them is the public safety. They were made in the emergency of war then threatened and now in progress. They prohibit, in terms that are absolute, certain acts that may interfere with or prejudice the preparations and efforts made for the successful carrying on of the war, or that may be prejudicial to the safety of the State. It would seem plain that both the subject-matter and the purpose of the Regulations, as well as the terms in which they are expressed make it necessary to hold that their prohibitions are absolute, and that it is not a defence in a prosecution for their breach to say that what was done was done in ignorance or without intending any harm.

[22] *Rex* v. *Singer*, [1941] 1 D.L.R. at p. 756.
[23] [1940] 1 D.L.R. 689, 73 Can. C.C. 141.
[24] [1940] 4 D.L.R. 502, 74 Can. C.C. 154.

The acts prohibited are to be stopped." The conviction was accordingly affirmed, but the sentence was substantially reduced.

A similar conclusion was reached in the case of *Rex* v. *Bronny*, in which the accused appealed from a conviction for having possession of a detailed sketch of an internment camp contrary to Regulation 16(d). The drawing disclosed with particularity the various buildings, roads and open spaces in the camp with markings clearly identifying it. In this case, also, it was held that *mens rea* is not a constituent element of the offence, and that it was not necessary to prove that accused's conduct *would* endanger the safety of the State. The Court need only be satisfied, with that degree of certainty necessary in criminal prosecutions, that accused's conduct was *likely* to prejudice the safety of the State. "So where the wife of an interned enemy alien was found in possession of a detailed sketch of a camp where her husband and prisoners of war were interned, held, although it was possible she had no criminal intent in possessing such sketch she must nevertheless be convicted, for the safety of the State might be endangered by the escape of prisoners of war, which might be facilitated by the possession, in a confederate's hands, of a detailed sketch of the ground."

Of outstanding interest is the question whether or not an executive order, made pursuant to and within the provisions of the War Measures Act, is subject to review by the courts. This question was considered in *Yasny et al* v. *Lapointe*,[25] an application by way of *certiorari* to quash an order issued by the Acting Secretary of State prohibiting the publication of a newspaper published by the applicants. The order was made pursuant to Regulation 15 under which the Secretary of State is authorized to "make provision by order" for preventing or restricting the publication of matters as to which he is satisfied that the publication thereof would or might be prejudicial to the safety of the State or the efficient prosecution of the war. The application was dismissed. It was held: (1) that the means which the Secretary of State may take to satisfy himself that a case is one for action under the Regulation must be in his own discretion, with responsibility only to Parliament. He must rely on what seems to him to be worthy sources of information; (2) the question whether a newspaper the publication of which is prohibited by such an order is in fact subversive

[25] Manitoba Court of Appeal, [1940] 2 W.W.R. 372, [1940] 3 D.L.R. 204; followed in *Ex parte Sullivan*, [1941] 1 D.L.R. 676, [1941] O.W.N. 49.

is one which for the purposes of Regulation 15 is solely within the judgment of the Secretary of State exercised upon such facts as convince him and under ministerial responsibility; (3) where ministerial action is within the scope of the War Measures Act, the exercise of ministerial discretion in applying the Act to any particular matter is not subject to the interference of the courts, and, therefore, so long as no provision of the Act is infringed, the steps taken precedent to such exercise of discretion cannot be inquired into on *certiorari*. Per Trueman J.A. (dissenting): The legality of the order is subject to investigation by the Court, and the review is obtainable by a writ or order of *certiorari*, since the writ is not limited to judicial acts or orders in the strict sense but extends to the acts and orders of a competent authority which has power to impose a liability or give a decision which determines the rights or property of the affected parties. The order in question is bad on its face because it does not state that the condition of the exercise of the authority vested by the Regulation in the Secretary of State has been fulfilled, *viz.*, that "he is satisfied that the publication is or may be prejudicial to the safety of the State or the efficient prosecution of the war." The "satisfaction" postulated by the Regulation is a "satisfaction" deliberately and judicially arrived at upon a knowledge of the facts, and it must be recorded in the order. References are made to a number of the earlier decisions.

A possible interpretation of the words "may make provision by order", which does not appear to have been previously advanced, is suggested by a writer in a comment on this case. One question that might have been raised, he suggests, is whether the framers of the regulation ever contemplated that the Secretary would make an order of this kind, *i.e.*, an order prohibiting a particular publication, and whether the intent was not merely that he should make orders in the nature of proclamations, for the purpose of specifying with particularity the type of published matter that would be considered from time to time prejudicial to the public safety or the efficient prosecution of the war; but leaving the enforcement of these "orders" to ordinary tribunals.[26] This possible interpretation, however, appears to have occurred to at least one member of the court. Said Denniston J.A.: "In time of war when reports come in of subversive agencies, there may be no time

[26] (1940), 18 Can. Bar Rev. 732.

for trials or witnesses. The Minister in Ottawa must be able to act at once upon the reports he receives from accredited agents".

Deficiencies said to exist in the text of a detention order made pursuant to Regulation 21(1)(c) were considered in *Re Penner*.[27] In this case an order was made by the Minister of Justice by his approval of a recommendation of the Deputy Minister "that you make an order directing that they (Penner and others) be detained under the above-mentioned regulation". Objection was made by counsel for Penner that the order of the Minister was defective in that no place of detention was specified as, he contended, was required by paragraph (c) of the Regulation. Counsel for the Minister, however, produced an order of the Minister dated September 22, 1939, which, after reciting in part Regulation 21, ordered that persons arrested and detained under the provisions of Regulation 21 "shall be detained in internment camps provided for the internment of prisoners of war under the same conditions as are prisoners of war held in such internment camps." The Court held that paragraph (c) of Regulation 21, whereunder the Minister is empowered to direct the detention of certain persons "in such place, and under such conditions, as the Minister of Justice may from time to time determine" is an enabling provision, and a general order made by the Minister fixing as the place of detention under Regulation 21 the internment camps provided for prisoners of war is a sufficient compliance therewith. Therefore, an order in the form of the Minister's initialled approval of a recommendation that he order the detention of certain persons under Regulation 21(1) is valid, notwithstanding that no place of detention is specified therein and notwithstanding the form of the order. This decision was subsequently affirmed by the Manitoba Court of Appeal.[28] It has been remarked that *Re Penner* affords another illustration of the fact that the particularity often demanded to show compliance with the terms of the Criminal Code is not always insisted upon with respect to the Defence of Canada Regulations.[29]

A recent case reported is that of *Rex* v. *Burt*,[30] an application by way of a stated case from a conviction by a police magistrate for loitering in the vicinity of a protected place contrary to

[27] [1940] 4 D.L.R. 428, [1940] 3 W.W.R. 159. See also *Ex parte Sullivan*, [1941] O.W.N. 49, [1941] 1 D.L.R. 676.

[28] *Penner* v. *Jenner*, *Nawizowski* v. *Jenner*, [1940] 4 D.L.R. 800, 48 Man. R. 144.

[29] (1940), 18 Can. Bar Rev. 814.

[30] [1941] O.W.N. 17, [1941] 1 D.L.R. 598.

Regulation 6. The evidence disclosed that the appellant and a number of other men were walking slowly up and down in front of an industrial plant at a time when workers were going into a plant to work. They were informed by a constable that by order in council the plant had been declared an industry of essential services, that it was unlawful for anyone to loiter at or near the premises, and they were requested to leave. They refused to obey the request and were arrested. It was stated that there was some industrial dispute at the plant but there was no evidence to connect the appellant and those with him with the employees alleged to have been on strike or that they were members of any trade union to which the employees of the plant belonged, other than a statement made by one of them that they were picketing the premises. It was held, however, that even assuming the purpose of the appellant and those with him to have been to picket the premises in the interests of an industrial dispute, the means or manner at the time and place when this picketing was carried out was an act of loitering within the meaning of the Regulation. It is to be noted that Regulation 6 has since been amended[31] to make it clear that its provisions are not intended to apply to lawful strikes so long as the action of the strikers is not otherwise unlawful.

It is evident that by reason of their subject-matter, their purpose, and the nature of the present emergency, orders and regulations made under the War Measures Act, *when within the authority of that Act,* have been construed, where possible, so as to enable them to fulfil their expressed intent. One cannot lose sight of the fact that these orders and regulations have been designed for the particular purpose of securing the safety of the State in a time of grave national peril, to be in force only during and for the period of the emergency that has brought them into existence. They are the inevitable corollary of modern war and its methods, and only in these conditions can they be justified. In the conditions of their application there may be occasions on which they may lack the absolute qualities and guarantees of statutory legislation. On the other hand, it has been seen that they have the advantage of greater flexibility than has legislation by statute, a factor which tends to correct and even forestall possible injustice, and that they can be made to respond more promptly to national opinion as well as to the constantly changing exigencies of national and international circumstances.

[31] P.C. 892, February 7, 1941.

The situation is concisely stated by Hope J., in a recent judgment:[32] "In support of my conclusions herein, I refer to the words in the judgment in *Ronnfeldt* v. *Phillips*:[33] 'A war could not be carried on according to the principles of Magna Charta,' and this strikes one as being of particular application in the circumstances of the present war, where it has been made abundantly clear that enemy operations are not confined to theatres of war, but that in an all-out war such as the present, the success of the totalitarian powers has been made possible in no small measure by the subversive activities of agents within the gates. In such circumstances, freedom of executive action in the interests of public safety requires that sympathetic construction be given to statutory authorization of delegated legislation. . . . At this grave moment in our struggle, not only for the democratic way of life but for our very existence, it may appear at times that some measures taken by the Government come near to suspending the very essence of our Constitution as it has been built up over the centuries. However, it may be imperative that our ancient liberties be placed in pawn for victory. By the Regulations, the Minister is still required to report to Parliament with respect to detentions. Our ancient liberties will not necessarily be swept away even though, for the moment, we are governed by Order in Council rather than by statute, for although the form of the law may be altered, the spirit remains unchanged."

JAMES FRANCIS.

Ottawa.

[32] *Ex parte Sullivan*, [1941] 1 D.L.R. 676, [1941] O.W.N. 49.
[33] (1918), 35 T.L.R. 46 at p. 47.