Supreme Court of Canada
In Re George Edwin Gray, (1918) 57 S.C.R. 150
Date: 1918-07-19

In Re George Edwin Gray.

1918: July 18; 1918: July 19.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

REFERRED BY MR. JUSTICE ANGLIN IN CHAMBERS.

Constitutional law — Parliament — Delegation of powers — Order-in-council—"War Measures Act, 1914" — "Military Service Act, 1917."

The Parliament of Canada can validly delegate but cannot abandon its Legislative powers.

Section 6 of the "War Measures Act, 1914," provides that: "The Governor-in-Council shall have power to do and authorize such acts and things and to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary or advisable for the security, defence, peace, order and welfare of Canada." By a joint resolution of the Senate and House of Commons of Canada, passed on April 19th, 1918, it was resolved: "That in the opinion of this House it is expedient that regulations respecting Military Service shall be made and enacted by the Governor-in-Council in manner and form and in the words and figures following that is to say," reciting the terms of an order-in-council passed on the following day which made regulations providing, *inter alia,* for additions to the men included in classes 1 and 2 as liable for service under the "Military Service Act, 1917," that the Governor-in-Council might direct orders to issue to men in, any class under the Act to report for duty and any exemption granted to any man should cease at noon of the day on which he was so ordered to report and no claim for exemption should be entertained thereafter; and that all men in class 1 should report for duty as required by proclamation under the Act or be liable to the penalties specified for failure to do so.

Held, Idington and Brodeur JJ dissenting, that this order-in-council was *intra vires.*

The said section of the "War Measures Act" proceeded to declare that "for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-Council shall extend to all matters coming within the classes of subject hereinafter enumerated, that is to say—(a) censorship and the control and suppression of publications &c., and went on to specify other matters also more or less remote from the prosecution of the war.

Held, that the *ejusdem generis* rule is not applicable because of this enumeration of matters which could be dealt with by the Governor-in-Council.

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MOTION before Mr. Justice Anglin in Chambers for the issue of a writ of *habeas corpus ad subjiciendum* referred by him to the full court.

The following was the resolution passed by the two Houses of Parliament.

RESOLUTION.

Passed by the Senate and the House of Commons of Canada, April 19, 1918:—

That in the opinion of this House, it is expedient that regulations respecting Military Service shall be made and enacted by the Governor-in-Council in manner and form and in the words and figures following, that is to say:—

P. C. 919.
At the Government House at Ottawa.
Present:
His Excellency the Governor-General-in-Council.

Whereas there is an immediate and urgent need of reinforcements for the Canadian Expeditionary Force and the necessity for these reinforcements admits of no delay;

And Whereas it is deemed essential that notwithstanding exemptions heretofore granted a substantial number of men should be withdrawn forthwith from the civil life for the purpose of serving in a military capacity;

And Whereas having regard to the number of men immediately required and to the urgency of the demand, time does not permit of examination by exemption tribunals of the value in civil life, or the position, of the individuals called up for duty;

Therefore His Excellency the Governor-General-in-Council, on the recommendation of the Right Honourable the Prime Minister, and in virtue of the powers conferred on the Governor-in-Council by the "War Measures Act, 1914," and otherwise, is pleased to make the following regulations which shall come into force as soon as approved by resolution of both Houses of Parliament, and the same are hereby made and enacted accordingly:—

Regulations,

1. In these regulations,—

(a) "Minister" shall mean the Minister of Militia and Defence,

(b) "Act" shall mean the "Military Service Act, 1917."

2. Class 1 under the Act shall, in addition to the men included therein as in the said Act mentioned, include all men who,—

(a) Are British subjects; and

(b) Are not within the classes of persons described in the exceptions mentioned in the schedule to the Act; and

(*c*) Have attained the age of 19 years; but were born on or since 13th October, 1897; and

(d) Are unmarried or widowers without children; and

(*e*) Are resident in Canada.

3. Class 2 under the "Military Service Act, 1917," shall, in addition to the men included therein as in the said Act mentioned, include all men who,—

(a) Are. British subjects; and

(*b*) Are not within the classes of persons described, in the exceptions mentioned in the schedule to the said Act; and

(*c*) Have attained the age of 19 years; but were born on or since 13th October, 1897; and

(d) Are married or widowers with children; and

(*e*) Are resident in Canada.

4. The words "In any theatre of actual war" in the fifth exception in the schedule to the Act shall not include the high seas or Great Britain or Ireland and the said exception shall be interpreted accordingly.

5. The Governor-in-Council may direct orders to report for duty to issue to men in any class under the Act of any named age or ages or who were born in named years or any named year or part of a year and any exemption theretofore granted to any man of any such named age or year of birth shall cease from and after noon of the day upon which he is ordered so to report and no claim for exemption by or in respect of any man shall be entertained or considered after the issue to him of such order, provided, however, that the Minister may grant leave of absence without pay to any man by reason of the death, disablement or service of other members of the same family while on active service in any theatre of actual war.

6. The age stated in any claim for exemption made by or on behalf of any man or in any other document signed by the man shall be conclusive evidence as against him of his age and year of birth.

7. The Minister may, from time to time, direct that no orders to

report for duty be issued to men who have been examined by military medical boards and placed in such medical categories as are specified in such direction.

8. All men included in Class 1 by virtue of the provisions of these regulations shall report to the Registrar or Deputy Registrar under the Act as required by Proclamations; they shall be subject to military law as in such Proclamation set out and shall, in the event of their failing to report, be liable to the penalties specified in the Act and the regulations thereunder.

9. *(a)* Any man now unmarried, who at any time hereafter attains the age of 19 years and is then a British subject resident in Canada and not within one of the exceptions in the schedule to the Act, shall; and

(*b*) Any man who, having attained the age of 19 years, being then a British subject resident as aforesaid and not within one of the exceptions in the schedule to the Act,

becomes a widower without children, shall, il the class within which he then falls has been called out on active service:

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Forthwith become subject to military law and shall within ten days thereafter report to the Registrar or Deputy Registrar under the province or the part of a province in which he resides. He shall be placed on active service as provided by the Act, by the regulations thereunder or by these regulations, and shall, until so placed on active service, be deemed to be on leave of absence without pay.

10. Where under or pursuant to any treaty or convention with any foreign Government or any country provision is now or hereafter be made that the subjects of such Government or the citizens of such country resident in Canada may be made liable by law to military service, such subjects or citizens of such Government or country may be called out by Proclamation and shall report, be liable to military law and be placed on active service as may be specified in said Proclamation or in the Act or the regulations thereunder.

The said order-in-council was passed on April 20th, 1918, and under the said regulations the applicant Gray, who had been granted exemption from service, was ordered to report for duty and refusing to do so was arrested by the military authorities. He then applied to Mr. Justice Anglin to be discharged on *habeas corpus.*

Chrysler K.C. for the applicant. The applicant asks for the issue of a writ of *habeas corpus* to discharge him from the custody of the military authorities who hold him for refusing to obey an order to put on uniform and enter into military service. This action was taken under the order-in-council of April 20th, 1918, which directed that all men in Class 1 (of which the applicant was one), could be directed to report for duty and that all exemptions granted to such men should cease.

Brodeur J.—Is this a criminal matter under section 62 of the Supreme Court Act?

Chrysler K.C:—It is my Lord. By section 74 of the "Military Service Act" (R.S.C. [1906] ch. 41) the "Imperial Army Act" is made part of the statute law of Canada and under it Gray could be sentenced to imprisonment.

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The real question is as to the scope and effect of the order-in-council of April 20th, 1918. Can a resolution of the two Houses of Parliament confer the powers contended for on the Governor-in-Council? We submit it cannot and that what this order-in-council purports to do can be done only under the authority of an Act of Parliament. See *Rex* v. *Halliday*[1]; *Sprigg* v. *Sigcan*[2]; *Cox* v. *Hates*[3].

Geoffrion K.C. follows for on the same side. The specific enumeration of matters with which the Governor-in-Council can deal shews that only orders-in-council can pass in respect to matters *ejusdem generis* as those enumerated.

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[1] [1916] 1 K.B. 738; [1917] A.C. 260.
[2] [1897] A.C. 238.
[3] 15 App. Cas. 506.

The power to make rules and regulations cannot be extended to the power to legislate.

The "British North America Act, 1867," does not authorize Parliament to amend the constitution and gives it no authority, express or implied, to delegate its powers.

C. C. Robinson was also present on behalf of the applicant.

Bennett K.C. was heard to point out the distinction between this case and that of *Re Lewis*[4] in the Court of Appeal for Alberta which held the order-in-council *ultra vires.* He cited the case of *Clowes* v. *Edmonton School District*[5].

Newcombe K.C. contra. Parliament is empowered to make laws for the peace, order and good government of Canada ("British North America Act, 1867," section 91) and must be granted the widest discretion for attaining that object. *Riel* v. *The Queen*[6], *per* Lord

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Halsbury, at pages 678-9. *Smiles* v. *Belford*[7], discussed in Lefroy on Legislative Power, page 214. Parliament in its sphere has powers as extensive as those of the Imperial Parliament. "Orders" and "Regulations" are merely the terms used to designate the mode of exercising the powers conferred on the Governor-in-Council.

The question of delegation has been settled by the House of Lords in *Rex* v. *Halliday*[8]. Formerly all the outlying portions of the Empire were governed by order-in-council; see *Taylor* v. *The Attorney-General*[9]; and some of them are still so governed. It cannot be said that there is any change in the constitution by this mode of proceeding.

Tilley, K.C., on same side.

Chrysler K.C. for the applicant.

THE CHIEF JUSTICE.—I have no doubt respecting the right of this court to entertain the present application for a writ of *habeas corpus.* Indeed, in any case of an application for this writ which, as is said in Maitland's Constitutional History of England,

> is unquestionably the first security of civil liberty,

this court, the court of last resort in the country, would not willingly admit any doubt of its authority to grant to any of his Majesty's subjects the protection which the writ affords.

The facts out of which these proceedings arise are fully set out by Mr. Justice Anglin in the reasons for judgment which he has delivered. In these I concur. But, in view of the

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[4] 13 Alta. L.R. 423; 41 D.L.R. 1.
[5] 9 Alta. L.R. 106; 25 D.L.R. 449.
[6] 10 App. Cas. 675.
[7] 23 Gr. 590; 1 Ont. App. R. 436.
[8] [1917] A.C. 260.
[9] 23 Com. L.R. 457.

importance of the question involved, I desire to add a few words of my own to emphasize my view of the points raised.

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The sole question for determination is whether there was authority for the order-in-council of the 20th of April, 1918, cancelling the petitioner's exemption from military service, granted under the provision of the Act respecting military service, passed in the year 1917.

Parliament, after the declaration of war, passed the "War Measures Act, 1914," to confer upon the Governor-in-council certain powers. Section 6 of the Act provides that:—

> The Governor-in-council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say: (a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communications; (b) arrest, detention, exclusion and deportation; (c) control of the harbours, ports and territorial waters of Canada and the movements of vessels; (d) transportation by land, air, or water, and the control of the transport of persons and things; (e) trading, exportation, importation, production and manufacture; (f) appropriation, control, forfeiture and disposition of property and of the use thereof.
>
> 2. All orders and regulations made under this section shall have the force of law and shall be enforced in such manner and by such courts, officers and authorities as the Governor-in-council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation.

The practice of authorizing administrative bodies to make regulations to carry out the object of an Act, instead of setting out all the details in the Act itself, is well known and its legality is unquestioned. But it is said that the power to make such regulations could not constitutionally be granted to such an extent as to

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enable the express provisions of a statute to be amended or repealed; that under the constitution parliament alone is to make laws, the Governor-in-council to execute them, and the court to interpret them; that it follows that no one of these fundamental branches of

government can constitutionally either delegate or accept the functions of any other branch.

In view of *Rex* v. *Halliday*[10], I do not think this broad proposition can be maintained. Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.

It is true that Lord Dunedin, in the case referred to, said:

> The British constitution has entrusted to the two Houses of Parliament, subject to the assent of the King an absolute power untrammelled by any written instrument, obedience to which may be compelled by some judicial body.

That, undoubtedly, is not the case in this country, which has its constitution founded in the Imperial statute, the "British North America Act, 1867." I cannot, however, find anything in that Constitutional Act which, so far as material to the question now under consideration, would impose any limitation on the authority of the Parliament of Canada o which the Imperial Parliament is not subject.

The language of section 6 is admittedly broad enough to cover power to make regulations for the raising of military forces. That power is directly covered by the words

> security, defence, peace, order and welfare.

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As Lord Halsbury said in *Reil* v. *Reg.*[11]:

> These words are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to.

But it is said that the enumeration of several matters in section 6 of the "War Measures Act" limits the effect of the general power conferred. The answer to this objection, as urged by Mr. Newcombe, would appear to be 1st, that the statute itself expressly provides otherwise; and 2nd, that the reason for introducing specifications was that those specified subjects were more or less remote from those which were connected with the war, and it

[10] [1917] A.C. 260.
[11] 10 App. Cas. 675.

was therefore thought expedient to declare explicitly that the legislative power of the government could go even thus far. The decisions of the Judicial Committee of the Privy Council) under section 91 of the "British North America Act," upon similar language exclude such limited interpretation. (See Lefroy, p. 119.)

It was also urged, at the argument, that the powers conferred by section 6 were not intended to authorize the Governor-in-council to legislate inconsistently with any existing statute, and particularly not so as to take away a right (the right of exemption) acquired under a statute. Here, again, Mr. Newcombe's answer appears to be conclusive. There is no difference between statute law and common law, and consequently if effect is given to that point the government would be denied any power to amend the law as a war measure, no matter how urgent or necessary that might be for public safety. Such an interpretation seems absurd and impossible. It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains

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unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and they must be understood to have employed words in their natural sense, and to have intended what they have said. There is no doubt, in my opinion, that the regulation in question was passed to provide for the security and welfare of Canada and it is therefore *intra vires* of the statute under which it purports to be made.

Now, I want to add a few observations. In August, 1914, the Empire was at war. *De jure* and *de facto* Canada and all the British dependencies were at war. There can be no doubt as to the individual liability at that time of all the male population of Canada between the ages of 18 and 60 for military service. It is so expressly declared by section 10 of the "Militia Act," ch. 41, R.S.C. 1906. By section 25 of the same Act, the Governor-in-council is authorized to make regulations for the enrolment of persons liable for military service. That Act is merely a re-enactment with amendments of the "Militia Act" passed in 1868, immediately after Confederation—31 Vict. ch. 40. Section 69 of the "Militia Act" authorizes the Governor-in-council to place the militia on active service anywhere in Canada, and also beyond Canada, for the defence thereof. Of course, it is unnecessary to add that so

long as Canada remains a part of the British Empire, the defence thereof may depend, as suggested by Sir Louis Davies, in the course of the argument, on the success of the military and naval operations carried on far beyond its borders.

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The main departure from the provisions of the "Militia Act" which the "Military Service Act, 1917," was intended to introduce, is to be found in the recital in the latter Act that

> by reason of the large number of men who have already left agricultural and industrial pursuits in Canada to join such Expeditionary Force as volunteers, and of the necessity of sustaining under such conditions the productivity of the Dominion, it is expedient to secure the men still required, not by ballot as provided in the "Militia Act," but by selective draft.

When, in April of this year, the government came to the conclusion that it was necessary to cancel the exemptions granted under the "Military Service Act" of 1917, the effect of the order-in-council was really nothing but a return to the status under the "Militia Act" In force since Confederation, by which all are liable for service with the variations in the order of their calling out introduced by the Act of 1917.

There are obvious objections of a political character to the practice of executive legislation in this country because of local conditions. But these objections should have been urged when the regulations were submitted to parliament for its approval, or better still when the "War Measures Act" was being discussed. Parliament was the delegating authority, and it was for that body to put any limitations on the power conferred upon the executive. I am not aware that the authority to pass these regulations was questioned by a vote in either house. Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.

SIR LOUIS DAVIES:—I concur with Mr. Justice Anglin.

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IDINGTON J. (dissenting)— The question raised herein is of a somewhat remarkable character.

In a brief session of the Dominion Parliament held in August, 1914, as a result of the declaration of war between the British Empire and Germany the "War Measures Act, 1914," was duly passed and assented to on the 22nd of said month of August.

Section 6, subsection 1, is as follows:—

> 6. The Governor-in-council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—
>
> (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
>
> (b) Arrest, detention, exclusion and deportation;
>
> (c) Control of harbours, ports and territorial waters of Canada and the movements of vessels;
>
> (d) Transportation, by land, air or water and the control of the transport of persons and things;
>
> (e) Trading, exportation, importation, production and manufacture;
>
> (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

Besides the sub-section 1 just quoted there was a subsection 2 which declared that all orders and regulations made under the said section should have the force of law, enforceable in such manner and by such courts, officers and authorities as the Governor-in-council might prescribe, and provided for variations and revocations by any subsequent order or regulation and then proceeded:

> But if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

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The "Militia Act" by its many provisions gave a much wider scope for the operations of a government to be carried on by orders-in-council than the above quotation from the said section 6 of the "War Measures Act" indicates.

Moreover, there were in the latter Act itself three other sections which gave unusual powers to the government each of which obviously furnished scope for the possible and indeed probable exercise of some such power as conferred by section 6 thereof.

All these and possibly cognate subjects by way of irrelevant details would give ample scope for the operation of the powers conferred by said section 6 beyond those somewhat crudely indicated in its s.s. (*a*), *(b),* (*c*), (*d*), (*e*) and (*f*) in subsection 1 thereof.

And I have not a shadow of doubt that its widest conceivable operation within the minds of the legislators concerned was confined to subserving the purposes I have suggested. And I agree with such conception.

If any doubt could have existed relative to the scope of power conferred thereby it must have been regarding some minor details.

For the law relevant to government by order-in-council so far as directly connected with the war stood so till the session, of 1917 when the "Military Service Act" was enacted in consequence of it being discovered that the "Militia Act" as it then stood providing for drafting men by ballot might operate to the detriment of agricultural and industrial pursuits, and hence it was necessary to reconcile the imperative demands for more men with a system of conscription that might not press unduly upon the productive capacities of the Dominion.

Hence that Act was passed after reciting many reasons therefor of which the last was as follows:—

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> And whereas by reason of the large number of men who have already left agricultural and industrial pursuits in Canada to join such Expeditionary Force as volunteers, and of the necessity of sustaining under such conditions the productivity of the Dominion, it is expedient to secure the men still required, not by ballot as provided in the "Militia Act," but by selective draft.

That Act was as clearly intended to be an absolute and paramount code for carrying out its provisions in the way therein indicated and provided as anything which can be described or defined in the English language.

Local Tribunals, Appeal Tribunals, and a Central Appeal Judge were provided thereby and powers were again conferred upon the Governor-in-council to make regulations to secure the full effective and expeditious operation and enforcement of the Act.

The applicant Gray is a young farmer, unmarried, and a homesteader on land in Nipissing whereon he had done such settlement duties that he has some thirty-six acres in crop and no one to help him, and upon an appeal founded upon that situation, under the said Act, the Local Tribunal did not allow his claim for exemption, but upon an appeal taken to the Appeal Tribunal his claim was allowed, and at this moment he thereby stands exempt under said "Military Service Act."

An appeal was taken by the military authorities to the Central Appeal Judge.

Pending that appeal, he has been, without his case having been disposed of by due process of law, seized and tried as an offender against neither the "Militia Act," the "Military Service Act," nor any other statute of his country unless he falls within an order-in-council dated 20th April last and alleged to have been passed by virtue of the said section 6 of the "War Measures Act, 1914," which it is strongly argued before us overrides all the enactments in and regulations

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made under the "Military Service Act" to which I have adverted.

Reliance for such contention so far as I can understand the argument, is based solely upon the powers conferred by section 6 of the "War Measures Act" of 1917,

> to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada

coupled with the following subsection (5) of section 13 of the "Military Service Act, 1917":—

> Nothing in this Act contained shall be held to limit or affect the punishment provided by any other Act or law for the offence of assisting the enemy nor the powers of the Governor-in-council under the "War Measures Act, 1914."

The fact that the order-in-council now in question was supported by a resolution of the two Houses of Parliament was very properly discarded by counsel for the Crown as failing to give any statutory efficacy thereto.

The bald proposition put forward in argument that notwithstanding the elaborate provisions of the "Military Service Act" evidently designed as a paramount code to govern the mode of selecting draftees under its provisions in substitution for the "Militia Act" and all therein contained was liable to be repealed or nullified by an order in council, I cannot accept.

Nor can I as a matter of law subscribe to any such doctrine as contained in the startling propositions put forward that it was quite competent for the Governor-in-council to have proceeded under the "War Measures Act" of 1914 not only independently of but to repeal and render inoperative all the provisions of the "Military Service Act" of 1917, and to substitute therefor what the Governor-in-council might "deem necessary or advisable" including therein the levy of such taxes as

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needed to meet such exigencies; and in short to govern the country according to such conceptions save and except the possibility of parliament being convened once a year and invited to act and seeing fit to revoke such orders.

Indeed, I venture to think that such conceptions of law as within the realm of legislation assigned by the "British North America Act" to the Dominion have no existence.

As I understand the situation with which we in Canada are confronted by this war, there is no activity which the mental and physical energies of every member of the entire population come to mature years is capable of but should be made so far as possbile subservient to the success of our endeavours.

The several measures required to produce such results must be enacted by the Parliament of Canada in a due and lawful method according to our constitution and its entire powers thereunder cannot be by a single stroke of the pen surrendered or transferred to anybody.

The delegation of legislation in way of regulations may be very well resorted to in such a way as to be clearly understood as such, but a wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against.

Not only as a matter of constitutional law, sanctified by all past history of our ancestors, and prevalent in the legislative enactments of he Mother Country, but as a matter of expediency I venture to submit such view should be our guide.

The "Military Service Act, 1917," and section 6 of the "War Measures Act" are quite consistent if properly interpreted and construed as intended by parliament but are quite incompatible according to the

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argument presented and the last legislative expression of parliament from such point of view must govern else there is an end to parliamentary sanction.

Test the matter of the question raised by supposing for a moment the quite conceivable case of a change of government having taken place after the "Military Service Act" had been passed, and the new government had desired to repeal it but possibly found the Senate bar the way, would the new men have dared to repeal it by an order-in-council under the "War Measures Act" of 1914? And suppose, further, they tried to do so and asked us by a reference for a judgment maintaining such an order-in-council what could we have said? I should in such a case answer just as I do now that the "War Measures Act" could not be so stretched nor our constitution stand such a strain as repeal of a single line of the "Military Service Act" by any such methods.

I think the application should be granted.

DUFF J.—The Governor-in-council shall have power

> to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

These words constitute the first branch of the first subsection of section 6.

The words (I put aside for the moment any suggestion of qualifying context or substantive modifying enactment) are comprehensive enough to confer authority, for the duration of the war, to "make orders and regulations" concerning any subject falling within the legislative jurisdiction of parliament— subject only to the condition that the Governor-in-

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council shall deem such "orders and regulations" to be

> by reason of the existence of real or apprehended war, etc., advisable.

"Order" is a proper term for describing an act of the Governor-in-council by which he exercises a lawmaking power, whether the power exist as part of the prerogative or devolve upon him by statute. (See 21 & 22 Vict., ch. 99, s. 2; Ruperts Land O. in C., 4 R.S.C. 57; B. C. O. in C., 4 R.S.C. 77 and 78; P.E.I. O. in C., 4 R.S.C. 87 and 88.)

"Regulation" when used in such a collocation as found in the sentence excerpted above is broad enough to extend to any rule in relation to a particular subject matter laid down in exercise of such authority; and past all possible doubt is sufficient to embrace provisions of the kind ordained by the order-in-council of 20th April.

In *Rex* v. *Halliday*[12], it was held by the House of Lords that under a general power to

> issue regulations for securing the public safety and defence of the realm

a "regulation" could validly be "issued" authorizing the detention of persons without trial and without charge. The judgments of the Law Lords in *Rex* v. *Halliday*[12], afford a conclusive refutation of the contention that a general authority to make "orders and regulations" for securing the public defence and safety and for like purposes is, as regards existing law resting on statute, limited to the functions of supplementing some legislative enactment or carrying it into effect and is not adequate for the purpose of supersession.

The authority conferred by the words quoted is a law-making authority, that is to say an authority

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(within the scope and subject to the conditions prescribed) to supersede the existing law whether resting on statute or otherwise; and since the enactment is always speaking, "Interpretation Act," section 9, it is an authority to do so from time to time. It follows that unless the language of the first branch of section 6 is affected by a qualifying context or by subsequent statutory modification the order-in-council of the 20th April (the subject matter of which in the above expressed view is indisputably within the scope of the "War Measures Act") is authorized by it.

There is no qualifying context. There is in the second branch of the section an enumeration (an enumeration let it be said rather of groups of subjects which it appears to have been thought might possibly be regarded as. "marginal instances" as to which there

[12] [19171 A.C. 260.
[12] [19171 A.C. 260.

might conceivably arise some controversy whether or not they fell within the first branch of the section) of particular subjects and a declaration that the powers thereby given to the Governor-in-council extended to these subjects, so enumerated; but there is also a declaration that this enumeration shall not have the effect of limiting the "generality" of the language of the first branch of the section—the language quoted above. Thus the context, instead of qualifying the preceding language (the language quoted), emphasizes the comprehensive character of it and pointedly suggests the intention that the words are to be comprehensively interpreted and applied.

It is here convenient to note the argument so strongly pressed—the argument of *reductio ad absurdum* —that under this construction of section 6 the Governor-in-council acquired authority to repeal the "Militia Act" and pass by order-in-council provisions identical with the provisions of the "Military Service Act,"

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1917. This, it is said, parliament could not conceivably have intended in August, 1914. The answer can be expressed in a sentence.

It is the function of a court of law to give effect to the enactments of the legislature according to the force of the language which the legislature has finally chosen for the purpose of expressing its intention. Speculation as to what may have been passing in the minds of the members of the legislature is out of place, for the simple reason that it is only the corporate intention so expressed with which the court is concerned. Besides that road—the road of speculation— leads into a labyrinth where there is no guide.

Ambiguous expressions may be interpreted in light of the general object of the enactment when that is known with certainty, and of the circumstances in which the enactment was passed, but subject to this the words of the statute must be construed in their natural sense.

It ought not, moreover, to be forgotten in passing upon this argument for a narrow construction, that this Act of Parliament supervened upon a decision which was the most significant, indeed the most revolutionary decision in the history of the country, namely — that an Expeditionary Force of Canadian soldiers should take part in the war with Germany as actual combatants on the Continent of Europe; a decision which would entail, as

everybody recognized, measures of great magnitude; requiring as a condition of swift and effective action, that extraordinary powers be possessed by the executive.

It is convenient also at this point to note the objection raised by Mr. Geoffrion, that accepting this construction of section 6 of the "War Measures Act" that enactment must be held to be *ultra vires* of the Dominion Parliament.

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It is a very extravagant description of this enactment to say that it professes (on any construction of it) to delegate to the Governor-in-council the whole legislative authority of parliament. The authority devolving upon the Governor-in-council is, as already observed, strictly conditioned in two respects: First —It is exercisable during war only. Secondly— The measures passed under it must be such as the Governor-in-council deems advisable by reason of war.

There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. Maitland's Constitutional History, pp. 1, 15 *et seq.*

Our own Canadian constitutional history affords a striking instance of the "delegation" so called of legislative authority with which the devolution effected by the "War Measures Act" may usefully be contrasted. The North West Territories were, for many years, governed by a council exercising powers of legislation almost equal in extent to those enjoyed by the provinces.

The statute by which this was authorized, by which the machinery of responsible government, and what

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in substance was parliamentary government, was set up and maintained in that part of Canadian territory, was passed by the Parliament of Canada; and it was never doubted that this legislation was valid and effectual for these purposes under the authority conferred upon parliament by the Imperial Act of 1871

> to make provision for the administration, peace, order and good government in any territory not for the time being included in any province.

That, of course, involved a degree of devolution far beyond anything attempted by the "War Measures Act." In the former case, while the legal authority remained unimpaired in parliament to legislate regarding the subjects over which jurisdiction had been granted, it was not intended that it should continue to be, and in fact it never was, exercised in the ordinary course; and the powers were conferred upon an elected body over which parliament was not intended to have, and never attempted to exercise, any sort of direct control. It was in a word strictly a grant (within limits) of local self government. In the case of the "War Measures Act" there was not only no abandonment of legal authority, but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence.

The point of constitutional incapacity seems indeed to be singularly destitute of substance.

The applicant does not point to any subsequent Act of Parliament by which the enactments of section 6 of the "War Measures Act" (in so far as they are now relevant) have been modified. A powerful argument might have been founded on the provisions of the

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"Military Service Act" of 1917, had it not been for sec. 13, sub-sec. 5 of that Act, by which it is provided that

> nothing in this Act contained shall be held to limit or affect * * * the powers of the Governor-in-council under the "War Measures Act" of 1914.

Here Parliament appears to have anticipated and nullified in advance the contention now put forward that the provisions of the "Military Service Act" are exclusive as regards the

subjects with which they deal and that the powers given by the "War Measures Act" in relation to these subjects were revoked in 1917.

The force of sub-section 5 as touching any controversy at present material, is not affected by anything to be found in sub-section 4. The last mentioned subsection deals with a particular subject matter only, the extent, namely, of the reinforcements to be provided under the "Military Service Act." These, it is enacted by sub-section 4, shall not exceed one hundred thousand men

> unless further authorized by parliament.

Assuming (without expressing any opinion upon the point) as Mr. Geoffrion contends, that the meaning of this sub-section is that the reinforcements to be provided under the Act shall not exceed the prescribed number in the absence of authority given by a new Act of Parliament; in other words, that as regards that particular subject matter the "Military Service Act" is not to be amended except by a new Act of Parliament to be passed for the purpose; assuming this, the provision is certainly an arresting one. It at once suggests that Parliament must have assumed the existence of some instrumentality for amending the Act it was passing other than a new Act of Parliament,

this instrumentality being, of course, the authority created by the "War Measures Act."

Sub-section 4 thus adds, if possible, to the force of the 5th sub-section, indicating as it does a conscious and deliberate acceptance by Parliament at the time (in 1917) of the view now put forward by the Crown concerning the scope of the powers granted by the "War Measures Act."

This brief sketch is perhaps more than is strictly necessary to dispose of all the argument seriously advanced in support of the application.

ANGLIN J.—The applicant moved before me in chambers for a writ of *Habeas Corpus ad subjiciendum* under section 62 of the "Supreme Court Act." He is in military custody awaiting sentence of a court martial for disobedience as a soldier to lawful orders of a superior officer. Such disobedience is declared to be an offence punishable by imprisonment for any term up to life by the "Army Act" (44 & 45 Vict., Imp., ch. 58, sec. 9; Manual of Military Law, 1914, pp. 370, 387) made part of the law of Canada by the "Militia

Act," R.S.C., ch. 41, sec. 62 and 74, and the "Military Service Act, 1917," ch. 19, sec. 13. The "commitment" of the applicant is therefore "in a criminal case" under an Act of Parliament of Canada and is within section 62 of the "Supreme Court Act."

Before me in chambers and on the argument of yesterday before the full court, counsel for the applicant based their client's claim for discharge from military custody solely on the ground that he had been granted exemption under the "Military Service Act, 1917," and that two orders-in-council of the 20th April, 1918 (Nos. 919 and 962) purporting to cancel or set aside exemptions so granted to men of Class A between the ages of 20 and 23 (which apply to him) are invalid.

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Counsel representing the Attorney-General frankly conceded that, if these impugned orders-in-council cannot be upheld, the applicant is entitled to his discharge. The issue is therefore clean cut and, while the circumstances of the two cases differ somewhat in points not material, is precisely that recently passed upon by the Supreme Court of Alberta in the case of Norman Earl Lewis. That court (Chief Justice Harvey dissenting) held the two orders-in-council to be *ultra vires.* As many thousands of young men throughout Canada, most of them already drafted and a considerable number of them already overseas or *en route* to Europe, are affected, the importance of the matter involved is obvious. It has occasioned much public excitement and unrest, and numerous applications for writs of *habeas corpus* are already pending in provincial courts. Under these circumstances it was obviously of great moment in the public interest that the question of the validity of these orders-in-council should be authoritatively determined by this court. I therefore readily acceded to the suggestion of Mr. Newcombe, in which Mr. Chrysler concurred, that I should follow the course taken by Mr. Justice Duff and approved of by the majority of this court in *Re Richard*[13], and subsequently sanctioned by Rule 72 of our Rules of Court, and, instead of myself dealing with the motion, should refer it to the court.

The doubt which exists as to the appealability of the order for discharge made by the Alberta court in the *Lewis Case*[14], the unavoidable delay that the taking of such an appeal (which solicitors for the respondent could scarcely be expected to expedite) might involve, the probability that if I should make a like order in the

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[13] 38 Can. S.C.R. 394.
[14] 13 Alta. L.R. 423; 41 D.L.R. 1.

present case it would not be subject to appeal (sub-sec. 2 of sec. 62 gives a right of appeal to the court

if the judge refuses the writ or remands the prisoner)

and the fact that it could not be expected that a decision of a single judge of this court would be accepted as binding in the provincial courts seemed to me most cogent reasons for taking the course suggested, in view of Mr. Newcombe's assurance that it had been already arranged with the Chief Justice and the Acting Registrar that, should the reference be directed, a special session of the court to hear the motion would be called for an early date so that the applicant would not suffer the prejudice of any undue delay.

Although some questions as to the case being within the section 62 of the "Supreme Court Act" and as to the right of the full court to deal with it were raised by two of my learned brothers during the course of the argument, for the reasons already stated I entertain no doubt upon either point.

Against the validity of the orders-in-council it is urged (a) that Parliament cannot delegate its major legislative functions to any other body; (b) that it has not delegated to the Governor-in-council the right to legislate at all so as to repeal, alter or derogate from any statutory provision enacted by it; (c) that if such power has been conferred it can validly be exercised only when parliament is not in session.

(a) The decision of the Judicial Committee in *Powell* v. *Apollo Candle Co.*[15], cited by Harvey C.J. in the *Lewis Case*[16], puts beyond doubt the sovereign character of colonial legislatures within the ambit of the legislative jurisdiction committed to them and the constitutionality of limited delegations of their legislative powers. Such delegations have been so frequent

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that it is almost a matter of surprise that their legality should now be considered open to question. A very common instance (sometimes regarded as conditional legislation) is the provision that a statute shall come into effect, if at all, in whole or in part on a day or days to be named by proclamation to be issued pursuant to an order-in-council. Here the

[15] 10 App. Cas. 282.
[16] 13 Alta. L.R. 423; 41 D.L.R. 1

limitation upon the extent of the powers delegated is found in the words of section 6 of the "War Measures Act" of 1914

> as he may by reason of the existence of real, or apprehended war, invasion or insurrection, deem necessary or advisable.

Their duration is expressly limited by section 3. A further limitation as to sanctions is imposed by section 11. As was said in the *Apollo Case*(1), at p. 291,

> the legislature has not parted with its perfect control over the Governor and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him.

In *Bank of Toronto* v. *Lambe*[17], at p. 588, their Lordships of the Judicial Committee said

> The Federal Act exhausts the whole range of legislative power.

A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is

> as plenary and as ample * * * as the Imperial Parliament in the plenitude of its powers possessed and could bestow.

Hodge v. the Queen[18];

> as large and of the same nature as those of the Imperial Parliament itself.

The Queen v. *Barah*[19]. I am of the opinion that it

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was within the legislative authority of the Parliament of Canada to delegate to the Governor-in-council the power to enact the impugned orders-in-council. To hold otherwise would be very materially to restrict the legislative powers of Parliament.

(b) I am quite unable to appreciate the force of the argument based on the *ejusdem generis* rule. In opening, Mr. Chrysler rather disavowed invoking it. Mr. Geoffrion, however, appealed to it and in his brief reply Mr. Chrysler appeared to insist upon its application. If

[17] 12 App. Cas. 575.
[18] 9 App. Cas. 117, 132.
[19] 3 App. Cas. 889, 904.

this rule of construction would otherwise have governed, its application to section 6 of the "War Measures Act" of 1914 is clearly excluded by the words which precede the enumeration of the specified subjects, namely

> for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared, etc.

The same language is found in section 91 of the "B.N.A. Act" and I have never heard it suggested that the residuary powers of Parliament under the general terms of that section

> to make laws for the peace, order and good government of Canada

are restricted to matters and things *ejusdem generis* with the subjects enumerated in its succeeding clauses, or, as Mr. Chrysler put his argument on this branch in opening, that the specified subjects should be regarded as illustrative of the classes of matters to which the application of the preceding general terms should be confined. Rather, I think, as put by Mr. Newcombe and Mr. Tilley, the specification should be deemed to be of cases in which there might be such doubt as to whether they fell within the ambit of the general terms—wide as they are,—that *ex abundanti cautelâ* it was safer to mention them specifically. Mr. Justice Beck in the *Lewis Case*[20] appears to have

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appreciated that this was the purpose of the words "for greater certainty, etc," yet by some mental process that I am unable to follow, after saying:

> The enumeration of the particular subjects of jurisdiction is obviously made in order to remove doubts which might possibly arise as to whether or not the particularized subjects would fall within the general statement of the subjects of jurisdiction,

he proceeds to add that

> Such an enumeration of particular subjects * * * must necessarily be taken as interpretative and illustrative of the general words, which must consequently be interpreted as intended to comprise only such subjects, in addition to those particularly specified, as fall within a generic class of which the specified instances are illustrative and definitive of the general characteristics of the class,

and he makes a strict application of the *ejusdem generis* rule, thereby excluding the making of orders for the enlistment of certain men exempt under the "Military Service Act,

[20] 13 Alta. L.R. 423; 41 D.L.R. 1.

1917," as to which, whatever else may be said of them, there cannot be a shadow of doubt that they were made

> by reason of the existence of real * * * war,

and because

> deemed necessary or advisable for the security, defence and welfare of Canada.

The very purpose of inserting the words

> for greater certainty, but not so as to restrict the generality of the foregoing terms

would appear to have been to insure the exclusion of the rule of construction under consideration.

The terms of section 6, the generality of which is not restricted, are

> to do and authorize such acts and things and to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

More comprehensive language it would be difficult to find. The corresponding terms of the "B.N.A. Act," section 91, are

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> to make laws for the peace, order and good government of Canada in relation, etc.

"Welfare" is substituted for "good government" and "security, defence" are added in section 6 of the "War Measures Act." In some constitutional Acts, for instance the "New South Wales Constitution Act," we find the word "welfare" used with "good government" as a substitute for the word order. To introduce such a limitation as that suggested by Mr. Justice Beck and approved of by some of his colleagues would therefore appear to me to be to fly in the teeth of the very words of the Act of Parliament itself.

Parliament by express recital in the "Military Service Act, 1917," declares that the Canadian Expeditionary Force is engaged in active service

> for the defence and security of Canada,

and that it is necessary to provide reinforcements to maintain and support it. The position taken by counsel for the Attorney-General, that the orders-in-council fall within the very terms of section 6 of the "War Measures Act," as orders made for the security and defence of Canada, therefore has statutory sanction.

Nor does the use of the term "orders and regulations" present any serious difficulty. No doubt "regulations" is a term usually employed to describe provisions of an ancillary or subordinate nature which the executive, or a Minister, or some subordinate body is empowered to make to facilitate the carrying out of a statute. But, coupled with the word "orders," (which, as used here, seems to me clearly to mean orders-in-council) and employed to connote provisions to be made

> for the security, defence, peace, order and welfare of Canada,

it has necessarily and obviously a more comprehensive

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signification, it was used no doubt because the Governor-in-council usually acts by making orders or regulations. "Ordinances" might have been a more apt expression; but the context leaves no room for doubt that it was intended to confer the power to pass legislative enactments such as should be deemed necessary or advisable by reason of

> real or apprehended war, invasion or insurrection,

which is declared by a definitive clause of the "Militia Act" to establish an "emergency."

No doubt the amendment of a statute or the taking away of privileges enjoyed or acquired under the authority of a statute by order-in-council is an extreme exercise of the power of the Governor-in-council to make orders and regulations of a legislative character; but the very statute, the operation of which is affected by the orders now in question, contains a provision, not found we are told in the original draft and apparently inserted for the purpose of expressing the acquiescence of Parliament in such a use being made of the power which it had conferred on the Governor-in-council by the "War Measures Act." By sub-sec. 5 of sec. 13 of the "Military Service Act" it is provided that

> nothing in this Act contained shall be held to limit or affect * * * the powers of the Governor-in-council under the "War Measures Act" of 1.914.

The very presence of this sub-section in the "Military Service Act, 1917," imports that under the power conferred on the Governor-in-council by the "War Measures Act," orders and regulations might be made with the validity of which, but for it, some provisions of the "Military Service Act" might be deemed to interfere. It carries confirmation of the view that the scope of the powers conferred by the "War Measures Act" was wide enough to embrace matters dealt with by the

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"Military Service Act" and it puts beyond question, in my opinion, the purpose of Parliament to enable the Governor-in-council, in cases of emergency, as defined, to exercise the powers granted by section 6 of the "War Measures Act" even to the extent of modifying or repealing, at least in part, the "Military Service Act" itself. The immediate juxtaposition of sub-sec. 4 to sub-sec. 5 of sec. 13, as was pointed out by Mr. Newcombe, serves to emphasize the significance of the latter and to make it certain that its purview and operation did not escape the notice of Parliament.

The provision of sub-sec. 2 of sec. 6 of the "War Measures Act" was also relied upon as affording an indication that Parliament did not mean to confer upon the Governor-in-council power to repeal statutes in whole or in part. Sub-section 2 is probably only declaratory of what would have been the law applicable had it not been so expressed. Parliament, however, thought it necessary to express such powers in regard to its control over its own statutes. (Sections 18 to 19 of the "Interpretation Act," R.S.C., ch. 1.) I fail to find in the presence of this clause anything warranting a court in cutting down such clear and unambiguous language as is found in the first paragraph of section 6 of the "War Measures Act."

Again, it is contended that should section 6 of the "War Measures Act" be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our Parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor-in-council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in extra-

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ordinary times which necessitate the taking of extraordinary measures. At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament

intended to confer and that it possessed the legislative jurisdiction requisite to confer them. Upon both these points, after giving to them such consideration as has been possible, I entertain no doubt, and, but for the respect which is due to the contrary opinion held by the majority of the learned judges of the Supreme Court of Alberta, I should add that there is, in my opinion, no room for doubt.

It has also been urged that such wide powers are open to abuse. This argument has often been presented and as often rejected by the courts as affording no sufficient reason for holding that powers, however wide, if conferred in language admitting of no doubt as to the purpose and intent of the legislature, should be restricted. In this connection reference may be made with advantage to the observations of their Lordships in delivering the judgment of the House of Lords in *The King* v. *Halliday*[21]. As Lord Dunedin there said:

> The danger of abuse is theoretically present; practically, as things exist, it is, in my opinion, absent.

As Lord Atkinson observed:

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the executive. What is contended is that the executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact.

(c) It may be open to doubt whether Parliament had in mind when enacting the "War Measures Act" that legislative enactments such as those now under

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consideration should be passed by the Governor-in-council acting under it while Parliament itself should be actually in session. We can only determine the intention of Parliament, however, by the language in which it has been expressed. The terms of section 6 of the "War Measures Act" are certainly wide enough to cover orders-in-council made while Parliament is in session as well as when it stands prorogued. The fact that in the present case a resolution was adopted by both Houses of Parliament approving of the orders-in-council, while it does not add anything to their legal force as enactments, makes it abundantly clear that no attempt was made in this instance to take advantage of the

[21] [1917] A.C. 260.

powers conferred by section 6 of the "War Measures Act" to pass legislation without the concurrence and approval of parliament.

For the foregoing reasons I am of the opinion that the motion for *habeas corpus* must be refused. But, having regard to the fact that this has been made a test case and to its criminal character, there should, in my opinion, be no order as to costs.

BRODEUR J.—I concur in the opinion of Mr. Justice Idington.