

The Emergency Power and Civil Liberties in Canada

Herbert Marx *

"Emergency, emergency", I cried, give us emergency. This shall be the doctrine of our salvation.

F.R. Scott.**

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** F. R. Scott, *Some Privy Counsel*, (1950), 28 Can. Bar Rev., 780.

Introduction

Since the outbreak of the First World War, Canada has been subject to "emergency" legislation for about forty percent of the time.¹ During both World Wars and for a period after, as well as during the Korean War, legislation was in effect that at times virtually allowed the Federal Government to rule by Order-in-Council. Generally the emergency power has permitted the Federal Government to override fields normally reserved to the provinces in the *British North America Act*.² Lord Atkin's³ watertight provincial compartment is thus opened to a flood of federal legislation. As well, the Federal Government has imposed restrictions on normal civil liberties in war emergency periods.⁴

Although it is beyond the purview of this paper, it is important to recognize that emergency government tends to weaken the federal principle — a principle that requires that as between the regional and the federal governments, each "should be limited to its own sphere and, within that sphere, should be independent of the other".⁵ Professor Wheare, for example, questions whether Australian federalism would survive another grave crisis.⁶ Consequently, in any future Canadian constitutional revisions, the provinces may desire guarantees for the restoration of breaches in the federal principle caused by emergency legislation.

In early 1968, the Federal Government presented a policy paper to the Constitutional Conference of Prime Ministers and Premiers as a basis for discussion by all eleven governments concerning an entrenched or constitutional *Bill of Rights*. The Federal Government

¹ This figure is obtained by adding the years of World War I plus a brief period afterwards to the World War II years and extending to 1954 at which time the emergency powers legislation of the post war period was permitted to expire. Had Prime Minister Bennett's "New Deal" legislation been held valid, this figure would be fifty percent or more.

² 30-31 Vict., 1867, c. 3, (U.K.), hereafter referred to as the *B.N.A. Act*. This is also generally true for Australia, see, W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia*, (3rd ed. 1962), pp. 254-290. For the United States, see the statement by E.S. Corwin in *Total War and the Constitution* (1947), at p. 174.

³ *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, at p. 354 (P.C.).

⁴ This is not true in peace time. *The Emergency Powers Act* of 1951, 15 Geo. 6, c. 5 (Can.) prohibited the Governor-in-Council from interfering with civil liberties. See s. 2(2), as well as the Preamble to the Act.

⁵ K.C. Wheare, *Federal Government*, (4th ed. Oxford paperback, 1963), at p. 14.

⁶ *Ibid.*, at p. 239. See also at pp. 205 and 238.

explicitly recognized that in formulating a *Bill of Rights* some attention would necessarily have to be given to the limitation and protection of those rights in time of crisis.⁷ Subsequently, the government made more precise recommendations.⁸

It is axiomatic that a sovereign government⁹ must have effective means at its disposal to deal with emergency situations. Federalism presents special problems, because a federal system presupposes diversity whereas an emergency, especially that of war, requires

⁷ "A discussion about implementation of rights calls of necessity for a discussion as well of their limitation in time of emergency. On the occasion of war or other national crisis, western democracies have found it necessary to interfere drastically with normal private rights. No matter what the constitutional context, the courts have generally permitted this interference because they recognize the necessities of state involved. Some consideration should therefore be given at the outset to the extent to which the legislative authority of Parliament should be restored in times of emergency, and the means by which this may be accomplished."

"One of three approaches might be employed: (i) some general exemption in the nature of the amendment to the *War Measures Act* enacted as part of the 1960 Canadian *Bill of Rights*; (ii) a precise specification of the several rights which may be infringed and, perhaps, to what extent (in this way the political and legal rights requiring abridgment could be dealt with while egalitarian and linguistic rights could continue unimpaired); (iii) no mention of any exemption, thus permitting the courts to determine what limitations are made necessary in times of crisis (many of the guarantees in the United States *Bill of Rights* are stated without qualification yet the American courts have recognized that some of them may be limited in time of war)." P.E. Trudeau, *A Canadian Charter of Human Rights*, (1968), at p. 30.

⁸ In February 1969, on the occasion of the second meeting of the Constitutional Conference, the Federal Government submitted a "tentative" proposal as to how the emergency power should be dealt with in relation to a *Bill of Rights*. The suggestion was that:

"It should be provided that where Parliament has declared a state of war, invasion, or insurrection, real or apprehended, to exist, legislation enacted by Parliament which expressly provides therein that it shall operate notwithstanding this Charter [*Bill of Rights*], and any acts authorized by that legislation, shall not be invalid by reason only of conflict with the guarantees of rights and freedoms expressed [in the present] Charter".

P.E. Trudeau, *The Constitution and the People of Canada*, (1969), at p. 60.

⁹ In an editorial on June 1, 1968, the *New York Times* stated that the Allies had reserved emergency powers and they had agreed to relinquish these powers when Bonn enacted an adequate law. Such an emergency law, the editorial continued, was the minimum required to give West Germany sovereignty after twenty years. *New York Times*, June 1, 1968, at p. 26, col. 2. For a discussion of the West German emergency legislation see, Note, *Recent Emergency Legislation in West Germany*, (1969), 82 Harv. L.R. 1704.

unity and centralism. More specifically, war requires "totalitarian"¹⁰ government, or, to use a less harsh term, "constitutional dictatorship".¹¹

Five main types of crises requiring emergency powers have been suggested¹² — war, economic depression, secession, insurrection and subversion. Whatever be the method of dealing with emergency situations — be it *état de siège* (state of siege), martial law¹³ or a delegation of legislative authority as in the Canadian *War Measures Act*¹⁴ — it is common to all methods that in times of emergency, power is abnormally concentrated in the executive branch of government.

*Etat de siège*¹⁵ was developed in France and it is the Continental and South American method of dealing with crises situations. It is to be distinguished¹⁶ from martial law primarily because *état de siège* is a legal institution constitutionally foreseen (as in France) and regulated by statute; whereas, martial law is a condition in which law is temporarily abrogated — it "is no law at all".¹⁷ Both doctrines, however, are but different sides to the same coin and are almost indistinguishable in practice. On the issue of constitutionality and statutory regulation there is some similarity between *état de siège* and a delegation of power as in the Canadian *War Measures Act*.

The inquiry suggested by the Canadian Government's policy paper can be explored as to — (I) The Resort to Martial Law; (II) The Emergency Doctrine in Canada; and, (III) The Impact of Emergency on Civil Liberties.

¹⁰ Wheare, *supra*, n. 5, at p. 187.

¹¹ C.L. Rossiter, *Constitutional Dictatorship*, (1948, Princeton N.J.), at pp. 4-5.

¹² G.J. Freidrich and A.E. Sutherland, "Study 13: the Defense of the Constitutional Order" in *Studies in Federalism*, Bowie and Freidrich eds., (Boston, 1954), p. 676.

¹³ The term "martial rule" is sometimes used by American commentators.

¹⁴ R.S.C. 1952, c. 288. Comparative legislation in the United Kingdom and in Australia was respectively, the *Emergency Powers (Defense) Act*, 2 & 3 Geo. 6, 1939, c. 62 (U.K.) and the *National Security Act*, 1939-1943 (Australia).

¹⁵ For an excellent discussion on *état de siège*, see Rossiter, *supra*, n. 11, at pp. 79 et s.

¹⁶ For comparisons between *état de siège* and martial law, see, M. Radin, *Martial Law and the State of Siege*, (1942), 30 Calif. L. Rev. 634; J.B. Kelly and G.A. Pelletier, *Theories of Emergency Government*, (1966), 111 S.D.L. Rev. 42, at pp. 53-58; Friedrich and Sutherland, *supra*, n. 12, at pp. 678-680.

¹⁷ *Tilonko v. A.G. Natal*, [1907] A.C. 93 at p. 94 (P.C.), per Lord Halsbury.

I—THE RESORT TO MARTIAL LAW

The term "martial law" as applied to England has been described as "the action of the military when, in order to deal with an emergency amounting to a state of war, they impose restrictions and regulations upon civilians in their own country".¹⁸ Within the bounds of this criterion it can be said that a state of martial law has not arisen in Britain since the seventeenth century civil war.¹⁹ That ordinary British citizens were subject to trial by courts - martial in 1914²⁰ would not qualify as martial law. However, for the purposes of the discussion that follows, martial law or partial martial law would include the situation wherein the ordinary law as applied by the ordinary courts is suspended in whole or in part and civilians are tried by courts - martial.²¹ Under this wider definition the situation in the England of 1914 amounted to a state of martial law or partial martial law. Whatever the description or definition, martial law is to be sharply distinguished from military law or from aid by the military to civilian authorities for the purpose of quelling disorder.

Since Confederation there has not been actual practical experience with martial law in Canada. Canadian legal roots on this matter, as well as those of the United States, are to be found in the

¹⁸ E.C.S. Wade and G.G. Phillips, *Constitutional Law*, (5th ed., 1955), p. 422; see also, E.S. Corwin, *The President; Office and Powers*, (3rd ed., 1948), p. 170; Rossiter, *supra*, n. 11, at pp. 9 and 140; and *Luther v. Borden*, (1849) 7 How. 1, at p. 45, cited *infra*, at n. 47.

¹⁹ Wade and Phillips, *supra*, n. 18, at p. 423. Rossiter, *supra*, n. 11, at p. 139, footnote 10 states that — "The last instances of martial law in England, none of them particularly serious, were in 1715, 1740, and 1780." He cites as authority for this statement C.M. Clode, *Military Forces of the Crown*, Vol. 2, (1869), at pp. 169 *et seq.* The quelling of these disturbances is traditionally not viewed as instances of martial law by writers on English constitutional law. Lord Chief Justice Cockburn said that neither in 1715 nor in 1745 was martial law attempted or exercised — and the 1780 episode was more in the nature of military aid to the civil authorities. Although the writ of *habeas corpus* was suspended, there were no trials by courts — martial at any time. See Clode, cited above; also, H.M. Bowman, *Martial Law and the English Constitution* (1916-1917), 15 Mich. L. Rev. 93, at pp. 119-121.

²⁰ *Defence of the Realm Act* (No. 2), 1914, 4 & 5 Geo. 5, c. 63 (U.K.).

²¹ The Honourable Brooke Claxton, then Minister of National Defense, defined martial law as "the condition obtaining when the application of the ordinary rules of law by the ordinary courts is suspended and such law as then remains is enforced by military tribunals." Canada-House of Commons-Special Committee on Bill No. 133. *An Act Respecting National Defense, Minutes of Proceedings and Evidence*, (1950), (hereafter referred to as *1950 Commons Committee Proceedings*), at p. 12.

common law and also in British experience. Consequently some guidance relevant to Canadian law can be gained from an examination of the British and American theory and practice.

A. Martial Law in Britain²²

"Martial law arises from the State necessity, and is justified at the common law by necessity, and by necessity alone..."²³ The *Petition of Right*²⁴ was passed in order to prevent the Crown from dealing with subjects by means other than that of the ordinary courts — to prevent the abuses of military trials of civilians that had occurred in the past. Even courts-martial for military personnel required parliamentary sanction so that parliament annually re-enacted legislation to provide for discipline in the army.²⁵

Martial law can be proclaimed under the authority of a statute or by the executive as in the case of the South African Boer War. When declared without statutory authority, it is not settled if this power to use extraordinary measures resides in a Crown prerogative or is merely the common law duty of both subject and ruler to use whatever force is necessary to suppress disorder and restore the rule of law. There is no practical difference in this distinction as in either case the Crown or those acting under Crown authority are limited by the necessities of the case.

The traditional British doctrine as laid down in *Wolfe Tone's Case*²⁶ was that persons not in the military could not be tried by court-martial while the ordinary courts were open. During the 1837-1838 rebellion in Lower Canada this view was re-iterated by the Law Officers of the Crown whose joint opinion stated that:

When the regular Courts are open, so that Criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. *Such power can only be conferred by the Legislature...*²⁷

This doctrine was soon to be reversed.

²² An excellent study of martial law in both England and the United States is by C. Fairman, *The Law of Martial Rule*, (1930), (a 2nd ed., 1943 is also available; however, references here are made to the 1930 edition) and a supplement to this work is found in C. Fairman, *The Law of Martial Rule and the National Emergency*, (1941-42), 55 Har. L. Rev. 1253.

²³ Cyril Dodd, *The Case of Marais*, (1902), 18 L.Q.R. 143, at p. 145.

²⁴ 3 Car. 1, c. 1, (U.K. 1627).

²⁵ Now re-enacted by the *Army and Air Force (Annual) Acts*.

²⁶ (1798) 27 State Tr. 759.

²⁷ 2 Clode, *supra*, n. 19 at p. 500, (emphasis added). The Law Officers were Sir John Campbell and Sir S.M. Rolfe.

During the Boer War, martial law was declared by an executive act, without statutory authority. In *Ex parte D.F. Marais*,²⁸ their Lordships reversed the traditional test, holding that even if the courts were open for some purposes, this in itself did not foreclose civilian trials by courts-martial.²⁹ And, when a state of war exists, the civil courts will not interfere with the actions of the military. *Marais* would not be binding on an English court.³⁰ From some of the cases that arose after the imposition of martial law in Ireland during the 1920's we can also note:³¹ that, once their jurisdiction has been invoked, the civil courts will decide whether a state of war justifying martial law exists;³² and, that a writ of prohibition cannot issue against a military court set-up under martial law because it is not really a court but only an advisory committee to the military commander.³³ Also, an *Act of Indemnity*³⁴ will retrospectively protect persons who have acted in good faith.

In 1914, for the first time in over 250 years a British subject in England could be condemned to death without a jury trial. The King's courts were open, and if war was raging, it was not raging on English soil. The original *Defence of the Realm Act*³⁵ (DORA) provided in s.1 that His Majesty in Council could authorize by regulation "the trial by courts-martial and punishment of persons . . . in like manner as if such persons were subject to military law." This was generally applicable to those assisting the enemy or for contravening regulations securing public transportation and public

²⁸ [1902] A.C. 109 (P.C.). For a discussion on martial law inspired by *Marais* see, Dodd *supra*, n. 23; W.S. Holdsworth, *Martial Law Historically Considered*, (1902), 18 L.Q.R. 117; H.E. Richards, *Martial Law*, (1902), 18 L.Q.R. 133 and, F. Pollock, *What is Martial Law?*, (1902), 18 L.Q.R. 152.

²⁹ The attorneys for petitioner in *Marais* [1902] A.C. 109 at p. 111, the statement by the Law Officers of the Crown, see *supra*, at n. 27, as well as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), to no avail. *Marais* was followed in *R. (Childers) v. Adjutant-General* [1923] Ir. R. 5, in which case the courts were not open in a practical sense insofar as the judges needed military protection in order to sit and the courthouse was in ruins.

³⁰ Wade and Phillips, *supra*, n. 18, at p. 426. Consequently, even if a state of war exists, the civil courts can call into question the actions of the military — i.e. a writ of *habeas corpus* would issue.

³¹ For a discussion of the Irish cases, see C. Fairman, *The Law of Martial Rule* (1930), at pp. 127-137. Jurisdiction under martial law is examined in F.B. Wiener, *Civilians Under Military Justice*, (Chicago, 1967), at pp. 219-226.

³² *R. (Garde) v. Strickland*, [1921] 2 Ir. R. 317, at p. 329.

³³ *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570, at pp. 580-81 (H.L.) accord, *Ex parte Vollandigham* 68 U.S. (1 Wall.) 243 (1863); see *infra*, n. 61.

³⁴ E.g., *Indemnity Act*, 1920, 10 & 11 Geo. 5, c. 48, s. 1(1) (U.K.), now repealed.

³⁵ 1914, 4-5 Geo. V, c. 29, (U.K.).

facilities. Almost three weeks later the *Act* was amended to cover regulations "to prevent the spread of reports likely to cause disaffection or alarm."³⁶ Subsequently, a further amendment provided for the death penalty if convicted by a court-martial of "assisting the enemy".³⁷ However, a little over seven months after the original DORA was passed, the right of a British subject to trial by jury was restored, provided that — "in the event of invasion or other special military emergency," trial of civilians by courts-martial could be restored by Proclamation.³⁸

The Emergency Powers Act ³⁹ of 1920 authorized proclamations of emergency by Order-in-Council for securing the essentials of life to the community. It was legislation designed to be used in the event of a crippling strike.⁴⁰ However, s.2(3) foresaw that the regulations made under the *Act* could not "alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial."

In the Second World War, trial by courts-martial was expressly forbidden in s.1(5) of the *Emergency Powers (Defence) Act*,⁴¹ for persons who were not subject to laws applicable to the armed services. However, as concerned enemy aliens aiding the enemy, the Attorney-General could proceed before a court-martial if it was so desired.⁴² When invasion was feared possible, legislation was passed to provide for special war zone courts. These courts were to sit if the military situation required "that criminal justice should be administered more speedily than would be practicable by the ordinary courts."⁴³ These were essentially civil courts of record; they were never required to sit.

This brief discourse on martial law in Britain would indicate that any future regime of martial law would most likely be established

³⁶ *Defence of the Realm Act* (No. 2), 1914, 4 & 5 Geo. 5, c. 63, s. 1(a) (U.K.).

³⁷ *Defence of the Realm Consolidation Act*, 1914, 5 Geo. 5, c. 8, s. 1(4) (U.K.). However, in the original *Act*, *supra*, n. 35, the government had expressly excluded the death penalty in order to gain support for passage of the bill. Bowman, *supra*, n. 19, at p. 96.

³⁸ *Defence of the Realm Amendment Act*, 1915, 5 Geo. 5, c. 34, s. 1(7) (U.K.). There was probably no real necessity for court-martial of civilians, see, Bowman, *supra*, n. 19, at p. 100.

³⁹ (1920), 10 & 11 Geo. 5, c. 55 (U.K.).

⁴⁰ E.g., this *Act* was used in the 1921 Coal Strike, the London Tramways and Omnibus Strike of 1924 as well as in the 1948 and 1949 Dock strikes.

⁴¹ (1939), 2 & 3 Geo. 6, c. 6 (U.K.).

⁴² *Treachery Act*, 1940, 3 & 4 Geo. 6, c. 21, s. 2(1)(b) (U.K.).

⁴³ *Emergency Powers (Defence) (No. 2) Act*, 1940, 3 & 4 Geo. 6, c. 45, s. 1(1) (U.K.).

under statutory authority. However, in an extreme case — sudden atomic destruction, for example — in which Parliament was prevented from acting, the common law doctrine of necessity would permit the establishment of martial law by whatever power was in existence (probably the military) so as to provide for the maintenance of order and the return of rule by law.

B. Martial Law in the United States⁴⁴

Although the term “martial law” is not in the American Constitution, this was an institution well known in Colonial America.⁴⁵ The common law doctrine of necessity determinative of martial law carried over as a state and federal power. There are a number of provisions in the Constitution germane to the establishment of martial law,⁴⁶ and it can be declared by an executive act or under statutory authority. In *Luther v. Borden*,⁴⁷ the Supreme Court held that the judgment of the Government of Rhode Island to use its military power to suppress an insurrection cannot be judicially questioned. The Court defined martial law as the,

...exercise of the military power which resides in the Executive Branch of Government to preserve order, and insure the public safety in domestic territory in time of emergency, when civil government agencies are unable to function or their function would itself threaten the public safety.⁴⁸

Under national authority this “military power” rests with the President as Commander-in-Chief.⁴⁹

The most important statement by the Supreme Court on martial law was given in the Civil War case of *Ex parte Milligan*.⁵⁰ Milligan,

⁴⁴ Generally, see, the works by Fairman, *supra*, n. 22; R.S. Rankin, *When Civil Law Fails*, (1939); F.B. Wiener, *A Practical Manual of Martial Law*, (1940); B.M. Rich, *The Presidents and Civil Disorder*, (1941); and, R.S. Rankin and W.R. Dallmayr, *Freedom and Emergency Powers in the Cold War*, (1964).

⁴⁵ An excellent study of martial law in Colonial America is in Wiener, *supra*, n. 31.

⁴⁶ U.S. Const. art. I, s. 9, cl. 2, the writ of *habeas corpus* can be suspended; art. II, s. 2, cl. 1, the President is Commander-in-Chief of the armed forces; art. II, s. 3, the President shall faithfully execute the laws of the United States; and art. IV, s. 4, the United States shall guarantee a republican form of government to every state.

⁴⁷ *Luther v. Borden*, 48 U.S. (7 How.) 1, (1849).

⁴⁸ *Ibid.*, at p. 45.

⁴⁹ When the Commander-in-Chief clause was wedded to that of the President's duty “to take care that the laws are faithfully executed” — the well-known “War Powers” of the President emerged. See, *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) which affirmed President Lincoln's power to order the blockade of southern ports before Congress had recognized the existence of the Civil War.

⁵⁰ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, (1866).

a private citizen, was arrested in Indiana on the orders of the local military commander. He was found guilty of treasonable offences and of disloyalty by a military commission and sentenced to be hanged. President Johnson had established this commission and had approved the findings of the Court. Milligan petitioned the Circuit Court of Indiana for a writ of *habeas corpus*, no civil indictment having been returned against him. The Circuit Court certified questions to the Supreme Court concerning the issuance of this writ. The case turned on the question: whether a private citizen can be tried by a military tribunal during a rebellion when he is not in an insurrectionary part of the country and the civil courts are open. There, of course, had been hundreds of arrests and trials in similar circumstances throughout the war.

The Court was greatly influenced by the British Constitutional practice, adhered to before *Ex parte Marais*.⁵¹ It was maintained that since the civil courts were open in Indiana to hear criminal accusations as well as civil cases, no usage of war could sanction the military trial of non-military persons and that Congress could not grant this power.⁵² Neither, in the Court's opinion, could martial law arise from a threatened invasion, and the Court found it difficult to see how the safety of the country required martial law in Indiana.⁵³ To proclaim martial law the test is that:

The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.⁵⁴

The decision rested on the lack of judicial power in a Military Commission (art. III, s.1), the guarantees of the Fourth Amendment, as well as the necessity for an indictment or presentment before anyone can be held to answer for high crimes, "except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger" (Fifth Amendment), and the right to a jury trial (art. III, s.2.cl.3 and the Sixth Amendment).⁵⁵

⁵¹ *Ibid.*, at p. 128. See also, C. Fairman, *The Law of Martial Rule and the National Emergency*, (1941-42), 55 Harv. L. Rev. 1253, at p. 1254.

⁵² 71 U.S. (4 Wall.) 2 at pp. 121-22, (1866). Chief Justice Chase, for himself and three Associate Justices, delivered the minority opinion concurring in the result, but maintaining that Congress could have authorized military commissions in Indiana. (*Id.* at p. 137).

⁵³ 71 U.S. (4 Wall.) 2 at p. 127, (1866).

⁵⁴ *Ibid.*

⁵⁵ The limitations on the executive in *Milligan* were modified in *Moyer v. Peabody*, 212 U.S. 78 (1908), so that where the military was used and arrests made in good faith an action could not be maintained against the Governor after he had left office. But see *Sterling v. Constantin*, *infra* n. 59.

The state governors possess emergency powers, analogous to that of the President,⁵⁶ that flow from the state constitution or from legislation. Governors, unlike provincial heads of government in Canada, can declare martial law and employ the state militia to stamp out civil disorder. Particularly before World War I, martial law was often used as a strike-breaking device. Some rather bizarre gubernatorial pretexts for martial law have occurred: the establishment of martial law over the race track of the governor's political opponent so as to tap his strength,⁵⁷ and in another instance, to allow a governor to take charge of football ticket sales between the state's two institutions of higher learning.⁵⁸ In 1931, the Governor of Texas declared martial law so as to restrict the production of oil in certain counties. When the legality of this act was questioned, the evidence disclosed that there was no violence — neither rioting nor insurrection — nor was any disorder even foreseeable.⁵⁹ A federal district court order restraining the enforcement of military or executive orders restricting or regulating oil production was affirmed by the Supreme Court. The measures taken by the governor amounted to a taking of property without due process.

In April 1918, a bill sponsored by Senator Chamberlin was introduced in the Senate which would have permitted the declaration of martial law on a national scale. Its purpose was to subject civilians to trial by courts-martial for spying. President Wilson was against the measure and it was allowed to die in committee. The trial by courts-martial of American civilians would surely have run counter to the principles laid down in *Milligan*.⁶⁰ On a number of occasions the Supreme Court has struck down federal court-martial enactments that were unconstitutional.⁶¹

⁵⁶ Rankin and Dallmayr, *supra*, n. 44, at pp. 92-95.

⁵⁷ Fairman, *supra*, n. 51, at p. 1276.

⁵⁸ Kelly and Pelletier, *supra*, n. 16, at p. 54 n. 31.

⁵⁹ *Sterling v. Constantin*, 287 U.S. 378, at pp. 390-392, (1932).

⁶⁰ In the summer of 1942 eight German saboteurs were apprehended soon after they landed in the United States. One of them, (Haupt) was an American citizen. It is difficult to reconcile his conviction by a court-martial with the Constitutional guarantees and the holding in *Milligan*. (*Ex Parte Quirin*, 317 U.S. 1 (1942)).

⁶¹ Held unconstitutional: the trial of dependents of servicemen by court-martial for capital offences, *Reid v. Covert*, 354 U.S. 1 (1956); as well as, the court-martial trial of an ex-servicemen for offences committed while he was in the military, *Toth v. Quarles*, 350 U.S. 111 (1955). However, the Supreme Court has no power to review the proceedings of a military commission, the commission not being part of the judicial system, *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

During the Second World War, a few hours after the attack on Pearl Harbour, the Governor of Hawaii proclaimed martial law and turned over control to the Commander of the United States Army in Hawaii. His action under s.67 of the *Hawaiian Organic Act*⁶² was subsequently approved by the President. Martial law remained in force until October 24, 1944; however, the curfew and blackout regulations were continued until July 11, 1945. The "justice" meted out by military tribunals has been severely criticized.⁶³

When the question as to the validity of martial law in Hawaii was decided by the Supreme Court, the war was already over. In *Duncan v. Kahanamoku*,⁶⁴ the defendant was convicted and sentenced by a military tribunal in early 1944, to imprisonment for brawling with sentries at the Navy Yard. The civil courts had by now been authorized by the military to exercise their normal jurisdiction, except that military tribunals had retained jurisdiction to try criminal prosecutions for violation of military orders. The Court held that the term "martial law" in the *Organic Act* carried no precise meaning. In view of American philosophical and political traditions, "martial law" in the *Act* did not mean trying civilians by military tribunals unless the civil courts were actually closed due to invasion or civil war.

The majority opinion held that congress had not authorized civilian trials by military tribunals since the civil courts were open. This holding, however, turned on the statutory construction of the *Organic Act* and the constitutional issue raised in *Milligan* was not reached.⁶⁵

Was martial law necessary in Hawaii? Undoubtedly the trial by military tribunals of even the most petty offences was not justified. And, it is not only wisdom of hindsight that justifies this conclusion.

⁶² 31 Stat. 141, at p. 153 at s. 67.

⁶³ "Lawyers who appear before these [military] tribunals are frequently treated with contempt and suspicion." Many citizens appeared without counsel and acquittals were rare. Sometimes the accused was held in custody for a few days even for a minor offence — the writ of *habeas corpus* had been suspended. And — "Heavy fines and long prison sentences are meted out in many cases for comparatively trivial violations of military orders." Letter from the Attorney-General of Hawaii to the Governor, December 1, 1942. J.G. Anthony, *Hawaii Under Army Rule* (1955) at p. 195. See also the *Spurlock* case, *id.* at p. 18. The author of this book was the Attorney-General of Hawaii and the writer of the above-cited letter.

⁶⁴ 327 U.S. 304 (1945). The companion case of *White v. Steer* was concerned with embezzlement by a stockbroker.

⁶⁵ In a concurring opinion Mr. Justice Murphy stressed the "open court" rule of *Milligan* 327 U.S. at 326 *et. seq.*

The *Milligan* doctrine, it has been argued, does not "meet the conditions of modern war"⁶⁶ — and, the twentieth century version of martial law in Hawaii is justified on the grounds of "invasion" by bombs, not soldiers.⁶⁷ However, in contrast, during the heavy bombings of Malta, the civil courts remained open for the trial of ordinary offences although the Island was under military government. Nor was there recourse to martial law in besieged Britain.⁶⁸ "The Hawaiian experience is a good illustration of the self-perpetuating tendency of martial rule and does not recommend itself for future imitation."⁶⁹

The civilian-military relationship in times of national disaster was fully discussed, in and out of Congress, after the Civil Defence exercise of Operation Alert in 1955.⁷⁰ During the exercise martial law was proclaimed nationally by the President, based on the effects of atomic destruction and the resultant breakdown in civil authority. It was deemed a necessary measure so as to give the military a free hand in restoring order. *Milligan* would not have survived such a catastrophe, even if the courts were open in many areas.

C. Martial Law in Canada

The situation as regards martial law in Canada was stated by a former Minister of National Defence to be as follows:

Martial law could only be lawfully proclaimed and enforced in Canada under the authority of an Act of Parliament such as the *War Measures Act*, or conceivably by some prerogative right, but it is a very extreme measure to deal with highly unusual situations. I do not think martial law has ever been proclaimed in Canada since the very early days and long before Confederation.⁷¹

Although never proclaimed in Canada since Confederation, martial law was authorized on one occasion by an Order-in-Council in 1918, but it never came into force.

⁶⁶ Fairman, *supra*, n. 51, at p. 1254.

⁶⁷ Colonel E.L. Farrell, *Civil Functions of the Military and Implications of Martial Law*, (1954), 22 U. Kan. City L. Rev. 157, at p. 164.

⁶⁸ For a discussion of the functioning of a judicial system in case of atomic attack, see, D.F. Cavers, *Legal Planning Against the Risk of Atomic War*, (1955), 55 Colum. L. Rev. 127, at pp. 151-153.

⁶⁹ Rankin and Dallmayr, *supra*, n. 44, at p. 48. See also, *id.* at p. 266; Anthony, *supra*, n. 63, at pp. 58-59 (the army desired to maintain martial law in Hawaii for as long as it could); and, J.P. Frank, *Ex parte Milligan v. The Five Companies: Martial Law in Hawaii*, (1944), 44 Colum. L. Rev. 639 (the army unduly perpetuated martial law in order to exercise control over civilian labour).

⁷⁰ See, Rankin and Dallmayr, *supra*, n. 44, at pp. 55-72, for a full discussion on the aftermath of Operation Alert.

⁷¹ Statement by Brooke Claxton, 1950 *Commons Committee Proceedings* at p. 12.

Historically the doctrine of martial law was introduced to Canada with British rule. After the British conquest, both civil and criminal trials were held before military tribunals during the Military Regime of 1760-1764.⁷² Allusion has already been made to the legality of proclaiming martial law in pre-confederation Canada.⁷³ On one rather bizarre occasion the "Provisional Government" of Louis Riel in the rebellious west tried a Mr. Scott by a "Council of War" presided over by "Adjutant-General" Ambroise Lépine and duly sentenced him to death.⁷⁴ Riel himself, of course, was subsequently tried by a judge and jury, and sentenced to death for treason.

The strong anti-conscription sentiment in Quebec during the first world war, culminated in the Quebec City riots of 1918.⁷⁵ The riot of March 29 was touched off by the *Military Service Act* of 1917⁷⁶ — and it quickly escalated. A police station was burned down and when the Dominion Police applied for military assistance, they were referred to the civil authorities. The mayor attempted to get the crowds to disperse but to no avail. He was hesitant to proclaim the *Riot Act*⁷⁷ in force and reluctant to call for military assistance.⁷⁸ By the following evening the situation had worsened and the Federal Government sent in troops. Order was re-established by the early hours of April 2, after four civilians had been killed and a number of civilians and soldiers were wounded.

⁷² See, Wiener, *supra*, n. 31, at pp. 37-63.

⁷³ *Supra*, n. 27.

⁷⁴ G.F.G. Stanley, *The Birth of Western Canada*, (1936), at p. 105. The accused was charged — "d'avoir pris les armes contre le Gouvernement Provisoire et frappé l'un des capitaines des gardes" — *ibid.*

⁷⁵ The historical material for this episode is taken from, E.H. Armstrong, *The Crisis of Quebec 1914-1918*, (1937), at pp. 220-233, and Canada — *House of Commons Debates*, 1918, at pp. 284-285 (hereafter referred to as *Hansard*).

⁷⁶ 7-8 Geo. 5, c. 19 (Can.).

⁷⁷ The original *Riot Act* was in Geo. 1, Stat. 2, c. 5 (U.K. 1714). Its Canadian counterpart is now in the *Criminal Code*, S.C. 1953-54, c. 51, ss. 65-70. For an analysis of state riot laws see, G.D. Ducharme and E.H. Eickholt, *State Riot Laws: A Proposal*, (1968) 45 U. Det. J. of Urban L. 713.

⁷⁸ The mayor could have asked for military aid under ss. 82-83 of the *Militia Act*, R.S.C. 1906, c. 41. Now, however, a requisition for military assistance from provincial authorities must come from the Attorney-General of the province — see the *National Defence Act*, R.S.C. 1952, c. 184, s. 221. The province is responsible for all expenses incurred by the Federal Government (s. 227). This Act also provides that in an emergency (here meaning, war, invasion, riot or insurrection, real or apprehended) any officer of the Canadian Armed Forces may as per regulations passed by the Governor-in-Council take, remove and destroy property (s. 207). Compensation is provided for in s. 208.

The press report of April 2 that stated — “*La loi martiale proclamée*”,⁷⁹ was more anticipatory than factual. Doubtlessly the Federal Government felt that the “threat of a declaration of martial law with its accompanying suspension of *habeas corpus* and trial by civil courts, might act as a distinct deterrent.”⁸⁰ The Government wanted to avoid the possibility of further anti-conscription rioting.

The Order-in-Council⁸¹ of April 4, 1918, made under the *War Measures Act*,⁸² legalized the action of the military in suppressing the Quebec City riots and permitted the army to hold prisoners then in custody, without recourse to a writ of *habeas corpus*. The preamble to the Order-in-Council reads like a mini-treatise on martial law in British theory and practice.

Essentially, the Order permitted a General Officer or Commanding Officer in a Military District to intervene to suppress a riot, insurrection, or civil disturbance, whether or not requested by the civil authorities, if he believed his military intervention necessary. If such action was taken while the *Military Service Act* was in effect, the Governor in Council could suspend the ordinary courts and institute court-martial trials of civilians. However, if civilians were tried by court-martial, the sentence imposed was to be like that which might be imposed by a civil court; and it was not to be executed until affirmed by the Governor-in-Council. The writ of *habeas corpus* was to be suspended as regards those in military custody. Lastly, any male obstructing implementation of the *Military Service Act* or demonstrating against the *Act* was subject to immediate military induction.

As the above summary of the Order-in-Council indicates, the power given to the military was clearly delineated. The military was to be the instrument for coercion and for repressing civil disturbances that could arise during the remainder of the war, but full control of military action was retained by the Cabinet.

The normal Canadian response to internal disorder which is beyond the control of the civil authorities has been a resort to military aid by the civil authorities. During the Winnipeg General

⁷⁹ The Montreal *La Presse*, April 2, 1918, at p. 1, col. 1.

⁸⁰ Armstrong, *supra*, n. 75, at p. 233.

⁸¹ Canada Gazette, vol. 51, no. 41, April 13, 1918, 3552. Also reproduced in *Hansard*, 1918, pp. 378-380.

⁸² 1914, 5 Geo. 5, c. 2, (Can.).

Strike⁸³ the city was at times virtually controlled by the strikers. Approximately thirty thousand persons left their jobs in a city with a population of 200,000. Bread, milk and ice deliveries were stopped; restaurants closed unless they had a permit from the Strike Committee. Public transportation was halted and telephone services were cut off. Even the police force had voted in favour of the strike and the force was subsequently dismissed and replaced by "special" police. During the strike — between May 15 and June 26 — the normal life of the city came to a standstill.

The Manitoba Appeal Court stated:

[The strike]... was a bold attempt to usurp the powers of the duly constituted authorities and to force the public into submission through financial loss, starvation, want and by every possible means an autocratic junta deemed advisable.⁸⁴

Some commentators have viewed the aims of the strikers as an attempt to establish a soviet-type government which was to spread — that is, as an insurrection. However, perhaps the more balanced view is that the strikers simply wanted improved working conditions, better wages and bargaining rights.⁸⁵

Governmental control was re-established by military intervention. The mayor requested military aid.⁸⁶ However, there was at no time

⁸³ The material for this brief description of the strike was taken from: D.C. Masters, *The Winnipeg General Strike* (1950); K. McNaught, *Prophet in Politics* (1959), at pp. 99-132. There were also strikes in many other Canadian cities but none reached the crisis proportions of the Winnipeg General Strike. For a study of post world war strikes in the United States that required troops to restore order, see Rich, *supra*, n. 44, at pp. 152-176.

⁸⁴ *R. v. Russell*, (1920), 33 Can. Crim. Cas. Ann. 1, at p. 20, (C.A. Man.).

⁸⁵ McNaught, *supra*, n. 83, at p. 100. The times when troops were used to disperse the crowds is usually termed a riot. (See, Masters, *supra*, n. 83, at p. 87).

Chief Judge Magruder distinguished riot from insurrection as follows: "...to constitute an insurrection or rebellion... there must have been a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof". *Home Ins. Co. v. Davilla*, 212 F. 2d. 731, at p. 736 (1st Cir. 1954).

The findings by the Appeal Court cited at n. 84 *supra*, seem to imply it was an insurrection under this definition.

⁸⁶ For the mayor's power under the old *Militia Act*, see *supra*, n. 78. American writings on military aid to civilian authorities are extensive. See generally, *Federal Aid in Domestic Disturbances*, Sen. Doc. No. 209, 57th Congress, 2nd sess. (1903), and, Sen. Doc. No. 263, 67th Congress, 2nd sess. (1922) for a report up to 1922; Rich, *supra*, n. 44; Note, *Riot Control and the Use of Federal Troops*, (1968), 81 Harv. L. Rev. 638; *In re Debs*, 158 U.S. 564, at p. 582 (1894), holding that the Federal Government can keep open the channels of interstate commerce by the use of the military.

a resort to martial law, and what prosecutions there were against individual strikers were on the grounds of sedition in the civil courts.

Martial law and the consequential trial of civilians by courts-martial will effectively remove every guarantee a citizen has as concerns his civil liberties. There is really no analogy between the proceedings of ordinary courts and a court-martial tribunal administering justice under the supervision of a military officer. Frequently, the presiding officer or officers will not have had any legal training — as was often the case during the regime of martial law in Hawaii. In the words of Sir J.F. Stephen:

[Court-martial tribunals]... are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government.⁸⁷

It is rather difficult to justify the use of this "discretionary power" when the civil courts are open and able to function — as the British and Hawaiian experiences would indicate.

Martial law is a very extreme measure. It should not be employed unless all other attempts to preserve civil authority have failed. In the past the resort to military aid to the civil authorities has proved sufficient as the extreme measure in restoring civil control. Besides the Winnipeg Strike, troops were used on other occasions to quell labour disturbances — such as occurred in Quebec City in 1878 and in Cape Breton in 1923. Yet if deemed necessary, Parliament or the government has the power to resort to martial law.

1. *Martial law under a Crown prerogative or under the common law.* The power to declare martial law under a prerogative or under the common law no doubt exists in Canada as it does in Britain. However, Canadian courts are not bound by the holding in *Ex parte Marais*. That civilians cannot be tried by courts-martial when the courts are open would seem to be the Canadian rule — as stated in the opinion of the Law Officers of the Crown,⁸⁸ which related specifically to Canada. The courts could intervene by way of *habeas corpus* to proclaim this rule. However, as in Britain, a writ of prohibition would not issue against a military tribunal.

2. *Martial law under statutory authority.* Most probably a proclamation of martial law would be under statutory authority.

⁸⁷ J.F. Stephen, *History of the Criminal Law of England* (1883), Vol. 1, at p. 216. A proclamation of martial law does not always mean the automatic suspension of civil liberties. See, the recent case of *Wilson and Co. v. Freeman*, 179 F. Supp. 520, at pp. 531-533 (D.C. Minn. 1959), where the proclamation of martial law by the governor expressly stipulated that civil liberties were not to be disturbed, except by direct command of the Commanding Officer as would be made necessary by the requirements of the public welfare.

⁸⁸ See *supra*, n. 27.

There are, of course, no restraints on Parliament to prevent it from declaring martial law, even if the courts are open — except that body's good sense. Also, at this time, the government could proclaim martial law if the present *War Measures Act* is invoked — as was the case in 1918. It is significant that under the British and Australian emergency legislation in World War II, those governments were expressly denied the power to proclaim martial law by Order-in-Council.⁸⁹ This was not the case in Canada.

There does not seem to be any sound reason why martial law should not be expressly excluded from those powers delegated to the Governor in Council when the present *War Measures Act* is proclaimed to be in force. It is, of course, whistling in the wind to speculate if an entrenched Canadian *Bill of Rights* would lead to judicial interpretation as in *Ex parte Milligan*, where even under statutory authority martial law cannot be proclaimed when the courts are open.

II — THE EMERGENCY DOCTRINE IN CANADA

The basis for federal emergency power legislation rests on the opening words of s.91 of the *British North America Act* which provide that:⁹⁰

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada.

The validity of federal emergency legislation has always turned on the question whether the legislation was a valid exercise of the federal emergency power or whether it unnecessarily invaded a field reserved to the provinces under s.92 of the *B.N.A. Act*.

In a rather bitter dissent concerning Regulations under the 1939 *Australian National Security Act*, Mr. Justice Starke remarked that he "had abandoned the hope of deciding any case upon grounds that are intelligible, satisfactory or convincing."⁹¹ In reviewing the

⁸⁹ *Emergency Powers (Defence) Act*, 1939, 2 & 3 Geo. 6, c. 62, s. 1(5) (U.K.); *National Security Act*, 1939-1940, s. 5(7b) (Austl.).

⁹⁰ The same clause appears in the opening words of s. 51 of the Australian Constitution. However — "It is unlike the corresponding power conferred by s. 91 of the Canadian Constitution Act of 1867, restricted by the words which immediately follow it." *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co.* [1914] A.C. 237, at p. 255 (P.C.).

⁹¹ *DeMestre v. Chisholm*, (1944), 69 Commw. L.R. 51, at p. 62 (Austl.). See, G. Sawyer, *Defence Power in the Commonwealth in Time of Peace*, (1952-54), 6 Res Judicatae 214.

development of an emergency doctrine in Canada, one wonders if the Privy Council did not make the same finding!⁹²

After a review of the development of this doctrine, attention will be given to the problem of judicially determining when the emergency is over; to the defence power; to the peacetime emergency power; as well as to the emergency power and the *Bill of Rights*.

A. The Development of an Emergency Doctrine

The seed for an emergency doctrine was first planted in *Russell v. The Queen*.⁹³ This was an appeal by a private person and no argument from the provinces was heard. The Privy Council did not have to forget it was a constitution they were expounding — they probably never even considered it.⁹⁴ In *Russell*, their Lordships related the sale of intoxicating liquors in Canada to the peace, order and good government clause — to allow for the application of a remedy by the central government “to an evil which is assumed to exist throughout the Dominion.”⁹⁵ Federal temperance legislation was permitted to come into operation by local option. Subsequently, the Privy Council could only support *Russell* on the assumption that Canada was a nation of drunkards at the time, and that “the National Parliament was called on to intervene to protect the nation from disaster.”⁹⁶ The situation forty years after *Russell* was seen in retrospect as having been analogous to an epidemic of pestilence.

Sometimes the germ of the emergency clause is attributed to the “dimensions doctrine” enunciated in the *Local Prohibition Case*.⁹⁷ This doctrine justified federal intervention in local and provincial matters when that matter had attained “such dimensions

⁹² For a trenchant criticism of the Privy Council's interpretation of the peace, order and good government clause, see B. Laskin, “Peace, Order and Good Government” *Re-Examined*, (1947), 25 Can. Bar Rev. 1054.

⁹³ *Russell v. The Queen*, (1882), 7 App. Cas. 829 (P.C.).

⁹⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, (1819), at p. 406. See, the comment on *Adegbenro v. Akintola*, [1963] 3 W.L.R. 63, concerning the Nigerian constitution, decided by the Privy Council, W.I. Jennings, *The Removal of a Premier*, [1963] Camb. L.J. 169, at p. 171.

⁹⁵ 7 App. Cas. 842.

⁹⁶ *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, at p. 412 (P.C.). This subsequent interpretation of *Russell's Case* has always provided comic relief in Canadian constitutional law. See, e.g., the remarks by Anglin C.J. in *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, at p. 438.

⁹⁷ *Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A.C. 348 (P.C.). See, Laskin, *supra*, n. 92, at p. 1067, but see, F.P. Varcoe *The Constitution of Canada* (1965), at p. 73.

as to effect the body politic of the Dominion"⁹⁸ — what was merely local had become of national concern. Wherever the seed may be found, a recognizable emergency doctrine was developed by Lord Haldane in two post World War I cases.

In the *Board of Commerce Case*⁹⁹ their Lordships were confronted by a 1919 Federal Act that purported to control trade combinations as well as hoarding — subjects that seriously interfered with "property and civil rights", and which are reserved to the provinces under s.92 head 13 of the *B.N.A. Act*. Basing himself on *Russell's Case*, Lord Haldane said that even in peacetime under normal circumstances such legislation would be constitutionally possible, but only "under necessity in highly exceptional circumstances",¹⁰⁰ such as could not be assumed at that time.

Undoubtedly, a post-war period requires re-adjustment to peace and consequently the retention of some controls by the central government. This was, of course, the holding in subsequent cases.¹⁰¹ What troubled their Lordships was that the legislation had been passed "after peace had been declared, and it [was] not confined to any temporary purpose..."¹⁰² Had the government presented properly framed legislation, it would have probably been deemed valid in the circumstances. When the temporality of the legislation was evident, the emergency doctrine was born.¹⁰³

The birth, however, was not painless. In the *Fort Frances Case*, it seems that Lord Haldane himself¹⁰⁴ discovered the *Hamilton v. Kentucky Distilleries and Warehouse Co. Case*¹⁰⁵ and borrowed the theory of implied power. It has often been suggested that this grafting of an implied power onto the peace, order and good government clause was an unnatural union.¹⁰⁶

⁹⁸ [1896] A.C. 348 at p. 361.

⁹⁹ *In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191 (P.C.).

¹⁰⁰ *Id.*, at p. 197.

¹⁰¹ See, e.g., *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124.

¹⁰² [1922] 1 A.C. at p. 197.

¹⁰³ *Fort Frances Pulp and Paper [Paper] Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 at p. 708, (P.C.); accord, *Block v. Hirsh*, 256 U.S. 135, at p. 157, (1920). (The wartime regulation was "put and justified only as a temporary measure."); *Victorian Chamber of Manufacturers v. The Commonwealth*, (1943), 67 Commw. L.R. 418, at p. 427 (Austl.). (The emergency defence measure was justifiable "to meet an abnormal and temporary crisis.")

¹⁰⁴ See *Fort Frances*... [1923] A.C. 695, at p. 698.

¹⁰⁵ 251 U.S. 146 (1919).

¹⁰⁶ See, e.g., Varcoe, *supra*, n. 97, at p. 76; Laskin, *supra*, n. 92, at p. 1076.

It has been remarked that English jurists were unfamiliar with the United States Constitution.¹⁰⁷ If Lord Haldane was unfamiliar with the American Constitution, he was at least well acquainted with one of its most renowned interpreters. After lunching with Lord Haldane, Mr. Laski wrote to Mr. Justice Holmes on December 14, 1920 that:

Haldane spoke very charmingly of having received the book [from you]; and of his wish for a talk with you on some Canadian federal cases he's handling just now.¹⁰⁸

It is not surprising then, that Lord Haldane found the answer to a Canadian problem in an American case.

What was said in the *Hamilton Case* that their Lordships found so appealing? ¹⁰⁹ This case dealt with the validity of the post World War I *War-Time Prohibition Act*,¹¹⁰ which was passed after the Armistice with Germany had been signed. The *Act* prohibited the sale of liquor throughout the United States. It was to remain in force "until the conclusion of the present war and thereafter until the termination of demobilization" — a date to be determined and proclaimed by the President. Congress deemed it a necessary measure to conserve manpower and for increasing efficiency in production during the critical post-war days.

In sustaining the legislation the Court said that:

[The implied power]... is not limited to victories in the field and the dispersion of the [insurgent] forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress.¹¹¹

This war power is therefore not necessarily extinguished with the cessation of hostilities. It continues so long as the emergency exists.

¹⁰⁷ "It was common knowledge... that the Constitution of the United States was a subject entirely unfamiliar to English lawyers, while to Australian publicists it was almost as familiar as the British Constitution." Griffith, C.J., in *Baxter v. Commissioners of Taxation, N.S.W.*, (1907), 4 Commw. L.R. 1087, at p. 1111 (Austl.).

¹⁰⁸ M.D. Howe, *Holmes-Laski Letters* (1953), Vol. 1, at p. 293.

¹⁰⁹ "In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton v. Kentucky Distilleries Co.*" (Fort Frances... [1923] A.C. 695, at p. 706). The other decisions he had in mind were probably those cases decided just after the war, such as *Block v. Hirsh*, 256 U.S. 135 (1920) (sustaining post war emergency rental legislation in the District of Columbia); *Jacob Ruppert Inc. v. Caffey*, 251 U.S. 264 (1920) (sustaining prohibition as in *Hamilton*).

¹¹⁰ c. 212, 40 Stat. 1045, 1046, (1918).

¹¹¹ 251 U.S. at 161, quoting *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, at p. 507 (1870). The 1870 case referred, of course, to insurgency in 1861-1865.

Based on the Necessary and Proper Clause (art. 1, s.8, cl. 18) the implied power gives the Federal Government a war power of an almost unlimited scope.¹¹²

The *Fort Frances Case* was that very rare occasion when the Privy Council cited a United States Supreme Court decision in a Canadian constitutional law opinion.¹¹³ If we now turn to this case, it becomes obvious how much their Lordships were indebted to the Supreme Court.¹¹⁴

To cope with the problems raised by war, the Canadian Parliament passed the *War Measures Act*, 1914,¹¹⁵ under the power granted to the Federal Government by the opening of s.91 of the *B.N.A. Act*. This *Act* was similar to DORA. It was also this legislation that granted extraordinary powers to the government in the Second World War,¹¹⁶ and it would serve the same purpose in another emergency.

Under the 1914 *Act*, the government passed a number of Orders-in-Council during the First World War to control the supply and price of newsprint in Canada. After the cessation of hostilities, Parliament passed legislation providing for the continuation of these controls until peace was proclaimed. The validity of the controls was contested in the *Fort Frances Case* on the ground that these orders trench on provincial powers under s.92.

Their Lordships acknowledged that the Federal Government could not normally interfere with provincial jurisdiction over property and civil rights. But they continued,

...it does not follow that in a very different case, such as... the outbreak of a great war, the Parliament of the Dominion cannot act under other powers

¹¹² See, e.g., *Ludecke v. Watkins*, 335 U.S. 160 (1948) (deportation of aliens); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (sustaining federal rental legislation after World War II in "Defence-Rental" areas).

¹¹³ This was the first time that their Lordships cited an American case in a Canadian constitutional law decision. The second and last time was in *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, at p. 338 (P.C.) where *Hammer v. Dagenhart*, 247 U.S. 251 (1918) was cited. Perhaps significantly, the judgment was delivered by Mr. Justice Duff (then Chief Justice) of the Canadian Supreme Court who was temporarily sitting at the Privy Council. Earlier the Supreme Court of Canada had frequently referred to American Supreme Court decisions. However, the Privy Council discouraged such references as being irrelevant given the differences of the American and Canadian constitutions. *Bank of Toronto v. Lambe*, (1887), 12 App. Cas. 575, at p. 587 (P.C.).

¹¹⁴ Also see *infra*, nn. 125 and 127.

¹¹⁵ 5 Geo. 5, c. 2 (Can.).

¹¹⁶ R.S.C. 1927, c. 206. This was a consolidation of the original *Act* slightly modified. It is now found in R.S.C. 1952, c. 288, discussed *infra*.

which may well be *implied* in the constitution. The reasons given in the *Board of Commerce Case* recognize exceptional cases where such a power may be implied.¹¹⁷

In a special emergency then, provincial powers can be overridden for the peace, order and good government of Canada as a whole.

To justify the application of this new power, their Lordships said that it was found in other countries with a written constitution; and their example was the United States. Since the residual powers in Canada are federal powers, they believed that this theory was to be all the more applicable to Canada. The provincial powers enumerated in s.92 of the *B.N.A. Act* do not disappear, but a "new aspect of the business of Government is recognized as emerging"¹¹⁸ — an aspect not precluded by the general words in which powers are given to the provinces. And, this is an aspect of business to be dealt with by the Federal Government. This expanding war power that the Central Government enjoys is "undefined and undefinable."¹¹⁹

The subsequent vicissitudes of the Privy Council interpretation of the peace, order and good government clause are not pertinent to this discussion. It is sufficient to note that the implied power "emergency doctrine" laid down in *Fort Frances* established an implied federal emergency power — and above all an implied war power. There is really no analogy between this implied power and that found in the American Constitution. In the *B.N.A. Act* this implied power served to generally restrict federal powers other than the emergency power;¹²⁰ it is a power that stands alone in the introductory words of s.91 and is not applicable to the subsequent clauses of that section. In the American Constitution the implied power of the Necessary and Proper Clause served to widen federal powers generally;¹²¹ it is applicable to the preceeding clauses in s.8 of art. 1. When Lord Haldane completed the transposition from the American Constitution, the result, although unwarranted, was something uniquely Canadian.¹²²

¹¹⁷ [1923] A.C. 695, at p. 703. Emphasis added.

¹¹⁸ *Id.*, at p. 705.

¹¹⁹ *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, at p. 146 (1948); accord, *Fort Frances* . . . [1923] A.C. 695, at p. 705; *Andrews v. Howell*, (1945), 65 Commw. L.R. 255, at p. 278 (Austl.).

¹²⁰ See, Laskin, *supra*, n. 92, at p. 1076.

¹²¹ See, e.g., *Jacob Ruppert Inc. v. Caffey*, 251 U.S. 264, at pp. 300-301 (1920).

¹²² This apparently has not been readily seen. See Varcoe, *supra*, n. 97, at p. 76; F.R. Scott, *The Consequences of the Privy Council Decisions*, (1937), 15 Can. Bar Rev. 485, at p. 489.

B. When is the Emergency Over?

A war legally ends when the executive or the legislature makes a determination that it has ended.¹²³ It is also clear that the war power is not extinguished with the cessation of hostilities. However, the effects of a war can "continue for centuries", and if the federal government could legislate on changes caused by a war, its jurisdiction would know no bounds.¹²⁴ The question then arises as to when the Canadian judiciary would be justified in overturning emergency legislation because the emergency had seemingly passed.

As to judicial intervention, Lord Haldane set down the following propositions:

1. As to what interest is to be protected during an emergency, "the Dominion Government must be deemed to be left with considerable freedom to judge."¹²⁵
2. "But very clear evidence that the crisis has wholly passed away [or 'has not arisen']¹²⁶ would be required to justify the judiciary... in overruling the decision of the Government that exceptional measures were still requisite".¹²⁷

Before considering how these criteria¹²⁸ have been applied in Canada, it is instructive to see how the problem was dealt with in Australia and the United States.

The Australian High Court had been influenced by the above criteria as laid down in *Fort Frances* and re-iterated in the *Japanese Canadians Case*.¹²⁹ The High Court, however, broke new ground in

¹²³ Note, *War and Peace: When Does One End and the Other Begin*, (1959), 4 S.D.L. Rev. 185; Note, *Emergency Powers — The End of the War — Question for the Executive*, (1946-47), 20 Austl. L.J. 223.

¹²⁴ *R. v. Foster*, (1949), 79 Commw. L.R. 43, at p. 83 (Austl.).

¹²⁵ *Fort Frances*... [1923] A.C. 695, at p. 705. The comparative phrase by Brandeis, J. in the *Hamilton Case* was — "...a wide latitude of discretion must be accorded" to Congress in the exercise of the war power. (251 U.S., at p. 163).

¹²⁶ *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada*, [1947] A.C. 87, at p. 102 (P.C.).

¹²⁷ *Fort Frances*... [1923] A.C. 695, at p. 706. Mr. Justice Brandeis had said: "...it would require a clear case to justify a court in declaring that such an act... had ceased to have force because the power of Congress no longer continued." (251 U.S., at p. 163).

¹²⁸ Lord Wright added to these criteria, "that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation." And, neither is the judiciary to be concerned "whether the executive will in fact be able to carry into effective operation the emergency provisions..." *Co-operative Committee on Japanese Canadians*... [1947] A.C. 87, at p. 102.

¹²⁹ See, e.g., *Miller v. The Commonwealth*, (1946), 73 Commw. L.R. 187, at pp. 211-212, (Austl.).

the *Decontrol Cases*¹³⁰ where a series of transitional regulations were held *ultra vires* the Federal Government. A state of war still existed (mid-April 1949) but hostilities were long over. The regulations in question dealt with women's employment, housing for war veterans,¹³¹ and gasoline licensing and rationing — subjects normally under state jurisdiction. In a joint opinion of the Court it was held that the legislation was no longer supportable under the defence power.

What is of most significance for this discussion is that the Court here ignored the *Fort Frances* criteria. It was acknowledged that the end of hostilities did not require an immediate removal of all controls. "But the Court must see with reasonable clearness how it is incidental to the defence power to prolong the operation of a war measure,"¹³² dealing with a subject exclusively assigned to the states by the Constitution. Unless the Court can make this finding, the legislation would be held *ultra vires*. Consequently, unlike the *Fort Frances* criteria, the legislation would not necessarily be held valid because a party challenging it had failed to prove that the emergency was over. Parliament's "freedom to judge" what was necessary was thus significantly narrowed.

In the United States, the validity of the post-World War I rental controls applicable in the District of Columbia came before the Supreme Court in *Chastleton Corp. v. Sinclair*.¹³³ The original *Act*¹³⁴ had been considered and held valid in the circumstances.¹³⁵ Subsequently, Congress had continued in force the original *Act*, declaring that the emergency still existed.¹³⁶

The Court said that great respect was to be given to a Congressional declaration that the measures were necessary.¹³⁷ But it was open to the Court "to inquire whether the exigency still existed upon which the continued operation of the law depended."¹³⁸ Consequently, the case was remanded to the lower court for a determination

¹³⁰ *R. v. Foster*, (1949), 79 Commw. L.R. 43 (Austl.). For a critical discussion of this case see, G. Sawyer, *The Transitional Defence Power of the Commonwealth*, (1949-50), 23 Austl. L.J. 255.

¹³¹ The housing regulations had previously been upheld as a valid temporary measure under the defence power. *The Real Estate Institute of N.S.W. v. Blair*, (1946), 73 Commw. L.R. 213 (Austl.).

¹³² (1949), 79 Commw. L.R. 43, at p. 84 (Austl.).

¹³³ 264 U.S. 543, (1924).

¹³⁴ c. 80, title 2, 41 Stat. 297, (1919).

¹³⁵ *Block v. Hirsch*, 256 U.S. 185 (1920).

¹³⁶ Extended by c. 91, 42 Stat. 200 to May 22, 1922, and by c. 197, 42 Stat. 543 to May 22, 1924.

¹³⁷ 264 U.S. 543, at p. 547.

¹³⁸ *Id.*, at p. 548.

of housing conditions in Washington. Although the Court did not rule that the emergency no longer existed, it strongly suggested that this was the case.

The transitional *Housing and Rent Act*¹³⁹ of 1947 was passed after the cessation of hostilities, but before World War II had been formally terminated. This *Act* limited the rent that could be charged in certain "Defence-Rental Areas." In *Woods v. Cloyd W. Miller Co.*,¹⁴⁰ decisions given a generation earlier were cited and applied¹⁴¹ in holding this legislation constitutional. The Court stated that the legislative history of the *Act* showed the housing shortage, which was created in great part by the war, had not yet been eliminated.¹⁴² It was acknowledged that if Congress could legislate to treat all conditions affected by the war, its power would be boundless and it would continue indefinitely; but this implication was not seen as applying to the case at bar.¹⁴³ Unlike the position taken by the Australian High Court, the fact that the war had not been formally terminated seemed to weigh heavily on the Supreme Court.¹⁴⁴

Rental regulations also served as the occasion for the Supreme Court of Canada to decide as to the validity of emergency legislation. A number of transitional acts¹⁴⁵ continued in force the leasehold regulations that had originally been made under the *War Measures Act*. In view of the previous Privy Council decisions, Parliament undoubtedly had authority to continue rent controls as a post war emergency decontrol measure — even though this was normally a provincial field. The case turned on whether an emergency did in fact exist.

The *Leasehold Reference* had come to the Supreme Court as an Advisory Opinion. Consequently, the Court had to give an opinion,

¹³⁹ 61 Stat. 193, 196.

¹⁴⁰ 333 U.S. 138 (1948).

¹⁴¹ Primarily the Court applied *Hamilton*, and *Jacob Rupert Inc. v. Caffey* — see *supra*.

¹⁴² 333 U.S. 138, at p. 142.

¹⁴³ *Id.*, at pp. 143-144. In a concurring opinion Jackson, J. stated — "I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so, they are permanent — as permanent as the war debts." (*Id.*, at p. 147). A similar statement was made in *R. v. Foster*, see, *supra*, n. 124.

¹⁴⁴ The Court cites (333 U.S. 141, n. 5) *Commercial Trust Co. v. Miller*, 262 U.S. 51, at p. 57 (1922) where it was stated that — "A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time...". Jackson, J. stated — "We still are technically in a state of war". (333 U.S. 141, at p. 147). Also see, *Ludecke v. Watkins*, 335 U.S. 160, at pp. 168-170, 178 (1948).

¹⁴⁵ *The National Emergency Transitional Powers Act*, S.C. 1945, c. 25; *The Continuation of Transitional Measures Act*, S.C. 1947, c. 16.

...on the material which appears in the Order of Reference and the Court is not expected to look to outside evidence. It is clear that the Court may take into consideration any fact which is of common, or public, knowledge, or of which it could ordinarily take judicial notice. Otherwise... the Court is limited to the statements of fact contained in the Order of Reference.¹⁴⁶

Any statement of facts introduced had to be with the consent of all the parties represented. Obviously, as Chief Justice Rinfret pointed out, anyone attacking the legislation as colourable would not find support in the Order of Reference — and independent facts would have to be introduced.¹⁴⁷

Put into this strait jacket, the Court had no alternative but to make, for all practical purposes, a mockery of Lord Haldane's "very clear evidence" rule. Admittedly, the problem set out here turns largely on the desirability of Advisory Opinions.¹⁴⁸ However, it is the only major Canadian case since *Fort Frances* dealing with the fundamental questions concerning transitional powers.¹⁴⁹

It is clear that the criteria set out above from *Fort Frances* are controlling.¹⁵⁰ The challengers of emergency legislation will have to clearly prove that the emergency no longer exists.¹⁵¹ It is doubtful if the Court would be troubled by a technical state of war — the test is "emergency" and nothing more. However, the Canadian Parliament will be given wide "freedom to judge" what measures are necessary¹⁵² — wider freedom than accorded the Australian Parliament.¹⁵³

¹⁴⁶ *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124, at p. 126.

¹⁴⁷ *Id.*, at p. 127.

¹⁴⁸ The shortcomings in this case are of course made clear when it is compared with *Chastleton Corp.*, discussed *supra*.

¹⁴⁹ The statutory construction of the *National Emergency Transitional Powers Act* was considered in *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427. The question was whether the power to appropriate property was given by this *Act*. In giving an affirmative answer the Privy Council reversed the judgment of the Supreme Court.

¹⁵⁰ E.g., [1950] S.C.R. 124, at pp. 128-129, 134, 151.

¹⁵¹ Counsel for the Attorney-General of Quebec had suggested that the transition from war to peace should constitute a "new" emergency to be considered apart from its cause, and that the Federal Government should prove the existence of such emergency. (*Id.*, at pp. 143-144).

¹⁵² Recitals are given very great weight by the Supreme Court of Canada. See e.g., [1950] S.C.R. 129, at p. 146; *References As to the Validity of the Regulation in Relation to Chemicals*, [1943] S.C.R. 1, at p. 8; Cf., e.g., *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, at p. 144 (1943).

¹⁵³ The decision by the Australian High Court in *R. v. Foster* "amounted in substance to a policy decision that the Commonwealth had been given sufficient time for post-war reconstruction". G. Sawyer, *Defence Power of the Commonwealth in Time of Peace*, (1952-54), 6 Res Judicate 214.

C. The Defence Power

Whenever the Federal Government's emergency power was deemed *intra vires* by the courts, it was with regard to war or war-related legislation. In the light of the Australian experience, it would be fair to state that all such legislation could have been sustained under the defence power.¹⁵⁴

The Canadian defence clause was only mentioned in two major constitutional cases.¹⁵⁵ On both occasions the reference was only in passing, and it was not necessary for the disposition of the case. No doubt this power covers normal defence legislation concerned with the immediate objects of the military establishment and defence. Otherwise the extent and limits of this federal power have not been defined.

The Supreme Court of Canada is, of course, aware that s.91(7) of the *B.N.A. Act* can be employed to sustain federal war emergency legislation.¹⁵⁶ It has been suggested, however, that one advantage in identifying the war power with the peace, order and good govern-

¹⁵⁴ The principle Australian and Canadian defence clauses that give the defence power exclusively to these central governments are:

Australian Constitution s. 51 (vi) — "The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."

Canada, *B.N.A. Act*, s. 91(7) — "Militia, Military and Naval Service, and Defence."

¹⁵⁵ *L'Union St. Jacques de Montréal v. Bélisle*, (1874), L.R. 6, at pp. 31, 37, (P.C.); (The Federal Government can expropriate land for purposes of defence); *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, at p. 77 (P.C.). (Aeronautics is in part given to the Federal Government by the defence power.)

One lower court decision suggested that the federal transitional legislation concerning the re-instatement of ex-servicemen into their previous employment could be supported under the defence power. *Fry v. W. H. Schwartz & Sons Ltd.*, [1951] 2 D.L.R. 198, at p. 200 (N.S.S.C.). However, in another case concerning similar legislation, the legislation was sustained under the peace, order and good government clause. *In re The Soldier Settlement Act*, *In re McManus*, [1939] 2 W.W.R. 199, at p. 202 (Sask. Dist. Ct.).

¹⁵⁶ In *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, P.C. 9029, [1950] S.C.R. 124, at p. 153, *Dawson v. The Commonwealth*, (1946), 73 Commw. L.R. 157, at p. 176 (Austl.), is cited by Kellock, J. In this latter case, Latham, C.J. had said that the defence power in Australia does not cease with the termination of hostilities or even with the end of the war. Elsewhere in the *Leasehold Reference*, Mr. Justice Rand, after citing *Fort Frances*, noted that Viscount Haldane had not considered whether the regulations could be supported under the defence power, on which Australian legislation had been upheld. ([1950] S.C.R. 124, at p. 145).

ment clause is to remind the courts "of the flexibility that the war power must possess".¹⁵⁷ The Australian Parliament has certainly not lacked any war powers under the defence power. One recent example will illustrate the flexibility of this power.

In 1951 both the Australian and Canadian Parliaments passed legislation to deal with the international emergency caused by the Korean War. Both governments suggested that economic matters would require special attention. The Canadian Parliament passed an *Act*¹⁵⁸ that ostensibly would be *intra vires* under its emergency powers: the validity of this *Act* was never challenged. Similar Australian legislation¹⁵⁹ was passed under the defence power: and this legislation was challenged in the courts.

Regulations were made under the Australian *Act* to regulate capital issues; that is, restrictions were placed upon raising money by the issue of share capital, debentures or other securities. Other countries, as well as Australia, had so legislated during the Second World War. The High Court in considering the operation of the defence power acknowledged that "a distinction between a period of actual hostilities and a period of apprehended danger short of war can never be disregarded".¹⁶⁰ The Regulations were sustained as being auxiliary to the diversion of resources for defence purposes, and such diversions can be made when war is threatened as well as during actual hostilities.¹⁶¹

However, the Australian defence power will not support *all* legislation. It is not a matter of "inflexibility", but rather that the

¹⁵⁷ E.E. Murphy, *The War Power of the Dominion*, (1952), 30 Can. Bar Rev. 791, at p. 798.

¹⁵⁸ *The Emergency Powers Act*, 1951, 15 Geo. 6, c. 5 (Can.).

¹⁵⁹ *Defence Preparation Act*, 1951, Australia Commonwealth Acts, Act 20.

¹⁶⁰ *Marcus Clark & Co. Ltd. v. The Commonwealth*, (1952) 87 Commw. L.R. 177, at p. 218 (Austl.).

¹⁶¹ In the United States the building of the Wilson Dam was upheld in part on the Congressional war power; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, at p. 326 (1936). President Truman's seizure of most steel mills at the end of 1951 was held unconstitutional by the majority of the Court who said that authority for the seizure was neither provided for specifically in the Constitution, nor by an Act of Congress. The dissenting justices felt that the President had the constitutional authority to act in an emergency that was admitted to exist at the time. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). See the appendix by Mr. Justice Frankfurter listing previous Presidential seizures. (*Id.*, following p. 614). For a discussion of Presidential powers, see, Corwin, *supra*, n. 18.

government's exercise of power must bear some relation to defence.¹⁰² This test has been applied even during the height of war. In *Ex parte Drummond*, the Australian Government attempted to control university admission as a control over manpower during the war. Education, however, is normally under the exclusive jurisdiction of the states. In striking down the Regulation, it was said that this exercise of the defence power "can only be valid if the court can see that the Act or regulation impeached can *conceivably be capable even incidentally of aiding defence*."¹⁰³ No such finding could be made in that case.¹⁰⁴

However, in Canada,

...there is virtually no limitation to the scope of legislative action which Parliament, considering it necessary, may take for the defence of the country.¹⁰⁵

Parliament, or the government if delegated the authority, decides what is "conceivably" a necessary measure during emergencies. Consequently, the courts cannot apply any standards as to the validity or invalidity of government emergency legislation.¹⁰⁶ If a war emergency exists, there are no restraints on Parliament's scope of

¹⁰² The Australian legislation that purported to dissolve the Communist Party could not be supported under the defence power in time of peace. *Australian Communist Party v. The Commonwealth*, (1950-51), 83 Commw. L.R. 1 (Austl.). A substantial distinction between this case and *Marcus Clark & Co.* "may be found in the pragmatic consideration that raising money is less important than liberty of opinion". (Sawer, *supra*, n. 153, at p. 223.).

¹⁰³ *The King v. The University of Sydney; Ex parte Drummond*, (1943), 67 Commw. L.R. 95, at p. 113 (Austl.) (emphasis added).

¹⁰⁴ The Regulation purported to control admissions to the faculties of medicine and dentistry. However, the defect in the Regulation was that those not admitted were not diverted to the military or to defence work. They could even enroll in another faculty. (*Id.*, at p. 108). A number of other defence measures were also held invalid during the war: see, e.g., *Victoria v. The Commonwealth*, (1942), 66 Commw. L.R. 488 (Austl.), (control over holidays and wages of State employees not connected with war-related employment); *Wertheim v. The Commonwealth*, (1945), 69 Commw. L.R. 601 (Austl.), (restrictions on the manufacture of fly sprays).

¹⁰⁵ *Leasehold Reference*, [1950] S.C.R. 125, at p. 145. There are some limitations. E.g., s. 20 of the *B.N.A. Act* requires that there be a yearly session of Parliament. This provision most probably could not have been suspended in times of emergency. However, suspension of this section was provided for in the amendment of s. 91(1) by the *British North America (No. 2) Act*, 1949, 13 Geo. 6, c. 81 (U.K.).

¹⁰⁶ Legislation has never been invalidated in Canada on the grounds that it had no relation to the emergency. The paucity of cases on emergency legislation can be explained by the sheer hopelessness of such litigation succeeding — see, the *Chemical Reference*, [1943] S.C.R. 1 at p. 9.

legislation. The emergency doctrine thus permits Parliament to exercise greater powers than would be the case under the defence power of s.91(7) of the *B.N.A. Act*.

At the outset of this paper it was suggested that there are five main types of crises that require emergency powers: war, insurrection, subversion, secession, and economic depression. Conceivably, all these matters, except economic depression can be dealt with without recourse to Lord Haldane's "emergency doctrine".¹⁶⁷ But as related to an economic depression, this doctrine has proved ineffectual.

D. The Emergency Power in Peacetime

Essentially, the emergency to be confronted in peacetime is an economic crisis. Yet, during the depression of the 1930's, any meaningful use of federal powers was ruled out.

President Roosevelt had said that the economic crisis of the 1930's was "an emergency greater than war".¹⁶⁸ However, before the "Court Packing Plan", Congressional social legislation had been ruled unconstitutional. In the *Steward Machine Co. Case*¹⁶⁹ dealing with unemployment insurance, the Court demonstrated a reversal of its previous position — unemployment was now viewed as a problem that had "become national in area and dimensions."¹⁷⁰ Emergency was the premise under which the Court sustained such social legislation.¹⁷¹ As to the temporality of the legislation, it was not referred to by the Court in this case.

Prime Minister Bennett's proposed "New Deal" legislation for Canada was patterned after similar legislation passed in the United States. In the *Labour Conventions Case*,¹⁷² the Federal Government attempted to support the validity of labour legislation on the introductory words of s.91 of the *British North America Act*, "as being

¹⁶⁷ Except for economic depression, all other crises can be dealt with under the defence clause or the criminal law power — both of which are exclusively federal powers. See, *supra*, on martial law and military aid to civil authorities.

¹⁶⁸ Corwin, *op. cit.*, n. 18, at p. 318.

¹⁶⁹ *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

¹⁷⁰ *Ibid.*, at p. 586.

¹⁷¹ "[O]f the legislative accomplishment of the New Deal, 'emergency' was the very watchword, while of the decisions sustaining that legislation it was the recurrent premise, sometimes frankly avowed, sometimes speciously disavowed." E.S. Corwin, *Total War and the Constitution*, (1947), at p. 177; compare also, *Steward Machine Co. v. Davis*, *supra*, n. 169; with *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1933).

¹⁷² *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.).

concerned with matters of such general importance as to have attained 'such dimensions as to affect the body politic'... and to have 'become matter of national concern'.¹⁷³ Their Lordships recalled the phrases from previous cases under which the use of the general federal power would be justified — "abnormal circumstances" "exceptional conditions", "standard of necessity", "highly exceptional", or "some extraordinary peril to the national life of Canada".¹⁷⁴ According to their Lordships, calling attention to these phrases shows "how far the present case [on labour legislation during the depression] is from the conditions which may override the normal distribution of powers in ss.91 and 92."¹⁷⁵ Surely if the Federal Government needed justification to override provincial powers, the depression should have been the classic occasion.¹⁷⁶

In another case, the Privy Council dealt with unemployment insurance — legislation that recalls the *Steward Machine Co. Case*. Their Lordships said that not only did the legislation not purport to deal with an emergency, but that it could not be supported on the theory of emergency in 1935. One serious defect that would prevent it from being qualified as "emergency" legislation was that it was intended to be permanent.¹⁷⁷ This was a re-iteration of the criteria laid down in Lord Haldane's emergency doctrine.

Even if "emergency" legislation is discounted, the Federal Government has a number of enumerated powers that it can employ to deal with an economic crisis.¹⁷⁸ Generally, serious cures for a depression would require long term planning — and some type of permanent legislation. However, the provinces in general are not

¹⁷³ *Ibid.*, at p. 352.

¹⁷⁴ *Ibid.*, at p. 353.

¹⁷⁵ *Ibid.*

¹⁷⁶ Perhaps the Privy Council was influenced more by *laissez-faire* economic policy, rather than by provincial autonomy. See, Scott, *supra*, n. 122, at p. 492. One lower court decision was decided partly on the grounds that the bankruptcy of the Grand Trunk Railway in 1919 constituted a national emergency that justified an Order-in-Council vesting the shares of the company in the Federal government, see, *Lovibond v. G.T.R. and C.N.R.*, [1939], 2 D.L.R. 562, at pp. 577-78 (C.A., Ont.).

¹⁷⁷ *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355, at pp. 365-66 (P.C.); but see also, *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193, at p. 207 (P.C.).

¹⁷⁸ See, for example, s. 91(5), banking; s. 91(20), legal tender; s. 91(21), bankruptcy and insolvency; unemployment insurance in s. 91(2a) was added by the *British North America Act*, 1940, 3 & 4 Geo. VI, c. 36, U.K. See also, B. Laskin, *Canadian Constitutional Law*, (Rev. 3rd ed., 1969), on the reconsideration of the general power, at pp. 245 *et seq.*

prepared to see their powers eroded under the aegis of federal emergency legislation. In fact, Quebec is now demanding the return of social security fields pre-empted by the Federal Government.

The "emergency doctrine" would only be of limited usefulness in combating a serious economic depression. It would perhaps support some temporary measures.¹⁷⁰ However, for any long term legislation, constitutional and political exigencies would indicate that federal/provincial agreement would be necessary.

E. The Emergency Power and the Bill of Rights

The Canadian *Bill of Rights*¹⁸⁰ remains in force by grace of the *War Measures Act*¹⁸¹ not having been proclaimed to be in force. For when the *War Measures Act* is operative, the *Bill of Rights* is suspended.¹⁸²

Under the *War Measures Act*, the issuance of a proclamation by Her Majesty or the Governor-in-Council is conclusive evidence that war, invasion or insurrection, real or apprehended exists — and has existed for the period specified in the proclamation — until terminated by a further proclamation (s.2). Section 3 authorizes the Governor-in-Council to make such "orders and regulations, as he may... deem necessary or advisable for the security, defence, peace, order and welfare of Canada". Included in this blanket delegation of power¹⁸³ is — censorship, arrests, detention, deportation, and controls over transportation, trading, production, and manufacture as well as the appropriation, control, forfeiture and disposition of property. All orders and regulations made under this section have the force of law. Also, these orders and regulations are to be enforced "in such manner and by such courts, officers

¹⁷⁰ An example of "temporary" emergency legislation can be found in *Home Building & Loan Association v. Blaisdell*, *supra*, n. 171, where the validity of Minnesota's Mortgage Moratorium law was considered. In sustaining this emergency legislation, the Court emphasized, at p. 447, that, "The legislation is temporary in operation".

¹⁸⁰ S.C. 8 & 9 Eliz. II, c. 44.

¹⁸¹ R.S.C. 1952, c. 238; as amended by 8 & 9 Eliz. II, c. 44, s. 6.

¹⁸² Of course, in the United States "even the war power does not remove constitutional limitations of safeguarding essential liberties." *Home Building and Loan Association v. Blaisdell*, *supra*, n. 171, at p. 426. However, they can be reduced to the "vanishing point", see, *infra*, n. 271.

¹⁸³ There is no question that Parliament can delegate its powers, see, the *Chemicals Reference*, [1943] S.C.R. 1; accord, *Lloyd v. Wallach*, (1915), 20 Commw. L.R. 299 (Austl.); *Opp Cotton Mills Inc. v. Administrator*, 312 U.S. 126 (1941).

and authorities as the Governor-in-Council may provide". The next section permits the Governor-in-Council to prescribe penalties for violations of orders and regulations made under the *Act*, that are not to exceed a fine of five thousand dollars and/or imprisonment for five years. Section five prohibits the release of an arrested alien without the consent of the Minister of Justice.

Section six was repealed and a new section was substituted when the *Bill of Rights* was enacted.¹⁸⁴ This section provides that sections three to six come into force only when war, invasion or insurrection, real or apprehended, exist. When such a proclamation is made, it is to be laid before Parliament; but if Parliament is not sitting, then within fifteen days after the next sitting. Ten members of Parliament can make a motion for the revocation of the proclamation, in which case it is to be debated. If both Houses resolve that it should be revoked, it ceases to have effect and sections three to five are no longer in force until brought into force by another proclamation. However, any official who acted in good faith while the *Act* was in force is protected. The last paragraph of this section effectively suspends the *Bill of Rights* when the *Act* is in force.

If the government proclaimed a false emergency and the proclamation was subsequently revoked by Parliament, the government would doubtlessly be forced to resign. As well, under the Lord Haldane criteria set out above, if the emergency never existed or has passed away, the courts on "very clear evidence" could rule that the continuation in force of the *War Measures Act* is invalid.

The final three sections of the *Act* provide for the fixing of compensation for any property appropriated by the government; the forfeiture of any ship or vessel used to transport goods contrary to regulations made under the *Act*; and, procedure to be followed in the courts under these last sections.

From the above description of the state of Canadian law, it follows that when government interference with civil liberties is most likely, protection of these liberties is least available.

III — THE IMPACT OF EMERGENCY ON CIVIL LIBERTIES

In times of war the government cannot carry on according to the *Magna Carta*. There must, of necessity, be some curtailment

¹⁸⁴ There was a great deal of criticism of this amendment. See, Canada, House of Commons, *Special Committee on Human Rights and Fundamental Freedoms, Minutes of Proceedings & Evidence*, 1960, 24th Parliament (3rd Session), (Ottawa: Queen's Printer); for a summary of this criticism, see, W.S. Tarnopolsky, *The Canadian Bill of Rights*, (Toronto: 1966), at pp. 225-227.

of liberty.¹⁸⁵ But it does not follow that civil liberties must be suspended completely. Although materially lessened, there is a place for civil liberties during wartime. Perhaps the test as to the suspension or dilution of liberties is that there should be some reasonable relationship between the measures taken and the exigencies of the moment.¹⁸⁶

During wartime, people will put up with a myriad of restrictions that they would normally find unbearable. Most often, however, the ordinary citizen does not feel any acute pinch on his civil liberties — and few will criticize a curtailment of rights in wartime.¹⁸⁷ The tendency is also to generally press for harsher and severer punishment of the wrong-doer.

The following discussion will centre primarily on the impact of the Second World War on the freedom of speech, of the press and of association; property rights; the suspension of the writ of *habeas corpus*; and, the abortive plan to deport Japanese Canadians.

A. Freedom of Speech, of the Press and of Association

Under the *War Measures Act* a number of Regulations¹⁸⁸ were brought into force in September 1939 in order to control freedom of speech and of the press. There were hundreds of prosecutions under these Regulations but only a few reported cases — nearly all during the first years of the war.¹⁸⁹ The Regulations and their enforcement can be most seriously faulted for the prosecution of chance remarks often made in “drunken brawls” that had an unnecessary chilling effect on ordinary grumblings of “dissatisfaction

¹⁸⁵ *Ronnfeldt v. Phillips*, 35 T.L.R. 46, at p. 47 (C.A., Scrutton, L.J.).

¹⁸⁶ See, *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, at pp. 146-147 (1948, Jackson, J.); *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*, (1943), 67 Commw. L.R. 116, at p. 162 (Austl.) per Williams, J.; F.R. Scott, *Civil Liberties and Canadian Federalism*, (Toronto: 1959), at p. 12.

¹⁸⁷ See, Anthony, *op. cit.*, n. 63 at p. 105 *et. seq.*

¹⁸⁸ 2 *Canada Proclamations and Orders-in-Council*, 1940, Regulation 39, at p. 9; provided that no person shall spread reports or make statements “intended or likely to cause disaffection to His Majesty or to interfere with His Majesty’s forces” or “to prejudice recruiting” or “to be prejudicial to the safety of the state or prosecution of the War”.

¹⁸⁹ For a discussion of civil liberties in the early war years and an analysis of the few reported cases, see, F.A. Brewin, *Civil Liberties in Canada During Wartime*, (1941), 1 Bill of Rights Rev. 112; *Civil Liberties in Great Britain and Canada During War*, (1942), 55 Harv. L.R. 1006.

or discontent".¹⁹⁰ Yet, it seems that this type of prosecution was favoured by the government.¹⁹¹

Because of Canada's proximity to the United States, it would have been quite difficult to impose strict censorship. American newspapers, books and periodicals were generally available in Canada, and of course Canadians were free to listen to American broadcasts. While Canada was at war for two years, the United States enjoyed a "peace time" press, but even when the United States was at war, press restrictions were relatively moderate.¹⁹²

However, some Canadian publications were repressed and a number of books and periodicals were banned from entering the country. As to judicial review of publications ordered suppressed under the Defence of Canada Regulations, it was stated :

In time of peace the civil rights of the people, the liberty of the subject, the rights of free speech, and the freedom of the press are entrusted to the Courts. In war time this may be changed. Parliament may take from the Courts their judicial discretion and substitute for it the autocracy of bureaucrats.¹⁹³

¹⁹⁰ See, Brewin, *loc. cit.*, n. 189 at p. 117. During World War I persons making pro-German remarks in bar rooms were prosecuted for sedition, see, *R. v. Trainor*, [1917], 1 W.W.R. 415, at p. 423 (C.A. Alta.); and other cases cited by D.A. Schmeiser, *Civil Liberties in Canada*, (London: 1964), at p. 206, n. 1.

¹⁹¹ The Minister of Justice explained in the House that: "Some joyous friend may imbibe a little too much liquor in a tavern and think it smart, for instance, to say that the Germans are better soldiers than the British, or something like that. Such a man should not be treated as a real enemy who is plotting against the state. There the summary conviction [carrying a lighter maximum sentence] applies. But when a case is serious, the prosecution should be by way of indictment, and I believe that the choice should be left to the Minister of Justice or the attorney general". (Hansard, 1940, at p. 745).

¹⁹² See, Corwin, *op. cit.*, n. 2 at pp. 106-107.

¹⁹³ *Yasny v. Lapointe*, [1940], 3 D.L.R. 204, at p. 205 (C.A. Man.) (no writ of *certiorari* from Minister's order suppressing publication of a Russian language newspaper). Regulation 15(1), Defence of Canada Regulations (1939), under which such orders were made provided: "The Secretary of State for Canada may make provision by order for preventing or restricting the publication in Canada of matters as to which he is satisfied that the publication, or, as the case may be, the unrestricted publication, thereof would or might be prejudicial to the safety of the State or the efficient prosecution of the war, and an order under this paragraph may contain such incidental and supplementary provisions as may appear to the Secretary of State to be necessary or expedient for the purposes of the order".

It was held that the powers of the Governor-in-Council under s. 3 of the *War Measures Act*, R.S.C. 1927, c. 206, as well as Regulations made pursuant to these powers was to be liberally construed. See *Attorney-General of Canada v. Wheeler*, [1944], 1 D.L.R. 784, (S.C. Ont.).

Compare the above to the judicial function under the American Constitution and Congressional powers. See, for example, *Schenck v. United States*, 249 U.S. 47 (1919).

This "autocracy of bureaucrats" resulted in the banning of some periodicals and newspapers that were freely circulating in beleaguered Britain from relatively secure Canada.¹⁹⁴

Under Regulation 39C a great many organizations were declared illegal, and any person continuing as a member or officer of such an organization was guilty of an offence.¹⁹⁵ The Communist Party as well as some fascist organizations were banned. The impact of war on civil liberties in Canada can be profitably viewed from the perspective of how the Jehovah Witnesses fared officially during the war in Canada, in the United States and in Australia.

On July 4, 1940, by Order-in-Council P.C. 2943, the Canadian Watch Tower Bible and Tract Society (Jehovah Witnesses) was declared an illegal organization. Ostensibly, the propagation of their pacifist beliefs would have affected the efficient prosecution of the war.¹⁹⁶ The organization's affairs were to be administered by the Custodian of Enemy Alien Property.¹⁹⁷ As was the case with other Orders and Regulations, this Order was subject only to government discretion; it was not subject to judicial review.

In 1943 at the height of World War II the right of American Jehovah Witnesses¹⁹⁸ to enjoy freedom of speech and freedom of

¹⁹⁴ *Civil Liberties in Great Britain and Canada During War*, loc. cit., n. 189 at p. 1012. As to suppression of publications in Britain, see, *ibid.*, p. 1011; H. Laski, *Civil Liberties in Great Britain in Wartime*, (1942), 2 Bill of Rights Rev. 243, at pp. 246-247; P.B. Rava, *Emergency Powers in Great Britain*, (1941), 21 B.U.L. Rev. 403.

¹⁹⁵ See, for example, *R. v. Sutton*, [1941], 2 W.W.R. 60, where the offence was membership in an illegal organization, i.e., the Jehovah Witnesses.

¹⁹⁶ In World War I, conscientious objectors (Dukhobors and Mennonites), as well as persons born in enemy countries and naturalized after 1902 were disenfranchised. This was a colossal disenfranchisement to help the government win the election. See, *The War-time Election Act*, (1917) 7-8 Geo. V, c. 36, s. 2; as to voting restrictions on Japanese Canadians in World War II, see, La Violette, *infra*, n. 197, at pp. 189-190.

¹⁹⁷ In June 1942 the Ukrainian Labour-Farmer Temple Association was declared to be an illegal organization. One hundred and eight halls of the organization were put under the care of the Custodian. When the ban was removed in 1943, sixteen properties had already been sold. Pressure was exerted on the government and these properties were later returned. (F.E. La Violette, *The Canadian Japanese and World War II*, (Toronto, 1948), at p. 219, n. 27.)

¹⁹⁸ The First Amendment in the American Constitution and s. 116 of the Australian Constitution formally restrain government interference as concerns religion. See the comparison of these provisions made by Latham C.J., in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*, *supra*, n. 186, at pp. 127-131. There is no comparable provision in the *B.N.A. Act*. For an account of religious freedom in Canada, see, Schmeiser, *supra*, n. 190, at pp. 54-118.

the press was affirmed. At issue was a Mississippi statute that prohibited the dissemination of literature that would generally promote disloyalty to the state and the nation. Some members of the sect were charged with distributing literature that condemned the war as well as the draft, and opposed saluting of the flag. The Supreme Court affirmed their right to distribute this material since it was not "claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state" or to have threatened any clear and present danger to American institutions or government.¹⁰⁰ The Fourteenth Amendment guaranteed that the states could not restrain these persons from communicating their beliefs.²⁰⁰

Similarly, as was the situation in Canada, the Australian Governor General could publish an Order under the National Security (Subversive Associations) Regulations declaring that the existence of an association was prejudicial to the defence of Australia or to the prosecution of the war, and that association was dissolved by the force of this declaration. Provisions were also made for the forfeiture to the government of the property of any such dissolved association. On January 17, 1941, the Jehovah Witnesses associations in Australia were declared to be subversive and consequently they were dissolved. Australia, like Canada, does not have an entrenched *Bill of Rights* as is found in the American Constitution. However, although there was a great deal of difference of opinion, the High

¹⁰⁰ *Taylor v. Mississippi*, 319 U.S. 583, at pp. 589-590 (1943).

In Canada, a member of the Jehovah Witnesses was convicted under Regulation 39 (making statements prejudicial to the safety of the state) for complaining about the expulsion of his children from school for refusing to salute the flag or sing the national anthem. His letter explained why his religion forbade such practices. In quashing the conviction the Court of Appeal held that what he wrote was neither intended nor likely to affect the prosecution of the war, nor, it was emphasized, was it addressed to the public in general. *R. v. Clark*, [1941], 4 D.L.R. 299 (C.A. Man.).

In at least one Canadian flag saluting incident "children of tender years have been summoned to give evidence against their parents on charges that the parents had made statements to the children 'likely to cause disaffection to His Majesty'." (Brewin, *supra*, n. 189, at p. 118. Compare with the United States, *infra*, n. 200.).

²⁰⁰ In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), the Supreme Court held that a state could not require a pledge of allegiance to the flag as part of its regulations of public education. Mr. Justice Jackson for the majority played down the religious aspect, and emphasized that a person should not be compelled to state a belief he does not hold. The right to remain silent is an adjunct of the freedom of speech.

Court held the Order to be invalid. Mr. Justice Williams stated that "such a law could not possibly be justified by the exigencies and course of the war".²⁰¹

Did the exigencies of war require that the Jehovah Witnesses be banned as an organization in Canada and often individually jailed for their beliefs, while their brethren in allied countries were free to exercise their beliefs? The answer would seem to be no.²⁰²

B. Property Rights

There is no question that the emergency caused by war requires drastic economic controls with a consequent severe infringement on property rights.²⁰³ The courts will, of course, be more sensitive to a denial of personal liberty than to one that causes economic discomfiture.²⁰⁴ But, there is a principle that what is done should be necessary for the safety and defence of the country.²⁰⁵

During the war, Canada was governed by Order-in-Council. These Orders and Regulations filled a number of volumes. Hoarding, foreign exchange, restrictions on changing jobs and a hundred and one other matters were subject to strict control. Possibly a study of the maze of wartime controls would turn up minor regulations that were ill-conceived and unnecessary. However, under the pressures of war, this is inevitable and relatively unimportant. Here one government measure will be reviewed — the sale of property without or against the owner's consent.

²⁰¹ *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*, *supra*, n. 186, at p. 165.

²⁰² In Britain there was a "greater sensitiveness to the necessity of preserving the procedures of democracy" than in Canada. (Brewin, *supra*, n. 189 at p. 114).

²⁰³ The *Emergency Price Control Act* in the United States provided for the control of rentals and the *Act* only required that they be "generally fair and equitable." In *Bowles v. Willingham*, 321 U.S. 503, at p. 519 (1943), a landlord complained that she was not allowed a "fair return" on her property. In spite of Fifth Amendment guarantees, the Court was able to state: "A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property."

²⁰⁴ See, for example, *supra*, n. 162.

²⁰⁵ In 1916 the Crown purporting to act under the Defence of the Realm Regulations took possession of a hotel for the Royal Flying Corps and denied compensation to the owner. Lord Dunedin said that under the Regulations "the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety or the defence of the realm that payment should not be made..." *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508, at p. 529 (H.L.).

After the evacuation of Japanese Canadians from the West Coast,²⁰⁶ their property was vested in a Custodian who had wide discretionary powers to deal with this property in any manner he thought proper.²⁰⁷ Often without the permission of the owners — and indeed over their protests²⁰⁸ — this property was sold by the Custodian. In the *Nakashima Case*,²⁰⁹ the Court was invited to rule that the sale of such property was not for war objects, that it had nothing to do with the evacuation, and that it was not a war measure and consequently beyond the competence of the Governor-in-Council.

Mr. Justice Thorson²¹⁰ reviewed the Orders providing for the disposition of this property, and referred to the recitals as establishing the purpose for these orders. He said that the Court could not assert a contrary opinion to what the Governor-in-Council thought advisable.²¹¹ Parliament having left the decision to the Governor-in-Council, the Court was powerless to intervene, and that corrective power lay with Parliament.²¹² A subsequent challenge to similar government action was based on the claim that the Custodian took custody of the property as a trustee, and committed a breach of

²⁰⁶ The history of the Japanese Canadians in World War II is in *La Violette*, *supra*, n. 197.

²⁰⁷ The Custodian's powers were given in the *Consolidated Regulations Respecting Trading with the Enemy*, (1939) as per Order-in-Council, P.C. 3959 of August 21, 1940 as amended by Order-in-Council P.C. 5353 of October 3, 1940. He was named by the Secretary of State (s. 3). All property is vested in him by s. 21. Under s. 23 he could transfer the property to his own name. In sections 38 to 40 provision was made for him to liquidate or relinquish the property at his discretion; and in disposing of property, he could sell it either publicly or privately as in his discretion he thought proper.

²⁰⁸ In July of 1943 Mr. & Mrs. E. Kitagawa wrote to the Custodian opposing the sale of their home. They said that they were pleased that the house was rented to a soldier's family, that the property was in the hands of a good agent, and that they could certainly use the rent. "We cannot understand", they complained, "the official claim that it is necessary to sell over our heads the home from which we were forcibly rejected. We do not quarrel with military measure[s] but this act can scarcely be in accordance with any war measure". The Custodian's reply was that policy is formulated in Ottawa. (This exchange of correspondence is reproduced in *La Violette*, *supra*, n. 197, at pp. 302-304.).

²⁰⁹ [1947] Ex. C.R. 486.

²¹⁰ Mr. Justice Thorson was the Minister of National War Services before his appointment to the Exchequer Court in 1942.

²¹¹ *Supra*, n. 209, at pp. 499-504.

²¹² By Order-in-Council 1810 of July 14, 1947, a Commissioner was appointed to investigate the claims of Japanese Canadians that they had suffered pecuniary loss. It was found that some properties had been sold below fair market value and additional payments were recommended. These were eventually paid by the government.

trust in selling the property without authorization. This claim was rejected.²¹³

The unauthorized sale of property did not affect only Japanese Canadians.²¹⁴ However, as concerns Japanese Canadians, who were neither charged nor convicted of any offence, the arbitrary sale of their property by the Custodian bore no relationship to the security, defence, peace, order or welfare of Canada; unless, however, the order or welfare of Canada required that their property be sold so that their roots in the West Coast be severed, and that they would be discouraged from returning.²¹⁵

C. Suspension of the Writ of Habeas Corpus

The English had made use of the suspension of the writ of *habeas corpus*, not to legalize an arrest but to suspend a remedy. A person could be held in custody without trial, until the emergency was over. "The object of the suspension was to enable the Government to take steps which, though politically expedient, were, or might be, not strictly legal."²¹⁶ In actual fact suspension of the writ does not suspend it as such; the writ of *habeas corpus* issues as a matter of course and the court decides if the person can proceed further.

In both World Wars, the writ of *habeas corpus* was never formally suspended in England. However, *DORA* was said to be wide enough to support an order for the internment of any person "of hostile origin or associations".²¹⁷ During the Second World War, Regulation 18B permitted the detention of certain classes of persons.²¹⁸ A detainee could appeal to an Advisory Committee that recommended to the Secretary whether the person should or should not be liberated. Generally these recommendations were followed.

The American Constitution provides that: "The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases

²¹³ *Iwasaki v. The Queen*, [1969], 1 Ex. C.R. 281, where the Court followed the decision in the *Nakashima* Case, *supra*, n. 209.

²¹⁴ See, for example, *supra*, n. 197.

²¹⁵ See, *infra*, n. 238, and n. 239.

²¹⁶ Wade and Phillips, *op. cit.*, n. 18, at p. 383.

²¹⁷ *R. v. Halliday*, [1917] A.C. 260 (H.L.).

²¹⁸ The Secretary of State could detain any person who he had "reasonable cause" to believe was a person of hostile origins or associations; or who had recently been concerned in acts prejudicial to the public safety; or who was or had been a member of an organization subject to foreign influence or control or whose leaders were sympathetic with the system of government of an enemy power. "Reasonable cause" was determined to mean, what the Secretary thought was reasonable. *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.).

of Rebellion or Invasion the public Safety may require it" (art. 1, s.9, cl.2). During the Civil War, President Lincoln suspended the writ of *habeas corpus*. Thousands of persons were detained and later released. When the validity of the Order came up before Taney C.J. on a petition of *habeas corpus* from a Baltimore resident named Merryman, the Chief Justice ordered that the detainee be brought before him. The army general to whom the writ was addressed refused to produce the body of John Merryman, stating that he was authorized by the President to suspend the writ of *habeas corpus*. In his judgment, the Chief Justice said that the power to suspend the writ of *habeas corpus* lay with Congress and not with the President. He sent a copy of his decision to the President so that the latter could determine what further civil action was to be taken.²¹⁹ Lincoln's suspension of the writ of *habeas corpus* in April 1861 was ratified by Congress in March 1863. Although it is not quite clear if Congress or the President can suspend the writ of *habeas corpus*, it would seem that during rebellion or invasion the President can act to detain persons until Congress acts.

At least formally, the writ of *habeas corpus* has not been suspended in the continental United States since the Civil War. However, preventive detention has often been judicially tolerated — in labour disturbances²²⁰ as well as in recent rioting.²²¹ In World War II, thousands of Japanese Americans were detained in relocation centres. The Supreme Court ruled that Miss Endo, whose loyalty was conceded by the War Relocation Authority, could not be detained

²¹⁹ *Ex parte Merryman*, 17 Fed. Cas. no. 9487 (C.C.D., Md., 1861).

In the Irish case of *Egan v. Macready*, [1921] Ir. R. 265, the military at first refused to obey the writ of *habeas corpus*—but they later did produce the body.

The commanding general of the army in Hawaii defied an order of the federal court, or at least avoided having it served; see, Antony, *op. cit.*, n. 63 at pp. 64 *et. seq.*

In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) the Court granted *certiorari* on February 12, 1945 but the case was not decided until one year later. Corwin, *op. cit.*, n. 2 at pp. 104-105 suggests that perhaps the Court did not want to put constitutional difficulties in the way of the military even at this late date in the war.

²²⁰ See, Fairman, *op. cit.*, n. 31 at pp. 167-177. In Mr. Justice Holmes' often quoted words: "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of the individuals must yield to what he deems the necessities of the moment". *Moyer v. Peabody*, 212 U.S. 78, at p. 85 (1909), (detention of a labour leader during a bitter strike in Colorado, see *supra*, n. 55).

— it is significant that her release was effected two and a half years after her petition was first filed.²²²

Canadian Regulation 21 gave the Minister of Justice wider authority to detain persons than was the case under Regulation 18B in Britain. The British Regulation permitted the detention of certain classes of persons.²²³ However, the Canadian Regulation authorized the detention of any person if the Minister of Justice was "satisfied" that it was necessary to prevent that person "from acting in any manner prejudicial to the public safety or the safety of the State." The Regulation also provided that a detainee "be deemed to be in legal custody".²²⁴ Consequently, a writ of *habeas corpus* would not have offered relief to a detainee. The Regulation permitted the Minister to detain persons without being hampered by judicial formalities.²²⁵ Enemy aliens were interned under another Regulation.²²⁶

In both Britain and Canada, Fascists and Fascist sympathizers were interned, but proportionately the number was greater in

²²¹ During the 1967 Detroit riots the delay in returning the writ of *habeas corpus* for seven to ten days rendered this relief ineffective. See, Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967*, (1968), 66 Mich. L.R. 1542, at pp. 1577 *et seq.*

²²² *Ex parte Endo*, 323 U.S. 283 (1944). See *infra* for a discussion of the case of the Japanese Americans.

²²³ See, *supra*, n. 218.

²²⁴ In *Ex parte Sullivan*, 78 Can. Crim. Cas. Ann. 400 (C.A. Ont. 1941), the Court held that there was no release on the grounds that Regulation 21 gave a detainee the status of a prisoner of war, and Regulation 50 provided that a prisoner of war could only be released with the approval of the Director of Internment Operations. It would seem that this interpretation was unnecessary.

²²⁵ See, *Re Guralnick*, 78 Can. Crim. Cas. Ann. 152 (K.B. Man. 1942). The petitioner was convicted of being a member of an illegal organization — the Communist Party — and given a twelve month sentence. On appeal he was given a suspended sentence. The Minister of Justice then ordered that he be interned.

²²⁶ Enemy aliens pose a special problem. Such a person can be someone who has lived in Canada for decades but for one reason or another has not taken out Canadian citizenship. During the summer of 1940, when the British government feared a fifth column, all enemy aliens over eighteen were interned. Many of these people had fled persecution and were staunchly anti-fascist while others were loyal citizens who had lived in the country for decades. This government action was condemned in the press and in Parliament. Matters were soon set right again, and in fact thousands of persons were released. See, Laski, *loc. cit.*, n. 194 at pp. 245-246.

Canada.²²⁷ Both governments thought this blanket power indispensable for the war effort. However, it is more realistic to compare the situation in Canada to that in the United States. Although the American President wielded enormous power during the war, he was never delegated the powers of a Regulation 21, which would, no doubt, have been unconstitutional.

The best example of how extreme was the power delegated by the Canadian Parliament to the government became evident during the spy investigations of 1946. In December of 1945, Parliament passed the *National Emergency Transitional Powers Act*²²⁸ to allow the government to cope with the immediate post war problems. Substantial powers were delegated to the Governor-in-Council and all existing Regulations under the *War Measures Act* could be continued in force. Subsequently, it was discovered that a secret Order-in-Council²²⁹ passed on October 6, 1945 was continued in force under the authority of the *National Emergency Transitional Powers Act*.

This Order-in-Council permitted the Minister of Justice to interrogate and/or detain "in such place and under such conditions as he may from time to time determine" any person who might in his opinion be likely to communicate secret information to an agent of a foreign power or to act in any manner prejudicial to the public safety. Any person detained was to be deemed in legal custody. Those detained under the Order were denied counsel, they were not permitted to communicate with anyone, and they were not warned about self-incrimination.²³⁰ No charges were laid against these persons. However, two judges of the Supreme Court of Canada were appointed to a Royal Commission to inquire and report on the

²²⁷ *Civil Liberties in Great Britain and Canada During War*, loc. cit., n. 199 at p. 1017.

²²⁸ S.C. 9-10 Geo. VI, c. 25. The power conferred on the Executive by Parliament was "without express reservation and in the amplest terms that statutory language can employ," *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427, at 450 (P.C.).

²²⁹ Order-in-Council, P.C. 6444. It was revoked by P.C. 1262 on April 1, 1946. By the *Regulations Act*, R.S.C. 1952, c. 235, s. 6(1), all orders, rules, regulations, and proclamations must be published in the *Canada Gazette* within thirty days.

²³⁰ In at least one case the evidence given by a suspect was used against him in a criminal trial, *Minutes of Proceedings of the Canadian Bar Association*, (1946), at p. 142.

activities of the detainees.²³¹ About half the persons detained were acquitted during the spy trials that followed. Needless to say, this government action was severely condemned.²³²

D. The Case of the Japanese Canadians

Nothing has stirred the disquietude of Canadians on civil liberties more than the treatment of Japanese Canadians in World War II. It is the skeleton in the closet that stalks out to haunt all our discussions on civil liberties.²³³ As Mr. Diefenbaker said in 1960, "one finds it difficult to forget the wrongs . . . committed in freedom's name but a few years ago."²³⁴ And more recently Prime Minister Trudeau stated that "it was one of the great scandals of Canadian history".²³⁵ Ironically, the Japanese Canadians felt that they knew the meaning of "British justice" and "British fair play", so that a Japanese Canadian newspaperman at the time could write, "this squeezing us out isn't British."²³⁶

In June 1941 there were 22,096 persons of Japanese origin in British Columbia, 76.3% of whom had been born in Canada; and of the remainder many had been naturalized.²³⁷ The evacuation of Japanese Canadians from the West Coast was not as a result of their conduct, but as a result of festering prejudice.²³⁸ Was this an appeal by politicians for votes in a racially biased British Columbia?²³⁹ No Japanese Canadians were over charged with espionage

²³¹ For a scathing criticism on the work of this Commission, see, M.H. Fyfe, *Some Legal Aspects of the Report of the Royal Commission on Espionage*, (1946), 24 Can. Bar Rev. 777.

²³² See, Minutes of Proceedings of the Canadian Bar Association, *op. cit.*, n. 230 at pp. 141-156; Hansard, (1946), at pp. 82-94; 137-140; 170-173; 260-262; and 286-287.

²³³ See, for example, Canada, Senate, *Proceedings of the Special Committee on Human Rights and Fundamental Freedoms*, 1950, (Ottawa: King's Printer), at p. 85, (hereafter 1950 Senate Committee Proceedings), Statement by Dr. E.A. Forsey, and that by the *Co-ordinating Committee of Canadian Youth Groups*, at pp. 292-293; *Scott, loc. cit.*, n. 186 at p. 37.

²³⁴ *Hansard*, (1960), vol. 7, at p. 7544.

²³⁵ *Globe and Mail*, October 28, 1968, at p. 12.

²³⁶ *La Violette*, *op. cit.*, n. 197 at p. 55.

²³⁷ *Ibid.*, at p. 77.

²³⁸ *Ibid.*, at p. 36; *Hansard*, (1960), vol. 7, at p. 7545, statement by Mr. Diefenbaker; *Hansard*, (1944), at p. 5916, statement by Prime Minister King; see *Senate Committee Proceedings*, (1950), at pp. 277-279, for a list of anti-Japanese legislation.

²³⁹ *La Violette*, *op. cit.*, n. 197 at p. 271, where it is suggested that this is possible.

or disloyalty²⁴⁰ — and the same is true for the Japanese Americans in the United States.²⁴¹

Similarities between the exclusion of Japanese Americans from the West Coast and the comparative events in Canada are "somewhat superficial in numerous points and basically different in others".²⁴² However, there is no difference on two points: in both countries Japanese citizens were deprived of their civil liberties, and in the United States as in Canada "this policy was not a military estimate of a military problem, but familiar west coast attitudes of race prejudices".²⁴³ In a series of Presidential Executive Orders²⁴⁴ culminating in April of 1942, provision was made for the exclusion of Japanese persons from the western states. Out of 126,000 persons of Japanese origin, about 112,000 lived in the west of whom at least 70,000 were American citizens. The evacuees were removed to relocation camps set up under the aegis of the War Relocation Authority, a civilian agency.

For all practical purposes, the *Bill of Rights* may as well not have existed for Japanese Americans — citizens and non-citizens

²⁴⁰ Hansard, (1944), at p. 5915, statement by Prime Minister King.

²⁴¹ E.V. Rostow, *The Japanese American Cases — A Disaster* (1944-45), 54 Yale L.J. 489, at p. 523; where it is also stated that those arrested in Hawaii as Japanese agents were all white men.

²⁴² La Violette, *op. cit.*, n. 197 at p. 313. More precisely — "The methods of evacuation, the amount of force, the plans for relocation, resettlement, the policy with respect to property, and even methods of segregation and repatriation" were

For example in the United States the military had the major role in the evacuations, whereas this was not true in Canada. In fact, after disturbances at the Tule Lake Relocation Center in California the army took over and declared "martial law". Trouble makers were apparently not tried, but simply arrested and placed in the stockade. Army rule lasted from November 4, 1943 to January 15, 1944 at which time the administration of the centre was returned to the War Relocation Authority. See, D.S. Thomas and R.S. Nishimoto, *The Spoilage* (1946), at pp. 147-183. There were no comparative incidents in Canada.

²⁴³ Rostow, *loc. cit.*, n. 241 at p. 496. Rostow makes the most documented denunciation of the whole episode. See, also, H.A. Freeman, *Genesis, Exodus and Leviticus — Genealogy, Evacuation and Law*, (1943), 28 Cornell L.Q. 414; for a defence of the government's action, see, M. Alexandre, *The Nisei — A Casualty of World War II*, (1943), 28 Cornell L.Q. 385.

²⁴⁴ Before the Presidential Orders were acted upon, Congress passed a statute authorizing the exclusion of all persons from designated military areas. (c. 191, 56 Stat. 173). Apparently the army wanted Congressional authority before acting.

alike.²⁴⁵ The Supreme Court upheld all the main features of the Japanese exclusion orders.

In *Hirabayashi*, the Court dealt with the case of a natural born Japanese American who had been convicted in a Federal District Court of violating a curfew order and of failing to report to a civilian control centre. The Court avoided the latter issue. The essence of the decision was that the Court could not sit in judgment of what was a necessary military measure in time of war.²⁴⁶ Chief Justice Stone asserted that, given the attachment of many Japanese to Japan and the dual citizenship of a great number under Japanese law, the government could not ascertain quickly the loyalty or disloyalty of individuals.²⁴⁷ In his concurring opinion, Mr. Justice Murphy felt constrained to state that this policy went to "the brink of constitutional power" and that if not for the great emergency caused by the war, it would violate the Fifth Amendment.²⁴⁸

When the constitutionality of the exclusion orders came before the Court, Mr. Justice Murphy, dissenting, said it went over the "brink" and "into the ugly abyss of racism".²⁴⁹ In *Korematsu*, the Court found the exclusion orders valid when made, on the same grounds stated in *Hirabayashi*.²⁵⁰ On the same day that *Korematsu* was decided, the Court freed Miss Endo from internment at the Tule Lake Relocation Center.²⁵¹

If Canadians could rationalize the evacuation of Japanese Canadians from the West Coast, they were shocked by the government's

²⁴⁵ Of the 1,100,000 enemy aliens in the United States only a very small number were interned. Aliens enjoy Fifth Amendment guarantees. However, an arbitrary distinction was made between the hundreds of thousands of Germans and Italians, as well as the small number of Japanese who did not live on the West Coast — and the internment of 110,000 Japanese who lived in the west.

²⁴⁶ *Hirabayashi v. United States*, 320 U.S. 81, at pp. 93 & 106 (1943).

²⁴⁷ *Ibid.*, p. 98; Rostow, *loc. cit.*, n. 241 at pp. 507-508, states that this is not true. Loyalty checks were made on thousands of Italian and German aliens in the United States.

²⁴⁸ *Supra*, n. 246, at p. 111.

²⁴⁹ *Korematsu v. United States*, 323 U.S. 214, at p. 233 (1944).

²⁵⁰ *Ibid.*, at p. 217.

²⁵¹ *Ex parte Endo*, *supra*, n. 222.

proposal to actually deport these persons.²⁵² Some pressures had been put on the government to — "Clear the Japanese out Canada".²⁵³ By a series of Orders-in-Council under the authority of the *War Measures Act*, the government provided for the deportation of Japanese from Canada — of the non-citizen as well as the citizen.

These Orders-in-Council were made on December 15, 1945, long after the cessation of hostilities and were continued in force in virtue of s.4 of the *National Emergency Transitional Powers Act*. The three Orders, P.C. 7355, 7356 and 7357 provided in substance that: the Minister of Labour could make Orders for the deportation to Japan of the following persons sixteen years old or over, who, being residents of Canada, had made a request for repatriation — (1) Japanese nationals, (2) naturalized and natural born persons of the Japanese race, (3) as well as "the wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person". Naturalized citizens who were deported were to lose their citizenship. Also, a Commission was to make inquiry concerning the activities, loyalties and extent of co-operation with the Government of Canada of Japanese nationals and naturalized persons of the "Japanese race", with the view of recommending in the circumstances of any such case whether such persons should be deported.

Requests for repatriation of Japanese nationals and naturalized citizens could not have been revoked after September 1, 1945, and requests by natural born persons could not be revoked after a deportation order had been made. It is questionable to what extent these requests were truly "voluntary".²⁵⁴

²⁵² La Violette, *op. cit.*, n. 197 at p. 275.

The classic example of deportations was the expulsion of the Acadians in 1755. Three thousand persons were deported from Canada to various English colonies in North America. Also, during the War of 1812, British subjects over eighteen years old were expelled from the eastern seaboard. (*Lockington v. Smith*, 15 Fed. Cas. 758 (Cir. Ct. Penna. 1817).

²⁵³ Editorial in the *Montreal Star*, May 17, 1944.

²⁵⁴ It has been alleged that natural born and naturalized Japanese Canadians were encouraged by government agents to sign forms as an act of co-operation, which were subsequently claimed by the government to be specific requests for repatriation. Those who refused to sign were described as unco-operative, and denied privileges accorded to those who did sign. (Brief of the National Japanese Canadians Citizens Association, *Senate Committee Proceedings* (1950), at pp. 269-277.

Of the approximately 10,000 persons who were to be repatriated only 3,964 left Canada after the reversal in the government's policy. That is, sixty per cent of those who originally signed repatriation forms never left. No person went against his will. (La Violette, *op. cit.*, n. 197 at p. 272).

The government requested an Advisory Opinion from the Supreme Court as to the validity of these Orders. It was argued that the Orders were repugnant to British statutes that purportedly extended to Canada, that the Governor-in-Council had not been delegated this power, and on the vagueness of the term "person of the Japanese race". In a split decision the Supreme Court held that the Orders were *intra vires* except for the provision providing for the forced deportation of wives and children under sixteen.²⁵⁵ The Japanese Co-operative Committee of Canada asked the Prime Minister to withdraw the Orders or to consider a reference to the Privy Council. The latter course was chosen. All the Orders were held *intra vires* the Governor-in-Council by the Privy Council on the basis of the almost unlimited powers given to the Governor-in-Council by the *War Measures Act* and on the construction of the Orders.²⁵⁶

Meanwhile, criticism had been mounting against the government's policy towards Japanese Canadians. It was said at the time that the government hoped that all the Orders would be held *ultra vires* by the Supreme Court.²⁵⁷ In other circumstances, perhaps, the Court could have accommodated the government.

If the powers delegated to the Governor-in-Council had been based on the defence power, the Court could have held that deporting citizens in 1946 bore no relation to defence.²⁵⁸ Had there been an entrenched Canadian *Bill of Rights*, perhaps the Court would have said that: even if there were disloyal Japanese Canadians, denaturalization was a cruel and unusual punishment and consequently unconstitutional;²⁵⁹ or, that citizenship is something

²⁵⁵ *Reference as to the Validity of Orders-in-Council in Relation to Persons of the Japanese Race*, [1946] S.C.R. 248. As to the provision that was held invalid, some justices said that in the absence of a treaty, forced deportation of citizens would infringe on the sovereign rights of another state. (*Id.* at pp. 290, 305).

²⁵⁶ *Co-operative Committee on Japanese Canadians v. Attorney General for Canada*, [1947] A.C. 87 (P.C.).

²⁵⁷ *La Violette, op. cit.*, n. 197 at p. 271.

²⁵⁸ See the discussion on the defence power *supra*. The Australian High Court ruled on a number of occasions that government measures bore no relation to defence.

²⁵⁹ *Trop v. Dulles*, 356 U.S. 86 (1958). Denaturalization of an army deserter, who was absent for less than one day, was held to be a cruel and unusual punishment and therefore unconstitutional. However, see *infra*, n. 260.

"which a citizen keeps unless he voluntarily relinquishes it".²⁶⁰ And as to voluntariness, perhaps if the Supreme Court had dealt with a concrete case, the facts would have revealed that the request for repatriation was very much involuntary and, thus, void.²⁶¹

These Orders-in-Council were revoked by the government in April 1947. The forced deportation of Japanese Canadians "didn't quite happen... but the fact it could have been contemplated [and legally carried out] is a frightening thing".²⁶²

CONCLUSION

The impression may have been given in this paper that during World War II other countries may have at times been utopias as concerns civil liberties, whereas Canada was a paragon of totalitarianism. This, of course, was not true. However, by focusing comparative materials on the Canadian situation, it was hoped to more clearly delineate Canadian shortcomings. Unquestionably there is room for improvement, elsewhere as well as in Canada.

The first two suggestions, concerning an entrenched *Bill of Rights* and Emergency Powers, made by the Federal Government²⁶³

²⁶⁰ *Afroyim v. Rusk*, 387 U.S. 253, at p. 262 (1967), overruling *Perez v. Brownell*, 356 U.S. 44 (1958). This recent Supreme Court decision interprets the Fourteenth Amendment as guaranteeing citizenship unless voluntarily relinquished — "the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship". (387 U.S. 253 at p. 257). Of course, naturalization that is unlawfully obtained can be set aside (*Id.*, at p. 267, n. 23).

²⁶¹ In the *Japanese Reference*, [1946] S.C.R. 248, at p. 320, Estey, J. said that the government was acting on the request of the Japanese Canadians, so that this was in no real sense deportation. Insofar as this was an advisory opinion, without a factual record before the court, this was a tenuous assumption on the voluntariness of the requests. See *supra*, n. 254.

On a factual record it was found that the renunciation of citizenship made by Japanese Americans at the Tule Lake Relocation Center was not on the basis of a free intelligent choice, but rather because of fear, intimidation and coercion. Some feared violence if they returned home, others were pressured into renouncing their citizenship by fellow internees. The renunciations were thus held invalid. *Acheson v. Murakami*, 176 F. 2d. 953, at p. 958 (9th Circuit, 1949). The government did not apply for *certiorari* because it was believed that the judgment would be upheld on the findings of fact, (1950), 35 Cornell L.Q. 605, at p. 610, n. 41.

²⁶² *Globe and Mail*, October 28, 1968, at p. 12. A comment by Prime Minister Trudeau.

In December, 1945 it was reported that the Chinese community was becoming alarmed over the treatment of Japanese persons in Canada. They wondered if it would soon be their turn to be evacuated or deported. La Violette, *op. cit.*, n. 197 at p. 32, n. 5.

are inadequate. To have a general exception in legislation such as the *War Measures Act* that would suspend all or a great many civil liberties, would again mean that when protection is required most, it is available least. The second suggestion would make provision for the suspension of certain liberties while others would continue unimpaired — that is, a hierarchy of liberties would be established. To set up such a list of liberties that can be infringed during an emergency would itself invite infringement.²⁶⁴ It would be preferable, as the Government document suggests lastly, that there be no general exemptions as to what liberties can be set aside in times of emergency.

Unwarranted and excessive government interference with civil liberties during an emergency can generally be checked in three ways: by a *Bill of Rights*, through parliamentary control, and by judicial review.

1. *An entrenched Bill of Rights.* — It, of course, would be fallacious to assume that guarantees similar to those found in the American Constitution would offer the same protections in a Canadian *Bill of Rights*.²⁶⁵ It was only after one hundred and seventy-five years that the American Constitution yielded the guarantee that citizenship is retained by an American until he voluntarily relinquishes it.²⁶⁶ This result may never be obtained from a Canadian *Bill of Rights* unless it is expressly provided for.

²⁶³ See, *supra*, n. 7. As to the Government's "tentative" proposal (see, *supra*, n. 8) it is a compromise between the Government's first two original suggestions, and it generally suffers from the same shortcomings. There is a certain safeguard in requiring an express statement by Parliament in its legislation when rights in a *Bill of Rights* are to be abridged. However, in times of emergency when "patriotic fervor" (see, *infra*, n. 272) is at its zenith, Parliament would generally be reluctant to withhold powers from a government when and if the executive unequivocally states that it absolutely needs certain powers to overcome a particular emergency — and this would be even more true as concerns a Parliament with a strong government majority in the House.

²⁶⁴ An analogy can be made with Professor Sutherland's observation that "...the insertion of an express provision for emergency powers [in a constitution] is an invitation to use them". A. E. Sutherland, "Study Six: Commerce, Transportation and Customs", in *Studies in Federalism*, Bowie and Freidrich, eds. (Toronto, 1954), at p. 332. And governments are prone to accept the invitation, see, for example, O. I. Odumosu, *The Nigerian Constitution: History and Development*, (London: 1963), c. 9. And the Western Nigerian crisis of 1962 could have been solved without a resort to emergency powers.

²⁶⁵ Professor Freund has remarked that — "Not only may like texts produce unlike results; unlike texts may curiously give rise to identical devices and expedients." (P. A. Freund, *A Supreme Court in a Federation: Some Lessons from Legal History*, (1953), 53 Colum. L. Rev. 597, at p. 604.

²⁶⁶ See, *supra*, n. 260.

To attempt to list in detail all liberties in a *Bill of Rights* would be almost impossible and unwise. However, recent Canadian experiences would suggest that some liberties be carefully enunciated. Among such a list should be included: a provision that trial by court-martial of non-military persons cannot be maintained when the civil courts are open and functioning; that citizens cannot be denaturalized without their consent; that citizens cannot be deported; and, when, and perhaps with what safeguards the writ of *habeas corpus* can be suspended.²⁶⁷

2. *Parliamentary control over the executive.* — Mr. Justice Holmes admonished that — “it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts”.²⁶⁸ In the Canada of World War II, individual members of Parliament were often successful in curbing arbitrary government measures by seeking liberalizations during debate or by sharply questioning the Government in the House as to the necessity of a particular measure.²⁶⁹

Without waiting for an entrenched *Bill of Rights*, Parliament can at this time curb unwarranted government interference with civil liberties when the *War Measures Act* is proclaimed in force. Firstly, the powers delegated to the Governor-in-Council can be narrowed so as to apply to the necessities of defence or the suppression of an insurrection. As well, some powers can expressly be withheld, such as the list suggested above for a *Bill of Rights*.

The *War Measures Act* in s. 6(3) provides that when an emergency is proclaimed, a motion can be made in either House by ten members asking that the proclamation be revoked and that motion is debated. For more efficient Parliamentary supervision over the government, the proclamation of an emergency should itself operate to automatically require a debate in the House and ratification of the government's action.

3. *Judicial review.* — When President Roosevelt warned Congress that if they did not repeal a particular enactment he would act himself, the Supreme Court must have gotten the message as

²⁶⁷ It was suggested that when the *War Measures Act* is proclaimed and the writ of *habeas corpus* can be suspended, that no detention be for more than sixty days at which time an appearance before a superior court judge would be required, and that all detention orders be brought before Parliament within fifteen days. *Hansard*, 1960, at p. 7543.

²⁶⁸ *Missouri, Kansas and Texas Rly. Co. v. May*, 194 U.S. 267, at p. 270 (1904).

²⁶⁹ See, Brewin, *loc. cit.*, n. 189 at p. 114.

well.²⁷⁰ In summing up judicial review during the Second World War, Professor Corwin stated that:

The restrictive clauses of the Constitution are not, *as to the citizen at least*, automatically suspended, but the scope of the rights to which they extend is capable of being reduced in face of the urgencies of war, sometimes even to the vanishing point, depending on the demands of the war. Theoretically these will be determined by the President and Congress, subject to judicial review; actually the Court will not intrude its veto while war is flagrant.²⁷¹

The Court, too, is not immune to the "passions and pressures" of the times.²⁷²

It was seen that during a crisis the Canadian courts were helpless to aid in the maintenance of even minimal civil liberty guarantees.²⁷³ The main function of the courts today would be to declare that an emergency has terminated or that it never actually arose. Of course, the role of the courts in preserving liberties would be effectively increased with an entrenched *Bill of Rights*, or even with a reduction in the powers delegated to the government in times of emergency.

There is no panacea for the maintenance of civil liberties during emergency. In the long run, the crucial factor in the preservation of civil liberties "is the existence of a citizen body which is conscious that civil liberties matter, and is willing, if need be, to fight for them".²⁷⁴

²⁷⁰ In an address to Congress on September 7, 1942, President Roosevelt demanded that Congress repeal the *Price Control Act*, of January 30, 1942. He threatened "to act" himself if Congress did not comply. Congress finally gave in to the threat. (See, Rossiter, *op. cit.*, n. 111 at pp. 268-269).

²⁷¹ Corwin, *op. cit.*, n. 2 at p. 131.

²⁷² In *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, at p. 146 (1948) Mr. Justice Jackson stated: The war power "is usually invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures". See also, *Ex parte Milligan*, 69 U.S. (4 Wall.) 2 at p. 109 (1866).

²⁷³ The important cases in all jurisdictions invalidating war emergency restrictions were given after the emergency has passed. An exception should perhaps be made for the Australian High Court, see *supra*.

²⁷⁴ Laski, *loc. cit.*, n. 194 at p. 251.