

Legal Proceedings 1945

67

50% signed for return
Believed half don't want to
expected Gov will try to whisk
them out

What kind of Legal support is possible there
e.g. an injunction of some sort
till test trial — or what,

~~Carlisle King writes to Hon. Norman,~~

~~How +~~

Carlisle King (the not seen)

- a. judges the "declaration" not binding
- b. recommends written renunciation
addressed to five authorities,
giving legal form.

How Norman

sends me copies < King's letter
form of declaration /
" " withdrawal

Sent to "New Canadian" to announce poss't.
the possibility of withdrawal, to them

Minister: W. H. H. Norman, B. A., S. T. M.
Fraser 1723 6464 Chester St.



Secretary of Board; John Ellis
Fraser 1368 392 E. 46th Ave.

Clerk of Session: Fred Rogers
Fraser 1307 436 E. 35th Ave.

St. George United Church

FORTY-SEVENTH AND FRASER

VANCOUVER, B. C.
Sept 24, 1945

Prof. Jarvis McCurdy,
Civil Liberties Union,
239 Lonsmount Dr.
Toronto 10, Ont.

Dear Mr. McCurdy:-

I am sending a letter identical with this one to Mr. David Freeman, Secretary of the Vancouver Civil Liberties Union.

Macdonald Mitchell

You are, of course, aware that the RCMP and certain government officials carried out a registration of persons of Japanese race across Canada, starting in B. C. from April of this year, and that considerable pressure was brought to bear to make them sign for Japan. Since some doubt as to whether this was legal existed, I wrote Mr. Garfield King about the matter. I received his answer, which was read at the Consultative Council. It was there decided to send the information to the New Canadian to publish, so that any person of Japanese race who had been induced to sign for Japan against his wish, might avail himself of the opportunity to disavow it. I am enclosing a copy of my communication to the New Canadian, and also a copy of the form a Nisei would sign. We are asking the Toronto and the Vancouver Civil Liberties Unions to stand by, because it is certain that the officials who have been harrying the Japanese in Canada will not take this passively. *justifying themselves* I imagine that they will use the forms that have been signed to whisk them out of the country, no matter how much they repent afterwards, unless the Japanese have legal defence.

We would welcome further communications and advice from you on this matter.

So

On Thursday - Sept 20 - I received a night-letter from the Coop Committee asking for 500 copies of the pamphlet, and letters to counteract the work of the Repatriation League. I sent the pamphlets c/o of the WMS, 299 Queen St. W., since no address was indicated. The letters to the newspapers should be in the mail very soon.

Yours truly,

W. H. H. Norman

Vice-President, Consultative Council

CLH. Encl. —

- Copy of Brief —

- Delega

King

Tanaka

Benny

Travis

Forsey

not

Sandwell

Fowler

Finley

Saw Norman Robertson

King, Tanaka "Humphrey Mitchell" "an done bad job, but now end back & ease prob."

Conversion? Done job w. BC secur. Comm. if sign. to stay
why? "because we have to get him out of BC."

Arthur Macnamara - no one allowed - Sel. Sen. - to move fr pt to pt.

re property sale: The Gov is rep; it has reasons the we don't know.

Municip —

Hamilton — agreed comm. agreed due to war produce, not safe to have them here
But BC Comm import. despite no license, agreement made.

- Fournal — set at City Hall.

- Pub. W. — Ransom

- Pitt

- Coord. Officer — making all our efforts
prop. Donald & Hugh —

Boas

- Legal — of two Poole & BC. —

McCurdy
Geo Tamaki, Deputy Rec
Andrene Brewin

How. Norman.

1. The Commissioner of Japanese Settlement.
2. The Prime Minister and Minister of External Affairs, Mr. Rt. Hon. W. L. Mackenzie King, Ottawa, Ontario.
3. The Minister of Labour, Ottawa, Ontario.
4. The Secretary of State of Canada, Ottawa, Ontario.

"I will be glad to assist you in revising the forms, if necessary."

Yours very truly,

(signature) GARFIELD A. KING

Below is the proposed form Mr. King suggests.

DECLARATION BY CANADIAN-BORN BRITISH SUBJECT

(J. R.)

* * (Address)

TO:

The Government of Canada:

The Rt. Hon. Prime Minister & Minister of
External Affairs;

The Minister of Labour;

The Secretary of State of Canada;

The R. C. M. P.;

The Commissioner of Japanese Placement;

ALL OF OTTAWA, Canada.

I, _____ (_____), born _____
m. or f. _____ DAY, month, year,
registered as a Canadian-born British Subject (J. R. _____),
hereby declare and give you notice that I hereby renounce, abandon,
and revoke my declaration heretofore made by me in which I declared
my desire to relinquish my British Nationality and to assume the
status of a national of Japan, and in which I requested the Govern-
ment of Canada to arrange for and effect my "repatriation" to
Japan.

It is my intention and firm resolve to retain and adhere to my
rights and status of a Canadian-born British Subject and as a
citizen of Canada, as well as to fulfill all the duties and obli-
gations that are thereby imposed on me.

DATE _____ 1945

SIGNATURE

WITNESS

INTERPRETER

GOVERNMENT OF CANADA

DECLARATION

DECLARATION

I,, (.....), born..... Under
 (M.orF.) (day, month, year)
 registered as a Canadian-born British subject (J.R. No.....) under
 Order in Council P.C.No. 9760, dated December 16, 1941, hereby declare my
 desire to relinquish my British nationality and to assume the status of a
 National of Japan.
 to arrange for and effect my repatriation to Japan, together with my

Further, I request the Government of Canada, under the conditions set
 out in the Statement of the Minister of Labour dated February 13, 1945,
 to arrange for and effect my repatriation to Japan.

I declare that I fully understand the contents of this document, and I
 voluntarily affix my signature hereto:

Date:....., 1945

SIGNATURE

Place:.....

Place

WITNESS

INTERPRETER

Note: All persons sixteen years of age and over are required to sign a
 separate Declaration.

Application Recommended:

Application Approved:

Date:.....
 R.C.M.P.

Commissioner of Japanese Placement

Date:....., 1945

Date:....., 1945

GOVERNMENT OF CANADA

DECLARATION
DECLARATION

I,, (.....), born.....
 I,, (M.orF.).... born (day, month, year).....
 (M.orF.) (day, month, year)
 registered as a Canadian-born British subject (J.R. No.....) Under
 registered as a Japanese national (J.R. No.....) under Order-in-
 Order in Council P. C. No. 9760, dated December 16, 1941, hereby declare
 Council P.C. No. 9760, dated December 16, 1941, hereby request the
 my desire to relinquish my British nationality and to assume the status
 Government of Canada, under the conditions set out in the Statement of the
 of a national of Japan.
 Minister of Labour, dated February 13, 1945, to arrange for and effect

Further, I request the Government of Canada, under the conditions set
 out in the Statement of the Minister of Labour, dated February 13, 1945,

I declare that I fully understand the contents of this document,
 to arrange for and effect my repatriation to Japan, together with my
 and I voluntarily affix my signature hereto:
 dependents UNDER SIXTEEN YEARS OF AGE as listed hereunder:

<u>Name</u>	<u>Nationality</u>	<u>Age</u>	<u>Sex</u>	<u>Relationship</u>
SIGNATURE				

Place:

I declare that I fully understand the contents of this document,
 and I voluntarily affix my signature hereto:
 WITNESS INTERPRETER

Note: All persons sixteen years of age and over are required to sign
 I declare that I fully understand the contents of this document, and
 I voluntarily affix my signature hereto:

Application Recommended:	Application Approved:
Date:, 1945
	SIGNATURE

Place:

.....
WITNESS	Commissioner of Japanese Placement INTERPRETER

Note: All persons sixteen years of age and over are required to sign a
 Date: ... separate Declaration. Date:, 1945

Application Recommended:	Application Approved:
.....
R.C.M.P.	Commissioner of Japanese Placement
Date:, 1945	Date:, 1945

GOVERNMENT OF CANADA

DECLARATION

I, I,, (.....), born.....
(M. or F.) (day, month, year)

registered as a Japanese national (J.R. No.) under Order-in-Council P.C. No. 9760, dated December 16, 1941, hereby request the Government of Canada, under the conditions set out in the Statement of the Minister of Labour, dated February 13, 1945, to arrange for and effect my repatriation to Japan, together with my dependents UNDER SIXTEEN YEARS OF AGE as listed hereunder:

I declare that I fully understand the contents of this document, and I voluntarily affix my signature hereto: Sex Relationship

Date:, 1945

SIGNATURE

Place:

I declare that I fully understand the contents of this document, and I WITNESS-ly affix my signature hereto. INTERPRETER

Note: All persons sixteen years of age and over are required to sign a separate Declaration. SIGNATURE

Place:

Application Recommended: 1945

Application Approved:

WITNESS

INTERPRETER

Note: All persons sixteen years of age and over are required to sign a separate Declaration. R.C.M.P. Commissioner of Japanese Placement

Application Recommended:

Application Approved:

Date:, 1945

Date:, 1945

R.C.M.P.

Commissioner of Japanese Placement

Date:, 1945

Date:, 1945

GOVERNMENT OF CANADA

DECLARATION

I,, (.....), born.....
(M. or F.) (day, month, year)

registered as a Japanese National (F.R. No.), under Order-in-Council P.C. No. 9760, dated December 16, 1941, hereby request the Government of Canada, under the conditions set out in the Statement of the Minister of Labour, dated February 13, 1945, to arrange for and effect my repatriation to Japan, together with my dependents UNDER SIXTEEN YEARS OF AGE as listed hereunder:

Further, I request the Government of Canada, under the conditions set out in the Statement of the Minister of Labour, dated February 13, 1945, to arrange for Nationality my repatriation Sex Relationship with my dependents UNDER SIXTEEN YEARS OF AGE as listed hereunder:

Name	Nationality	Age	Sex	Relationship
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I declare that I fully understand the contents of this document, and I voluntarily affix my signature hereto.

Date:, 1945

SIGNATURE

and I voluntarily affix my signature hereto:

Place:

Date:, 1945

WITNESS

INTERPRETER

Place:

Note: All persons sixteen years of age and over are required to sign a separate Declaration.

WITNESS

INTERPRETER

Application Recommended:

Application Approved:

Note: All persons sixteen years of age and over are required to sign a separate Declaration.

.....
R.C.M.P.

.....
Commissioner of Japanese Placement

Application Recommended:

Application Approved:

Date:, 1945

Date:, 1945

R.C.M.P.

Commissioner of Japanese Placement

Date:, 1945

Date:, 1945

GOVERNMENT OF CANADA

DECLARATION

I,....., (.....), born.....
(M.orF.) (day,month,year)
registered as a Canadian-naturalized British subject (J.R. No.....)
under Order in Council P.C. No. 9760, dated December 16, 1941, hereby
declare my desire to relinquish my British nationality and to assume
the status of a national of Japan.

Further, I request the Government of Canada, under the conditions
set out in the Statement of the Minister of Labour, dated February 13,
1945, to arrange for and effect my repatriation to Japan, together with
my dependents UNDER SIXTEEN YEARS OF AGE as listed hereunder:.....

<u>Name</u>	<u>Nationality</u>	<u>Age</u>	<u>Sex</u>	<u>Relationship</u>
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..... WITNESS INTERPRETER
------------------	----------------------

I declare that I fully understand the contents of this document,
and I voluntarily affix my signature hereto:

Date:....., 1945 SIGNATURE
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Place:..... WITNESS INTERPRETER
---------------------------------	----------------------

Note: All persons sixteen years of age and over are required to sign a
separate Declaration.

Application Recommended:

Application Approved:

.....
R.C.M.P.

.....
Commissioner of Japanese Placement

Date:....., 1945

Date:....., 1945

GOVERNMENT OF CANADA

DECLARATION

I,....., (.....), born.....
(M.orF.) (day, month, year)
registered as a Canadian-naturalized British subject (J.R. No.....)
under Order in Council P.C. No. 9760, dated December 16, 1941, hereby
declare my desire to relinquish my British nationality and to assume
the status of a national of Japan.

I declare that I fully understand the contents of this document,
and I voluntarily affix my signature hereto:

Date:....., 1945

.....
SIGNATURE

Place:.....

.....
WITNESS

.....
INTERPRETER

Note: All persons sixteen years of age and over are required to sign a
separate Declaration.

Application Recommended:

Application Approved:

.....
R.C.M.P.

.....
Commissioner of Japanese Placement

Date:....., 1945

Date:....., 1945

IN THE SUPREME COURT OF ONTARIO

BETWEEN:

UTAKA SHIMOYAMA and
YAE NASU,

Plaintiffs,

-and-

THE ATTORNEY-GENERAL OF CANADA

Defendant.

STATEMENT OF CLAIM

(Writ issued 27th of December, 1945)

1. The Plaintiff Shimoyama resides in the Village of Port Credit in the County of Peel in the Province of Ontario and works on a mushroom farm. The Plaintiff Yae Nasu is a widow residing in the City of Toronto.
2. The Plaintiff Shimoyama is a Canadian citizen born in Canada and is of Japanese ancestry or origin. The Plaintiff Yae Nasu is of Japanese origin but her late husband was a naturalized Canadian and the said Plaintiff is by virtue of the Naturalization Act, R.S.C. 1927 Chapter 138, a British subject. The said Plaintiff is the mother of seven children who are British subjects and Canadian nationals by virtue of their birth in Canada.
3. On the 15th day of December, 1945, His Excellency, the Governor-in-Council made three Orders described as P.C. 7355, an Order-in-Council re deportation of Japanese, P.C. 7356 described as Order-in-Council revoking naturalization of persons deported in pursuance to Order-in-Council P.C. 7355 and P.C. 7357 described as an Order-in-Council re Commission to inquire into conduct during the war of persons of the Japanese race, etc.
4. By the terms of P.C. 7355, His Excellency purported under the authority of the War Measures Act, to authorize the Minister of Labour to make Orders for the deportation of the following classes of citizens:
 - (1) Every person of sixteen years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who,
 - (a) has, since the date of declaration of war by the Government of Canada against Japan, on December 8th, 1941, made a request for repatriation; or

(b) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, of the 5th day of February, 1943, as amended by P.C. 5637, of the 16th day of August, 1945, and was so detained as at midnight of September 1st, 1945;

- (2) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan; Provided that such person has not revoked in writing such request prior to midnight the first day of September, 1945.
- (3) Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan; Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation.
- (4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person.

5. By Order-in-Council P.C. 7356, His Excellency purported to order that any person who, being a British subject by naturalization under the Naturalization Act, Chapter 138, R.S.C. 1927, is deported from Canada under the provisions of Order-in-Council P.C. 7355 shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

6. By Order-in-Council P.C. 7357, His Excellency, the Governor-in-Council purported to order that a Commission be appointed to make inquiries concerning the activities, loyalty and extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada, in cases referred to the Commission by the Minister of Labour with a view to recommending whether such persons should be deported and further that the said Commission might at the request of the Minister of Labour inquire into the case of any naturalized British subject of the Japanese race who has made a request for repatriation and to make such recommendation in respect to such cases as it deems advisable and further that any person of the Japanese race recommended for deportation by the Commission should be deemed to be subject to deportation under the provisions of Order-in-Council P.C. 7355 and further that as and from the date on which he leaves Canada in the course of such deportation such person shall cease to be either a British subject or a Canadian national.

7. The Plaintiffs, in or about the month of August, 1945, executed forms in words and figures, the same as or similar to the following form:

No. CBW

I, _____ (_____) born _____ registered
m. or f. day, month, year

as a Canadian-born British subject, (or Canadian naturalized British Subject), (J. R. _____) under Order-in-Council P.C. No. 9760, dated Dec. 16, 1941, hereby declare my desire to relinquish my British nationality and to assume the status of a national of Japan.

Further, I request the Government of Canada, under the conditions set out in the Statement of the Minister of Labour, dated February 13, 1945, to arrange for and effect my repatriation to Japan.

I declare that I fully understand the contents of this document, and I voluntarily affix my signature thereto.

Date _____ 1945

Place _____

Signature.

Interpreter

Application recommended

Application approved

Date _____ 1945 RCMP

Date _____ 1945 Commiss-
ioner of Japanese Placement

8. In or about the month of December, 1945, the Plaintiffs severally wrote to the Minister of Labour at Ottawa, written requests revoking the declaration or requests hereinabove referred to but have received no acknowledgment of the receipt of the same from the Minister of Labour.

9. The Plaintiffs allege as the fact is that the Governor-in-Council is not authorized by the War Measures Act or by any other valid statute or law to enact the said Orders-in-Council or any of them, either in whole or in part and the said Orders-in-Council are ultra vires the Governor-in-Council and have not been and could not be authorized by the Parliament of Canada and are, therefore, invalid, void and of no effect.

10. The Plaintiffs further allege that the written forms referred to in Paragraph 7 hereof are illegal, invalid and of no effect or alternatively that they are revocable and have been revoked and are of no further force and effect and do not justify any action by the Government of Canada or any servant or agent of the Government of Canada with a view

to the deportation of the Plaintiffs or to deprive them of their status as British subjects or Canadian nationals.

11. The Plaintiffs, therefore, claim:

(a) A declaration that the said Orders-in-Council are ultra vires the Governor-in-Council and are void and of no effect.

(b) A declaration that the written forms referred to in this Statement of Claim are illegal, invalid and of no effect or alternatively are revocable and have been revoked and are, therefore, of no effect.

(c) A declaration that the Plaintiffs are not liable to be forcibly removed from Canada or from the Province of Ontario or to be deprived of their status as British subjects and Canadian nationals.

(d) Such further and other relief as to this Court may seem just and expedient.

(e) Their costs of this action.

The Plaintiffs propose that this action be tried at the City of Toronto.

DELIVERED at Toronto, this 28th day of December, A.D. 1945 by
F. ANDREW BREWIN, 372 Bay Street, Solicitor for the Plaintiffs.

S.

C.

O.

UTAKA SHIMOYAMA and YAE NASU

VS.

THE ATTORNEY-GENERAL OF CANADA

STATEMENT OF CLAIM

F. ANDREW BREWIN,
372 Bay Street,
Toronto, Ontario.

1. Minutes
2. Bills
3. Legislative Program generally
4. CCF News
5. Housing
6. Labor.
7. Welfare.

-
1. Children.
 2. Consent. E. C. Hudson.
 3. Parliament. Respect. 2.A. Dissenting judgment
 4. P.C. Appeal.
 5. Habeas Corpus.
 6. Policy.

Recreation Internationalism Rule of Law	}	suspended in times of war
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The Prime Minister in his long
& distinguished career has earned the
reputation as a humanitarian. I cannot
believe that at this stage, he will permit
an action that in the minds of many of
his fellow-citizens will profit that reputation.

The real reasons for the proposed deportation
is not war necessity but racial prejudice
and political expediency as it conceived by
certain politicians in one Province. I have
heard that a ^{certain} Minister of the Crown has said
Either the Japanese Canadians go or I go.

I cannot refrain from expressing the opinion which
I find shared by many members of all parties
that the alternative to the possible deportation
of Canadian citizens & residents of long standing
is one that they can contemplate without misgiving.
Indeed it is my personal opinion that the loss
of the particular gentlemen from the council of the nation
would be a very real incalculable advantage of a
change of policy by the government.

In an admirable statement Mr. Kasey Dyanna, editor of the New Canadian, referred to the decision of the Supreme Court of Canada as an event in the nature of a defeat in the first round.

In my judgment the result of the Supreme Court's decision is a resounding ^{defeat} of ~~not final~~ ^{but the} ~~and conclusive~~ defeat for the Government's policy of deportation of Japanese Canadians, though not ~~final~~ ^{practically conclusive}.

A majority of the Justices of the Supreme Court of Canada have certified to the Governor-in-Council their opinion that the orders-in-Council are ultra vires the Governor-in-Council in so far as they provide for the deportation of wives + children of those who may be ordered to be deported.

This happens to be the largest group numerically affected by the orders. Apart from wives altogether the Minister of Labor told Parliament on Nov 21st that out of a total of 10,340 affected 3500 were children under 16. ²² who did not sign. If one further reduces the ~~number~~ ^{number} to 10,000 by the Canadian born who signed but have revoked in the time allowed. It would appear that the 3500 represents nearly $\frac{1}{2}$ of those subject to the deportation under the orders. & it is clear the Court by a majority judgment have held that the Government has no legal or constitutional power

to provide for the deportation of this group of 3500 children ^{from their families}

But the decision of the Court as to this group raises far graver questions than are involved in the substantial numerical reduction of those liable to be deported.

What remains of the Orders-in-Council cannot be carried out without one of two consequences.

Either 3500 Canadian ~~born~~ ^{from} children are to be deprived of their fathers ^{perhaps not} or parents & left as wards of the State or alternatively ~~indirectly~~ because ~~their parents prefer~~ they cannot be separated from parents. They will be in effect

be deported to Japan without their consent & indirectly in defiance of their legal & constitutional powers the Government will have achieved their purpose. These innocent children

born in the free air of Canada ~~are to be~~ ^{entitled to all the} ~~privileges of Canadian children~~ are faced with the alternative of exile ~~to~~ because of their race or being made into orphans. "neglected children"

as the Children's Protection Act describes them. ~~What the Government has done is to take away from these children their families & their homes & to place them in the hands of the State.~~ ^{These children are to be taken away from their families & their homes & placed in the hands of the State.}

+ horrible events in the catastrophic course of modern warfare. Are we in Canada to inaugurate ~~the~~ ^{the} dawn of a peaceful world by adding to worlds suffering by inflation on innocent Canadian children the ~~grave~~ ^{alternative} cruelty of exile or orphanage

The second question is ^a ~~the~~ ^{fully} ~~the Court has~~
held that the Governor-in-Council ~~has no~~
authority to deport Canadian citizens under
the powers conferred on it by his Majesty of Canada
by the War Measures Act. In the opinion of Mr.
Justice Kellard ^{now} ~~his Justice Rand~~ this applies
to all those referred to in the orders as
naturalized or Canadian born citizens of the
Japanese Race & the orders are therefore
beyond the powers of the Government in respect to
all referred to in the orders except Japanese nationals
~~In his Justice Rand's Division this applies to~~
~~the~~ ^{as} notwithstanding requests signed by
them. Mr Justice Rand's opinion is that the
principle applies to Canadian born citizens but
that the G.-I.-C. has the power, which he
has exercised, to deprive naturalized citizens
of their status rights as Canadian citizens & ~~then~~
deport them. Mr Justice Hudson & Mr Justice Estey
and both of the opinion that at the consent of the citizen to ^{so widely by} ~~sign~~
~~depart~~ being sent out of Canada takes the case out of
principle that Canadian citizens cannot be forcibly
deported against her will. This ^{opinion} ~~view~~ whatever
one may think of it from the legal point of view
raises squarely the question as to ~~whether~~ the
circumstances & reality of the consents in the written
documents upon which the Government relies.
~~Indeed Mr Justice Hudson~~ ^{on} This was not
a problem with which the Court was concerned.

It is my earnest hope that the enlightened & humane administration we have at Ottawa will ~~recognize~~ understand the true nature of any further continuance in their plans. I will recoil from the assumption of responsibility for the guilt of such a gross injustice to children. Has it not been written. "Whoso offendeth one of these little ones, it were better that a millstone were ^{drov'n} hung about his neck & he were cast into the sea."

Indeed I am encouraged in ^{my} hope by the Congress of Mr. Ken Humphrey ^{he order} Hubbell in addressing Parliament. when he repeated ^{wounds} ~~the order~~ ^{Hampard p 2407} necessary humanitarian purpose

Essential ^{See} → how Justice Esty suggest amendment p 12A

There is only one thing for the Government to do. & that is to say frankly that the Council decision makes it impossible to carry out the scheme of deportation in the humane manner intended. & that the scheme has been abandoned. The Immigration Act confers ample power for the deportation & the Naturalization Act gives power for the denaturalization of any ^{any way} Japanese alien or naturalized Canadian ^{of any way} who has been guilty of disaffection or disloyalty to His Majesty. the course of the war

C
O
P
Y

CRA 202 (FD) 153 Collect DL

Ottawa Ont 21 558 P

A. GLADSTONE VIRTUE KC
BARRISTER MCFARLAND BLDG
LETHBRIDGE ALTA

REGISTRAR SUPREME COURT REPORTS ONLY FACTA
FILED SO FAR ATTORNEY GENERAL CANADA AND ATTORNEY GENERAL
BRITISH COLUMBIA STOP FORWARDING FORMER AIR MAIL TONIGHT
LATTER IN A FEW DAYS I HOPE STOP DOMINION FACTUM SIGNED
BY AIME GEOFFRION AND DAVID MUNDELL STOP BRITISH COLUMBIAS
SIGNED BY THE HONORABLE R L MAITLAND K C ATTORNEY GENERAL
EWART AND COMPANY ARE OTTAWA AGENT STOP UNDERSTAND JAPANESE
FILING FACTUM TOMORROW STOP SASKATCHEWAN FACTUM SIGNED BY
ALEX BLACKWOOD IS ONE SHORT PAGE AND READS THUS QUOTE
IN THIS REFERENCE THE ATTORNEY GENERAL OF SASKATCHEWAN
ADOPTS AND RELIES ON THE FACTUM FILED HEREIN BY THE COOPERATIVE
COMMITTEE ON JAPANESE CANADIANS UNQUOTE CANNOT SEE HOW YOU
CAN BE HEARD BY COURT REPRESENTING ONLY ONE SECTION OF
JAPANESE WITHOUT LEAVE OF COURT STOP MAILING OTHER MATERIAL
AVAILABLE FROM PRIVY COUNCIL OFFICE STOP WHAT ELSE DO YOU
WANT STOP SORRY THOUGHT WHAT I SENT YOU SUFFICIENT STOP
WILL TRY AGAIN TOMORROW RE FURTHER FACTA

S? RUPERT BROADFOOT

In the Supreme Court of Ontario

Between

UTAKA SHIMOYAMA and YAE NASU

PLAINTIFF S

AND

THE ATTORNEY- GENERAL OF CANADA,

DEFENDANT

Dye & Durham
9-11 Yonge-St.
Arcade
Toronto, Can.
Form No. 574-577

George the Sixth by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

TO

THE ATTORNEY-GENERAL OF CANADA,

of the	of
in the	of

We Command You, that within ten days after the service of this Writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in this action, and take notice, that in default of your so doing, the plaintiff may proceed therein and judgment may be given in your absence on the plaintiff's own showing, and you may be deemed to have admitted the plaintiff's claim and (subject to Rules of Court) will not be entitled to notice of any further proceedings herein.

In Witness Whereof this writ is signed for the Supreme Court of Ontario
by **CHARLES WALTER SMYTH,** Registrar

of the said court at Osgoode Hall, Toronto this
27th day of December, in the year of our Lord 19⁴⁵

Registrar S.C.O.

N.B.—This Writ is to be served within 12 calendar months from the date thereof, or if renewed, within 12 calendar months from the date of such renewal including the day of such date, and not afterwards.

Registrar's Office

~~The Plaintiff's claim is~~

The Plaintiffs' claim is for a declaration that Order-in-Council P.C. 7355 dated 15th day of December, 1945, Order-in-Council P.C. 7356 passed on the 15th day of December, 1945, and Order-in-Council P.C. 7357 passed on the 15th day of December, 1945 are ultra vires, illegal and void and for a declaration that the Plaintiffs are not subject to the provisions of the said Orders or liable to be deported or deprived of their status as British subjects or Canadian nationals under the provisions thereof.

This Writ was served by

on

the Defendant

on day, the

day of

19

This memorandum is made this

day of

19

(Signed)

(Address)

In the Supreme Court of Ontario

UTAKA SHIMOYAMA and
YAE NASU

This Writ was served by

on

the Defendant

on day, the day
of 19

This memorandum is made

this day of 19

(Signed)

Address

VS.

THE
ATTORNEY-GENERAL OF CANADA

Writ of Summons
GENERAL FORM

Dye & Durham, 9-11 Yonge-Street Arcade, Toronto, Can.
Law and Commercial Stationers

This Writ was served by

on

the Defendant

on day, the day
of 19

This memorandum is made

this day of 19

(Signed)

Address

This Writ was issued by F. ANDREW
BREWIN,
of the City of Toronto

in the County of York

Solicitor for the said Plaintiff

who reside at Toronto.

F. ANDREW BREWIN
PLAINTIFF'S SOLICITOR

Severability.

"When an enactment is found to contain provisions which are ultra vires, the whole Act may not be invalid for the provisions which offend may be severable from the rest,

Phillips v. Eyre L.R., 6 Q.B.

"The rule has been stated to be that the whole Act is not void unless all the provisions are connected in subject matter, depending on each other. The point is whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is struck out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.

Presser v. Illinois 116 U.S. 252

"On the other hand, if the provisions are so mutually connected with & dependant on each other as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, & if all could not be carried into effect the legislature would not pass the residue independently. Then if some parts are unconstitutional, all the ~~connected~~ provisions which are thus dependant, conditional or connected must fall with them.

Warren v Mayor of Charleston,
2 Gray 84

In re Initiative & Referendum Act
(1919) A.C., at p 944. & 955



VI, 1

An act of Parliament or of a Provincial
Legislature may be declared ultra
vires in part without invalidating
the remainder of the Act, if the
part which is ultra vires is
separate in its operation from the
remainder,

In re Public Utilities Act;
[1917] 1 W.W.R. 9; 30 D.L.R. 159
at p 175

Legislature Power in Can.
Lefroy App-289-299

Stunt on Ultra Vires.

Civil Rights

The right to sue is a substantive right and not a matter of procedure.

A.G. for Alberta and Westonley v. Atlas Lumber Co.
1941 - S.C.R. 87

Where the pith and substance of legislation is under an enumerated head of Section 91 the Province cannot pass valid legislation refusing access to the Courts, but that is ancillary to Dominion Jurisdiction (even though it is an interference with property and civil rights).

Referring also to the case

Proprietary Articles Trade Association v. A.G. for Canada
1931 - A.C. 310 @ 326-7

i.e., before the Dominion can transgress the Provincial field their power must be asserted under an enumerated head of Section 91.

91 Head 25 "Naturalisation and Aliens", does not give the Dominion the right to interfere with civil rights under the foregoing authority.

See Cunningham v. Tomy Homma - 1903 A.C. 151 (P.C.) @ 156

Section 91 head 25 of B.N.A. Act reserved to the Dominion the subject of "Naturalisation" - i.e., "the right to determine how it shall be constituted."

Provincial Legislature has the right to determine under Section 92 head (1) what privileges as distinguished from necessary consequences shall be attached to it.

"The truth is that the language (in 91 (25) does not purport to deal with the consequences of either alienation or naturalisation..... It is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalisation, but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

Liberty of Subject:

The Court will be jealous to guard the liberty of the Subject

Dyson v. A.G. 1911 - 1 KB 410 @ 424.

per Farwell, L.J. "if ministerial responsibility were more than a mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

Cooper v. Wandsworth 143 E.R., page 420.

The Courts will lean towards giving a man a hearing, of which he should have sufficient notice.

"The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God Himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' says God, 'Where art thou? Hast thou not eaten of the tree whereof I commanded thou shouldst not eat?' And the same question was put to Eve also."

(2)

British Nationality And Status of Aliens
Act, 1943. (cp. 14)

An Act to amend the law relating to the nationality of children born abroad of British fathers; to make special provision for the naturalization of persons rendering service in connection with the present war; to restrict the making of declarations of allegiance in time of war; and to extend the power to make regulations under section nineteen of the British Nationality and Status of Aliens Act, 1914.

No. CBW

GOVERNMENT OF CANADA
DECLARATION

I, _____ (_____) born _____, registered
m. or f. day, month, year
as a Canadian-born British subject, (J. R. _____) under Order-in-
Council P. C. No 9760, dated Dec. 16, 1941, hereby declare my de-
sire to relinquish my British nationality and to assume the status
of a national of Japan.

Further, I request the Government of Canada, under the conditions set
out in the Statement of the Minister of Labour, dated February 15,
1945,
to arrange for and effect my repatriation to Japan.

I declare that I fully understand the contents of this document, and
I voluntarily affix my signature hereto.

Date _____ 1945

Place. 6

Signature

Interpreter

Application recommended

Application approved

Date _____ 1945 RCMP

Date _____ 1945 Commissioner
of Japanese Placement

NOTES

"CBW" stands for Canadian-born w, whatever the "w" is. There are
5 other forms distinguished by the letters

CBD	Canadianborn dependent
CNW	Canadian naturalized w
CND	do. do. dependent
JNW	Japanese national w.
JND	do. do. dependent

. R. stands for the number of the person in the Japanese registration.

The Finance Plan

To finance its program. the Cooperative is offering an unusual & interest security as follows.

Series A. ^{negotiable} Bonds under the seal of the corporation ^{repaid} & in units of \$100.00. ^{repaid} repayable in 60 years ^{from the date of issue} as follows: ~~\$100~~ 2% interest component Capital \$100, and accumulated interest compounded annually at 2% that is ~~\$21.89~~ ^{any additional money} on a together ^{with the} proceeds of a sinking fund. ^{to be set up} made up as follows: One year after the 1st of January, 1911 after the date of issue of the bond if the ^{average} index for the Dominion of Canada as published by the Dominion of Canada has increased to a sum equal to ~~1 to 60~~ ^{1 to 60} of the value of the bond shall be set aside & paid into the sinking fund on each succeeding year until maturity. ^{with of the} out of the rentals & earnings of the company. & together with a sum equal to ~~1 to 60~~ ^{1 to 60} of the In addition the company will pay into the sinking fund ~~a sum equivalent to 1 to 60~~ ^{1 to 60} in each year. after the date of issue of the bond a sum ~~representing~~ ^{representing} money equal to ~~1 to 60~~ ^{1 to 60} of the increase over \$100 arrived at by ~~increasing the~~ ^{estimating the} percentage increase in each varying year over the next preceding year of the average wage index for the Dominion of Canada published by the ~~the~~ Dominion Department of Labor that is to say if wages go up. At

That is to say if wages ^{increase} year by year - ~~at the~~ ^{or over the} during the next 60 years the sinking fund & available to repay capital & accumulated interest will be substantially increased ^{in proportion} to meet the increased wage rates. Partially ~~subsidized~~ ^{subsidized} by ~~sinking fund~~ ^{sinking fund} while the maturity of the bond is long.

Series B. Ten Year Bond. 10 years in which interest but the amount to be set aside will be as in the Series A bond & are therefore stabilized in part & partially ~~stabil~~ ^{stabil}

be Bonds. fully negotiable & ~~with~~ if as is most probable. their value will be increased by the manner set out above by increased wage rates & the sinking fund payable of maturity & holders will in that way be able to realize increased values by sale before maturity.

or \$60,000 to be paid

Novo Selo 14 B 31

Basijeva Vrbaosko

Katrich

22 33 E 33

Korenica Brdo 8

30.00

Subs 4 of C. 2

473.55

4.3.
Anderson & Estey

ultra vines by magnifying glass
ultra vines

Round J

Subs 3 + 4 of S2

7355

ultra vines

Sub 2. ultra vine
7356 ultra vines

Kellough

3 + 4. or S2

both ultra vine

S. 3.

S. 1. 47356.

ultra vines

7357 ultra vines

RECEIVED

FEB 22 1946

TELEPHONE 4-1225

MASON,

CAMERON & BREWIN

J.P. ERICHSEN-BROWN

BARRISTER, SOLICITOR &c

46 ELGIN STREET

OTTAWA, CANADA

February 22, 1946.

Mason, Cameron and Brewin,
Barrister, Solicitors, etc.,
372 Bay Street,
Toronto, Ontario.

Dear Andy:

Re: Japanese Canadians

I am enclosing one copy of each of the judgments
with the exception of the Judgment of Mr. Justice Kellock.
Mr. Kellock's judgment will follow tomorrow.

Yours very truly,

JPEB/MM
Enc.



Reinforced.

operator 17

Ma. 9048

1

Sect 5 - War Measures Act.

Sect 9 of 7355

I do not see any conflict between the two sections.
It is apparent that section 5 of the Act really deals with
the situation anterior to the order for deportation.
While section 9 of the Act deals with the situation
after the order for deportation has been made. Even if the
two sections dealt with the same situation, it does not
follow that because the person detained or restrained
is declared to be deemed to be in legal custody under order.
9, it could not happen that the same person could
be released upon bail, or otherwise discharged or tried
with the consent of the Minister of Justice.

But above all ... not 9 ... superfluous
necessarily in legal custody.

But I do not think it can be concluded
from the wording of section 9 that the intention
of the order-in-council is that the recourse to
order of arrest is thereby abolished. At least,
counsel for the Crown did not so contend; on the
contrary he stated it was not. The language of section
9 refers to an order authorized by order in council
P.C. 7355 and, therefore, ^{to} a valid order resulting in
legal custody.

Sect. 9 clearly reversible - even if ^{it were} ^{remains} ^{would} ^{not} ^{be} ^{affected}
reversible

Dawson - Inchevian agree.

and adopted

Kellogg - referred to R v Seng & Stoe for Home
agencies Ex parte Greene
(1981) 3 All. England 104

H. of Lords exp 388

C.A. { Goddard L.J. in CA at 121.
also Scott L.J. at 116

H. of L. *Quayle* 388-9

Amell 370

Forster 388-810 402-3

H. of L.

Hudson

"It was argued that clause 9 of
Order-in-Council 7355 might have the effect
of depriving a person about to be deported from
any right to a writ of *habeas corpus*. I agree
with the other members of the court that such is
not a proper interpretation of this clause. I think
that where any question of just bearing on the jurisdiction
of the government in Council is raised, the person
concerned would have a right to put it forward.

(examples)

- had not signed request
- misrepresentation ^{COERCION}
- not of ^{genuine} race.
- validity of order 7355 } - depends on realities of request etc.

Prud:

3

"Then it is argued that section 9
of order 7355 is ultra vires because of
conflict with section 6 (?) of the Trade Disputes Act
But is "order" for deportation under 7355
means one that carries with it the ^{force} ~~force~~
of law. The "legal custody" which is declared
relates only to the agents or instrument
by which the restraint is effected.

^{LIVERSIDE}
Liverside v Sei John Anderson
(1982) A.C. 206 app. 273

Estey:

In particular counsel contends that para 9
deprives a person detained in council P.C. 7355
of the right to have the legality of his detention ^{INQUIRED} ~~inquired~~
into under habeas corpus proceedings because by its
express provision the legality of the custody is
finally determined in the words "declared to be in
legal custody" and therefore a return to the
writ that the person who so detained would
preclude further inquiry. While section 5 of the
Immigration Act specifically contemplates such
proceedings with the consent of the Minister of Justice
this para. 9 purports to take away the right thereto
and is therefore beyond the powers of the Governor

4

(over)

"... Sect 9 ..."

has not precluded an inquiry as
to whether that legal custody is justified
or legal within the terms of the order is
council. It has not therefore deprived
the party so detained or restrained of his
right to apply for a writ of habeas corpus.
This suggested conflict between sect 9
and sect 5 in my opinion has not
arisen.

Kellock's judgment most able
and judicial in my opinion
a well as a great assistance
before Privy Council.

9.8.26

Final Draft

IN THE SUPREME COURT OF BRITISH COLUMBIA

A F F I D A V I T

I, ROBERT JAMES McMASTER, Barrister and Solicitor,
of 4168 West 11th Avenue in the City of Vancouver, Province
of British Columbia, MAKE OATH AND SAY:

1. THAT I am a duly qualified barrister and solicitor
under the laws of the Province of British Columbia and my
chief place of abode is 4168 West 11th Avenue in the City
of Vancouver aforesaid.
2. THAT the Honourable Humphrey Mitchell is the
Minister of Labour in the Government of the Dominion of Canada.
3. THAT I am solicitor for _____
who resides at _____ in the Province aforesaid
the Applicant herein, and am instructed by him to make application
on his behalf for the issuance of a Writ of Certiorari addressed
to the said The Honourable Humphrey Mitchell, the said Minister
of Labour with respect to the matters herein referred to.
4. THAT now produced and shown to me and marked
Exhibit "A" to this my affidavit is a document purporting to
be an Order for deportation and purporting to be signed by
_____ which I am instructed by the said
Applicant herein, and verily believe, has been made in
respect of him.
5. THAT I am instructed by the said Applicant, and
verily believe, that any forms or written statements or
requests relating to the repatriation which were signed
by him were forms presented to him by the Royal Canadian
Mounted Police for signature and that at the time of signing
the same he did so because he understood that he was required
to do so or else that he would be compelled to remove from

the Province of British Columbia or from the place where he was then residing.

6. THAT I am instructed by the said Applicant herein, and verily believe, that he did not wish at the time of signing the said form or written statement, or request, for various personal reasons, to be removed or required to move from the place where he was then living.

7. THAT I am further instructed by the said Applicant herein, and verily believe, that he honestly believed by reason of statements made to him, or reported to him to have been made by Officers of the Royal Canadian Mounted Police or Officials of the Department of Labour of the Dominion of Canada, that he could cancel or revoke the said form, written statement, or request, at any time.

8. THAT I am further instructed by the said Applicant, and verily believe, that he did not sign the said form, written statement or request for any reason other than aforesaid and that the said form, written statement, or request, was signed by him on the basis of the representations made made or reported to him as in the last preceding paragraph set forth and under a misapprehension as to its effect and the said form, written request or statement was not signed by him voluntarily, nor with full understanding of its meaning, implication or effect, nor with the intention of expressing sympathy with or support of Japan, nor as an act of disloyalty to Canada.

9. I am further instructed by the said Applicant herein that he has since becoming a resident in Canada been a peaceful and law abiding citizen of Canada and has in no manner whatsoever manifested sympathy with or support for Japan in the recent war between Canada and Japan.

10. THAT I am further informed by the said Applicant herein that he has on one or more occasions since signing the said form, written statement or request, applied for cancellation thereof and revoked in writing the said form, written statement or request.

11. The only records which may exist other than the order exhibited hereto, are in the possession, custody, or control of the said Honourable Humphrey Mitchell, the said Minister of Labour and that I have no knowledge of the content of such records, if any, other than the said Order exhibited hereto.

12. THAT as the Applicant in pursuance of the said Order is in jeopardy of being deported from the jurisdiction of this Honourable Court at any time, it is probable that the ends of Justice would be defeated if the Applicant were required to delay his application pending obtaining copies of the said records, if any, other than the said Order exhibited hereto.

13. THAT I am informed and verily believe that the Honourable Humphrey Mitchell, the said Minister of Labour either knew or ought to have known that some of the requests for repatriation signed by certain persons of Japanese origin were signed on the basis of representations made to certain persons of Japanese origin that the said requests could be readily cancelled, or that they were signed under a misapprehension as to their effect, or were signed for personal reasons and not as a manifestation of sympathy or support of Japan and that they were not signed voluntarily and that the said written statements were contrary to law and void and had the said Honourable Humphrey Mitchell, the said Minister of Labour, made proper enquiry he could have ascertained the circumstances

under which the said request for repatriation had been signed by the Applicant.

14. THAT the Applicant is not readily accessible to swear an affidavit in support of this application and that for the reasons alleged in the last preceding paragraph it is probable that the ends of Justice would be defeated if time were taken to obtain an affidavit sworn by the Applicant before launching the application herein.

15. THAT certain of the constitutional questions referred to in the notice of motion herein were considered by the Supreme Court of Canada recently in a Reference to the said Court by the Governor-in-Council and that the Supreme Court of Canada determined on the 20th day of February, 1946, that Orders-in-Council P.C. 7355, P.C. 7356 and P.C. 7357 dated December 15th, 1945, were intra vires the Governor-in-Council except in the following respects:

16. Mr. Andrew Brewin, a Solicitor of the Supreme Court of Ontario is solicitor for and was solicitor for the said Committee upon the hearing of the said Reference and I am now informed by the said Andrew Brewin and verily believe that the said intends to apply for leave to appeal and to appeal the said decision of the Supreme Court of Canada to the Privy Council.

SWORN before me at the City)
of Vancouver, Province of)
British Columbia this)
day of _____ 1946.)

A Commissioner for taking affidavits within British Columbia.

THIS Affidavit is filed at the request and for and on behalf of the Applicant herein by R. J. McMaster, one of the firm of Campbell, Brazier, Fisher & McMaster, Solicitor for the said whose place of business and address for service is 1408 - 675 West Hastings Street, Vancouver, B.C.

First Draft

TO THE HONOURABLE HUMPHREY MITCHELL ESQUIRE

Minister of Labour for the Dominion of Canada,

Ottawa, Ontario.

TAKE NOTICE that the Supreme Court of British Columbia will be moved at the Court House, Vancouver, B.C. on _____ day the _____ day of _____, A. D. 1946, at the hour of 10.00 o'clock in the forenoon, or so soon thereafter as Counsel may be heard by Counsel on behalf of _____ for a Writ of Certiorari to remove into the said Court a certain record of an Order made by you the said The Honourable Humphrey Mitchell Esquire, Minister of Labour for the Dominion of Canada, at Ottawa, Ontario, on the _____ day of _____ 1946, whereby you, the said the Honourable Humphrey Mitchell Esquire ordered that the said _____ be deported from Canada on the following amongst other grounds, that is to say:

1. THAT the said Order purports to be made in pursuance of Orders-in-Council No. P.C. 7355, P.C. 7356 and P.C. 7357 made the 15th day of December, 1945, or one or more of them, which said orders-in-Council are wholly ultra vires in the following respects:-

(a) The said Orders-in-Council purport to give authority for the exile or banishment from Canada of citizens of Canada to an alien country and exceed the powers granted to the Governor-in-Council under the provisions of the War Measures Act R.S.C. _____ in pursuance of which the said Orders-in-Council are purported to be made.

(b) The said Orders-in-Council are contrary to the accepted principles of International Law.

(c) The said Orders-in-Council are contrary to the British Nationality and Status of Aliens Act 4-5

Geo. V Chap. 17, and the Naturalization Act R.S.C. 1927, Chapter _____, and the Provisions of the Colonial Laws Validity Act _____ .

(d) The said Orders-in-Council deal with matters which fall within the competence of the Provinces under the British North America Act.

(e) The said Orders-in-Council do not continue any action deemed necessary by reason of the continued existence of the National Emergency arising out of the war against Germany and Japan as required by the National Emergency Transitional Powers Act, 1945.

(f) The said Orders-in-Council were not, at the time of being made, nor are they now, necessary by reason of real or apprehended war or invasion, nor by reason of any existing national emergency, for the security, defence, peace, order and welfare of Canada.

(g) Those portions of the said Orders which refer to persons of the Japanese race are void because of uncertainty.

(h) The Governor-in-Council did not exercise properly, or at all, the discretion vested in him under the said War Measures Act in making the said Orders-in-Council.

(i) The said Orders-in-Council are a legislative scheme and all of the provisions of the said Orders-in-Council are interdependent.

2. The said The Honourable Humphrey Mitchell, the said Minister of Labour, in making the said Order failed to determine judicially or at all that the applicant was a person subject to deportation within the meaning of the said Orders-in-Council, or at all, or, alternatively, the said the Honourable Humphrey Mitchell, the said Minister of Labour exceeded and abused his jurisdiction in so determining by

failing to make proper investigation, or, alternatively, any investigation, as to the matters required to be determined by him as affecting the Applicant before making the said Order.

3. The said the Honourable Humphrey Mitchell, the said Minister of Labour exceeded his jurisdiction in making the said Order in that he determined that the Applicant was a person of the Japanese race without proper, or, alternatively any, evidence that the Applicant was or is a person of the Japanese Race.

4. The said the Honourable Humphrey Mitchell, the said Minister of Labour, exceeded his jurisdiction by making the said Order before first referring the Applicant to the Commission authorized to be created under the said Order-in-Council P.C. 7357.

5. The said The Honourable Humphrey Mitchell, the Minister of Labour, exceeded his jurisdiction or acted without any jurisdiction by reason of the fact that he failed to give any notice to the Applicant of his intention to determine that the applicant was a person subject to deportation within the meaning of the said Order-in-Council P.C. 7355 and neglected or failed to give to the Applicant an opportunity to put forward his case in the determination of the question as to whether he was a person subject to deportation within the meaning of the said Order-in-Council, whether he was a person against whom an Order ought to be made under the said Order-in-Council contrary to natural justice and to the method prescribed by law and in total disregard of the special circumstances of the case.

6. The said the Honourable Humphrey Mitchell, the said Minister of Labour acted without jurisdiction in making the said Order in as much as the request for repatriation upon which

the said Honourable Humphrey Mitchell relied was obtained by duress or misrepresentation, or mistake, or was void as being made contrary to law, as the Honourable Humphrey Mitchell, the said Minister of Labour, either knew or ought to have known, or which he readily could have ascertained if he had made a proper enquiry.

AND FURTHER TAKE NOTICE that upon the hearing of the said Motion the Court will be moved that the Order for the Writ of Certiorari be made absolute for the Writ to be issued forthwith and that the said Order of the said Honourable Humphrey Mitchell the said Minister of Labour, be quashed on return without further order or, in the alternative, for an Order Nisi to show cause why the said Writ of Certiorari should not issue;

AND FURTHER TAKE NOTICE that upon the hearing of the said Motion and in support thereof will be read the affidavit of Robert James McMaster sworn the _____ day of _____ 1946 and filed, and the exhibit therein referred to.

DATED at Vancouver, B. C. this _____ day of _____ 1946.

Solicitor for

THIS APPLICATION is made for and on behalf of _____ upon his request.

THIS NOTICE OF MOTION is filed by Robert James McMaster, one of the firm of Campbell, Brazier, Fisher & McMaster, solicitor for _____ whose place of business and address for service is at 1408 Royal Bank Building, 675 West Hastings Street, Vancouver, B.C.

Lloyd v. Wallach, 20 C.L.R. 299. deals with the detention of naturalized persons in Australia in wartime, where, as ~~required~~ required by the War Precautions Regulations, 1915 s.55(1), the Minister of Defence "has reason to believe that any naturalized person is disaffected or disloyal." The case holds that the regulation permitting detention is a valid exercise of the power conferred by S. 4 of the War Precautions Act, 1914-1915. See also Ex parte Paine, (1940) 42 W.A.L.R. 16.

The Commonwealth has under the Constitution power to exclude any person, whether alien or not; Ah Yin v. Christie, (1907) 4 C.L.R. 1428.

There is no Australian nationality, as distinguished from Br. nationality, so as to limit the power of the Commonwealth under S. 51 of the Constitution to exclude persons from Australia; Q. D. for Ch. v. Ah Shering (1906) 4 C.L.R. 949.

Deportation of Br. subjects in Australia charged with seditious enterprise; R. v. Macfarlane, (1923) 32 C.L.R. 518.

As to the revocation of a certificate of naturalization; Meyer v. Paynton (1920) 27 C.L.R. 436. (H.C.)

Presumption against being an alien, Halpern v. Abbott (1951) 85 C.L.R. 695 (NSW. - - -).

Persons who have immigrated to Aust and made their homes there, and a

become members of the Australian community
... are not subject to deportation in
pursuance of an order purporting to be
made under D.S.A.A. of the Immigration Act
1901-1925 (cth); Ex parte Walsh and Johnson;
(1925) 37 C. L.R. 36.

Two propositions

Factum p 5125.

1. That the orders or regulations of subordinate ^{agency} body given legislative powers may be void or invalid for uncertainty or ~~because they~~ ambiguity & do not make clear what is to be done by the persons upon whom a duty or obligation is laid.

new point.

Craies. Statute Law. p 262. 274.

R. Broad. 1915 A.C. 1110

ruled in Inungi Sniff case. Re Immigration Act 20 B.C.R. 243.

Scott vs Pilliner 1904. 2 K.B.

A.G. v. Denby. 1925. Ch Div 596 at 612

2. That if that principle is sound, the present orders as they make "race" are invalid on account of vagueness or ambiguity as "the term" of the Japanese race is so vague that neither the Minister nor the Court has any means of knowing who is included in that classification.

Clayton v. Remoden. 1943. S.C.R. A.C. 320
at 332-3.

Factum.

3. Eschaybayi E.L.R. 10

Relate this argument to, Mr. Cartwright's argument on Chester v. Bateson.

Severability

In re Legislative & Referendum Act. 1919 A.C. 935 at 944.

A.G. for B.C. v. A.G. for Canada. 1937. A.C. 377 at 388-9.

A.G. for Manitoba v. A.G. for Canada. 1925. A.C. 568.

1934 S.C.R. 317 at 323

Reference re Alberta Statutes Bank Taxation Act at
1938 S.C.R. 100

Redan v. The King. 1926 A.C. 482.

①

Br. Nationality and Status of Aliens Act, c. 17, 4 & 5 Geo. V.
"adopted" in Canada, 4 & 5 Geo V,
c. 44 and 5 Geo V. c. 57

Amendment to the English Act, 1918, c. 38
Incorporated substantially into
Canadian Act by c. 38, 9 & 10 Geo V.

Amendment to the English Act as respects
the acquisition of British nationality
by persons born out of Her
Majesty's Dominions, 1922, c. 44,
See Canadian statutes 1923, c. 61

(P. 405)

A Canadian statute was passed
amending the Act in 1931, c. 39.

Similar amendments were
made to the British Act, 1933,
c. 49.

The last amendment ^(c. 14, 1943) to the British
Act was passed in 1943, c. 14.
(For an outline of the contents see
page 2)

There has been no
amendment to incorporate
changes.

The Civil Liberties Association of Toronto

16 Dundas Street, Toronto 5, Ont.

28 WELLINGTON STREET WEST, ROOM 508, TORONTO, ONTARIO

Telephone WAVERLEY 5118

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J. W. NOSEWORTHY, M.P.

MRS. H. B. SPAULDING

DR. M. WALLACE

Secretary:

MRS. J. A. DEWAR

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JAN 21 1946

MASON,
CAMERON & BREWIN

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WILLIAM DUNN
BARKER FAIRLEY
CLOTILD S. FERGUSON
DEWAR FERGUSON
SIR ELLSWORTH FLAVELLE
REV. C. J. FRANK
W. KASPAR FRASER, K.C.
ELEANOR GODFREY
MISS MARGARET GOULD
GEORGE GRANT
MRS. W. L. GRANT
G. M. A. GRUBE
MRS. L. INFELD
C. S. JACKSON
BEN LAPPIN
NORMAN LEVY
D. C. MCCRIMMON
MISS AGNES MACPHAIL, M.P.P.
W. J. MCCURDY
CHARLES H. MILLARD
MICHAEL MUTZAK
J. W. NOSEWORTHY, M.P.
B. K. SANDWELL
CLIFFORD SIFTON
C. E. SILCOX
MRS. C. B. SISSONS
MRS. H. B. SPAULDING
DR. GEORGE TATHAM
MARCUS TAIT
DR. M. WALLACE
DRUMMOND WREN

Dear Andy
Sorry I missed the post with
the cheque yesterday. I will get
Mr. McMillan to send you a
cheque today for another \$500
Best wishes

S.T.

October 5, 1945.

Professor Jarvis McCurdy,
239 Lonsmount Drive,
Toronto, Ontario.

Dear Jarvis:

I have received the documents which you sent in regard to the position of Japanese-Canadians, who have signed a declaration relinquishing their British nationality.

In order to give an opinion on whether or not those affected might apply for a declaration in the Courts that this document is invalid and that they are not liable to be deported, I would like to have the statement of the Minister of Labour of February 13th, 1945 and a copy of Order-in-Council P.C. 9760, both of which are referred to in the Declaration, and also any information as to whether your informants know of any other Order-in-Council which might affect the matter or any communications from the Minister of Labour or any other government official in regard to their status.

I will try to get some of this information for myself, but if you can get it for me, so much the better.

Yours truly,

TCC

FAB/EW

OFFICE OF
EDITOR-IN-CHIEF

SATURDAY NIGHT
TORONTO

THE
CANADIAN
ILLUSTRATED
WEEKLY

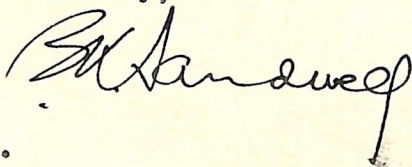
October 11, 1945

Dear Andy:

I am sending herewith all the Japanese material I can lay my hands on. The copies of the New Canadian in the envelope belong to Mrs. MacMillan and she wants them back early next week. The October 3 issue contains a legal opinion on the relinquishment-of-citizenship declaration.

If you will return these New Canadians to me I will see that they get back to Mrs.M.

Yours truly,



Andrew Brewin, Esq.
Mason, Cameron & Brewin
372 Bay street.
Toronto.

October 18, 1945.

Professor Jarvis McCurdy,
239 Lonsmount Drive,
Toronto, Ontario.

Re: Civil Liberties Association

Dear Mr. McCurdy:

I have read the material which you sent me in regard to the position of the Canadians of Japanese race, who signed forms relinquishing their Canadian citizenship.

Mr. Sandwell also was good enough to send me some material on the matter.

It is a well-known principle of constitutional law that no citizen can, in wartime, make any declaration which would have the effect of making such a citizen into an enemy alien.

There is a suggestion in some of the cases that this rule is not applicable where His Majesty clearly assents. I am doubtful, however, if His Majesty can be taken to assent to such a departure from the accepted rule of International and Constitutional law without the clearest evidence that he had done so. The approval of the Commissioner of Japanese Placement, the R.C.M.P. and even the Minister of Labour would not seem to me to be binding on His Majesty or sufficient declaration of His Majesty's assent to such an extraordinary anomaly as the making into enemy aliens of a large group of Canadian citizens.

I cannot find any Order-in-Council which justifies such a course and in my opinion the declaration of alienage which you sent me, a large number of which I believe have been signed by Canadian citizens, is invalid and illegal.

I cannot quite go so far as to agree with Mr. Garfield King that under the War Measures Act, the Governor-in-Council might not pass an Order-in-Council authorizing or validating these documents and providing for expatriation to Japan of those who signed the documents. It does not appear that any such Order-in-Council has in fact been passed and as the war against Japan is now over, it might be a little difficult for the Government to justify any such Order-in-Council under the War Measures Act.

It must, however, be recognized that the War Measures Act

Professor Jarvis McCurdy

October 18, 1945.

gave sweeping powers to the Government and the Courts will not generally review the policy or propriety of the exercise of the emergency powers conferred on the Government by the Act.

I believe, however, that you were more interested in the question of whether there would be any appropriate action in the Courts, assuming the opinion of Mr. King and myself, that the declarations are invalid to be correct.

It would of course be possible to wait until some forcible action with a view to repatriation to Japan was taken and then to apply for a Writ of Habeas Corpus.

There is little doubt of the appropriateness of this remedy as the historic weapon by which the liberty of the subject is secured. It may, however, be subject in these days and in these circumstances to serious practical difficulties as the expatriation might be carried out in haste and it might be difficult to have the legal proceedings dealt with in time to be effective.

In these circumstances, I believe that this is a case in which any of the persons who have received notice that the Department of the Government, or the Police intend to act upon the declaration and forcibly carry out the deportation, has the right to apply to the Supreme Court for a declaration that the document which forms the basis or justification for such action is invalid and that any threatening proceedings are unauthorized by law.

I understand that some of those who signed the document are resident in Ontario although many more are resident in other Provinces.

I believe that if such an action were taken, the Government would hesitate until the matter was disposed of to act upon the strength of the impugned declaration.

In the action for a declaration, some of the parties affected by the notice would be Plaintiffs and the Attorney-General of Canada representing the Crown in the Courts would be the Defendant.

I know of no other way in which the legality of the documents in question could be judicially determined except as I have said, waiting for a detention based upon these documents and applying for habeas corpus.

I would be glad to discuss the matter further with the members of your Committee who are interested and to co-operate if those affected see fit to take the action suggested.

Professor Jarvis McCurdy

October 18, 1945.

I would think it wise to proceed in this matter without delay as the Courts have the discretion to refuse the declaration and will take some little time to bring the matter to trial.

Yours very truly,

FAB/EW

To New Canadian

Persons of the Japanese race who signed forms relinquishing their Canadian citizenship, indicating a desire to go to Japan, may have an opportunity to change their minds. This, at least, is the opinion of Mr. Garfield King, well-known barrister in Vancouver, and official in the Civil Liberties Union. After a preliminary examination of the forms signed by Canadian British-born persons of the Japanese race, naturalized Canadians, etc. In a letter to an official of the Consultative Council, who wrote him inquiring about this point he writes: "I would say, unless there is statutory authority, no British Subject may, in time of war, relinquish his British nationality, if the effect of such relinquishment would be to make him an alien enemy. That has been decided in the Courts of England, including the Court of Appeal.

"Rex vs. Commanding Officer of the 30th Batt. of the Middlesex Regiment, 116 The Law Times 237, and there is another decision of the late Chief Justice Isaacs to the same effect in the same volume.

"In these cases, a section of the 'British Nationality and Status of Aliens Act, 1914,' which gave to British Subjects possessing dual nationality, the right to relinquish their British nationality by a Declaration of Alienage, was held not to operate in time of war, if it resulted in the declarant thereby becoming an alien enemy.

"I apprehend that that particular section of the act, although passed by the British Parliament, applies to Canada, for reasons which I do not need to elaborate at the moment.

"Of course the 'War Measures Act' gives the Governor-in-Council most sweeping powers, which one might presume would extend to deal with this matter. But I doubt that the Canadian Government could, even under that Act, deal with such a matter as the relations subsisting between the Subject and the Sovereign, unless it possessed the fullest powers in this field, and if my assumption that the 'British Nationality' and Status of Aliens Act, 1914", an Imperial Statute, extends to Canada, then clearly the Canadian Government cannot invade the exclusive jurisdiction of the British Parliament on this question of relinquishing the British Nationality of a British Subject, whether naturalized or British-born, and any Canadian Order-in-Council that that had effect would be ultra vires, because it would, in effect, be repealing an Imperial Statute.

"It would seem to me, from the wording of the forms as they concern Canadian born, that the proposed 'relinquishments' are made, not pursuant to say, statutory authority, but as merely an expression of desire by the declarants. It is not a contract between the declarant and the Canadian Government, because it is without "consideration" and not under seal. It cannot be said to be an enforceable document. It follows, therefore, that it can be revoked and/or renounced by the declarant, by proper notice in writing.

"As to the form of such notice, and the person or persons to whom it should be addressed, I am not altogether clear. But I should think that something like the attached forms should suffice, and I suggest that copies, all signed by the declarant, be sent by registered mail to at least the following:

Article for News Comment
on the Decision of the
Supreme Court on Japanese
Canadian Reference.

The newspaper headlines which announced the decision of the Supreme Court of Canada gave the impression that the Government's policy of deportation of Japanese Canadians had been approved by the Supreme Court of Canada.

This is far from the fact, and the first point of note is that a majority of the Court held that the Orders-in-Council were ultra vires of the Govern-in-Council in respect to one of the four groups to be deported, namely, the wives and children of those against whom orders of deportation were made. This happens to be the most numerous of all the groups. In a statement made in Parliament on November 21st, the Minister of Labour stated that there were altogether some 10,347 involved in the voluntary requests, and an additional 500 Japanese Nationals who did not sign the requests, but who were liable to deportation.

Of this total of approximately 11,000, the children under the age of 16 represented 3503. A further 2460 were Canadian born, ^{were} who given an opportunity under the orders to revoke their requests to be sent to Japan.

The majority decision of the Court is therefore that the Government has no constitutional or legal power to deport nearly half of those actually affected by the Orders.

Apart from the mere question of the substantial numerical reduction of those liable to be deported, the decision of the Supreme Court makes it impossible for the plans to be carried out in regard to the remainder, without grave injustice to these 3500 Canadian born children. They are faced with the alternative of losing their parents and becoming "neglected children" for whom the Provincial Childrens' Aid Societies will be responsible, or accompanying their parents to Japan and thereby in effect, being deported in defiance of the limitation placed upon the Government's legal powers by the court's decision. The alternative before them is that of exile or orphanage. The Government may well hesitate before treating innocent

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY
OF ORDERS-IN-COUNCIL OF THE 15th DAY OF DECEMBER
1945,
(P.C. 7355, 7356 & 7357) IN RELATION TO PERSONS
OF THE JAPANESE RACE

FACTUM OF THE CO-OPERATIVE COMMITTEE
ON JAPANESE CANADIANS

F. A. Brewin, Solicitor for The
Co-operative Committee on Japanese
Canadians

-and-

J. P. Erichsen Brown, Ottawa Agent
for the Solicitor for the Co-operative
Committee.

DRAFT FACTUM IN THE MATTER OF A
REFERENCE AS TO THE VALIDITY OF
ORDERS-IN-COUNCIL OF THE 15th
DAY OF DECEMBER 1945,
(P.C. 7355, 7356 & 7357) IN RELATION
TO PERSONS OF THE JAPANESE RACE

FACTUM OF THE CO-OPERATIVE COMMITTEE
ON JAPANESE CANADIANS

PART I

By Order-in-Council P. C. 45 of the 8th day of January 1946, the following question was referred to the Court for hearing and consideration, namely:

"Are the Orders-in-Council dated the 15th day of December 1945, being P. C. 7355, 7356 and 7357, ultra vires of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?"

The Orders-in-Council purport to be passed under the authority of the War Measures Act R. S. C. 1927, Chapter C206 "By reason of the War". P. C. 7355 provides that the Minister of Labour may make Orders for the "deportation" to Japan of the following classes of persons, ~~of sixteen years of age or over and resident in Canada,~~

1. Nationals of Japan resident in Canada who since December 8th 1941, made a request for repatriation, or who were detained as of September 1st 1945 under the provisions of the Defence of Canada Regulations Order P. C. 946 of February 5th 1943 as amended by P. C. 5637 August 16, 1945.

2. Every naturalized British Subject of the Japanese race resident in Canada who has made a request for repatriation provided that such person has not revoked in writing such request before midnight on September 1st, 1945.

3. Natural born British Subjects of the Japanese race resident in Canada who made a request for repatriation provided that such person has not revoked in writing such request before the Minister makes an Order for "deportation".

~~4. The wives and children under 16 years of age of any person for whom the Minister makes an Order for "deportation."~~
~~be included in such order and deported with such person.~~

The requests for repatriation which were in the form printed in the Appendix to this Factum, are to be deemed final

and irrevocable, ~~except as provided in regard to Classes 2 and 3 mentioned above.~~

P. C. 7356 provides that any person being a British Subject by naturalization under the Naturalization Act R. S. C. 1927, Chapter 138 who is deported from Canada under the provisions of P. C. 7355, shall as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British Subject or a Canadian National

P. C. 7357 provides for the appointment of a commission of three persons to make inquiry concerning the activities, loyalty and extent of co-operation with the Government of Canada during the war of Japanese Nationals and naturalized persons of the Japanese race in cases referred to the commission by the Minister of Labour for investigation with a view to recommending whether such person should be deported.

The commission is further empowered to inquire at the request of the Minister of Labour into the case of any naturalized British Subject of the Japanese race who has made a request for repatriation, and make recommendations. Any person of the Japanese race who is recommended by the commission for deportation, is subject to deportation under the provisions of P. C. 7355. Where any person is recommended for deportation pursuant to this Order, he shall as and from the date on which he leaves Canada in the course of such deportation, cease to be either a British Subject or a Canadian National.

The National Emergency Transitional Powers Act, 1945, provides that for the purpose of the War Measures Act, the war is deemed to have ceased as of January 1st 1946, and the National Emergency Transitional Powers Act 1945, comes into force on that date. In purported pursuance of its terms, the Governor in Council passed P. C. 7414 on the 28th day of December 1945 purporting to continue in full force and effect, all Orders and Regulations lawfully made under the War Measures Act in force immediately before January 1, 1946, [and purported no doubt to include in these terms P. C. 7355, 7356, and 7357.]

PART II

Counsel for the Co-operative Committee on Japanese Canadians will submit that the question referred to the Court should be answered as follows:

1. The Orders-in-Council P. C. 7355, 7356 and 7357 are wholly ultra vires of the Governor in Council.

PART III

ARGUMENT

The impugned Orders-in-Council purport to be an exercise by the Governor in Council of the delegated powers ^{conferred upon him} ~~conveyed~~ by reason of War under the terms of Section 3 of the War Measures Act R. S. C. 1927 Chapter 206 in the following terms.

"The Governor in Council may do and authorize such acts and things and make from time to time such Orders and Regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada." These words taken by themselves confer the widest and ~~most~~ comprehensive legislative powers upon the Governor in Council. They are, however, restricted by the qualifying context (to use the language of Duff, J., in re Gray, 57 S.C.R. 150 at 168) and ~~are~~ subject to the specific provisions of the Statute ~~re~~ (Reference as to validity of the regulations in relation to chemicals R.S.C. 1943^{SCR}, 1.)

The qualifying context and specific provisions relevant in this case are to be found in the later words of the same section which reads "and for greater certainty but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated that is to say, (b) arrest, detention, exclusion and deportation." The word "deportation" means "the forcible removal of aliens" (Fong-^{Yue}-Ting vs U. S.) 149 U. S. 698⁷⁹⁹. Webster's Dictionary page — Attorney General for Canada vs Cain, 1906 A.C. 542. ^{at p. 546.}

The word "deportation" is not apt to describe the sending to Japan of Canadian citizens who ^{were} either born in Canada or born in other parts of the world and naturalized in Canada ^{and who} ~~should~~ have no connection with Japan other than that of "race."

Deportation is the return of an alien to the country from whence he came and not the exile or banishment of a citizen to an alien country.

Section 3 of the War Measures Act should therefore be read as follows:

" The powers of the Governor in Council shall extend to all matters coming within the classes of subject hereinafter enumerated that is to say, ^(b) "arrest, detention, exclusion, and the forcible removal of aliens to their country of origin."

Admittedly the purpose of the enumeration of classes of subjects in Section 3 was not to cut down the generality of the powers conferred by the broad language of the opening clause so as to require the operation of the *ejusdem generis* rule (in *re Gray*, *supra*), but the purpose of the enumeration was however, in respect at least to the enumerated classes of subjects themselves, to indicate that the powers of the Governor in Council "could go even thus far (per Sir Charles Fitzpatrick, C.J. in *re Gray* 57 S.C.R. page 158) or to indicate "marginal instances" (per Duff, C. J. *ibidem* page 168) or "cases in which there might be such doubt that it was better to mention them specifically ^{ad} ^{per} Anglin, J. *ibidem* 177) It is respectfully submitted that Parliament in saying that the forcible removal of aliens to the country of their origin is to be regarded as a "marginal instance" as to which there might be doubt, ~~was~~ ^{that} clearly indicated ~~with~~ [&] the forcible removal of British subjects to a foreign country was regarded as beyond the line, beyond doubt, and very much further than the margin.

change was interpretation
~~In considering the question of interpretation raised,~~
there are several rules of interpretation which support the in-
attention
~~terpretation~~ here advanced. Where there is ambiguity, a statute even in war time should be interpreted in favour of the liberty of the subject and the ~~previous~~ policy of the law.

The banishment of subjects by any court or body for any other reason than conviction of felony is expressly prohibited under heavy penalties by Habeas Corpus Act 31, Charles II, Chapter 2, section ¹¹~~66~~, R vs Halliday 1917 A.C. Appeal Case 260 at ^{A.C. at}, and Liversedge vs Anderson 1943 Appeal Case page .

There is also a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations, (Halsbury Second Edition, volume 31, page 509.) That the banishment of ^{subjects} ~~Nationals~~ particularly on racial grounds, is contrary to the accepted principles of International law may be gathered from Attorney General of Canada vs Cain, 1906 A. C. 542 at 546. ^{There are} Recent developments in the field of International law by which the deportation of civilian population on racial grounds is regarded as a crime against humanity, ^{See 23} Canadian Bar Review, ⁷⁵⁴ page ~~574~~ and particularly ^{at} 756 and 757. The ^Public policy in respect to racial discrimination is discussed in re Drummond Wren 1945 O. R. 778.

2. At the time the War Measures Act was passed in 1914 and also when it was consolidated in 1927, the Parliament of Canada could not have delegated power to the Governor in Council to make laws or regulations repugnant to any act of the Imperial Parliament extending to the Dominion of Canada, as it could not have done so itself. (Colonial Laws Validity Act 29-30 Vict. (Imp.) Chapter 63 S 2). Various provisions of the ~~Imperial~~ Orders-in-Council are repugnant to the British Nationality and status of Aliens Act 4-5 George V, C.17. In particular the discriminating provisions of Section 2 of P. C. 7355 are repugnant to ~~Section 3(1) of the Act~~; the provisions of P. C. 7356 and the provisions of 7357 which purport to deprive naturalized British ~~Subjects~~ of their status as British Subjects for no cause other than that they have signed a request ^{not sent to Japan,} not revoked ⁱⁿ before a given date, or because the extent of their co-operation with the Government of Canada during war is deemed unsatisfactory by the commission appointed by the Government, are repugnant to Sections 7 & 8, 13-16 of the Imperial Act which deals with ^{loss of} ~~laws on~~

nationality. The provisions in respect to the wives and children of naturalized Canadians who are deported and who are to lose their status without any option, are inconsistent with and are repugnant to Sections 10, 11 and 12 of the Imperial Act.

Part II of the British Nationality and Status of Aliens Act was only to apply to the Dominion of Canada, if adopted by the "legislature" of that Dominion, (Section 9). The Parliament of Canada did adopt the Act (4-5 George V, C44 and 5 George V C7). The Act is therefore an act to which the Colonial Laws Validity Act applies.

It is clear that if the Parliament of Canada did not have the power to make laws repugnant to the Imperial Statute, it could not delegate such powers and could not be assumed to have attempted to do so.

Since the passing of the Statute of Westminster by the Imperial Parliament in 1931, the Parliament of Canada ^{in matters within its competence} could no doubt make laws repugnant to the Imperial Statute. Parliament, however has not since 1931 re-enacted the War Measures Act which is still therefore, subject to the Colonial Laws Validity Act and the Orders-in-Council themselves are not "laws made after the commencement of this Act by the Parliament of the Dominion." They do not therefore fall within the provisions of Section 2 of the Statute of Westminster.

3. The Orders-in-Council throughout depend upon the persons affected being in fact of the "Japanese race." It would be the duty of the Court on any application for Habeas Corpus to determine the issue as to whether or not any particular individual was "of the Japanese race." *Eshugbayi Eleko vs Government of Nigeria*, 1931 A.C. at 670. The phrase "Japanese race" is so vague as to make the provisions unenforceable.

The text book authorities quoted in the Appendix hereto indicate that the word "race" is not definable in scientific terms and has not any precise meaning. It is a hypothetical group inferred to have existed in the past. Provisions in a Will in regard to the "Jewish race" have been held to be void for uncertainty, 1943 A.C. 320 referred to in *Clayton v Ramsden*

Is this too wide a concession?
Cld Parlt enact that a British subject born in England should lose his British nationality?

re Drummond Wren 1945, O.R. 778 at 786.

It is true that Parliament has delegated legislative power to the Governor in Council, but such power is not exercised by passing what purport to be orders and regulations so vague as to be unenforceable, and meaningless.

4. The impugned Orders-in-Council deal with the matter which, in the absence of the emergency of war, would fall within the competence of the legislature of the Provinces, namely, property and civil rights, Section 92, Head 13, British North American Act. To restrain the liberty of the subject where there has been no crime committed is beyond question, an interference with civil right, per Robertson, C. J. O. in re McKenzie 1945 O.R. at 796. The Orders-in-Council are prevented^{re} in nature, and are not criminal law and do not fall within any of the enumerated heads of section 91.

It is conceded that, by reason of war, a new aspect of the business of Government has arisen which justifies the Dominion Parliament in encroaching on subject matters normally reserved exclusively to Provincial Legislature. It is also conceded that these exceptional interferences may continue to be justified after actual war conditions have ceased, Fort Francis Pulp & Papers^{Co Ltd} vs Manitoba Free Press 1923, A. C. 695. The Parliament of Canada by enactment of the National Emergency Transitional Powers Act has recognized that the emergency of war which justified or required the enactment of the War Measures Act, ceased on the first day of January 1946. The recital to the Act, however indicates, that certain transitional powers require to be exercised by the Governor in Council, and that it may be necessary for this purpose to continue certain orders and regulations made under the War Measures Act.

Parliament has by Section 2 (1) further defined what powers may be necessary to be exercised by reason of the continued emergency. ^{Satin 3} The Clause "b" of the War Measures Act in regard to "arrest, detention, exclusion and deportation" is entirely omitted from the new Act. It is submitted that this constitutes a declaration by Parliament and the clearest evidence that in respect to "deportation"

there is no continuing necessity for the exercise of extraordinary powers by the Governor in Council from January 1, 1946 by reason of the emergency of war or by reason of any continuing transitional "post-war" emergency.

The impugned Orders-in-Council do not continue any action deemed necessary by reason of the war. Actual hostilities with Japan concluded on or about the 25th day of August 1945, see proclamation Canada Gazette 1945, page 3704. No orders or regulations in respect to the banishment of Canadian Nationals or British Subjects had been passed at that time or indeed at the time the National Transitional Emergency Powers Act was passed, which declared that only transitional and continuing powers were necessary. Parliament must therefore be taken either not to have delegated to the Governor in Council, the power to legislate for "deportation" after January 1, 1946 or alternatively, Parliament could not authorize the invasion of a provincial sphere which it had itself declared no longer necessary to be invaded by reason of the emergency of war or the transitional post-war emergency. Parliament itself has absolved the Courts from the inquiry upon which otherwise the Court might be loathe to enter, namely, as to whether there exists any emergency either by reason of war, or by reason of the transition from war to peace in respect to the subject matter of the impugned Orders-in-Council.

5. P. C. 7355, 7356, 7357 are a part of one legislative scheme. It is possible that the Governor in Council could have passed a valid Order-in-Council for the deportation of one of the 4 classes referred to, namely the Japanese Nationals, but all of the provisions of the Orders are inter-dependent, and it is impossible to say that the Governor in Council would not have abandoned the whole scheme if parts of it had been known to be ultra vires. In re Alberta Statutes the Bank Taxation Act 1938, S.C.R. 100 at 123 and 132.

Respectfully submitted by

J. R. Cartwright, K.C. and
F. A. Brewin

Counsel for the Canadian Co-operative
Committee.
January 16, 1946.

APPENDIX "A"

Form of request for Repatriation

GOVERNMENT OF CANADA

DECLARATION

I,....., (.....), born.....
(M.or F.) (day, month, year)

registered as a Canadian-born British subject (J.R. No.....) under
Order in Council P.C. No. 9760, dated December 16, 1941, hereby declare
my desire to relinquish my British nationality and to assume the status
of a National of Japan.

Further, I request the Government of Canada, under the conditions
set out in the Statement of the Minister of Labour dated February 13,
1945, to arrange for and effect my repatriation to Japan.

I declare that I fully understand the contents of this document,
and I voluntarily affix my signature hereto:

Date....., 1945
SIGNATURE

Place.....

.....
WITNESS INTERPRETER

Note: All persons sixteen years of age and over are required to
sign a separate Declaration.

Application Recommended:

Application Approved:

.....
R.C.M.P.

.....
Commissioner of Japanese Placement

Date....., 1945

Date:....., 1945

N.B.- The form in respect to Naturalized British Subjects was the
same with the substitution of the words "Canadian naturalized"
for "Canadian born" in the above form.

APPENDIX "B"

STANDARD TEXTS ON "JAPANESE RACE"

1. "The People of Asia", by L. H. Dudley Buxton, M.A., F.S.A.
lecturer in Physical Anthropology,
University of Oxford.

Page 3- Referring to Blumenbach, "he says",

He recognized the fact that no sharp lines demarcate the several varieties of mankind, and realized that the transition from type to type is imperceptible.

and on Page 15-

But not only is the difficulty confined to the main racial stocks. The subdivisions of the main groups are almost infinite in number, and the subject for endless controversy and vast columns of figures and infinite measurements which appear often to be but imperfectly understood. There are few criteria which are generally accepted and the student is left to wander disconsolate in a welter of conflicting literature.

2. "The Study of Man", by Ralph Linton, Ph.D., Professor of
Anthropology, University of Wisconsin,

Page 39 -

Racial classifications are, therefore, based upon the presence of similarities with respect to a selected series of physical traits. The content of any group within the classification depends both upon the traits selected and upon the degree of similarity which the investigator considers significant.

Page 40-

The real point of all this is that, while breeds are genuine biological entities, races, as we have chosen to use the term, are creations of the investigator and creation with regard to which all the creators are by no means in agreement. These (breeds) are genuine biological entities, groups characterized by close physical resemblances and common heredity. Races and stocks, on the other hand, are abstractions.

3. "The Racial History of Man", by Roland B. Dixon, Professor
of Anthropology at Harvard
University.

Page 1-

The term "race" is one which has unfortunately acquired a somewhat varied meaning in our every-day speech.

Page 4-

However distinct, therefore, races may once have been, the peoples of the world to-day are complex mixtures of these original types, in which we must seek to discover, if we can, the constituent elements.

Page 7-

In other words, we cannot point to any group of criteria and say that these are inherently connected and form a true racial standard.

4. "We Europeans", by Julian S. Huxley D.Sc and A. C. Haddon
Sc.D., F.R.S., formerly reader in Ethnology
in the University of Cambridge.

Page 107-

The word "race" as applied scientifically to human groupings, has lost any sharpness of meaning. To-day it is hardly definable in scientific terms, except as an abstract concept which may, under certain conditions, very different from those

APPENDIX "B" (Continued)

now prevalent, have been realized approximately in the past, and might, under certain other but equally different conditions, be realized in the distant future.

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A true "race" or sub-species, major or minor, is thus a hypothetical group inferred to have existed in the past: an "ethnic type" is a subjective judgment of the normal or ideal characteristics of a component of an existing population.

The examination of the Text Books further indicates that the population of the Japanese Island is itself composed of a mixture of races, and what races there are there, are indistinguishable from the people in Manchuria and Korea and any other parts of Asia.

Dixon - Op.cit. - the same work, page 287.
The Races of Man by A. C. Haddon, page 32, 94 & 95.
Man Past and Present by A.H.Keene, revised by A.C. Hingston Quiggan
A. C. Haddon at page 294 and 295,
Buxton - Op.cit. 206 and 217.

As indicating the great varieties of physical types in Japan, see the Journal of the Faculty of Science, University of Tokyo, volume 1, part 1, 1925.

A F F I D A V I T

C A N A D A)
PROVINCE OF ALBERTA)
TO WIT:)

WE, GEORGE S. NARUKE, KIMIKO HINATSU,
SOSHICHI TANAKA, IWAWO MASUDA, SHINISHI KAWADE, and OSAMU NAKUTSURU,
Severally Make Oath and Say:

1. The homes of all who make this affidavit originally were in the Province of British Columbia where we were established in different homes and earning our livings in different occupations.
2. In the months of April and May, 1942, we were ordered to leave our homes in British Columbia and were taken to Southern Alberta, where we were all placed at work in the sugar beet fields and were housed, during winter and summer, in temporary beet workers' houses.
3. We remained in this temporary accommodation and temporary employment from the time when we arrived in Alberta in April or May, 1942, until about the middle of July, 1943.
4. At that time we were notified to appear at various public buildings in our respective Towns, namely: Raymond, Alberta; Picture Butte, Alberta; Lethbridge, Alberta; and Taber, Alberta, and Magrath, Alberta.
5. When we reached these points, we were met by members of the Royal Canadian Mounted Police and were told that they had with them forms of application for return to Japan.
6. Not only those of our people who signed this affidavit, but many scores and hundreds of others were confused about the whole situation.
7. We asked questions of the Police and, as far as we could understand, it was considered that if we did not sign these forms, we would not be co-operating with the Canadian authorities.

8. We had been living under desperate conditions for more than three years. Many of us have been living in out-houses which had been converted into living quarters and health and sanitary conditions were of an extremely poor character.

9. In many cases, not only the health but the very lives of the older men and women and the young children were endangered by the extreme cold weather of the winters which now and then reached thirty degrees below zero and even more.

10. As a result of the desperate conditions under which we were living, and as a result of the impression we were given that we would not be co-operating with the Government if we did not sign, many of the Japanese people, including those who sign this affidavit, signed for the above reasons.

11. Later on when we found that we were mistaken, all those who signed this affidavit and many others cancelled the request for repatriation.

12. All those who signed this affidavit and many scores more whom they represent, desire to remain in Canada and consider Canada their permanent home.

13. We and the scores of others whom we represent have no desire to return to Japan or to live there. We prefer the Canadian system and living conditions.

14. During the whole of the war, we and those we represent have been guilty of no misconduct and no breach of regulations.

15. On the other hand we have done our best as sugar beet labourers and have endeavoured to behave as honest citizens.

16. We are anxious to be given a chance to continue our homes in Canada with our families and to show that we are and have been loyal Canadian subjects.

and
Generally

SWORN at the City of Lethbridge,
in the Province of Alberta,
this 21st day of January, A. D.
1946,
Before me,

Arar Futu

A Notary Public in and for the
Province of Alberta.

George S. Karube

Kenji. Kusatsu

Sashichi Tanaka

Iwao Masuda

Shinichi Kamada

Osamu Nakatsu

January 21st, A. D. 1946.

A F F I D A V I T

A. GLADSTONE VIRTUE, K. C.
Barrister and Solicitor,
Lethbridge, Alberta.