

No. 67-25 (6) W/100-001 2/1

No. 67-25 (6) - Vancouver Centre -
W/100-001 2/1
British Columbia (1946)

OTTAWA, 6th May, 1946.

The Honourable Ian A. Mackenzie,
Minister of Veterans Affairs,
OTTAWA, Canada.

Dear Mr. Mackenzie,-

On the 15th day of December, 1945, His Excellency the Governor General in Council, by P.C. 7355, 7356 and 7357, made provision for the deportation to Japan of Japanese nationals and other named persons of the Japanese race. These Orders were passed under the authority of the War Measures Act, and constituted the announced policy of the Government in connection with Japanese resident in Canada.

Following the adoption of the Orders, representations were made to the Minister of Justice, by and on behalf of a number of Canadian organizations and societies, expressing the opinion that the Orders were ultra vires, and requesting a reference to the Supreme Court of Canada to test the question, and an action was commenced against the Attorney-General of Canada for declaration that the Orders-in-Council were ultra vires.

Accordingly, His Excellency the Governor General in Council submitted the question to the Supreme Court of Canada for hearing and consideration, and on the 20th day of February, 1946, that Court gave answers to the questions, as set out in the Certificate of the Registrar dated the 20th day of February, 1946.

There was considerable difference of opinion in the Court.

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The Chief Justice, Kerwin and Taschereau, JJ., were of opinion that the Orders in Council in question were not ultra vires of the Governor in Council, either in whole or in part.

Hudson and Estey, JJ., were of opinion that the Orders in Council were not ultra vires of the Governor in Council, with the exception of paragraph 4 of Section 2 of P.C. 7355.

Rand, J., was of opinion that -

"(1) Order in Council 7355 is not ultra vires of the Governor in Council in relation to Japanese nationals and to persons of the Japanese race, naturalized under the Naturalization Act of Canada, as well as to persons voluntarily leaving Canada; but is ultra vires in relation to the compulsory deportation of natural born British subjects resident in Canada, and of wives and children under 16 who do not come within the first two classes; and that

(2) Order in Council 7356 is not ultra vires insofar as it takes away incidental rights and privileges of persons of the Japanese race as Canadian nationals; but that it is ultra vires of the Governor in Council to the extent that it purports to revoke the naturalization of such persons under the Naturalization Act; and that

(3) Order in Council 7357 is not ultra vires of the Governor in Council, subject to the observance of the requirements of the Naturalization Act as to grounds for the revocation of naturalization."

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Kellock, J., was of opinion that -

"(1) Order in Council 7355 is not ultra vires except in the following particulars:

- a) Subsection 3 of Section 2 and Section 3 are ultra vires insofar as they authorize the deportation of natural born British subjects who do not wish to leave Canada, and insofar as it prevents such persons from withdrawing consents at any time and in any manner.
- b) Subsection 4 of Section 2 is ultra vires in toto.

(2) Order in Council 7356 is not ultra vires with the exception of Section 1 thereof insofar as it provides for loss of the status of a British subject.

(3) Order in Council 7357 is not ultra vires save insofar as it may purport to authorize a departure from the provisions of the British Nationality and Status of Aliens Act 1914."

These judgments, for the most part, rest upon highly technical considerations, and in my view, although two of the learned Judges dissent from the proposition to some extent, it cannot be seriously contended that the Parliament of Canada has not the power to do that which the Orders-in-Council purport to do.

The argument on behalf of the Co-operative Committee on Japanese-Canadians is summed up in the judgment of the Chief Justice Kerwin and Taschereau, JJ., at page 7, and is dealt with in the judgment of all the Judges, and it will be seen that,

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in the main, the objections go to the jurisdiction of the Governor in Council under the War Measures Act, and whether the language used in the Orders-in-Council is apt to bring about the result which the Orders-in-Council sought.

There is considerable difference of opinion, on the part of the Judges, on the issues, and in the result, certain features of the Orders-in-Council in question are held to be beyond the powers of the Governor in Council.

An appeal has been taken by counsel for the Co-operative Committee on Japanese-Canadians to the Privy Council, and this is expected to be heard at the June sittings of that tribunal.

It seems to me that, from the standpoint of British Columbia, the position is most unsatisfactory.

The Government of Canada, after full investigation, has announced a definite policy dealing with the Japanese question in Canada. Parliament is in Session, and yet we have the whole issue in doubt, not because of any serious question of the sovereign power of Parliament to carry out the policy of the Government, but because of the objection that the Government had no power to do it in the form of the Orders-in-Council.

The Supreme Court has held that parts of the Orders-in-Council are intra vires, and that other portions are ultra vires. There is danger that, in the Privy Council, other portions, or the whole of the Orders-in-Council, may be held to be ultra vires. In other words, the whole policy of the Government dealing with Japanese may be rendered abortive through legal considerations, many of them highly technical in their character, though there is no doubt whatever that such policy could be implemented and carried into effect if an Act of Parliament were passed for that purpose.

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Acting on behalf of British Columbia, which is mainly concerned, I feel that it would be most unfortunate if this situation were permitted to continue, and I would urge that steps be taken to bring this whole matter before Parliament, with a view to passing legislation clearly authorizing the Government to carry its announced policy into effect.

It seems to me that the question which is now being posed to the Privy Council, namely, the power of the Executive Council in the emergency of war, is largely academic.

I might state further that, as far as I can ascertain, there is no Order-in-Council or statute providing for the re-allocation of those Japanese who, if the policy of the Government were implemented, would remain in Canada, and there would, therefore, be no way to avoid those particular members of the Japanese race returning to British Columbia en bloc. If the Privy Council appeal succeeds, then their numbers would be augmented by all Japanese in Canada who wished to go there. This would create a most serious situation in our Province.

There are very many further reasons, apparent upon a perusal of the judgments of the members of the Supreme Court, which make it essential that the whole Japanese question should be dealt with by Parliament at this Session.

I should be glad if you would give this matter your consideration.

Yours faithfully,

ATTORNEY-GENERAL
for
British Columbia.

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OTTAWA, 23rd July, 1946.

PERSONAL

My dear Colleague,-

I have your letter of the 18th instant.

Of course my policy is well known - 'no Japanese from the Rockies to the sea'. But that may not be Government policy.

I also said that I would not be a member of any Government who permitted any Japanese to the protected area.

I must abide by that pledge.

Yours very truly,

The Honourable Humphrey Mitchell,
Minister of Labour,
O t t a w a.