Articles

The Strategic Constitution in Action: Canada's Afghan War as a Case Study

By Irvin Studin[*]

A. Introduction – What is the Strategic Constitution?

What does the Canadian Constitution have to say (or not say) about Canada's recent war in Afghanistan? The question seems intellectually natural, but has seldom been asked – not least because in Canada, the fields of constitutional law and foreign affairs, in both scholarship and praxis, are often near-perfect strangers. The seldom examined second recital of the preamble to the Constitution Act, 1867[1] (once the British North America Act, *1867*, and hereafter the '1867 Act'), reads that the "Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire." The only provision of the 1867 Act that explicitly references foreign affairs is section 132, although it speaks to the implementation by Canada (legislative and executive branches) of *imperial* or British Empire treaty obligations. One can therefore propose with reasonable certainty that both the character and paucity of explicit language on *strategy* in the text of the founding legal document of the modern Canadian state betray a fundamental reality: that Canada, *constitutionally speaking*, was never intended or expected to be a power player of any note in the world, but, rather, was constituted as a strategic appendage or *auxiliary kingdom* of the British Empire— its instruments and interests subsumed to the strategic designs and direction of Westminster.[2]

Canada's strategic constitutional conception finds expression in both Canadian constitutional scholarship and constitutional jurisprudence. Canadian constitutional scholars and courts have been animated historically by concerns of federalism or the federal-provincial division of powers—largely exclusive of foreign or strategic affairs—and, increasingly, particularly since the advent of the Charter of Rights and Freedoms in 1982, questions of civil liberties. Much like the text of the Constitution Act, 1867, the text of the

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[1] Constitution Act, 1867, 30 & 31 Vict., c.3 (U.K.).

[2] *See* JACK GRANATSTEIN, CANADA'S ARMY: WAGING WAR AND KEEPING THE PEACE 10 (2002): "Strategy was the province of the imperial masters, not the Canadians, whether French- or English-speaking. […] Strategy was not for Canadians to decide; tactics, perhaps, but strategy, never."

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Constitution Act, 1982[3]— hereafter the '1982 Act'—in which the Charter figures prominently, is conspicuously silent on foreign affairs; the domestic realm is king. We might even say that 'federalism' and 'rights jurisprudence' are the first two *schools*, as it were, of Canadian constitutional scholarship.

And yet, it seems plain that Canadian performance in the international arena – and specifically in the Afghan war – must be fundamentally informed by the very constitutional makeup of the Canadian state – just as strategic events in the world (like wars) have from day one influenced the Constitution. Law and strategy, in other words, are "mutually affecting"[4], such that the state affirms its domestic legitimacy through the Constitution, and its external legitimacy through strategy; that is, through the use of state power to advance key (strategic) interests.

Moving from this, let us now introduce a new concept or construct called the *Strategic Constitution* – and with it a new or third *school* of Canadian constitutional scholarship. The Strategic Constitution is the subset of Canada's Constitution that materially informs or describes Canada's capacity to exert strategic power in international affairs. If we agree, more or less, that the Constitution – the supreme law of the land – consists of the 'written' parts outlined in section 52(2) of the 1982 Act, as well the 'unwritten' parts expressed in key judicial decisions and certain principles and common law powers, then the Strategic Constitution consists essentially of the 'strategic sections' of the key written parts (in particular, the bulwark 1867 and 1982 Acts), high-court jurisprudence in respect of these strategic sections, and common law powers of the state, like the critical Crown prerogative. These sections, decisions and common law powers can be categorized according to what may be called *factors of strategic power*: elements of national strategic power that materially inform (and underpin) the potency of the two key instruments of national strategic power – the military and the diplomatic forces, both quite broadly defined.

For all practical intents and purposes, the Canadian military and diplomatic forces may be thought of as *both* core elements of Canadian power and indeed the pivotal instruments or servants of this power. It is presumed that each of the other elements of power, taken on its own or in combination with one or more other elements, has material influence – positive or negative – on the potency of the diplomatic and military instruments. These elements or factors of power include, as mentioned, both the military and the diplomacy (by identity with the said instruments), but also the 'potency' of the federal executive,

[3] Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982, c. 11 (U.K.).

[4] *See* Michael Howard, *Preface*, *in* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY at xvi (2002).

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natural resources, the national economy, strategic transportation, strategic communications and, finally, the national population.[5]

Figure 1.1 provides a stylized breakdown of the sections of the Constitution most associated with key factors or elements of Canadian strategic power, or with Canada's Strategic Constitution. The challenge before us, then, is to determine whether jurisprudence on these sections, combined with analysis of relevant doctrines, conventions and statutes, can add 'meat to the [textual] bones' of each of these elements of power – the bones of the Strategic Constitution – in order to give us a more meaningful constitutional picture of Canada's strategic power in the specific context of Canada's war in Afghanistan.

Power Element/ Document	***Constitution Act, 1867***	***Charter of Rights and Freedoms (in Constitution Act, 1982)***[6]
Diplomacy	Preamble/royal prerogative; ss. 9; s. 91 general power (POGG); 132	ss. 1; 4(2); 6; 7-14; 33
Military	Preamble/royal prerogative; ss. 9, 15; 91(7); 108; 117	
Executive Strength of Central (Federal) Government[7]	Preamble/royal prerogative;	

[5] If one be pedantic, it is more precise to offer that the relative influence of each factor or element of strategic power on the state's aggregate strategic power is, in constitutional terms, a function both of the potential raw magnitude or scope of the factor or element and, just as importantly, the extent to which all or part of that factor or element can be mobilized to inform one or both of the state's diplomatic and military instruments. It should also be noted that we are here interested in the case law for each of the strategic *sections* of the Constitution (falling under a given category or factor of strategic power), and not, strictly speaking, case law relating to the specific categories or factors or elements (*per se*, taken as a whole) of power, mindful as we are of the warning of Justice Beetz in the Anti-Inflation Reference, 1975, [1976] 2 S.C.R. 373, that excessively diffuse subject matters should not be seen as a legitimate basis for exclusive legislative power for either the federal or provincial government.

[6] The *Charter* provisions that make up Canada's Strategic Constitution are those that are most likely to come into play against (or indeed, suffuse) exercises of government power based on the common law or legislative heads of powers cited in the 1867 and 1982 Acts. In this sense, they cannot easily be separated into discrete categories along the lines of the various elements or factors of power listed in the second column.

[7] One might think it a misnomer to call this factor of power 'executive strength [or potency] of central government,' given that, apart from the royal prerogative and section 9 of the 1867 Act, all the various sections underpinning this factor of power refer to Parliament's (legislative) powers, and not the powers of the federal executive. However, we assume quite firmly in this paper that executive power follows the grant of legislative power, in the context of both majority and minority government, even if this dynamic is mitigated or complicated somewhat in minority government situations. This is affirmed in cases like Liquidators of the Maritime Bank v. Receiver General of New Brunswick, [1892] A.C. 437, as well as Mowat v. Casgrain (1897), 6 Que. Q.B. 12. For its

	ss. 9; POGG; 91(11); 91(29); 92(10)(c); 91(27)	
Natural Resources (and Food)	ss. 91(1A); 92A; 95; 108; 109	
Economy	POGG; ss. 91(1A); 91(2); 91(3); 91(29); 92(10); 92(13); 92(16); 121; 122	
Communications	POGG; ss. 91(29); 92(10); 92(13); 91(27); 92(16)	
Population	ss. 91(25); 95	

Figure 1.1: Canada's Strategic Constitution

Figure 1.2 illustrates the interaction between the various factors of strategic power and the diplomatic and military instruments of the Canadian state in 'making' Canadian strategic power. The factors of power may be seen as the building blocks of the Canadian state's strategic power, with the two instruments as the output or manifestation of this strategic power. It stands to reason that there is dynamic interaction between and among the various factors of power, which in and of themselves are not to be treated as strictly discrete, but rather as illustrative.

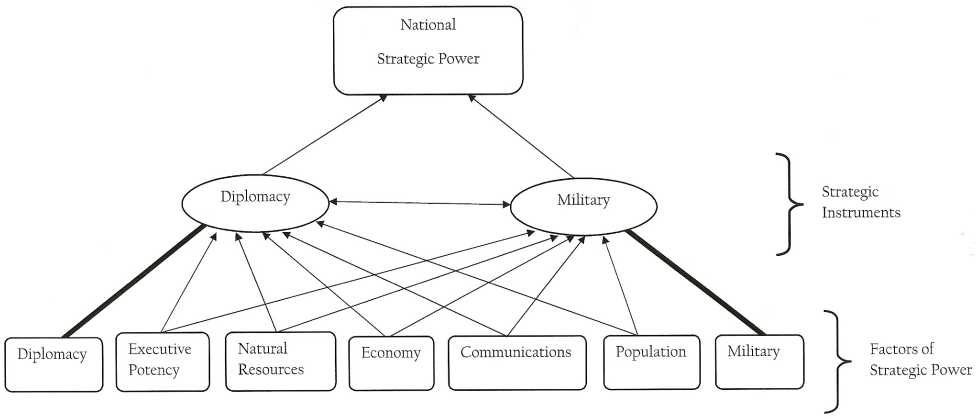

Figure 1.2: The Factors or Elements of Canadian National Strategic Power

part, Parliament, strictly speaking, constrains or conditions this executive power. Naturally, we should concede that the effective identification of federal legislative powers with executive powers is often weakened, although certainly not emasculated (indeed, far from it, electoral mandate and control of the machinery of government by the executive oblige), in the context of minority government.

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Within the context of the very *du jour* Afghan War, this article attempts to distil the implied or effective power of the Canadian state, as suggested by the Constitution. The military and also diplomatic instruments are central to such an analysis; however, as will quickly become plain, all of the aforementioned factors of power play meaningfully in the 'constitutional statics' that inform aggregate Canadian power in respect of full war. Diplomacy, as here understood, includes such subsidiary *strategic* instruments as, *inter alia*, treaties, development aid, sanctions, intelligence and various types of 'information sharing.' It also includes such strategic capabilities as coercion, negotiation, lobbying, important (strategic) appointments and the international deployment of certain national assets. We discuss the military instrument in Canadian strategic power in the next section.

B. The Canadian Constitution and the Military Instrument

While Canada, in practice, had no formal diplomatic capacity at Confederation, it did have a slight modicum of military power projection against the Americans – to wit, volunteer land and naval militias that acted in support of British regulars, for all of which, under section 15 of the 1867 Act, "[t]he Command-in-Chief" was "declared to continue and be vested in the Queen" (in whom "Executive Government and Authority of and over Canada" was vested under section 9), and legislative responsibility for which would lie with Parliament under the so-called defense or militia power of section 91(7). However, the Canadian militia, whether mobilized for domestic strategic purposes (such as insurrection, rebellion or emergency) or, to the extent possible, deployed internationally, was always to be in the strict service of the interests of the British Empire. For these purposes, let us recall that the second recital of the preamble to the 1867 Act, reads that the "Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire" – to which the Canadian constitutionalist F.R. Scott adroitly replied: "what does 'promote the interests of the British Empire' mean in law?"[8] And in fact, the militia power of section 91(7) – perhaps because it was not intended to be understood outside the context of British imperial power – was, according to the late great Canadian jurist Bora Laskin, scarcely developed and "never authoritatively defined"[9] in the constitutional jurisprudence.

[8] F.R. Scott, *Expanding Concepts of Human Rights*, *in* ESSAYS ON THE CONSTITUTION 358 (1977). As mentioned, the only provision of the 1867 Act that explicitly references foreign affairs is section 132, although it speaks to the implementation by Canada (legislative and executive branches) of *imperial* or British Empire treaty obligations. In the famous and controversial *Labour Conventions* case of 1937 (A.G. Can v. A.G. Ont. *et al.*, [1937] 1 D.L.R. 673), the Privy Council interpreted this imperial treaty implementation provision in section 132 of the 1867 Act by conceiving of the division of powers between the federal and provincial governments as "watertight compartments," thereby distributing treaty *implementation* power between the federal and provincial legislatures and governments (depending on whether a treaty subject matter falls under federal, provincial or joint jurisdiction).

[9] BORA LASKIN, CANADIAN CONSTITUTIONAL LAW 199 (4th ed., 1975).

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Since the royal prerogative – which exists at common law – is and remains, constitutionally speaking, dominant in governing Canada's strategic military affairs, the dearth of strategically meaningful jurisprudence on sections 15, 91(7), 117 and also 118 – the only sections of the 1867 Act that explicitly reference the military instrument – is far from crippling to a proper constitutional understanding of the potency of Canada's military instrument.[10] For strict strategic purposes, it is section 15, plus the more general regal executive power in the said section 9, and, hovering above and beyond these sections, the royal (executive) prerogative, that are strategically most important. Indeed, the dearth of jurisprudence may also betray the basic fact that Commonwealth courts have historically presumed, and largely continue to presume, that foreign and military matters – questions of so-called 'high policy' – are *generally* non-justiciable; that is, they do not lend themselves to the judicial process, and that the executive is institutionally more legitimately placed to dispose of these issues.

In *Aleksic v. Canada*,[11] for instance, the Ontario Superior Court of Justice held that tort claims against the Government of Canada for damage incurred during the 1999 NATO bombing of Yugoslavia were non-justiciable precisely because the bombing decisions were purely matters of high policy – much as would have been the historic Canadian decision to join the NATO alliance or any military alliance, for that matter.[12] However, what was justiciable – and the Court here built on the innovative holding almost two decades earlier in *Operation Dismantle*[13] – was subject-matter that lay at the intersection of such high policy and Charter rights; such as claims that the bombing campaign violated the plaintiffs' section 7 (life, liberty and security of the person) and section 15 (equality and non-discrimination) rights. Relying on *Operation Dismantle*, the Court dismissed the Charter claims, with Justice Heeney declaring at paragraph 69 that "[t]o hold otherwise would permit any citizen to, in effect, hijack Canadian foreign policy."

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[10] *See*, for instance, the unqualified wording of Lord Reid in Chandler v. Director of Public Prosecutions, [1964] 1 A.C. 763: "It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised. I need only refer to the numerous authorities gathered together in China Navigation Co. Ltd. v. Attorney-General [(1932) 2 K.B. 197]. Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court."

[11] Aleksic v. Canada (2002), 215 D.L.R. (4th) 720.

[12] Even if the issue were justiciable, the Crown would be immune in tort by virtue of the fact that the bombing decision was one of so-called pure policy, as well as by virtue of section 8 of the *Crown Liability and Proceedings Act*, which strategically immunizes the Crown from tortious liability "in respect of anything done or omitted in the exercise of any power or authority exercisable for the Crown, whether in time of peace or war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces."

[13] Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441.

In Operation Dismantle, what had been challenged was a decision by the Canadian government to allow the testing of American cruise missiles on Canadian territory. This testing was alleged to have been in violation of section 7 of the Charter on the grounds that, by hosting the missiles on Canadian soil, the Government of Canada had increased the risk of war involving Canada. Justice Wilson wrote in that decision:

> The government's decision to allow the testing of the U.S. cruise missiles in Canada, even an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(a) of the *Charter*. It was not insulated from review because it was a 'political question' since the Court had a constitutional obligation under s. 24 of the *Charter* to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.[14]

In the end, the Supreme Court ruled in *Operation Dismantle* that there was no violation of section 7 of the Charter. It determined that there exists a strong presumption that government action of a *state-to-state* nature that is not directed at, or that only incidentally affects, a particular Canadian was never intended to be captured by section 7 – or by any other Charter right, for that matter. Although opening the door for more Charter actions on strategic questions – particularly those touching individual rights – the Court's ruling, for all practical intents and purposes, actually concretized the general dominance of the royal prerogative in respect of the military instrument.[15]

Aleksic treated, somewhat parenthetically, the question of whether the Charter applies to activities outside the territorial limits of Canada. The Court, relying on its earlier holding in *Cook*,[16] held that, conditionally, it did. However, the *Cook* ruling was eclipsed, not

[14] *Supra* note 13. This citation is taken from the summary of the case.

[15] We should add that, in the hypothetical event that military activity of the Canadian government under the prerogative should be found to be in violation of a *Charter* right, there is evidence to suggest that this violation would likely be saved under section 1 of the *Charter*, which reads that the rights and freedoms in the *Charter* are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In *obiter*, in the *Operation Dismantle* case, Justice Wilson mused that, were the government to impose conscription for overseas service in wartime, this would seem to be in violation of section 7 of the *Charter*, but would meet the reasonable limitation in section 1. Contrariwise, she supposed, a government decision to seize citizens for military service without enabling legislation would unequivocally violate the *Charter*, under both sections 7 and 1.

[16] R. v. Cook, [1998] 2 S.C.R. 957. The Supreme Court held that a Canadian citizen questioned abroad is still entitled to *Charter* protection as long as the application of the *Charter* does not interfere with the sovereign authority of the foreign state in question; more precisely, as long as there is no objectionable interference with the exercise of the foreign state's jurisdiction.

uncontroversially, by *Hape*,[17] a case which provided for a two-part test to determine when there was extraterritorial applicability of the Charter: first, the conduct at issue has to be that of a Canadian *state actor* caught by section 32(1)[18] of the Charter; and second, pursuant to international comity, the foreign state on whose territory the conduct occurs has to give its consent to the extraterritorial application of Canadian Charter or constitutional rights. The latter, presumed to be an improbable condition, thereby reasserts the general immunity of military matters from judicial control. Indeed, the royal prerogative, in relation to military matters, develops its own insulation from judicial control. It is highly noteworthy, therefore, that the Supreme Court, in a unanimous 2008 decision, qualified this improbable applicability of the Charter in *Khadr*[19] (henceforth *Khadr 2008*), stating that the Charter applied to Canadian officials "to the extent that the conduct of Canadian officials involved [Canada] in a process that violated Canada's international obligations." The Federal Court of Appeal reaffirmed this ratio in *Khadr 2009*[20], upholding the decision of the Federal Court[21] earlier that same year. The Court of Appeal reasoned as follows: First, based on *Khadr 2008*, it was clear that Omar Khadr's section 7 Charter rights were violated by virtue of Canadian officials' participation in a process (i.e. the questioning of Khadr by Canadian officials, knowing as they did that he had been maltreated via sleep deprivation by American officials at Guantanamo Bay, Cuba, contrary to international law,[22]); second, the section 7 violation was not saved by section 1 of the Charter;[23] and third, the remedy prescribed by the Court that the Government of Canada must request of

[17] R. v. Hape (2007), 280 D.L.R. (4th) 385.

[18] Section 32(1) specifies that the *Charter* applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . . ; and (b) to the legislature of each province in respect of all matters within the authority of the legislature of the province. Section 32(1) does not provide for an explicit territorial limit on the application of the *Charter*.

[19] Canada v. Khadr, [2008] S.C.J. No. 28. The Supreme Court found that section 7 of the *Charter*, relating to "fundamental justice," was engaged in this case, thereby imposing "a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process [i.e. the questioning of Omar Khadr at Guantanamo Bay] that is contrary to international law and jeopardizes the liberty of a Canadian citizen." This important determination was in fact somewhat anticipated by Justice LeBel's reasons for the plurality in *Hape*, *supra* note 14, where he noted at paragraph 101: "I would leave open the possibility that, in a future case, participation by Canadian [state actors] in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the Charter [...]."

[20] Khadr v. Canada, 2009 FCA 246.

[21] Khadr v. Canada, [2009] F.C.J. 462.

[22] The Canadian courts deferred to U.S. jurisprudence in a Rasul v. Bush, [542 U.S. 466 (2004)], in respect of the determination of illegality of the said interrogation process at international law.

[23] At paragraph 63, Justices Evans and Sharlow, writing for the majority and citing HOGG, CONSTITUTIONAL LAW OF CANADA 38-46 (5th ed., 2007), note that the Supreme Court has already stated that a breach of section 7 could only be validated under section 1 in exceptional circumstances, such as "natural disasters, the outbreak of war, epidemics and the like."

the United States the repatration of Khadr was wholly appropriate. Finally, in 2010, the Supreme Court, in *Khadr 2010*,[24] unanimously reaffirmed the section 7 breach of Khadr's Charter rights, but determined that the remedy of requiring the federal government to seek the repatriation of Khadr to Canada was not appropriate and just in the circumstances. According to the Court, while there was a necessary connection between the breach of section 7 and the remedy, "the remedy [...] gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests." The Court was also concerned about evidentiary uncertainties in this case, as well as the overall legitimacy of the judiciary contradicting or directing the executive on matters of foreign affairs – that is, affairs in which the military and diplomatic instruments of the state are cardinal. In its summary, the Court, in privileging declaratory relief as the appropriate new remedy for Khadr, wrote that "judicial review of the exercise of the prerogative power for constitutionality remained sensitive to the fact that the executive branch of government was responsible for decisions under this power, and that the executive was better placed to make such decisions within a range of constitutional options."

In the aggregate, the *Khadr* holdings, surely demand rapid clarification, as they together greatly muddy the erstwhile clear, prerogative-laden *marge de manoeuvre* of Canadian officials acting abroad in complex operations (including, arguably, some military operations – discussed below), the international legality of which is not always within their control (and for which there is, in the *Khadr* 2010 vernacular, considerable "evidentiary uncertainty"), or indeed not always decisive in Canadian calculations in respect of where the state's strategic interests lie. For instance, returning to *Aleksic*, could one not have argued, on the logic of *Khadr 2008* and *Khadr 2009*, that the Kosovo war was illegal at international law (*ius ad bellum*), and that the consequent activities of Canadian troops and officials in Kosovo were, on the balance of probabilities, contrary to the Charter? Or that Canadian intelligence agents collecting information on threats emerging from Iraq during the arguably illegal war in Iraq (also in terms of *ius ad bellum*) might be at risk of acting in contravention of the Charter? Or that Canadian intelligence officials in the full war case that interests us in this article might be acting contrary to the Charter in, say, questioning individuals who had previously been subjected to torture by the Afghan government. Affirmative answers to these counterfactual queries would surely be tantamount to meaningfully circumscribing some of the strategic potency of Canada's military and diplomatic instruments in the world.

Indeed, the 2008 Federal Court *Amnesty International*[25] decision, issued prior to *Khadr 2008* and thus relying on *Hape*, affirmed that the Charter did not apply to the conduct of

[24] Canada v. Khadr, [2010] S.C.J. No. 3.

[25] Amnesty International v. Canada, 2008 F.C. 336.

Canadian Forces personnel in detaining or transferring Afghan detainees; that is, even though the Forces were clearly Canadian state actors, the application of Canadian constitutional rights to their detainees was not consented to by the Afghan government. So while the question which lay at the intersection of the prerogative and a claimed constitutional right was easily justiciable, this mattered little in practice, as the effective *marge de manoeuvre* of the Canadian Forces in Afghanistan was unaffected by the decision.[26] This holding was roundly upheld by the Federal Court of Appeal,[27] and a subsequent application for leave to appeal the *Amnesty International* decision was dismissed without reasons by the Supreme Court[28], notwithstanding the intervening *Khadr 2008* decision. *En attendant*, it must be posited, although perhaps controversially, that Charter considerations, as a general rule, continue to matter little in strategic decision-making by the military in Canada. In other words, *Khadr 2008*, *Khadr 2009*, and *Khadr 2010* notwithstanding, the Charter is *for the time being* not a very material bar to Canadian military strategic power at least outside Canadian borders.

Of course, in addition to the courts interpreting or controlling the scope of the prerogative in strategic matters through the common law, legislation may also function to clip or eclipse the prerogative. The National Defence Act, for instance, governs the conduct of the Canadian Forces and the administration of the Department of National Defence on the strength of section 91(7) Federal Militia Power of the 1867 Act. And to the extent that the provisions of the Act speak explicitly or by necessary implication to matters otherwise coming under the purview of the royal prerogative, the legislative provisions, under the constitutional doctrine of parliamentary supremacy, trump the prerogative. Notably, section 31 of the Act provides for "active service" designation by the Governor in Council (the executive or government), which may seem to destabilize the historically untouchable royal prerogative in respect of troop deployments. In practice, however, it seems that, at least for the time being, this provision has not generally been viewed or treated as a statutory rule in respect of deployment of the Canadian Forces.[29]

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[26] In *Amnesty International*, [2008 F.C. 336], Justice Mactavish, in *obiter*, suggested that there remains some uncertainty in respect of the possibility that the military, because of its coercive character, might require a *sui generis* test for extraterritorial application of the *Charter*. In this respect, Mactavish tracks the important British holding in Al-Skeini et al. v. Secretary of State for Defence, [2007] UKHL 26, in which it was determined that the UK Human Rights Act, 1998, which effectively implemented into British domestic law the European Convention on Human Rights, did apply to British public authorities – in the event, the British military – to the narrow extent that they exercised effective control on foreign territory through military detention facilities, as with embassies and consulates, operating on the consent of the Iraqi government. Strangely, *Al-Skeini* is not at all referenced in *Amnesty International* or in the cognate Canadian jurisprudence in *Cook*, *Hape* or the *Khadr* line of cases.

[27] Amnesty International v. Canada, [2008] F.C.J. No. 1700.

[28] Amnesty International v. Canada, [2009] S.C.C.A. No. 63.

[29] CRAIG FORCESE, NATIONAL SECURITY LAW 154 (2008). *See*, however, the dissent in *Aleksic*, *supra* note 11, by Justice Wright, suggesting that the active service provision in the National Defence Act should now be seen as having replaced the royal prerogative for military deployments.

In the meantime, section 32 of the Act states that "[w]henever the Governor in Council places the Canadian Forces or any component or unit thereof on active service, if Parliament is then separated by an adjournment or prorogation that will not expire within ten days, a proclamation shall be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit on the day appointed by the proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day." This provision clearly adds a perfunctory measure of legislated Parliamentary involvement in at least the discussion of military matters, broadly put, at the expense of the royal prerogative. However, this means that Parliament is only strictly required to meet and sit *after* a given declaration of war or troop deployment and, given the absence of specific language to that effect, without a legal mandate for scrutiny – let alone control, of strategic or tactical operations of the Forces. Moreover, considering that the weight of the evidence continues to suggest that there is no constitutional requirement for Parliament to debate or vote, *ex ante*, on Canadian declarations of war or troop deployments[30], the prerogative for the military instrument clearly emerges unmolested – in strategic terms, at least.

Provincial – that is, province-level – considerations do not figure prominently or obviously in most elements of the strategic military instrument. They are important, however, in respect of various permutations of Canadian military deployment or so-called 'call-out' on Canadian soil. Classically, the Canadian Forces may be called out in aid of the civil power, which is governed by Part VI of the National Defence Act. This aid of the civil power involves the prevention or suppression of an anticipated or actual riot or disturbance of the peace that is deemed by the relevant provincial attorney general to be exceeding the capabilities of provincial civilian authorities. This call-out may be requisitioned in writing by the relevant provincial attorney general, following which, according to section 283 of the Act, "[t]he Canadian Forces or any part thereof called out in aid of the civil power shall remain on duty, in such strength as the Chief of the Defence Staff or such officer as the Defence Staff may designate deems necessary or orders, until notification that the Canadian Forces are no longer required in aid of the civil power is received from the attorney general of the province concerned and, from time to time as in the opinion of the Chief of the Defence Staff the exigencies of the situation require, the Chief of the Defence

[30] Some might have argued that the first (2006) Harper government's formal and public commitment to hold Parliamentary votes on military deployments might have been the start of a 'convention-in-the-making' in Canada on legislative control of the Canadian Forces. The Parliamentary vote to end the military mission in Afghanistan in 2011, for instance, might have been further evidence of such a convention-in-the-making. However, the 2010 decision of the (second) Harper government to continue Canada's military role in Afghanistan for the purpose of training Afghan forces (rather than for strict combat) was taken *sans* Parliamentary vote. It therefore comfortably reasserted what had already been true theretofore – even if one had argued that a convention had until then been in the making: that the matters of troop deployment and of the purposes or objectives or aims of such deployment fall strictly under the aegis of the royal prerogative.

Staff may increase or diminish the number of officers or non-commissioned members called out."

The federal government may equally trigger the domestic deployment of Canadian Forces without the provinces. This includes the ill-defined "public service" deployments under the National Defence Act in respect of a law enforcement matter that, according to section 273.6(2) of the Act, (a) is in the national interest (a term of art evidently undefined in the legislation, and therefore subject to executive discretion[31]), and (b) cannot be effectively dealt with except with the assistance of the Canadian Forces.[32] More fundamentally, however – and this gets to the core of the federal state's constitutional capabilities in respect of *strategic* domestic military deployment – any threat or emergency (or indeed attack) emanating from, or materially related to, foreign states or parties could (and likely would, depending on its assessed scale) be addressed under the Emergencies Act (not the aid of the civil power provisions), including through the declaration by the federal executive of a public order, international or war emergency. The Emergencies Act therefore triggers, or yields to, a host of potent executive capabilities and assets, including the military instrument. Moreover, the entirety of the ambit of this military instrument afforded by the royal prerogative in the context of strategic emergencies – domestic or international – is not exhausted or replaced by this Act.[33]

The provinces also loom large in respect of section 117 of the 1867 Act, which states that "[t]he several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country." This is a powerful expropriation provision for the federal government, affirmed most recently in the *Human Rights Institute* ruling[34] in 2000, which upheld the Government of Canada's right to

[31] *Id.*

[32] CRAIG FORCESE, *supra* note 30, at 168-170, observes that two federal orders-in-council were issued in the 1990s, pursuant to the royal prerogative, in relation to domestic deployment of the Canadian Forces *solely* on the initiative or approval of the federal government: the first, the Canadian Forces Assistance to Provincial Police Forces Directions (P.C. 1996-833), addresses federal military assistance to provincial law enforcement agencies; the second, the Canadian Forces Armed Assistance Directions (P.C. 1993-624), addresses the deployment of Canadian special forces assets. Both orders-in-council address disturbances of the peace, likely or actual, deemed of national interest. Notes Forcese, at 170: "Out of an abundance of caution, […], the preferable approach is to treat the order-in-council provisions as procedures governing the application of the [*National Defence Act*] public service powers to the particular circumstances to which they relate."

[33] Indeed, it is notable that, of the four emergencies treated in the Emergencies Act – public order, welfare, international and war – the statute is most laconic in respect of the war emergency. Surely, this is because it is near impossible for legislation to restrict or condition the entirety of executive behaviour in the context of the most serious national emergencies or situations. The gap between what may be necessary for the executive in such situations and what is explicitly permitted or conditioned in the statute is therefore equivalent to the state's emergency (royal) prerogative.

[34] Human Rights Institute of Canada v. Canada, [2000] 1 F.C. 475.

expropriate land from British Columbia for purposes of continuing a torpedo testing arrangement with the United States near Nanoose Bay. While section 117 is an executive power (not a legislative power), its strategic force is similar to that of the non-military declaratory power (a legislative provision) in section 92(10)(c) of the 1867 Act, and it overcomes the general presumption of provincial land (and resource) ownership outlined in section 109. To be sure, of course, Parliament may enact laws under the section 91(7) militia power that have the very same effect as section 117.[35]

Section 109 is in fact a key strategic section for purposes of the natural resource factor of power. Along with national economic capacity and population, both in upcoming sections, the natural resources factor greatly influences Canada's military instrument (and indeed the diplomatic instrument) through avenues that are generally indirect. Of course, these factors of power are greatly complicated by the federalism dynamic in Canada, which means that the strategic military instrument, while *prima facie* dominated by the federal executive, is in reality undergirded by highly nuanced federal-provincial constitutional dynamics, as well as by related factors of power among the factors of power identified above. We treat all of these in some detail in the case study below on the Afghan war as a proxy for *bona fide* Canadian war-making.

C. The Strategic Constitution in Action – Implied National Power and the Afghan War

Until very recently, Canada was involved, head first, in its first *bona fide* war – in Afghanistan – since the 1950-53 war in Korea. The Korean and Afghanistan missions are qualitatively differentiable from intervening 'non-full-war' or 'non-*bona fide*-war' military missions (including and especially Canadian peacekeeping missions) like Suez (1956), Congo (1960), Cyprus (1964), the Middle East (1970s and 1980s), Iran-Iraq (1988), the Persian Gulf (1990), Somalia (1992), the Balkans (the 1980s), Haiti (the 1990s) and even Kosovo (1999), principally in virtue of the superior degree or intensity to which these two missions engaged the various strategic factors of power of the Canadian state; that is, the strategic factors that are part of the Strategic Constitution construct developed above.[36] The stated Canadian goals or objectives (the 'definition of victory,' as it were) for the war in Afghanistan – with at least half of the total focus being on Kandahar province – were

[35] This is affirmed by the author in GÉRARD LA FOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CONSTITUTION 155 (1969), on the strength of the 1874 holding in L'Union St. Jacques de Montréal v. Bélisle (1874), 6 P.C. 31. The age of the case likely speaks less to the import of the ruling itself than to the aforementioned patent penury of cases on the strategically important militia power.

[36] This means that we do not, strictly speaking, define war, for purposes of this article, as solely a function of a declaration of war by the federal government or Parliament (itself not a constitutional or even yet conventional requirement in Canada); that is, analytically, in strategic terms, war may be understood as that strategic end or scenario that maximally (and certainly more than any other scenario) engages the various factors of power of the state, or that engages these factors of power over and above a *de minimis* threshold.

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numerous and diverse, ranging from providing security in Kandahar (and, by significant extension, one can infer, for Canada), to providing basic services (e.g. water, education, employment) and humanitarian assistance in Kandahar, to contributing to the stabilizing of the Afghanistan-Pakistan border. The Canadian government also stated that it wishes to contribute to the creation of nation-wide institutions for Afghanistan, and to national reconciliation among competing groups, tribes and militias.[37] Finally, in 2010, the Canadian government decided that, after 2011, Canada's military role would morph from combat to the training of the Afghan forces.[38]

Strategic engagement for Canada in the Afghanistan war (and in *bona fide* war in general) has both upstream and downstream dimensions. The upstream dimensions include national preparation for war, broadly speaking, as well as the national declaration of war (and related pre-war decision-making). Downstream dimensions of war include strict military operations (i.e. combat), national support of the war (in particular, material support of the war), war-time decision-making, as well as the declaration, treaty or agreement to end the war.

I. National War Preparation

Generally, national preparation for a war like the Afghan war has material and social aspects. We focus in this article almost exclusively on so-called 'material' aspects of war preparation – that is, the 'material' resources, including manpower, that underpin national efforts to prepare or plan for military missions. Evidently, there exist important social (or socio-psychological) aspects to war preparation, including the development or molding of the national 'geist,' mentality, 'spirit' or even culture that disposes – or fails to dispose – a given population to perform in, endure and otherwise support national war efforts;

[37] The goals for the Afghan mission arguably morphed over the years since the start of the war in 2001, with the most pronounced inflection point surely coming when the Canadian military mission moved to the more dangerous theatre of Kandahar province from Kabul in 2005. The priorities cited in this paper reflect the last comprehensive statement of the goals for the war by the Canadian government. *See* The Government of Canada, *Canada's Engagement in Afghanistan,* available at: http://www.afghanistan.gc.ca/canada-afghanistan/priorities-priorites/index.aspx?lang=eng (last accessed: 24 April 2012). *See also* JANICE GROSS STEIN & EUGENE LANG, THE UNEXPECTED WAR: CANADA IN AFGHANISTAN 14 (2007), where the authors suggest that, to the extent that any strategic coherence could be found in Canadian motives in their participation in the 2001 to 2005 International Security Assistance Force (ISAF) Kabul mission, it consisted primarily in an "early in, early out" imperative – high symbolism, low casualties and high 'linkage'; that is, material, positive strategic spillover into the overall bilateral relationship with the U.S. – all readily within the realm of the federal executive's royal prerogative. For a description of Canada's broader state-building activities in Kandahar, *see also* Ben Rowswell*, Kandahar and Grassroots State Building*, GLOBAL BRIEF (Winter 2011), available at: http://globalbrief.ca/blog/2011/02/18/grassroots-statebuilding-lessons-from-kandahar/ (last accessed: 24 April 2012).

[38] *Supra* note 30.

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however, for the purposes of this analysis, we set aside these more diffuse aspects of strategic power. Needless to say, education – a largely provincial constitutional responsibility – is a manifestly non-negligible lever here (one that, of course, we do not strictly include in the Strategic Constitution construct.

The strict national planning function for war lies uncontroversially with the federal government – principally via the royal prerogative and, in particular cases, under the aegis of the National Defence Act [relying on the section 91(7) militia power of the 1867 Act], which, as established above, provides legislative underpinning for, *inter alia*, the activities of the Department of National Defence and the Canadian Forces. Defence, intelligence, security and foreign relations planners in various departments of the federal government regularly iterate or 'game,' or have exclusive constitutional capacity to iterate or 'game,' war plans and military contingencies involving a wide variety of enemies (state and non-state), alliances, geographic or spatial theatres, species of conflict (conventional or other), length and intensity of conflict, and a host of other variables and scenarios. Defensive bases may be established anywhere in Canada; where not on existing federal lands, this can be done through the purchase of private or provincial land or through outright expropriation of such land.[39] Recall that section 117 of the 1867 Act allows for federal expropriation, on the strength of *Human Rights Institute*,[40] of "any Lands or Public Property required for Fortifications or for the Defence of the Country" – evidently, an *in extremis* policy-political option. We might also presume that an executive power to expropriate is inherent in such federal heads of power as the section 91(7) federal militia power of the 1967; that is, the federal militia power. Offensive bases – outside of Canadian territory, or in another country – could clearly be established under federal competence under the militia power, although such a capacity would clearly depend on agreement or

[39] Note the sporadically mooted, exotic – yet strategically non-negligible – possibility of Canada annexing the Caribbean island of Turks and Caicos, currently a British Overseas Territory. While such annexation has historically been mooted by Canadians for apparently 'touristic' reasons, one could clearly imagine strategic use of such a territory for strategic purposes, such as the basing of Canadian military (including naval) and intelligence assets. (The relevance of Canadian geography – land and nautical – as a factor of strategic power again becomes more plain.) On the Canadian side, the simplest and strategically most 'elegant' form of the annexation 'transaction' would be for the federal Parliament (through initiation of the federal executive, of course) to pass an act of Parliament to make the Turks and Caicos a federal territory, as with the Yukon, the Northwest Territories and Nunavut. *Prima facie*, it would seem to make little strategic sense to attempt to make T&C a *bona fide* Canadian province, as this form of annexation would require a large degree of deference to the provinces (sub-strategic actors) via the constitutional amending formula required for the granting of such provincial status – to wit, seven provinces representing at least 50 percent of the Canadian population – as per sections 38(1) and 42(1)(f) of the 1982 Act. Moreover, even once past the process of becoming a province, Turks and Caicos as a province would acquire a host of strategic or quasi-strategic constitutional powers – principally in section 92 of the 1867 Act, but also, as discussed the 'quasi-strategic' education competence – that would arguably dilute the potency of the federal executive's capacity to use it for deliberate strategic ends.

[40] Human Rights Institute of Canada v. Canada, [2000] 1 F.C. 475.

acquiescence by another host state.[41] Military procurement (spending power) under the National Defence Act is also exclusively a federal capability.[42] Procurement is clearly a function, *inter alia*, of national economic capacity (national purchasing power),[43] but it would seem that the critical vector of enquiry for purposes of determining the potency of national preparatory capacity for *bona fide* war is the extent to which the federal state can, constitutionally speaking, properly *mobilize* national economic capacity for purposes of military preparation. Microeconomically, this would involve monitoring or driving or conditioning industrial performance, efficiency or output in certain strategic industries (e.g. certain natural resource, energy, manufacturing and heavy industrial sectors, strategic communications, strategic transportation and even certain agriculture), as well as assuring the security of these strategic industries – or protecting their very existence in Canada. Notes John Kenneth Galbraith in *The New Industrial State* in respect of this federal state-led military (economic) planning function in the United States:

> With the $60 billion it spends [...] each year [...] the [U.S.] Department Defense supports [...] the most highly developed planning in the industrial system. It provides contracts of long duration, calling for a large investment of capital in areas of advanced technology. There is no risk of price fluctuations. There is full protection against any change in requirements, i.e. any change in demand. Should a contract be cancelled the

[41] Again, see note 37 above regarding possible federal purchase of Turks and Caicos for purposes of a potential military base.

[42] Section 36 of the National Defence Act states: "The materiel supplied to or used by the Canadian Forces shall be of such type, pattern and design and shall be issued on such scales and in such manner as the Minister, or such authorities of the Canadian Forces as are designated by the Minister for that purpose, may approve." While provinces do not typically engage in pure military procurement – legally and constitutionally – their spending power allows them to purchase a very wide variety of assets – so-called 'dual-purpose' assets – that would certainly have military utility in both war preparation and military operations (specifically, defensive military operations on Canadian soil). First and foremost, these would include local and provincial police and emergency assets. To be sure, there is a strategic coherence issue generated by the great flexibility of the federal and provincial spending powers.

[43] Evidently, the larger the economic capacity of the country, other things being equal, the greater its ability to support the military campaign and related industries and production in the actual event of war, and to deter a potential enemy in the event of threatened war, given that the enemy – including an enemy like the Taliban – would to some extent infer the war-fighting capability of the country from its economic mass. Conversely, the smaller a country's economic capacity, other things being equal, the less its capacity to discourage strategic confrontation or, *in extremis*, military attack by another country. Naturally, the aggregate capacity of the Canadian economy is a function of an extremely complicated cocktail of variables. The same is true of the economy's capacity for strategic mobilization. These include: the macroeconomic capacity to resist strategic shocks; the general strength of the national economic union; the capacity to protect or lever strategic industries or sectors in international trade and investment agreements; the constitutional character of the national strategic transportation infrastructure; as well as the constitutional character of national strategic communications.

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> firm is protected on the investment it has made. For no other products can the technostructure[44] plan with such certainty and assurance.[45]

In actual wartime, to which we shortly turn, these capabilities would presumably need to be supplemented by a capability to require that the output of these strategic industries be mobilized specifically for war. Of course, there is no strict bar to federal legislation, under section 91(7) of the 1867 Act, creating certain public companies (Crown Corporations, presumably) or programs to produce, or to incentivize private companies (via the federal spending power[46]) to produce, specific strategically important output (e.g. munitions, fortifications, defensive infrastructure, military equipment, etc.). However, such companies or programs would doubtless bump up against non-negligible federalism issues relating to provincial regulation of most industrial concerns under the broad property and civil rights power [section 92(13) of the 1867 Act]. Indeed, section 91(7) is arguably just one of a very

[44] JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 71 (1967): "With the rise of the modern corporation, the emergence of the organization required by modern technology and planning and the divorce of the owner of the capital from control of the enterprise, the entrepreneur no longer exists as an individual person in the mature industrial enterprise. Everyday discourse, except in the economics textbooks, recognizes this change. It replaces the entrepreneur, as the directing force of the enterprise, with management. This is a collective and imperfectly defined entity; in the large corporation it embraces chairman, president, those vice presidents with important staff or departmental responsibility, occupants of other major staff positions and, perhaps, division or department heads not included above. It includes, however, only a small proportion of those who, as participants, contribute information to group decisions. This latter group is very large; it extends from the most senior officials of the corporation to where it meets, at the outer perimeter, the white and blue collar workers whose function is to conform more or less mechanistically to instruction or routine. It embraces all who bring specialized knowledge, talent or experience to group decision-making. This, not the management, is the guiding intelligence – the brain – of the enterprise. There is no name for all who participate in the group decision-making of the organization that they form. I propose to call this organization the Technostructure."

[45] GALBRAITH, *supra* note 45, at 30.

[46] Parliament enjoys expansive taxation and spending (i.e. fiscal) powers under sections 91(1A) and 91(3) of the 1867 Act, relating respectively to public debt and property and the raising of money by any mode or system of taxation. Section 91(1A), in particular, allows Parliament to borrow very significant amounts of money – both from Canadian and international sources – in order to drive national economic goals, bearing in mind policy-political considerations. Other sections likely (arguably) relevant to the constitutional existence of a muscular federal spending power include sections 102 and 106 of the 1867 Act, both dealing with federal appropriations. Section 102 states: "All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided." Section 106 states: "Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service." Of course, for both sections, "Public Service" of Canada is to be understood broadly – that is, something approximating the general welfare of the country (and certainly not as referring the federal civil service proper!).

large swath of constitutional levers available to the federal government and Parliament – policy-praxis notwithstanding – to prepare the country for war.

We established above that the federal Defence Production Act, constitutionally authorized by section 91(7), gives the Minister of Public Works and Government Services the presumptive lead in organizing the national defense production or supplies required to meet the needs of the Department of National Defence – in short, the military needs of Canada. The Act even suggests in section 12 that:

> [t]he Minister shall examine into, organize, mobilize and conserve the resources of Canada contributory to, and the sources of supply of, defence supplies and the agencies and facilities available for the supply thereof and for the construction of defence projects and shall explore, estimate and provide for the fulfillment of the needs, present and prospective, of the Government and the community with respect thereto and generally shall take steps to mobilize, conserve and coordinate all economic and industrial facilities in respect of defence supplies and defence projects and the supply or construction thereof.

However, because this section, like the rest of the Act, has not been litigated in any strategically meaningful sense, we do not at this time of writing know or understand the precise parameters of the federal government's power to substantially organize or mobilize Canada's defense industry (or indeed its economy at large), at peacetime, or indeed on a standing basis.[47] More broadly, federal capacity to prepare or plan for war is rooted in the dull lever of Parliament's competence over inter-provincial and international trade via section 91(2) of the 1867 Act, and more blunt levers like the federal spending power, the federal declaratory, federal expropriation powers and the various branches of the general power (residual, emergency, national concern and even inter-provincial significance).

The federal spending (and borrowing) power can be used to incentivize, through the federal tax system, production of, or investment in, specific products of military value (discussed below). It could also arguably be used to purchase a federal interest – however large or small – in a given property or concern – in order to assume federal legislative control over it, as per section 91(1A) of the 1867 Act. For instance, the federal government

[47] Note that the Canadian Security Intelligence Service (CSIS)'s enabling statute, the CSIS Act, may be partly rooted in section 91(7) of the 1867 Act, based on the holding in Attorney-General (Quebec) v. Keable v. Attorney-General (Canada), [1979] 1 S.C.R. 218. Much, if not most, of the basis for the Act would likely come from the residual branch of the general power, or POGG (Peace, Order and Good Government), in the 1867 Act.

could purchase a minority or majority stake in a given mine, munitions plant, communications concern or even shipbuilding or military aircraft company (constitutionally speaking, works, not undertakings) in order to claim for Parliament direct legislative concern over that work (where it would otherwise, in principle, fall within provincial legislative jurisdiction) – this in order to assure a specific quality or supply of a given product or service deemed critical to military success in Afghanistan. In addition, even in the absence of any desire to assume legislative control over a given work, it stands to comparable reason that the spending power may be used by Parliament to directly purchase for the federal government specific assets of military import that are otherwise not being produced at an acceptable quality or quantum.[48] The argument concerning the federal government's capacity to purchase petroleum – production of which is provincially regulated under section 92A of the 1867 Act, and ownership of which is, with the exception of the offshore brand, provincial under sections 108 and 117 of the 1867 Act – on the market, including at a possible premium, in order to not violate the North American Free Trade Agreement, for the purpose of building a national petroleum reserve readily comes to mind.[49] One could conceive of similar use of the federal purse for the purpose of building up, in war preparations, national reserves of iron ore (for shipbuilding, tanks, planes, body armor), nickel (bullets), copper (wiring) and many other raw materials – not to mention food – deemed essential to military equipment and infrastructure. The use of the federal declaratory power over uranium immediately after the Second World War is the obvious instructive precedent here. Note that the threatened use of the federal declaratory power [s.92(10)(c)],[50] while not issuing in federal jurisdiction over specific

[48] Federal purchases under the spending power that are not intentionally for military use, but which otherwise end up having a so-called 'dual-use' cannot, strictly speaking, be considered as part of national strategic economic capacity; that is, strategic capacity must link capacity with express – not accidental or incidental – ends.

[49] *See* the North American Free Trade Agreement art. 605, Jan. 1, 1994 (NAFTA), known as the 'proportionality clause, which repeats the prohibition in the Canada-U.S. Free Trade Agreement on Canadian restrictions of energy exports to the United States (in the NAFTA case, to Mexico also) for reasons of national conservation, supply shortages and price stabilization provided the share of total energy supply available for export purchase by the U.S. (or Mexico) from Canada falls below the average level of the previous 36 months. Indeed, the Article 605 proportionality clause tracks an almost identical proportionality clause in Article 315 in respect of all goods subject to the NAFTA. For a strategic petroleum reserve, the federal government could arguably use its spending power to purchase exported oil from the provinces on the free market, within the terms of the NAFTA. This would effectively require the federal government to effectively *outbid* potential American and Mexican buyers; that is, on volumes of oil over and above those which would have to be made available to them, based on historic sales over a representative period.

[50] This declaratory power has been used nearly five hundred times since Confederation, in particular in the transportation industry, and especially in respect of the once highly strategic (and still arguably somewhat strategic) rail sector – but also in respect of telecommunications and labor strikes of national significance. A declaration by Parliament is dispositive, meaning that the courts will not enquire into whether the 'work' – say, a uranium mine – in question, provided it relates to something physical, material or tangible, is *actually* for the general advantage of Canada. Signally, when the federal Parliament declared atomic energy for the general advantage of Canada in 1946, it also enacted the Atomic Energy Control Act. As this legislation was contested, because of traditional provincial dominance in the area of natural resources, the immediate use of the declaratory power by the federal Parliament effectively eliminated any uncertainty as to the legitimacy of the

works, could also in some cases have the requisite 'energizing' effect on the provincial regulators or the direct owners of the works in question, forcing them to align the operations of the works with the strategic – military – goals of the federal government in its (Afghan) war preparations. Historically, transportation and communications assets have often been targets of the declaratory power or threats of its use (although the declaratory power is certainly not limited solely to such types of assets[51]), even if the presumptive reasons behind such use of the power have not always manifestly been part of a military planning scheme. Expropriation for explicit military purposes could also occur under section 117 of the 1867 Act, and even, arguably, under the s 91(7) militia power of the 1867 Act.

In the event of a declared war emergency, of course, the Defence Production Act is supplemented by the Emergencies Act – constitutionally rooted in the federal emergency power in POGG – which grants the Canadian federal government, under that declared war emergency, expansive powers of economic mobilization and organization in support of the country's military efforts.[52] Where the provisions of the Emergencies Act are inadequate

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legislation and federal jurisdiction until such time as the Supreme Court, many years later, in the 1993 *Ontario Hydro* case (*infra* note 51), could confirm the statute on the basis of the national concern branch of the POGG power.

[51] *See*, for instance, the observation of Chief Justice Lamer in the judgement in Ontario Hydro v. Ontario, [1993] 3 S.C.R. 327, at para. 69: "There is no authority supporting the view that the declaratory power should be narrowly construed. Quite the contrary. It might, I suppose, have been possible to interpret s. 92(10)(c) so as to confine it to works related to communications and transportation such as those specifically listed in s. 92(10)(a) and (b) but the courts, including this Court, have never shown any disposition to so limit its operation, and a wide variety of works – railways, bridges, telephone facilities, grain elevators, feed mills, atomic energy and munitions factories – have been held to have been validly declared to be for the general advantage of Canada."

[52] The Emergencies Act coexists with the predecessor Energy Supplies Emergency Act, also rooted in the federal emergency power, which states at section 15(1), specifically in relation to petroleum resources, that when the "the Governor in Council is of the opinion that a national emergency exists by reason of actual or anticipated shortages of petroleum or disturbances in the petroleum markets that affect or will affect the national security and welfare and the economic stability of Canada, and that it is necessary in the national interest to conserve the supplies of petroleum products within Canada, the Governor in Council may, by order, so declare and by that order authorize the establishment of a program for the mandatory allocation of petroleum products within Canada in accordance with this Act." Note also that the Emergencies Act states, quite laconically, in section 40(1), only that, in the event of a declared war emergency, "the Governor in Council may make such orders or regulations as the Governor in Council believes, on reasonable grounds, are necessary or advisable for dealing with the emergency." This is the total extent of what is written in the "Orders and regulations" part for this type of emergency, as compared with more extensive descriptions of "Orders and regulations" for the other three types of emergency – public welfare, public order and international. This would suggest that the Act intends for there to be very expansive *marge de manoeuvre* for the executive to do whatever is "necessary or advisable" to address the war emergency. Naturally, such *de maximis marge de manoeuvre* does not eclipse or exhaust the overarching emergency or national security prerogative that is availed to the executive – over and above the Act. Moreover, to the extent that the government wishes to resort to, or cite, the specific "orders and regulations" made explicit under the other three types of emergency, there is nothing in the Act to stop it from declaring more than one type of emergency. Indeed, it would seem quite natural that a war emergency might also beget an international emergency, which would then entail, according to section 30 of the Act, orders and regulation

for purposes of dispatching a national war or security imperative, the federal government may still use the royal prerogative (emergency or national security prerogative) to achieve its ends.

In addition to direct defense production, there is the federal government's capacity to purchase or import from other countries the assets necessary for war preparation (or deterrence) and war-fighting. The larger the economy, other things being equal, the greater its purchasing power for such assets. That said, it stands to reason that excessive importation of strategic military assets also poses a significant strategic risk for a country, given its dependence on foreign supply and supply or distribution routes that could be disrupted at critical strategic moments. Still, strictly speaking, we will concede that the balance between indigenous defense-related production and imported production is very much a policy-political choice, rather than a constitutional concern, and that the core strategic observation stands: The larger the economic capacity of the state, the greater the potency of its military instrument, other things being equal, including as supported by purchases of foreign military assets. Of course, as we know, it is not just the magnitude of the factor of power – in this case, the national economy – that matters for purposes of determining aggregate strategic power, but also, critically, the capacity of the state to mobilize the factor, directly or indirectly, in support of the cardinal strategic instruments – the military and diplomatic instruments.

The Canadian state would also need to ensure that the military instrument is adequately populated to fight an effective war in Afghanistan. The size of the national military, outside of political discretion, is a function of national economic capacity and the aggregate national population. Far more directly, and to the extent that economic capacity (or national spending – specifically, on recruitment) and national population fail to yield

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relating to, *inter alia*, control or regulation or "any specified industry or service, including the use of equipment, facilities and inventory" and "the appropriation, control, forfeiture, use and disposition of property or services."

As an aside, it is interesting to observe that the expansive *marge de manoeuvre* given the executive for orders and regulation in the context of a war emergency is prefigured in the old War Measures Act of 1914, in which parliamentary oversight or control was considerably less robust and in which the delegation of legislative power from Parliament to the executive was at issue in the famous holding in Re. Gray, 57 S.C.R. 150. In that holding, Chief Justice Sir Charles Fitzpatrick notes, at para. 12, in respect of section 6 of the War Measures Act: "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 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."

adequate effectives for the military, one can justly enquire into the national capacity to require, on a standing or *ad hoc* basis, Canadian citizens to populate the military instrument. In other words, constitutionally speaking, what is the federal peacetime conscription capability? Is there a federal peacetime 'military training' capability ('requirement') short of conscription? While the second question tends toward the 'social' or socio-psychological dimensions we touched on above, the federal government could surely, in respect of the first question, legislate to effect military conscription, under the militia power. However, in such instances, Charter issues would doubtless be raised – in particular, to the extent that such conscription happens outside of a strict war context (i.e. in preparation for eventual war); indeed, it would seem that any violation of, say, section 7 Charter rights by a federal conscription law could well be saved under section 1 to the extent that the context is actually intra-war, rather than peace-time, *interbellum* or *antebellum*. In other words, intra-the Afghan war, section 1 would likely save a national conscription law in the event of a breach of section 7, or other, Charter rights. More to the point, would national conscription be considered disproportionate under the third branch of the Oakes test? Justice Wilson, in *Operation Dismantle*, speaks directly to this counterfactual in her *dicta*:

> Let us take the case of a person who is being conscripted for service during wartime and has been ordered into battle overseas, all of this pursuant to appropriate legislative and executive authorization. He wishes to challenge his being conscripted and sent overseas as an infringement of his rights under s. 7. It is apparent that his liberty has been constrained and, if he is sent into battle, his security of the person and, indeed, his life are put in jeopardy. It seems to me that it would afford the conscriptee a somewhat illusory protection if the validity of his challenge is to be determined by the executive. On the other hand, it does not follow from these facts that the individual's rights under the *Charter* have been violated. Even if an individual's rights to life and liberty under s. 7 are interpreted at their broadest, it is clear from s. 1 that they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." If the Court were of the opinion that conscription during wartime was a "reasonable limit" within the meaning of s. 1, a conscriptee's challenge on the facts as presented would necessarily fail.[53]

[53] Note, however, that the Canadian government could not rely on the Emergencies Act for purposes of conscription, which means that Parliament would have to pass an explicit law on conscription. Section 40(2) of

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II. Declaration of War and Related Decision-Making

There is absolutely no strict constitutional requirement that Parliament declare or approve a war.[54] No formal declaration of war was made in either of the said full or *bona fide* war cases of Korea or Afghanistan.[55] The declaration of war, constitutionally speaking, is the province of the federal executive, and is a creature of royal prerogative in its purest or highest form – judicially unreviewable, for all intents and purpose, in the absence of Charter claims.[56] Note that while, as mentioned, there was never a formal Canadian declaration of war on the Taliban government in Afghanistan in 2001, the Canadian Parliament did vote in 2007 – again, in a non-binding vote, and one that was not a matter of confidence – in favor of extension of the Afghan mission until 2009, and then again in 2008 to conclude the formal military mission in 2011.[57] At this time of writing, there has been *no* Parliamentary vote in respect of the subsequent executive decision to continue the Canadian Afghanistan mission after 2011 in a military 'support' or 'training' capacity only; that is, in a non-combat capacity. Relatedly, the federal executive, via the royal prerogative, uncontroversially has the constitutional competence to stand up any number of decision-making structures for the purposes of reaching the decision to go to war, as

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the Emergencies Act states: "The power [...] to make order and regulations [under the war emergency] may not be exercised for the purpose of requiring persons to serve in the Canadian Forces."

[54] *See* note 30 in respect of the possible constitutional convention in respect of such a Parliamentary vote requirement that might have been argued to have been developing in the early years of the first Harper government.

[55] Formal declarations of war by Congress are also not strictly required in American constitutional law in order for the executive to commence military operations.

[56] Laskin J.A. writes in Black v. Chrétien [(2000), 47 O.R. (3d) 532], at paras. 52 and 53:

'[...] I will briefly discuss prerogative powers that lie at the opposite ends of the spectrum of judicial reviewability. At one end of the spectrum lie executive decisions to sign a treaty or to declare war. These are matters of "high policy." R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett, [1989] 1 All E.R. 655 at 660, *per* Taylor L.J. Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations [Laskin is here referring to the standard from *Council of Civil Service Unions v. Minister for the Civil Service*, *supra* note 40]. At the other end of the spectrum lie decisions like the refusal of a passport or the exercise or mercy. [...]" Indeed, in Council of Civil Service Unions v. Minister for the Civil Service, [1985] 1 A.C. 374, Lord Roskill, at p. 148, famously invokes the broad category of "the defence of the realm" as one of the select few prerogative powers that are not "susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process" – noting that the courts are not (institutionally) best placed to determine whether the "armed forces [should be] disposed in a particular manner [...]." We may presume, in the Canadian context, that this is so to the extent that the said defence of the realm does not engage *Charter* rights – but that if it did, upon judicial review, the *Charter* claim would have little chance of success.

[57] The second extension vote came with several conditions, one of which was that other NATO allies must send at least 1,000 troops to southern Afghanistan. However, as this vote did not override the royal prerogative, this condition cannot be regarded as constitutionally (or legally, or indeed, for our purposes, strategically) binding.

well as for prosecuting the war (i.e. for wartime or intra-war decision-making). These structures may range from formal or *ad hoc* cabinet committees (war cabinets, as it were) to interdepartmental intelligence committees and indeed international watching or briefing groups. For instance, the Harper government, following the 2008 Manley report, stood up a formal cabinet committee on Afghanistan, with a supporting secretariat (the Afghanistan Task Force) in the Privy Council Office.[58]

The provinces do not play any constitutional role in any initiation of hostilities or a national declaration of war. This may seem self-evident, but has not always been resolved in favor of federal executives historically; that is, in other federations, past or present. Note the warning by James Madison in *The Federalist No. 19* of the danger of excessive sub-state influence in war preparations:

> Military preparations must be preceded by so many tedious discussions, arising from the jealousies, pride, separate views and clashing pretensions, of sovereign bodies; that before the diet can settle the arrangements, the enemy are in the field; and before the federal troops are ready to take it, are retiring into winter quarters.[59]

III. Military Operations

Military operations in the Afghanistan war are strictly the province of the federal executive, under the royal prerogative. Offensive operations – typically outside of Canada, and mostly in Afghanistan[60] – are uncontroversially so. Macro military issues from the determination of the enemy or adversary, to overall military doctrine, to the definition of victory or success, and tactical issues – from the determination of how many effectives and how much equipment to deploy, and to where and when, in support of the global objectives – all fall under the prerogative, effectively untrammeled. We should stress,

[58] Independent Panel on Canada's Future Role in Afghanistan, *Independent Panel on Canada's Future Role in Afghanistan*, MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES 34 (2008). Compare this *ad hoc* war cabinet with the *standing* national security committee of cabinet employed in the Australian government, which makes decision on everything ranging from declaration of war (and conclusions of peace) to military procurement.

[59] ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS 109 (2003). In Canada, evidently, certain provinces – often Quebec – will likely have strong views in respect of the strategic or policy-political wisdom of the federal state engaging in hostilities with one or more other states. These provincial views may carry moral or political weight, but their significance, in strict constitutional terms, is nugatory.

[60] Quite manifestly, there would be intelligence, logistical and transportation activities involving Canadian military assets outside of Afghanistan – all in order to advance Canadian interests and performance in the Afghan theatre.

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however, that the *Khadr 2008*, *Khadr 2009* and *Khadr 2010* stipulations that Canadian officials operating abroad are subject to the Charter "to the extent that the conduct of Canadian officials involved [Canada] in a process that violated Canada's international obligations" are, at least theoretically, operative on Canadian troops in the field; this would apply to the extent that the conduct of the troops is in violation of Canada's international legal obligations. And this would seem to pose complex implications for the behavior of troops in situations like the one at the centre of the *Amnesty International* case[61], discussed above, in which Canadian troops transferred Afghan detainees to Afghan authorities, arguably with the attendant possibility that they would be mistreated, if not outright tortured. *Amnesty International*, decided as it was prior to the said *Khadr* holdings, had easily reaffirmed the supremacy of the royal prerogative in military operations. But that holding is now somewhat compromised in the light of the *Khadr* holdings, and one of these outcomes surely must 'give' before long.

Of course, we also have in the *Khadr* holdings the implied oddity that the officials in question were Canadian *intelligence* officials, and not Canadian soldiers or military effectives. Were they soldiers, the implied impact on the royal prerogative of that holding would have been all the more plain. But the *Khadr* decisions did not seem to differentiate between *types* or *modes* of Canadian officials, and so we must assume, facially, that they apply with equal strength to Canadian intelligence, military and diplomatic officials operating abroad, among others; to analogize from the world of transport policy, that the *Khadr* line of holdings applies 'inter-modally,' as it were, to different modes or species of strategic officials. It is just that, arguably, military and diplomatic officials, operating as they do in the 'anarchical' world of international affairs[62], particularly in wartime[63], tend to abut areas of legal 'grey' in their operations, meaning that a 'hard' (non-theoretical or non-trivial) reading of the *Khadr* line cases could well constitute a very material fetter on their activities, and therefore, over time, a very material drag on the aggregate capacity of the federal government to achieve its ends in a *bona fide* war scenario like that in Afghanistan; this fetter could indeed apply to certain military sub-scenarios in the overall Afghan war.

It behooves us to also note the import of the 2009 *Smith* holding[64] as another possible 'clip' on the royal prerogative in respect of foreign affairs or strategy – or indeed, military

[61] *Amnesty International v. Canada*, *supra* note 24.

[62] *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977) for the concept and vernacular.

[63] Consider, for instance, a federal decision to initiate or participate in a war that is illegal at international law. This could arguably have been the case in Kosovo 1999, or in Iraq in 2003 (had Canada decided to participate), or in the prospective event of, say, a federal intervention in a foreign country, *sans* Security Council mandate, to, say, staunch a genocide or humanitarian disaster.

[64] Smith v. Canada, [2009] F.C.J. No. 234.

operations. And indeed, that case seems also consistent with the supposition made at the start of this paper that Canadian constitutional jurisprudence is patently astrategic; that is, even when it pertains to foreign affairs – in the *Smith* case, to the sub-strategic Canadian government intervention or non-intervention in an American death penalty case – there is little thought given, even in *obiter*, to the precedential import of the holding for more strategic fact patterns.

Let us recall that in the *Smith* holding, the Federal Court determined that the Government of Canada had breached the right to procedural fairness of Mr. Ronald Smith, a death-row inmate in the American state of Montana, by denying him diplomatic assistance for purposes of commuting his death sentence (or clemency support) – contrary to the long-standing policy of many erstwhile Canadian governments. The Court conceded that the exercise of the Government's prerogative in relation to foreign affairs was generally non-justiciable, but that "government decisions of an administrative character which affected the rights, privileges or interests of an individual were reviewable and were subject to the principles of procedural fairness." According to the Court, the said breach of procedural fairness consisted in the Government's arbitrary change of approach or policy in relation to clemency support for Canadians facing execution in foreign countries.

The *Smith* case could at some point take on strategic significance in so-called 'high policy' cases, including in respect of *bona fide* war scenarios like that of Afghanistan. For instance, a sudden or *prima facie* 'arbitrary' change in military alliances or relationships by a given Canadian government – very possible in the context of wartime military operations – could potentially frustrate the 'legitimate expectations' (an administrative law standard) of certain Canadians (e.g. those who may be commercially or financially invested in the ousted or now 'out of favor' foreign country). Such a counterfactual - nary considered in the reasoning in the *Smith* decision - not only speaks to potential, non-negligible judicial incursion into erstwhile prerogative-protected military affairs, but may also at some point be assimilated into government strategic decision-making, resulting in a more jurisprudentially pedantic (or conservative) – likely more risk-averse - calculus by the executive in respect of the employ of its military instrument.

Defensive operations – typically within Canada, as would happen in a possible attack of some species in Canada by the Taliban or their allies – are also under the purview of the prerogative, and may also be governed by the provisions of the Emergencies Act, discussed above; this is with specific regard to the provisions pursuant to a declaration by the federal executive (not Parliament) of a war emergency. But indeed, over and above the Act, the actions of the executive in the context of war are surely underpinned by the doctrine of necessity[65] (or the emergency and national security prerogatives). One can also safely

[65] For a treatment of the doctrine of necessity in Canadian constitutional law, consider Re: Manitoba Language Rights, [1985] 1 S.C.R. 721. The Court, in the unanimous judgment said: "Necessity in the context of governmental action provides a justification for otherwise illegal conduct of a government during a public emergency. In order

presume that domestic deployment of the Canadian Forces under a war emergency would trump the aid of the civil power provisions in Part IV of the National Defence Act (where call-out is requisitioned by the provinces), such that the provinces would play no material or direct strategic role in domestic defense operations.[66]

The Emergencies Act, like all legislation, is evidently subject to the Charter. However, the Charter also has a powerful notwithstanding clause (section 33) providing for the operation of laws by either the federal Parliament (or indeed provincial legislatures) notwithstanding certain sections of the Charter for a period of up to five years. This clause has not to date been invoked by any federal government, and would not be operative on the 'democratic rights' in sections 3, 4 and 5, as well as the 'mobility rights' in section 6. However, in the context of military operations intra-war, the federal government would have available to it, under the notwithstanding clause, the capacity to override the Charter "legal rights" in sections 7 to 14, as well as the equality provision in section 15 – again, for up to five years. No justification for such an override would have to be provided under section 1, as that section would also be overridden by section 33. It is similarly not inconceivable, depending on the gravity of the circumstances, that a government, confronted with a "real or apprehended war, invasion or insurrection," could invoke both the notwithstanding clause and section 4(2), which would be tantamount to a fairly potent cocktail of executive override of most of the Charter's key rights provisions. Section 4(2) states that:

> [i]n time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature *beyond five years* [emphasis added] if such continuation is not opposed by the votes of more than one third of the members of

to ensure rule of law, the Courts will recognize as valid the constitutionally invalid Acts of the [Manitoba] Legislature." In the event, these constitutionally invalid laws were ones that had not been translated into French. Strictly speaking, the ruling in the *Manitoba Language Rights Reference* affirms the doctrine of necessity not as a proper principle of the Canadian Constitution, but rather as subservient to the constitutional principle of the rule of law. The ruling, just as fundamentally, confirms that the Canadian Constitution cannot be a 'suicide pact' – the implication being that, again, *in extremis*, it is for Parliament and the federal government to do all that is necessary (the doctrine of constitutional necessity), in an emergency situation, to preserve the state and the rule of law.

[66] It goes without saying – and it may even be somewhat uninteresting to observe – that the provinces, given the 'dual-purpose' assets at their disposal and their massive legislative jurisdiction in a number of annex areas (e.g. microeconomically), would have to be coordinated to play an important supporting role in domestic military defense. (Compare note 46, *supra*.) Recall, *en passant*, that the *Emergencies Act* states that federal orders and regulations made under its auspices may not "unduly impair the ability of any province to take measures [...] for dealing with an emergency in the province" or, in respect of command and control, that nothing in the Act should be construed or applied "so as to derogate from [...] the control or direction of the government of a province or municipality over any police force over which it normally has control or direction."

> the House of Commons or the legislative assembly, as the case may be.[67]

Therefore, the combination of sections 4(2) and 33 – logically independent of each other – would mean that Parliament and the wartime government could operate for more than five years (arguably for as long as it might take to conclude the war – see below), and that many of its wartime laws could be inured from the Charter (save, effectively, from sections 5 and 6).[68]

IV. Concluding the War

Just as with the declaration of war or the commencement of military operations, there is no constitutional necessity – and, despite Parliament's vote to end Afghan military operations in 2011, no established convention – for Parliament to speak on the matter of the strict cessation of military operations in Afghanistan; and, for the most part, on the terms of such cessation. These are the strict provisions of the federal executive under the royal prerogative. And this would be the case even if the cessation of hostilities were spelled out in a proper peace or ceasefire treaty.[69] The treaty or agreement would be entirely negotiated by the federal executive. Naturally, Parliament would be required to vote on any possible implementing legislation for such a treaty or agreement. *In extremis*, it is also not unthinkable that provincial assent would be required to implement certain aspects of the concluding treaty or agreement, where such terms fall into areas of provincial legislative competence. Granted, these would seem to be exceptional circumstances, but one could presume that in the event of a treaty of Canadian military concession or defeat, a victorious adversary could insist on terms that cover, say, education (e.g. reform of history or civics curriculum) or industrial policy (e.g. prohibitions on production of certain products) in Canada. The terms of defeat effectively dictated to Nazi Germany or Imperial Japan at the end of the Second World War provide an example of this. The consent of provincial legislatures to the implementation of such terms would evidently influence the negotiation of the concession treaty or agreement (to the extent that Canada would have *marge de manoeuvre* for such negotiation), but would also inform

[67] A majority government evidently makes successful invocation of section 4(2) of the *Charter* easier.

[68] Sections 3 (that every citizen has the right to vote in an election) and 4(1) (that no House of Commons will continue for more than five years) would become moot upon the invocation of section 4(2).

[69] An agreement could be signed with the Taliban, but not a 'treaty' under international law. And while our interest is this article is not international law, but rather constitutional law, it stands to reason that Canada would not, at Canadian law, sign a 'treaty' (vernacular oblige) with a non-state actor; an agreement, however, yes. But the point made in this piece still stands – to wit, that consultation with, or assent from, Parliament in respect of the signature of, and also the pre-signature content of, the agreement would not be necessary under Canadian constitutional law.

the 'implementability' of such a treaty or agreement. This could issue in the strange paradox – let us call this the constitutional paradox of (Canadian) strategic defeat – of Canada negotiating an end of hostilities treaty, but not being able to implement it! Indeed, this would bring new meaning to Trotsky's famous aphorism of "neither war nor peace." We might 'game' the paradox – granted, reductively – as follows: Canada loses a war. The federal government signs a surrender treaty, but is unable to implement it over provincial objections. Other things being equal, the victor resumes war in order to force implementation of the agreed treaty. The federal government surrenders again, signs a new treaty, but is again unable to implement it. War resumes. And so on.

D. Conclusion and Future Outlooks

In summary, policy-political choices aside, Canada's constitutional capacities in the context of a *bona fide* war as in the present Afghan theatre are significant and flexible, with the fewest fetters to executive capacity coming in the context of the war declaration and the concluding stages of war, noting again the possible paradox of implementation at the provincial level in the event of Canadian defeat in war. Federal decision-making, pre-war and intra-war, is also constitutionally expansive and uncontroversial, with executive prerogative dominance over war cabinet policy deliberations only trammeled – barring the said, rather extreme use of section 4(2) of the Charter – by the constitutional requirement that each Parliament not exceed five years in length (section 4(1) of the Charter, with section 56.1(2) of the Election Act now fixing government term lengths – perhaps not quite quasi-constitutionally – at four years].

Where there is manifest complexity and nuance is in the realm of national preparation for war. Federal strategic potency in leading national preparation for war is heavily invested in the still unlitigated, or indeed untested, section 91(7) of the 1867 Act (which supports statutes like the National Defence Act and the Defence Production Act). This lever is quite clearly material intra-war, but its strategic scope is not yet firmly established, as suggested, in the *antebellum* period. The federal spending power is also highly material for war planning or preparation – subject to the requirement of reasonable coherence with provincial spending in dual-purpose assets, and contingent on national economic capabilities – as are coercive capabilities like the declaratory power or direct expropriation. Emergency powers – also evidently coercive capabilities – come into play hugely in the actual intra-war context – either under the Emergencies Act or via the national security or emergency prerogative.[70] On the other hand, distributed microeconomic capabilities

[70] Note the *dicta* from Chief Justice Laskin – for all intents and purposes, about the principle of constitutional necessity in times of war, in the *Anti-Inflation Reference*, *supra* note 5, referring to the *Fort Frances* case (Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co., [1923] A.C. 695), which was perhaps the first Canadian case to make use of the word 'emergency': "The *Fort Frances* case is curious in an important respect because the reasons appear to suggest that in time of war there is a power implicit in the Constitution which, irrespective of

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among the federal and provincial levels, as well as constitutionally-rooted challenges in growing Canada's aggregate population base – and notwithstanding a clear federal capacity, *pace* the *Charter*, to raise an army by conscription in times of war (a capacity less clear in the *antebellum*) – would together seem to materially compromise the strategic base from which the diplomatic and military instruments of the state draw their potency. Finally, Canadian constitutional capacity in respect of direct military operations, while still largely untrammeled, has for the first time ever begun to be materially clipped, as it were, by anti-prerogative holdings like *Khadr* and *Smith*. And while it would be a stretch to posit that military operations (as distinguished from, say, intelligence or law enforcement operations) are at present materially affected by these two decisions, it would be reasonably safe to suggest that military decision-making may before long begin to assimilate these decisions – unless reversed – into the strategic calculus informing the employ of Canadian forces in *bona fide* war.

A *third school* of constitutional scholarship in Canada – one anchored in Constitution and strategy considerations – requires us to see whether, in the near future, the judicial branch in Canada will begin to assimilate strategic considerations in their weighing of cases, both in terms of justiciability and also the very outcomes of specific cases that may have significant precedential impact for the behavior of the Canadian state in international affairs. *Bona fide* war is clearly the bluntest form of such international strategic behavior by the state, and this century does not promise anything but greater complications in this realm of strategy.

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what is in ss. 91 and 92, endows the Parliament of Canada with extraordinary authority to protect the general interest."

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