Co-operative Ctte on Japanese Canadians:
Appeal to the Imperial Privy Council, 1946

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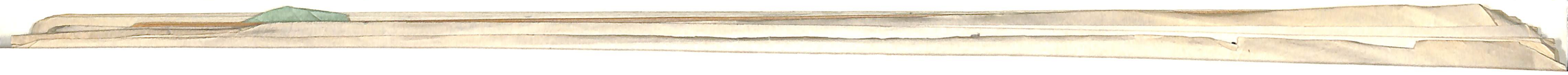

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN:

Co-operative Committee on Japanese Canadians.

-and-

The Attorney General of Saskatchewan

PETITIONERS

-and-

The Attorney General of Canada

-and-

The Attorney General of British Columbia.

RESPONDENTS.

IN THE MATTER OF A REFERENCE as to the validity of Orders-in-Council of the 15th day of September 1945 (P.C. 7355, 7356 and 7357) in relation to persons of the Japanese Race.

TO THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL

THE HUMBLE PETITION of the above named Petitioners, CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS, and the ATTORNEY GENERAL OF SASKATCHEWAN

SHEWETH as follows:-

1. YOUR PETITIONERS desire to obtain special leave to appeal from the opinions certified by the Supreme Court of Canada to His Excellency the Governor-in-Council upon a Reference (under the provisions of Section 55 of the Supreme Court Act R. S. C. 1927 Chapter 35) of the following question "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 and particulars, and to what extent?"

2. THE answers certified by the Supreme Court of Canada were as follows:

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

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

Rand, J. was of opinion that:

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

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

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

Kellock, J. was of opinion that:

(1) Order-in-Council 7355 was not ultra vires except in the following particulars:

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

(b) Subsection 4 of Section 2 were ultra vires in toto.

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

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

3. YOUR Petitioners will submit that the answers to the said questions should have been that the Orders-in-Council P. C. 7355, 7356 and 7357 are wholly ultra vires of the Governor-in-Council.

4. Questions of law of very great and general importance are involved including the following questions:

(a) Whether upon the correct interpretation of the War Measures Act R. S. C. 1927 c. 206, the Governor-in-Council has been empowered by the Parliament of Canada to make Orders for the forcible removal from Canada to Japan or elsewhere of British Subjects resident in Canada, whether born in Canada or naturalized.

(b) Whether the Parliament of Canada could or did authorize the Governor-in-Council to deprive naturalized British subjects resident in Canada of their status as British subjects for reasons and by a procedure inconsistent with and repugnant to that in the Imperial Statute, the British Nationality and Status of Aliens Act 4 and 5 George V, Chapter 17 as amended in 1918 by 8 and 9 George V, Chapter 38.

(c) Whether Part II of the Imperial Statute, the British Nationality and Status of Aliens Act has been "adopted" by the Parliament of Canada so as to extend to the Dominion of Canada, and whether the provisions of the impugned Orders-in-Council, purporting to deprive British subjects of their status, are repugnant to the said Imperial Statute and therefore invalid.

(d) Whether the Statute of Westminster (1931) had the effect of enabling the Governor-in-Council to make orders or regulations under the provisions of the War Measures Act, repugnant to an Imperial Statute having application to Canada.

(e) Whether the impugned Orders-in-Council do not constitute an interference with "civil rights within the province" not justified by any emergency of war or other exceptional circumstances, and are therefore such as the Parliament of Canada could not itself have authorized the Governor-in-Council to make at the relevant time or alternatively, whether or not by reason of such interference with civil rights the said Orders have ceased to have any validity and effect as of January 1, 1946, when the

war for the purpose of the War Measures Act ceased to exist.

(f) Whether or not the said Orders-in-Council are not all part of one integral legislative scheme and therefore, as parts of them are invalid, whether or not the whole are ultra vires of the Governor-in-Council.

(g) Whether the said Order-in-Council authorizing the Minister of Labour to make orders for the "deportation of persons of the Japanese race" are not so vague as not to be an ineffective exercise of the power delegated by Parliament to the Governor-in-Council to make orders and regulations, and for that reason, void.

5. The question as to the validity of these three Orders-in-Council was referred to the Supreme Court of Canada by His Excellency the Governor-in-Council by the terms of P. C. 45 dated the 8th day of January, 1946.

This Order recites that it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the validity of the Orders-in-Council aforesaid be obtained with the least possible delay, "which question" it continues "is in the opinion of the Acting Minister of Justice, an important question of law touching the interpretation of Dominion Legislation."

6. The impugned orders confer on the Minister of Labour, the power to make orders for deportation of the following classes of persons resident in Canada.

(1) The Nationals of Japan who since December 8th 1941 made a request for repatriation, or who were detained as of September 1st, 1945 under the provisions of the Defense of Canada regulations P. C. 946 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 1, 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.

(4) Wives and children under 16 years of age, of any person for whom the Minister makes an order.

(5) Any Japanese National or naturalized person of the Japanese race whose deportation is recommended by a commission of three persons to be appointed by the Government to make an inquiry concerning the activity, loyalty and extent of co-operation with the Government of Canada of such persons.

7. It is impossible to say precisely how many are affected by the Orders-in-Council. On November 21st 1945 the Minister of Labour made an announcement to Parliament that there was a total of 10,347 involved in the voluntary requests for repatriation. Of this number, 6,844 actually signed requests, and the remainder of 3,503 were dependent children under the age of 16 years, of those who signed. Of the 6,844, 2,923 were said to be Japanese Nationals, 1461 naturalized Canadians, and 2460 Canadian born.

8. Upon the argument before the Supreme Court of Canada, your Petitioners submitted.

(a) That Section 3 of the War Measures Act in providing that the powers of the Governor to make orders and regulations by reason of war should extend to "(b) arrest, detention, exclusion and deportation" should be interpreted as restricting the power of the Governor-in-Council to make orders for the forcible removal of Canadian residents, to those to whom the word "deportation", was aptly applied, and that the word "deportation" was not an apt word to extend to the forcible removal of British subjects resident in Canada to a country with which they might have had no connection other than that of race.

(b) That P. C. 7356 and Section 5 of P. C. 7357 were ultra vires of the Governor-in-Council because they purported to deprive naturalized British subjects of their status as British subjects, or Canadian Nationals as and from the date upon which they left Canada in the course of deportation.

No ground for the deprivation of nationality is suggested, other than that the persons affected were of the Japanese race and signed a request for repatriation not revoked within the times set out in the order. No form of inquiry was

required by the Minister of Labour before making the order, and it is not necessary for him to conclude that the person in respect to whom the order is to be made, was in any way disaffected or disloyal to His Majesty.

The Petitioners submitted that these orders were inconsistent with the Imperial Statute, the British Nationality and Status of Aliens Act (4 and 5 George V, Chapter 17) Part II of which was adopted by the Parliament of Canada and was therefore applicable to the Dominion of Canada.

The Petitioners submitted that the Statute of Westminster (1931) did not have the effect of enabling the Governor-in-Council under powers conferred by a Statute which preceded the Statute of Westminster to make provisions repugnant to an Imperial Statute having application to Canada.

(c) On December 8th, 1944, the Parliament of Canada passed the National Transitional Emergency Powers Act to come into force December 31st, 1944. This Act declared that for the purpose of the War Measures Act, war was over on the 31st of December 1944. It recognized, however, that certain transitional powers required to be exercised by the Governor-in-Council who should for that purpose have authority to continue orders and regulations made under the War Measures Act.

In defining the powers regarded as necessary, clause (b) of Section 3 of the War Measures Act in regard to arrest, detention, exclusion and deportation, was ommitted.

The Petitioners submitted that this was a recognition that there was no emergency after January 1, 1946 of the nature which required the Governor-in-Council to interfere with the civil rights of British subjects by requiring their forcible removal from Canada, and that the Orders-in-Council were not necessary by reason of real or apprehended war, invasion or insurrection.

(d) The Petitioners further submitted that if part of the Orders-in-Council were invalid, the whole was invalid as the provisions of the various orders were inter-dependent, and all part of one scheme.

9. The Chief Justice, Kerwin, and Taschereau, J. concurring, were of the opinion that the Orders were wholly valid. They held that the words "deportation" and "exclusion" in Section 3 of the War Measures Act were both broad enough to cover the measures contained in the Order-in-Council; that in any event these Orders-in-Council were sufficiently covered by the general terms of the opening clause of Section 3 of the War Measures Act; that the Orders-in-Council contained legislation that could have been adopted by Parliament itself; that under the War Measures Act the Governor-in-Council was empowered to adopt any legislation that Parliament could have adopted; that such legislation was expressly and impliedly adopted because it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; that the Governor-in-Council was the sole judge of the necessity or advisability of the measures, and it was not competent to any Court, to canvas the considerations which might have lead the Governor-in-Council to deem such orders necessary or advisable for the objectives set forth; that further, none of the provisions of the Orders-in-Council were repugnant to the British Nationality and Status of Aliens Act; that in any event the Orders-in-Council were the equivalent of a statute, or exactly the same as a statute, and therefore under the Statute of Westminster of 1931, they were not affected by any supposed repugnancy with the Imperial Statute; and that the Parliament of Canada did not adopt the British Nationality and Status of Aliens Act which had no application to Canada.

10. Mr. Justice Estey with whom Mr. Justice Hudson substantially agreed, was of the opinion that the Orders-in-Council were valid, except Section 2 of Subsection 4, of P. C. 7356 by virtue of which the wives and children of those to be deported were themselves made liable to deportation. He was of the opinion that there was an undoubted power to deport aliens; that the Governor-in-Council had authority to revoke naturalization in the manner provided by the Orders which was not inconsistent with the British Nationality and Status of Aliens Act; and that therefore naturalized subjects of the

Japanese race could be deprived of their nationality, and deported as aliens; that the provisions in regard to Canadian born subjects of the Japanese race could not be regarded as involving "deportation" as they were founded upon request; that in respect to the wives and children, the element of compulsion existed and that could not be justified.

11. Mr. Justice Rand was of the opinion that P. C. 7355 was ultra vires in relation to the compulsory deportation of natural born British subjects and of wives and children under 16. He based his opinion on the ground that the Orders involved the compulsory invasion of another's territory, the violation of sovereign rights, and an affront to its dignity as represented by the occupying power, and that Parliament in his opinion did not delegate such authority, to the Governor-in-Council.

He further found in the Orders-in-Council themselves, clear evidence that the act of expulsion so far as Canadian born citizens and wives and children was concerned, was not deemed necessary or advisable by the Governor-in-Council for the peace and welfare of Canada for any reason arising out of war.

He was further of the opinion that P. C. 7356 was ultra vires in revoking the naturalization of persons of the Japanese race naturalized under the Naturalization Act, but intra vires so far as it took away incidental rights and privileges of such persons as Canadian nationals and that P. C. 7357 was intra vires subject to the observance of the requirements of the Naturalization Act as to the grounds for the revocation of nationals.

12. Mr. Justice Kellock rejected the Petitioners' argument that the "continuing emergency" referred to the National Transitional Emergency Powers Act was not such as justified the exercise of the powers contained in the impugned Orders-in-Council.

He held that the power to make orders for "deportation" conferred by Section 3 (b) of the War Measures Act did not extend to, nor was it apt in the case of citizens who have committed no offense and as to whom there is no charge, trial or conviction

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN:

Co-operative Committee on Japanese Canadians.

-and-

The Attorney General of Saskatchewan

APPELLANTS

-and-

The Attorney General of Canada

-and-

The Attorney General of British Columbia.

RESPONDENTS

IN THE MATTER OF A REFERENCE as to the validity of Orders-in-Council of the 15th day of September 1945 (P.C. 7355,7356 and 7357) in relation to persons of the Japanese Race.

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

TITLE PAGE FOR RECORD OF PROCEEDINGS

IN THE PRIVY COUNCIL

No. of 1946.

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BETWEEN:

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-and-

The Attorney General of Saskatchewan

Appellants

-and-

The Attorney General of Canada

-and-

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IN THE MATTER OF A REFERENCE as to the validity of Orders-in-Council of the 15th day of September 1945 (P.C. 7355,7356 and 7357) in relation to persons of the Japanese Rade.

RECORD OF PROCEEDINGS

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Winchester House
Old Broad Street,
London, E.C.2

For the Appellants.

Charles Russell & Co.,

For the Attorney General of Canada, Respondent

Gard Lyall & Co.,
47 Gresham Street,
London, E.C. 2

For the Attorney General of British Columbia, Respondent.

TITLE PAGE FOR RECORD OF PROCEEDINGS

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Gard Lyall & Co.,
47 Gresham Street,
London, E.C. 2

For the Attorney General of British Columbia, Respondent.

PART II

Documents

CASE OF THE APPELLANT ATTORNEY GENERAL OF SASKATCHEWAN.

1. This is an appeal from the opinion certified by the Supreme Court of Canada to His Excellency the Governor-in-Council in answer to the following question:

"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?"

2. The text of the impugned Orders P. C. 7355, 7356 and 7357 is printed in full in the Record of Proceedings.

3. The answers to the said question certified by the Justices of the Supreme Court of Canada are printed in the Record.

4. The Reasons for the opinion are also printed in the Record.

5. This Appellant associates himself with the submissions contained in the Case of the Appellant, the Co-operative Committee on Japanese Canadians and will respectively submit that the proper answer to the question referred to should have been that the impugned Orders are in their entirety ultra vires the Governor-in-Council because

(a) The Orders provide for the exile to Japan of Canadian citizens, which was not a power delegated to the Governor-in-Council by the Government of Canada under the War Measures Act.

(b) The Orders constitute an exceptional interference with property and civil rights, a subject matter reserved exclusively by the British North America Act, Section 92, Head 13, to the provincial legislatures and there was at the date of the promulgation of the said Orders or alternatively from the 1st day of January 1946, no such emergency in existence as justified an exceptional encroachment on a sphere of legislation normally reserved to the provincial legislatures.

(c) The Orders or parts of the said Orders are repugnant to the British Nationality and Status of Aliens Act, and are

therefore void and inoperative.

(d) The Orders are vague and unenforceable insofar as they refer to persons "of the Japanese Race", as their is no ascertainable standard to determine who is "of the Japanese Race" and hence the Orders are not such "orders" as the Governor General-in-Council was empowered to pass under the terms of the War Measures Act.

(e) The said Orders or parts of them were not and could not have been deemed necessary "by reason of war".

(f) The said Orders if bad in part are wholly bad as their provisions constitute one legislative scheme, and are not severable.

F. A. Brewin.

DRAFT CASE FOR THE APPELLANTS CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS

1. This is an appeal, by special leave, from the opinion certified on the 20th day of February 1946 by the Supreme Court of Canada to His Excellency the Governor-in-Council upon a reference under the provisions of the Supreme Court Act of the following question.

R.S.C.1947 c.35 s.55

" 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? "

P.

All of the impugned orders were passed on the 15th of December 1945.

2. The first Order-in-Council referred to,(P. C. 7355) is an order authorizing the Minister of Labour to make orders for deportation "to Japan" of the following classes of persons, resident in Canada.

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

(2) Every naturalized British Subject "of the Japanese Race" who had made requests for repatriation provided that such request had not been revoked in writing before midnight on September 1st, 1945.

(3) Natural born British Subjects "of the Japanese Race" resident in Canada, who made a request for repatriation and did not revoke it in writing before the Minister had made an Order for "deportation".

(4) The wives and children under 16 years of age of any person against whom an Order for "deportation" had been made.

P -

The requests for repatriation which were in the form set out in the Appendix hereto were to be deemed final and irrevocable except as provided in ~~regard to~~ clauses 2 and 3 of Section 2 of the Order. The remaining provisions of this Order are largely of an ancillary or administrative nature.

P —

R.S.C.1927 c.138

3. The second Order (P. C. 7356) provides that any person being a British Subject by naturalization under the Naturalization Act 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 —

4. The third Order (P. C. 7357) provides for the establishment of a Commission to make inquiry concerning the activity, 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 where their names are referred to the Commission by the Minister of Labour for investigation with a view to recommendation whether in the circumstances of any such case, such persons should be deported. The Commission may further 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 make recommendations. Any person of the Japanese Race who is recommended by the Commission for deportation, shall be deemed to be a person subject to deportation under the provisions of P. C. 7355, and as and from the date upon which he leaves Canada in the course of deportation, he shall cease to be either a British Subject or a Canadian National.

5. The recitals to the Orders indicate that they purport to have been made by the Governor-in-Council under authority conferred by the War Measures Act. The relevant provisions of this Act are as follows:

R.S.C.1927 c.206

"~~Section 3~~ - Powers of the Governor-in-Council"

3. "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 be reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-Council shall extend to all matters coming within the classes of subjects hereinafter mentioned, that is to say:-

(a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(b) Arrest, detention, exclusion and deportation;

(c) Control of the harbours, ports and territorial waters of Canada and the movement of vessels;

(d) Transportation by land, air or water and the control of the transport of persons and things;

(e) Trading, exportation, importation, production and manufacture;

(f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

(2) All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor-in-Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof, nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation."

" 4. The Governor-in-Council may prescribe the penalties that may be imposed for violation of orders and regulations made under this Act, and may also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment. No such penalty shall exceed a fine of $5000 or imprisonment for any term not exceeding 5 years or both fine and imprisonment.

" 5 No person who is held for deportation under this Act, or under any regulation made thereunder, or is under arrest or detention as any enemy alien or upon suspicion that he is an enemy alien, or to prevent his departure from Canada, shall be released upon bail or otherwise discharged or tried without consent of the Minister of Justice.

"6 The provisions of the three sections last preceding, shall only be in force during war, invasion or insurrection, real or apprehended."

4-5 GEO. V. C.2

6. The War Measures Act was first passed by the Parliament of Canada in the second session of 1914.

7. On December 7th 1945 the House of Commons of Canada passed the National Emergency Transitional Powers Act, 1945. This Act was assented to on the 18th of December 1945 after having been passed with minor amendments by the Senate of Canada on the 13th of December 1945.

s - The Act was to come into force on the 1st of January 1946, and on and after that day, the war against Germany and Japan was for the purpose of the War Measures Act to be deemed no longer to exist.

The Act recites the War Measures Act and the continuance of a national emergency arising out of the war since the unconditional surrender of Germany and Japan, and the necessity that the Governor-in-Council should exercise certain transitional powers during the continuation of the exceptional conditions brought about by the war and the necessity that certain acts and things done and authorized, and certain orders and regulations made under the War Measures Act be continued in force, and that it is essential that the Governor-in-Council be authorized to do and authorize such further acts, and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of discontinuance in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency.

By Section 2 of the Act, the Governor-in-Council is given power to make orders and regulations as he may, by reason of the continued existence of the National emergency, arising out of the war against Germany and Japan, deem necessary or advisable for certain purposes set out therein which do not include arrest, detention, deportation or exclusion, but do include, under subsection (e)

"Continuing or discontinuing in an orderly manner as the emergency permits, measures adopted during and by reason of the war." Subsection 3 of Section 2 provides for every Order-in-Council passed under the Act, being laid before Parliament and being annulled upon

resolution of the Senate ~~in~~ or the House of Commons. Section 4 provides as follows:

"Without prejudice to any other power conferred by this Act, the Governor-in-Council may order that the Orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act, in force immediately before the day this Act comes into force, shall while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act."

8 On December 28th 1945 the Governor-in-Council passed Order-in-Council P. C. 7414, pursuant to Section 4 of the National Emergency Transitional Powers Act 1945 providing that all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day the National Emergency Transitional Powers Act 1945 comes into force, ~~shall~~ should, while the latter act ~~is~~ to in force, continue in full force and effect subject to amendment or revocation under the latter act. 9. The Orders-in-Council impugned on this reference are, therefore, now in force, if at all, under the provisions of the National Emergency Transitional Powers Act of 1945 and not of the War Measures Act by virtue of which they ~~could~~ originally purported to have been passed on the 15th of December 1945. 10. The question set out in paragraph 1 hereof was referred to the Supreme Court of Canada by Order-in-Council P. C. 45, ~~and~~ Upon the argument the present Appellants contended that the answer to the said question should have been that the said Orders-in-Council ~~P. C. 7355, 7356 and 7357~~ were wholly ultra vires on the grounds inter alia, that the terms of the War Measures Act, Section 3 were not broad enough to authorise ~~exercise~~ the forcible removal from Canada to Japan of British Subjects by birth or naturalization, that in any event the provisions of the Orders-in-Council were repugnant to the British Nationality and Status of Aliens Act which applied to the Dominion of Canada; that the Orders were not made by reason of war or apprehension of war, and were an encroachment upon the legislative sphere of the Provincial Legislatures assigned by the British North America Act, and that the orders were invalid on account of their vagueness and unenforc-

Para.

4 & 5 GEO.V c.17

ibility, and that in any event, on and after the 1st of January 1946, they ceased to have any force and effect.

8 & 9 GEO. V. c.38

11. The British Nationality and Status of Aliens Act of 1914 was substantially amended in 1918. The relevant provisions of the Act as amended are set out in the appendix hereto..

Part II of the Act is said not to apply within the Dominions specified in the first schedule, (which includes Canada,) unless the legislature of that Dominion adopts that part of the Act.

4 GEO.V c.44

The Parliament of Canada by the Naturalization Act 1914, instead of adopting Part II of the British Nationality & Status of Aliens Act in terms, re-enacted the provisions of the Imperial Act almost word for word as Part II of the Act of the Parliament of Canada, and by 5 GEO. V. c.7 amended the Naturalization Act so as to conform to amendments that were made in Part II of the Act passed by the United Kingdom.

4 & 5 GEO.V. c.44

In the recital to the latter Act of the Parliament of Canada, it is stated that the Dominion of Canada had adopted Part II of the British Nationality and Status of Aliens Act up #12. in 1931.

22-23-GEO.V.c.4 until the passage of the Statute of Westminster, the Colonial Laws Validity Act of 1865, which provided that any "Colonial Law" which was repugnant in any respect to the provisions of an Act of the Imperial Parliament extending to the colony to which such law related, was absolutely void and inoperative to the extent of such repugnancy, was still in effect, and was applicable to the Parliament of Canada". 13. By Section 2 of the Statute of Westminster, it is provided as follows:

28-28 VICT. c.63

(1) "The Colonial Laws Validity Act of 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) " No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion, shall be void and inoperative on the ground that it is repugnant to the law of England or to the provision of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of a

Parliament ~~as~~ of a Dominion, shall include the power to ~~appeal~~ repeal/? or amend any such Act, order, rule or regulation insofar as the same is part of the law of the Dominion."

14-18. The answers to the above questions certified by the Supreme Court of Canada were briefly as follows:

The Chief Justice, Kerwin, & Taschereau, J. J. were of the opinion that the Orders-in-Council were not ultra vires of the Governor-in-Council either in whole or in part. Hudson and Estey, J. J. were of the opinion that the Orders-in-Council were not ultra vires of the Governor-in-Council with the exception of Paragraph 4 of Section 2 of P. C. 7355. Rand and Kellock, J. J. were of the opinion that P. C. 7355 was ultra vires of the Governor-in-Council in relation to the "deportation" of the classes of persons in subsection 3 and 4 of Section 2 of the said Order, and that P. C. 7356 and 7357 were ultra vires in certain respects.

16-18. The Chief Justice of Canada, with whom Kerwin and Taschereau JJ. concurred, ~~were~~ was of the opinion that the words "deportation" and "exclusion" to which the powers of the Governor-in-Council under the War Measures Act were expressly stated to extend, were both broad enough to cover the measures contained in the Orders-in-Council; that in any event the general terms in the opening clause of Section 3 of the War Measures Act ~~was~~ were broad enough to authorize the Governor-in-Council to make these Orders; that the Orders-in-Council contained legislation that could have been adopted by Parliament itself; that under the War Measures Act, the Governor-in-Council was empowered to adopt any legislation that Parliament could have adopted; that such legislation was expressly and impliedly adopted because it was deemed necessary, or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; that the Governor-in-Council was the sole judge of the necessity or advisability of the measures, and it was not competent to any Court, to canvas the considerations which might have lead the Governor-in-Council to deem such orders necessary or advisable for the objectives set forth; that further, none

of the provisions of the Orders-in-Council were repugnant to the British Nationality and Status of Aliens Act; that in any event the Orders-in-Council were the equivalent of a statute, or exactly the same as a statute, and therefore under the Statute of Westminster of 1931, they were not affected by any supposed repugnancy with the Imperial Statute; and that the Parliament of Canada did not adopt the British Nationality and Status of Aliens Act which had no application to Canada.

15.16. Mr. Justice Estey with whom Mr. Justice Hudson substantially agreed, was of the opinion that the Orders-in-Council were valid, except Section 2 of Subsection 4, of P. C. 7356 by virtue of which the wives and children of those to be deported were themselves made liable to deportation. He was of the opinion that there was an undoubted power to deport aliens; that the Governor-in-Council had authority to revoke naturalization in the manner provided by the Orders which was not inconsistent with the British Nationality and Status of Aliens Act; and that therefore naturalized subjects of the Japanese race could be deprived of their nationality, and deported as aliens; that the provisions in regard to Canadian born subjects of the Japanese race could not be regarded as involving "deportation" as they were founded upon request; that in respect to the wives and children, the element of compulsion existed and that could not be justified.

16.17 Mr. Justice Rand was of the opinion that P. C. 7355 was ultra vires in relation to the compulsory deportation of natural born British subject and of wives and children under 16. He based his opinion on the ground that the Orders involved the compulsory invasion of another's territory, the violation of sovereign rights, and an affront to its dignity as represented by the occupying power, and that Parliament in his opinion did not delegate such authority, to the Governor-in-Council.

He further found in the Orders-in-Council themselves, clear evidence that the act of expulsion so far as Canadian born citizens and wives and children was concerned, was not deemed necessary or advisable by the Governor-in-Council for the peace and welfare of Canada for any reason arising out of war.

He was further of the opinion that P. C. 7356 was ultra vires in revoking the naturalization of persons of the Japanese race naturalized under the Naturalization Act, but intra vires so far as it took away incidental rights and privileges of such persons as Canadian nationals and that P. C. 7357 was intra vires subject to the observance of the requirements of the Naturalization Act as to the grounds for the revocation of nationals.

~~17~~ 18. Mr. Justice Kellock rejected the Petitioners' argument that the "continuing emergency" referred to the National Transitional Emergency Powers Act was not such as justified the exercise of the powers contained in the impugned Orders-in-Council.

He held that the power to make orders for "deportation" conferred by Section 3 (b) of the War Measures Act did not extend to, nor was it apt in the case of citizens who have committed no offense and as to whom there is no charge, trial or conviction nor is it apt in modern times in application to a natural born citizen of a country, as it involves the idea that there is some other country to which the citizen may be sent which is under some obligation to receive him by reason of some previous connection of the citizen with that country. He did not think that the general words with which sub-section 3 (1) begins, should be interpreted as authorizing an illegal act, namely, an infringement of a sovereignty of another country unless this was clearly expressed. He was therefore of the opinion that P. C. 7355 was ultra vires insofar as it authorized the deportation of natural born British subjects who do not wish to leave Canada, or of wives and children. He held that the Parliament of Canada had adopted Part II of the British Nationality and Status of Aliens Act and had not rescinded such adoption; that the status of British subjects might not be affected except upon the terms set forth in the Imperial Act, but that the Parliament of Canada could interfere with the rights and liabilities flowing from such statutes and could deny the rights of residence in Canada. He held that P. C. 7356 was invalid so far as it purported to revoke naturalization, but that P. C. 7355 was valid in denying ~~n~~ He right of continued residence in Canada. He

held that P. C. 7356 was invalid so far as it purported to revoke naturalization, but that P. C. 7355 was valid in denying right of continued residence in Canada. He further held that upon an inspection of the orders themselves that it did not appear that the provision in respect to the deportation of wives and children was deemed necessary or expedient by reason of war. He held that although parts of the orders were invalid, the invalid parts of the orders were severable.

19. This Appellant respectively submits that the appeal from the said opinions of the Supreme Court of Canada delivered on the 20th day of February 1946 should be allowed, and that the opinion that should have been certified under the provisions of the Supreme Court Act to the Governor-in-Council was that the Orders-in-Council referred to in the question of reference, were wholly ultra vires for the following among other reasons.

(a) Because the Parliament of Canada did not by the terms of the War Measures Act, delegate to the Governor-in-Council, the power to make orders providing for the exile, to Japan, of British Subjects whether by birth or naturalization, resident in Canada, as provided by P. C. 7355 and 7357.

(b) Because the provisions of the Orders-in-Council are repugnant to the provisions of the British Nationality and Status of Aliens Act which extends to the Dominion of Canada.

(c) Because the Orders involved, insofar as they authorize the forcible removal to a foreign country of British Subjects, are contrary to the accepted principles of international law, and which constitute an infringement of the sovereignty of such countries, and are therefore not to be deemed to be within the powers conferred on the Governor-in-Council by the language of Section 3 of the War Measures Act.

(d) Because the impugned Orders-in-Council are not laws made after the passing of the Statute of Westminster, by the Parliament of the Dominion of Canada and are therefore subject to the provisions of the Colonial Laws Validity Act and void and inoperative insofar as they are repugnant to the British Nationality and Status of Aliens Act.

(e) Because the impugned Orders were not made by reason of war or apprehended war.

(f) Because the said orders interfere with the civil rights of ~~a~~ British Subjects resident in Canada, a subject matter reserved exclusively to the legislative competence of the respective legislatures by the provisions of Section 92 of the British North America Act, subsection 13.

(g) Because at the time ~~and~~ of the passing of the said orders, or alternatively from and after the first day of January 1946, there existed no such emergency as justified interference by the Parliament of Canada with subject matters reserved exclusively for the legislative competence of the Provincial Legislatures.

(h) Because the Orders-in-Council were not in their nature, legislation competent to the Parliament of Canada under the provisions of the British North America Act.

(i) Because the Orders-in-Council which empower the Minister of Labour to make orders for deportation of persons "of the Japanese Race" are so vague that they are incapable of application to ascertained persons and are therefore inoperative and invalid, and do not constitute orders or regulations such as the Governor-in-Council is empowered to make under the provisions of the War Measures Act.

(j) Because if the orders are invalid in their application to certain classes of those liable to be deported, the Orders-in-Council are wholly invalid as they form one legislative scheme throughout and the good parts cannot be severed from the bad.

F.A. Brewin

Copy see p 11 A.

APPENDIX "A"

Request for Repatriation

APPENDIX "B"

Relevant Provisions of the British Nationality and Status of Aliens Act 1914 as amended by 8 and 9 GEO. V. c.38.

PART I

Natural Born British Subjects

(1) The following persons shall be deemed to be natural

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.- This 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.

born British Subjects, namely:-

(a) Any person born within His Majesty's dominions and allegiance; and

(b) Any person born out of His Majesty's Dominions whose father was a British Subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted; or had become a British Subject by reason of any annexation of territory or was at the time of that person's birth in the service of the Crown; and

(c) Any person born on board a British Ship whether on foregin territorial ~~borders~~ waters or not provided-.....

PART II

Naturalization of Aliens

2. ~~(1)~~ (1) The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State.

(a) .....

3. ~~(2)~~ (1) A person to whom a certificate of naturalization is granted by ~~the~~ a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, duties and liabilities to which a natural born British Subject is entitled or subject~~ed~~, and as ~~and~~ from the date of his naturalization , have to all intents and purposes, the status of a natural born British Subject.

(2) .....

7. ~~(2)~~ (1) Where the Secretary of State is satisfied that ~~the~~ a certificate of naturalization granted by him has been obtained by false representation or fraud, or by concealment of material circumstances, or that the person to whom the certificate is granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Secretary of State shall by order, revoke the certificate.

(2) Without prejudice to the foregoing provisions, the Secretary of State shall by order, revoke a certificate of

naturalization granted by him in any case in which he is satisfied that the person to whom the certificate was granted either -

(a) Has during any war in which His Majesty is engaged, unlawfully traded or communicated with the enemy or with a subject of an enemy state or been engaged in or associated with any business which is to his knowledge, carried on in such manner as to assist the enemy in such war; or

(b) ~~Has~~ HAS within five years of the date of the ~~granting~~ of the certificate, been sentenced by any Court in His Majesty's Dominions ~~for~~ to imprisonment for a term of not less than 12 months, or to a term of penal servitude, or to a fine of not less than £100, or;

(c) Was not of good character at the date of the ~~granting~~ of the certificate, or;

(d) Has since the date of the grant of the certificate, been for a period of not less than seven years, ordinarily resident out of His Majesty's Dominion otherwise than as a representative of a British Subject, firm or company carrying on business, or an institution established in His Majesty's Dominion or in the service of the Crown, and has not maintained substantial ~~communication~~ CONNECTION with His Majesty's Dominion, or;

(e) Remains according to the law of the state at war with ~~the~~ His Majesty, a subject of that state; and that NEW LINE (in any case) the continuance of the certificate is not conducive to the public good.

(3) The Secretary of State, may if he thinks fit, before making an order under this section, refer the case for such inquiry as is hereinafter specified and in any case to which subsection 1, or paragraphs(a),(c) or (e) of subsection 2 of this section applies, the Secretary of State shall by notice given to or sent to the last known address of the holder of the certificate, give him an opportunity of claiming that the case be referred for such inquiry, and if the holder so claims in accordance with the notice, the Secretary of State shall refer the case for inquiry accordingly.

(4) An inquiry under this section shall be held by a committee constituted for the purpose by the Secretary of State, presided over by a person (appointed by the Secretary of State with the approval of the Lord Chancellor), who holds or has held high judicial office,and shall be conducted in such manner as the Secretary of State may direct (the section continues with a proviso that the Secretary of State may refer the inquiry to the High Court AND by giving powers to the Committee to summon witnesses, etc.)

(5) Where a person to whom a certificate of naturalization has been granted in some other part of His Majesty's Dominions, is resident in the United Kingdom, the certificate may be revoked in accordance with this section, by the Secretary of State with the concurrence of the Government of that part of His Majesty's Dominions in which the certificate was granted.

(6).....

7A. (7) Where a certificate of naturalization is revoked, the Secretary of State, may by order, direct that the wife and minor children (or any of them) of the person whose certificate is revoked, shall cease to be British Subjects, that any such person shall thereupon become an alien; but except where the Secretary of State directs, as aforesaid, the nationality of the wife and minor children of the person whose certificate is revoked, shall not be affected by the revocation, and they shall remain British Subjects provided that;

(a) It shall be lawful for the wife of any such person within 6 months ~~of~~ AFTER the date of the order of revocation to make a declaration of alienage, and thereupon she and any minor children of her husband and herself shall cease to be British Subjects and shall become aliens, and

(b) The Secretary of State shall not make any such order as aforesaid in the case of a wife who was at birth a British Subject, unless he is satisfied that if she had held a certificate of naturalization in her own right, the certificate could properly have been revoked under this Act, and the provisions of this Act as to referring cases for inquiry shall apply to the making of any such order as they apply to the revocation of the certificate.

(2) The provisions of this Section shall, as respects persons affected thereby have effect in substituting for any other provisions in this Act as to the effect upon the wife and children of any person where the person ceases to be a British Subject, and such provision shall accordingly not apply to any such case.

(3) Where a certificate of naturalization is revoked, the holder thereof shall be regarded as an alien, and as a subject of the State to which he belonged at the time the certificate was granted.

8. (1) The Government of any British possession shall have the same power to grant a certificate of naturalization as the Secretary of State has under this Act, and the provisions of this Act as to the grant and revocation of such certificate shall apply accordingly, with the substitution of the government of the possession for the United Kingdom and of a High Court or superior court of the possession, for the High Court, and with the omission of any reference to the approval of the Lord Chancellor, and also in a possession where any language is recognized as on an equality with the English language with the substitution of the English language of language for the English language;

Provided that in any British possession other than British India, and the Dominion specified in the first schedule to this Act, the powers of the Government of possession under this section, shall be exercised by the Governor or a person acting under his authority, but shall be subject in each case to the approval of the Secretary of State, and any certificate proposed, and any proposal to revoke certificate shall be submitted to him for his approval.

(2) Any certificate of naturalization granted under this Section shall have the same effect as a certificate of naturalization granted by the Secretary of State under this Act.

9. (1) This part of this Act shall not nor shall any certificate of naturalization granted thereunder, have effect

within any of the Dominions specified in the first schedule to this Act, unless the legislation URE of that Dominion adopts this part of this Act.

(2) Where the legislature of any such Dominion has adopted this part of this Act, the Government of the Dominion shall have the like powers to make regulations with respect to certificates of naturalization, and to oaths of allegiance as ~~are~~ ARE conferred by this Act, on the Secretary of State.

(3) The legislature of any such Dominion which adopts this part of this Act, may provide how and by what department of the Government, the powers conferred by this part of this Act on the Government of a British possession, are to be exercised.

(4) The legislature of any such Dominion may at any time rescind the adoption of this part ofthis Act, provided that no such rescission shall prejudicially affect any legal rights existing at the time of such rescission.

PART III General

~~General~~ National Status of Married Women and Infant Children.

10. The wife of a British Subject shall be deemed to be a British Subject, and the wife of an alien shall be deemed to be an alien, provided that where a man ceases during the continuance of his marriage, to be a British Subject , it shall be lawful for his wife to make a declaration that she desires to retain British Nationality and thereupon she shall be deemed to ~~be a~~ REMAIN A British Subject, and provided that where an alien is a subject of a state at war with His Majesty, it shall be lawful for his wife if she was at birth a British Subject, to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State if he is satisfied that it is desirable that she be permitted to do so, may grant her a certificate OF NATURALIZATION.

11. A woman who, having been a British Subject, has by, or in consequence of her marriage becomes an alien, shall not by reason only of the death of her husband or the dissolution of her

marriage, cease to be an alien, and a woman, who, having been an alien, has by or in consequence of her marriage, become a British Subject, shall not by reason only of the death of her husband or the dissolution of her marriage cease to be a British Subject.

12. (1) Where a person being a British Subject ceases to be a British Subject whether by declaration of alienage or otherwise, every child of that person being a minor, shall thereupon cease to be a British Subject, unless such child, of that person ceasing to be a British Subject, does not become by the law of any other country, naturalized in that country: Provided that where a widow who is a British Subject, marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British Subject whether he is residing outside His Majesty's Dominions or not.

(2) Any child who has so ceased to be a British Subject, may within one year after obtaining his majority, make a declaration that he wishes to resume British nationality and shall thereupon again become a British Subject.

LOSS OF BRITISH NATIONALITY

13. A British Subject who, when in any foreign state not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British Subject.

14. (1) Any person who by reason of his having been born within His Majesty's Dominions and allegiance or on board a British Ship, is a natural born British Subject, but who at his birth or during his minority became under the law of any foreign state, a subject also of that state, and is still such a subject, may if of full age and not under disability, make a declaration of alienage, and on making the declaration, shall cease to be a British Subject.

(2) Any person who though born out of his Majesty's Dominion is a natural born British Subject, may, if of full age and not under disability, make a declaration of alienage and on

making the declaration, shall cease to be a British Subject.

15. Where His Majesty has entered into a convention with any foreign state to the effect ~~of all~~ THAT THE subjects or citizens of that state to whom certificates of naturalization have been granted may divest themselves of their status as such subjects, it shall be lawful for His Majesty, by Order-in-Council, to declare that the convention has been entered into by His Majesty; and from and after the date of the Order, any person having been originally a subject or citizen of the state therein referred to who has been naturalized as a British Subject, may, within the limit of time provided in the convention, make a declaration of alienage, and on his making the declaration, he shall be regarded as an alien and as a subject to the state to which he originally belonged as aforesaid.

PROCEDURE & EVIDENCE

19. (1) The Secretary of State may make regulations generally for carrying into effect the objects of this Act; and in particular with respect to the following matters:-.....

(2) Any regulation made by the Secretary of State in pursuance of this Act, shall be of the same force as if it had been enacted therein, but shall not, so far as respects the imposition of fees, be in force in any British possession, and shall not so far as respects any other matter, be in force in any British possession in which any Act or ordnance, or in the case of a Dominion specified in the first schedule to this Act, any regulation made by the Government of the Dominion under Part II of this Act, to the contrary of or inconsistent with any such regulation ~~which~~ may for the time being be in force.

SUPPLEMENTAL

26. (1) Nothing in this Act shall take away or abridge any power vested in or exerciseable by the Legislature or Government of any British possession, or affect the operation of any law at present in force which has been passed in exercise of such power, or prevent any such legislature or Government from treating differently, different classes of British Subjects.

(2) All laws, statutes and ordnances made by the

Legislature of a British possession for imparting to any person any of the privileges of naturalization to be enjoyed by him within the limits of that possession, shall, within those limits, have the authority of law.

(3) Where any parts of His Majesty's Dominion are under both, ~~under the~~ a central and ~~the~~ a local Legistlature, the expression "British Possession" shall for the purpose of this Section include both, all parts under the central Legislature, and each part under ~~the~~ a local Legislature.

Provided that ~~anything~~ NOTHING in this provision shall be construed as validating any law, statute or ordnance with respect to naturalization made by any such local Legislature, in any case, where the central Legislature possesses exclusive Legislative authority with respect to naturalization.

SCHEDULES

First Schedule

List of all Dominions.

The Dominion of Canada, etc.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN:

Co-operative Committee on Japanese Canadians.

-and-

The Attorney General of Saskatchewan

APPELLANTS

-and-

The Attorney General of Canada

-and-

The Attorney General of British Columbia.

RESPONDENTS

IN THE MATTER OF A REFERENCE as to the validity of Orders-in-Council of the 15th day of September 1945 (P.C. 7355,7356 and 7357) in relation to persons of the Japanese Race.

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

Order of Reference
Judgments, etc.

In the Privy Council

No. 58 of 1946

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS

—and—

THE ATTORNEY GENERAL OF SASKATCHEWAN

Appellants

—and—

THE ATTORNEY GENERAL OF CANADA

—and—

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents

IN THE MATTER OF A REFERENCE as to the valadity of Orders-in-Council of the 15th day of September 1945 (P.C. 7355, 7356 and 7357) in relation to persons of the Japanese Race.

CASE FOR THE APPELLANT

THE ATTORNEY GENERAL OF SASKATCHEWAN

LAWRENCE JONES & CO.,
Winchester House
Old Broad Street,
London, E.C. 2

for the Appellants.

CHARLES RUSSELL & CO.,
37 Norfolk St., London, W.L. 2.

for the Attorney General of British Columbia, Respondent.

GARD LYALL & CO.,
47 Gresham Street,
London, E.C. 2.

for the Attorney General of Canada, Respondent.

THE SOVEREIGN PRESS LIMITED
TORONTO
1946

In the Privy Council

No. of 1946

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS

—and—

THE ATTORNEY GENERAL OF SASKATCHEWAN

Appellants

—and—

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—and—

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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IN THE MATTER OF A REFERENCE as to the valadity of Orders-in-Council of the 15th day of September 1945 (P.C. 7355, 7356 and 7357) in relation to persons of the Japanese Race.

CASE FOR THE APPELLANT

THE ATTORNEY GENERAL OF SASKATCHEWAN

LAWRENCE JONES & CO.,
Winchester House
Old Broad Street,
London, E.C. 2 — *for the Appellants.*

CHARLES RUSSELL & CO.,
37 Norfolk St., London, W.L. 2. — *for the Attorney General of British Columbia, Respondent.*

GARD LYALL & CO.,
47 Gresham Street,
London, E.C. 2. — *for the Attorney General of Canada, Respondent.*

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THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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CASE FOR THE APPELLANT

THE ATTORNEY GENERAL OF SASKATCHEWAN

---

1. This is an appeal from the opinion certified by the Supreme Court of Canada to His Excellency the Governor-in-Council in answer to the following question:

"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?"

2. The text of the impugned Orders P. C. 7355, 7356 and 7357 is printed in full in the Record of Proceedings.

3. The answers to the said question certified by the Justices of the Supreme Court of Canada are printed in the Record.

4. The reasons for the opinion are also printed in the Record.

5. This Appellant associates himself with the submissions contained in the Case of the Appellant, the Co-operative Committee on Japanese Canadians and will respectively submit that the proper answer to the question referred to should have been that the impugned Orders are in their entirety ultra vires the Governor-in-Council because

(a) The Orders provide for the exile to Japan of Canadian citizens, which was not a power delegated to the Governor-in-Council by the Government of Canada under the War Measures Act.

10 (b) The Orders constitute an exceptional interference with property and civil rights, a subject matter reserved exclusively by the British North America Act, Section 92, Head 13, to the provincial legislatures and there was at the date of the promulgation of the said Orders or alternatively from the first day of January 1946, no such emergency in existence as justified an exceptional encroachment on a sphere of legislation normally reserved to the provincial legislatures.

(c) The Orders or parts of the said Orders are repugnant to the British Nationality and Status of Aliens Act, and are therefore void and inoperative.

20 (d) The Orders are vague and unenforceable insofar as they refer to persons "of the Japanese Race", as there is no ascertainable standard to determine who is "of the Japanese Race" and hence the Orders are not such "orders" as the Governor-General-in-Council was empowered to pass under the terms of the War Measures Act.

(e) The said Orders or parts of them were not and could not have been deemed necessary "by reason of war".

(f) The said Orders if bad in part are wholly bad as their provisions constitute one legislative scheme, and are not severable.

F. A. BREWIN.

NEWS BULLETIN #6 came to you before the Summer season—before the season's many widely representative Canadian gatherings and Conferences; also before the Privy Council hearing in London.

We can now report that the concern felt by Canadians over this question, and so forcefully expressed in letters and telegrams of protest to the Government during the early part of the year continued throughout the summer. In a score of important gatherings the question was discussed. Requests for literature took 25,000 copies of our leaflet "OUR JAPANESE CANADIANS; CITIZENS, NOT EXILES."

The Privy Council hearing occupied four days in mid July. Mr. Andrew Brewin was our Canadian counsel. Two able London lawyers were also present. These were Mr. Christopher Shawcross, M.P., brother of the British Attorney General, and Mr. Geoffrey Wilson, till recently associated with Sir. Stafford Cripps. Lord Simon stated in concluding the hearings that "This was one of the most important cases that has ever come before us."

MEANWHILE the Government's policy of dispersal is being progressively implemented. Mr. Humphrey Mitchell, Minister of Labour, reported on August 31st in the House of Commons that 12,469 persons of Japanese racial origin are now dispersed throughout Canada outside British Columbia.

In B.C. there are 3,080 under the Department of Labour Settlement, and 5,572 elsewhere in the province. Self supporting communities are being developed in the interior.

Mr. Mitchell also reported, in line with the Government policy to return to Japan those who have voluntarily agreed to go, 3,152 have gone. "Approximately only 600 others have so far asked to be returned. Shipping is now awaited to take them," the Minister stated.

IT MUST BE REMEMBERED, however, that of those who have left our shores it is estimated that about one-half are Canadian born. These accompanied parents or relatives for family reasons or as supporters of aged or infirm persons. The parents of many of them lost their homes in Canada, built up in a life time. They despaired of being able to re-settle here. These Canadian born are foreigners in a strange land. They are Canadian by birth and up-bringing. We owe to them protection of their citizenship and the right to return to the land of their birth at the earliest opportunity.

OUTSTANDING HONOUR has come to Dr. Yachiyo Yoneyama, first woman to graduate from the faculty of dentistry at the University of Alberta. Dr. Yoneyama has been offered a Guggenheim Fellowship to do research work in New York.

NEWS OF FINANCIAL CONTRIBUTIONS

Many people in all parts of Canada have contributed toward the budget. Among these the Japanese Canadians have given a large part. The thanks of the Committee goes to all. The faith placed in this Committee in our taking on a big task without visible resources is deeply appreciated. A financial statement is attached. It speaks for itself.

FINANCIAL STATEMENT SEPT. 13th, 1946

RECEIPTS May 1945 to Sept. 13 1946 .....total.....		$17,362.30
EXPENDITURES May 1945 to Sept. 13 1946		
Salaries.....	$1,750.00	
Travel.....	271.85	
Literature and office expenses..	1,824.74	
Legal expenses; Supreme Court of Canada and Privy Council, London	11,608.09	15,454.68
Balance on hand		$1,907.62

The books, however, are by no means closed. Much work remains to be done. The job of rehabilitation has been little more than begun. Nor is the struggle for justice at an end. Further contributions are needed, and may be sent to the Treasurer, Miss Constance Chappell, 299 Queen St. W., Toronto.

James M. Finlay, Chairman
Hugh MacMillan, Secretary
126 Eastbourne Ave.
Toronto 12, Canada

Liverpool

1 Kendall v Walsh. In 1. Ready

2 Rowland v Tanner Ready

3 Clark v Barnes. Ready

? Redford v Connell 20/11.

? Fox v Johnson [illegible]

~~[illegible] v TTC. Also settled~~

~~[illegible] v [illegible] Ready. may be settled~~

(~~[illegible] v [illegible] [illegible]. [illegible]~~)

Everington v TTC. Ready

Rooney v Bedford ?

Jerman v Richardson

RA 5343

Jack —

Varsity

re Revlist.

160

Mr J. H. Brown

Apartments No.: 75.

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

June 1946	13	14	15	16	17	18	19
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS	1 5-	1 5-	1 5-	1 5-	1 5-	1 5-	1 5-
FIRES							
BATHS							
BREAKFASTS		3-	3-			3-	3-
LUNCHEONS							
DINNERS		7 6			7 6	7 6	7 6
TEA, COFFEE AND MILK		3-					
SANDWICHES							
SERVANTS' BOARD							
DOGS							
FRUIT							
WINES							
SPIRITS AND LIQUEURS		19			19	19	3
		3-			3	6	1
				5-			5-
			3				3
	9	1 8 9	1 10.	1 14 6	1 18 3	2 5 3	
		3 8 9	4 17 6	6 7 6	8 2.	10 . 3	
	9	4 17 6	6 7 6	8 2	10 . 3	12 5 6	
Hotel Acccount						12 1 0	
SERVICE CHARGE.							1 10.
GRAND TOTAL							13 15 6

No. 28682 7/6/1946

Received with thanks

FROM Mr J. H. Brown 75.

THE SUM OF ROOM No.

HOTEL BILL £12:5:7:6

SERVICE

TOTAL

BROWN'S HOTEL,

DS TWO PENCE 10 45

No. A26293 25/6/1946

Received with thanks

FROM Mr J. H. Brown 76

THE SUM OF ROOM No.

HOTEL BILL £

SERVICE 1:10:1

TOTAL

BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

160 Mr J.M. Brewin

Apartments No.: 75.

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

June 1946	13	14	15	16	17	18	19
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS	1 5-	1 5-	1 5-	1 5-	1 5-	1 5-	1 5-
FIRES							
BATHS							
BREAKFASTS		3 6	3 6			3 6	3 6
LUNCHEONS							
DINNERS		7 6			7 6	7 6	7 6
TEA, COFFEE AND MILK		3 6					
SANDWICHES							
SERVANTS' BOARD							
DOGS							
FRUIT							
WINES							
SPIRITS AND LIQUEURS							
BEER		1 9			1 9	1 9	3
MINERALS							
CIGARS AND CIGARETTES							
HAIRDRESSER							
SUNDRIES							
TELEPHONE		3 6			3	6	1
LAUNDRY							
PRESSING				5-			5-
THEATRE TICKETS							
MOTORS, TAXIS, &C.							
TELEGRAMS AND CABLES							
NEWSPAPERS			3				3
MESSENGER							
PARCELS AND LUGGAGE							
POSTAGE							
ACCOUNTS PAID OUT							
Daily Total	1 5-	2 3 9	1 8 9	1 10.	1 14 6	1 18 3	2 5 3
Brought forward		1 5-	3 8 9	4 17 6	6 7 6	8 2.	10 - 3
Cash							
Carried forward	1 5	3 8 9	4 17 6	6 7 6	8 2	10. 3	12 5 6

Hotel Account ... ... 1 10.

12½% SERVICE CHARGE.

GRAND TOTAL 13 15 6

185 Mr J.A. Brewin

Apartments No.: 45

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

June 1946.

	20	21	22	23	24	25.	26
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS	1 5.	1 5.	1 5.	1 5.	1 5.	1 5.	1 5.
FIRES							
BATHS							
BREAKFASTS	3/6	3/6	3/6		3/6	3/6	3/6
LUNCHEONS		6/6					
DINNERS		15.			15.		
TEA, COFFEE AND MILK							
SANDWICHES							
					3		
				3	3	1 3	3
			3		3	3	3
			1 8 9	1 5 3	2 7.	1 10.	19
Cash	1 8 8	4 1 1	5 9 10	6 15 1	9 2 1	10 12 1	12 1 1
Carried forward						Hotel Acccount	1 10
						12½ SERVICE CHARGE	
						GRAND TOTAL	13 11 1

No. 28779 19

Received with thanks

FROM M

THE SUM OF Room No. 75

HOTEL BILL £ 12 1 -

SERVICE

TOTAL

BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

DT TWO PENCE

No. A26387 19

Received with thanks

FROM M

THE SUM OF Room No. 75

HOTEL BILL £ 1 - 10 - 0.

SERVICE

TOTAL

BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

185 Mr J.A. Brewin

Apartments No.: 45

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

June 1946.	20	21	22	23	24	25.	26
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS	1 5.	1 5.	1 5.	1 5	1 5.	1 5.	1 5.
FIRES							
BATHS							
BREAKFASTS	3 6	3 6	3 6		3 6	3 6	3 6
LUNCHEONS		6 6					
DINNERS		15.			15.		
TEA, COFFEE AND MILK							
SANDWICHES							
RVANTS' BOARD							
GS							
UIT							
NES							
RITS AND LIQUEURS							
ER		19			3		
ERALS							
ARS AND CIGARETTES							
RDRESSER							
DRIES							
EPHONE		6		3	3	1 3	3
NDRY...							
SSING...							
ATRE TICKETS							
ORS, TAXIS, &C.							
EGRAMS AND CABLES							
WSPAPERS	2	2	3		3	3	3
SSENGER							
RCELS AND LUGGAGE							
STAGE							
COUNTS PAID OUT							
ily Total	1 8 8	2 1 2 5	1 8 9	1 5 3	2 7.	1 1 0.	1 9
ought forward		1 8 8	4 1 1	5 9 10	6 15 1	9 2 1	10 12 1
Cash							
Carried forward	1 8 8	4 1 1	5 9 10	6 15 1	9 2 1	10 12 1	12 1 1

Hotel Account 1 10

12½% SERVICE CHARGE.

GRAND TOTAL £ 13 11 1

265 Mr. J. A. Bremin

Apartments No.: 75

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

June 1946 / July

	27	28	29	30	1	2	3
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS		1 5 -	1 5 -	1 5 -	1 5 -	1 5 -	1 5 -
FIRES	15 -						
BATHS							
BREAKFASTS	3 6	6				3 6	3 6
						7 6	
		6				3	
						9	6
						12 3	
		3	3		3		3
		13 3	1 5 3	1 5 -	1 5 3	2 12 -	1 9 3
	13 9 10	15 3 1	16 8 4	17 13 4	6 17 6	9 9 6	9 9 6
					18 18 7		
Cash					12 1 1		
Carried forward	13 9 10	15 3 1	16 8 4	17 13 4	6 17 6	9 9 6	10 18 9

Hotel Acccount

12½ % SERVICE CHARGE. 1 7 6

GRAND TOTAL 12 6 3

No. 29033 8/7/1946

Received with thanks

FROM M Mr J A Bremin

THE SUM OF ROOM No. 75

HOTEL BILL £ 10:18:9

SERVICE

TOTAL

BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

DR. TWO PENCE 10 45

No. A30894 8/7/1946

Received with thanks

FROM M Mr J Bremin

THE SUM OF ROOM No. 75

HOTEL BILL £

SERVICE 1:7:6

TOTAL

BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

265 Mr. J. A. Brennin

Apartments No.: 75

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

June 1946	27	28	29	30	1 July	2	3
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS		1 5 -	1 5 -	1 5 -	1 5 -	1 5 -	1 5 -
FIRES	1 5 -						
BATHS							
BREAKFASTS	3 6					3 6	3 6
LUNCHEONS		6 6				7 6	
DINNERS							
TEA, COFFEE AND MILK							
SANDWICHES							
SERVANTS' BOARD							
DOGS							
SUIT							
WINES							
SPIRITS AND LIQUEURS		1 6				3	
CIGAR							
MINERALS							
CIGARS AND CIGARETTES							
HAIRDRESSER							
LAUNDRIES						9	6
TELEPHONE							
LAUNDRY						12 3	
PRESSING							
THEATRE TICKETS							
MOTORS, TAXIS, &C.							
TELEGRAMS AND CABLES							
NEWSPAPERS	- 3	3	3		3		3
MESSENGER							
PARCELS AND LUGGAGE							
POSTAGE							
ACCOUNTS PAID OUT							
							1 9 3
Daily Total	1 8 9	1 13 3	1 5 3	1 5 -	1 5 3	2 12 -	9 9 6
Brought forward	12 1 1	13 9 10	15 3 1	16 8 4	17 13 4	6 17 6	9 9 6
					18 18 7		
Cash					12 1 1		
Carried forward	13 9 10	15 3 1	16 8 4	17 13 4	6 17 6	9 9 6	10 18 9

Hotel Acccount 10 18 9

12½% SERVICE CHARGE. 1 7 6

GRAND TOTAL 12 6 3

1.7.6
1.10
1.7.6.
1.7.6

5.

487 Mr. J. A. Bremin

Apartments No.: 75

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

July 1946

	4	5	6	7	8	9	10
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS	1 5	1 5 -	1 5 -	1 5 -	1 5 -	1 5 -	1 5 -
FIRES					3 6	3 6	
						C C	
CIGARS AND CIGARETTES						1 9	
... ...							6
ACCOUNTS ...		3	3		3	3	3
Daily Total	18 -	2 10 9	1 5 3	15 -	1 8 9	1 17 -	1 5 9
Brought forward	10 18 9	12 6 9	14 17 6	16 2 9	17 7 9	7 17 9	9 14 9
					18 16 6		
Cash					10 18 9		
Carried forward	12 6 9	14 17 6	16 2 9	17 7 9	7 17 9	9 14 9	11 - 6
Hotel Account							1 4 6
GRAND TOTAL							£ 128 ·

12½% SERVICE CHARGE.

No 29132

Received with thanks

FROM M. Bremin

THE SUM OF ROOM No. 75

HOTEL BILL £ 11 : 0 : 6

SERVICE : :

TOTAL : :

BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

W 3

DU TWO PENCE 10 45

Received with thanks

FROM M. Bremin

THE SUM OF ROOM No. 75

HOTEL BILL £ : :

SERVICE : :

TOTAL : :

BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

487 Mr. J. A. Brenin

Apartments No.: 75

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

July 1946	4	5	6	7	8	9	10
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS	1 5	1 5 -	1 5 -	1 5 -	1 5 -	1 5 -	1 5 -
FIRES							
BATHS							
BREAKFASTS					3 6	3 6	
LUNCHEONS		6 6				6 6	
DINNERS		15					
TEA, COFFEE AND MILK	2 6						
SANDWICHES							
SERVANTS' BOARD							
WINES AND LIQUEURS		3 6				1 9	
MINERALS							
CIGARS AND CIGARETTES							
HAIRDRESSER							
SUNDRIES							
TELEPHONE	3	6					6
LAUNDRY							
PRESSING							
THEATRE TICKETS							
PORTERS, TAXIS, &c.							
TELEGRAMS AND CABLES							
NEWSPAPERS	3	3	3		3	3	3
MESSENGER							
PARCELS AND LUGGAGE							
GARAGE							
ACCOUNTS PAID OUT							
Daily Total	18 -	2 10 9	1 5 3	1 5 -	1 8 9	1 17 -	1 5 9
Brought forward	10 18 9	12 6 9	14 17 6	16 2 9	17 7 9	7 17 9	9 14 9
					18 16 6		
Cash					10 18 9		
Carried forward	12 6 9	14 17 6	16 2 9	17 7 9	7 17 9	9 14 9	11 - 6
Hotel Account 12½% SERVICE CHARGE.							1 7 6
GRAND TOTAL							12 8 -

1496 Mr. J.A. Brown

Apartments No.: 75

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

July.

	11	12	13	14	15	16	17
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
APARTMENTS	1 5	1 5	1 5	1 5	1 5	1 5	1 5
FIRES							
BATHS							
BREAKFASTS						3	3
LUNCHEONS		6 6					
DINNERS					7 6	15	
TEA, COFFEE AND MILK						6	
SANDWICHES							
SERVANTS' BOARD							
DOGS							
FRUIT							
WINES							
SPIRITS AND LIQUEURS							
BEER		4 6			1 9	3	
MINERALS							
CIGARS AND CIGARETTES							
HAIRDRESSER							
SUNDRIES		6			6	3	
TELEPHONE							
DISBURSEMENTS. LAUNDRY					5		
PRESSING							
THEATRE TICKETS							
MOTORS, TAXIS, &C.							
TELEGRAMS AND CABLES							
NEWSPAPERS	3	3			3	3	3
MESSENGER							
PARCELS AND LUGGAGE							
POSTAGE							
ACCOUNTS PAID OUT							
Daily Total	1 5 3	1 16 9	1 5	1 5	2 . .	2 13 6	1 8 9
Brought forward		1 5 3	3 2 .	4 7 .	5 12 .	7 12 .	10 5 6
Cash							
Carried forward	1 5 3	3 2 .	4 7	5 12	7 12 .	10 5 6	11 14 3
Hotel Acccount							1 9 6
GRAND TOTAL							13 1 9

12½ SERVICE CHARGE.

1605 Mr. J. A. Brewin

Apartments No.: 75

TELEGRAPHIC ADDRESS: "BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 *Ch.* ______ *Ser.* ______

July 46	18 £	s.	d.	19 £	s.	d.	20 £	s.	d.
APARTMENTS ...	1	5	-	1	5	-			
FIRES ...									
BATHS ...									
BREAKFASTS ...		3	6		3	6		3	6
LUNCHEONS ...									
DINNERS ...									
TEA, COFFEE AND MILK ...		2	6						
SANDWICHES ...									
SERVANTS' BOARD ...									
DOGS ...									
FRUIT ...									
						3			
						3			3
					9	-		3	9
					5	6	14	14	6
Cash ...									
Carried forward ...	13	5	6	14	14	6	14	18	3

Hotel Acccount ... 14 18 3.
12½. 1 17.
GRAND TOTAL 16 15 3

No. A31073 20/7/1946
(Received) with thanks
FROM Mr. J. A. Brewin / 6891
THE SUM OF ROOM No. 75

No. 29248 20/7/1946
(Received) with thanks
FROM Mr. J. A. Brewin / 6904
THE SUM OF ROOM No. 75
HOTEL BILL £14/18/3
SERVICE
TOTAL
BROWN'S HOTEL,
for J. J. FORD & SONS LTD.

TWO PENCE

1605 Mr J. A. Brown

Apartments No.: 75

TELEGRAPHIC ADDRESS:
"BROWNOTEL, LONDON."
TELEPHONE: REGENT 6020.

BROWN'S HOTEL,

DOVER STREET, AND ALBEMARLE STREET, LONDON, W.1.

No. of Visitors 1 Ch. Ser.

July 46	18			19			20													
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
APARTMENTS	1	5	-	1	5	-														
FIRES																				
BATHS																				
BREAKFASTS		3	6		3	6		3	6											
LUNCHEONS																				
DINNERS																				
TEA, COFFEE AND MILK		2	6																	
SANDWICHES																				
SERVANTS' BOARD																				
DOGS																				
FRUIT																				
WINES																				
SPIRITS AND LIQUEURS																				
BEER																				
MINERALS																				
CIGARS AND CIGARETTES																				
HAIRDRESSER																				
LAUNDRIES																				
TELEPHONE						3														
LAUNDRY																				
PASSING																				
THEATRE TICKETS																				
MOTORS, TAXIS, &C.																				
TELEGRAMS AND CABLES																				
NEWSPAPERS		3			3			3												
MESSENGER																				
PARCELS AND LUGGAGE																				
POSTAGE																				
ACCOUNTS PAID OUT																				
Daily Total	1	11	3	1	9	-		39												
Brought forward	11	14	3	13	5	6	14	14	6											
Cash																				
Carried forward	13	5	6	14	14	6	14	18	3											

Hotel Acccount ... ... 14 18 3.

12½. 1 17.

GRAND TOTAL £15 3

DRAFT PRESS STATEMENT

RE PRIVY COUNCIL DECISION

1. If we Win

The decision of the Privy Council is a great triumph for civil liberties and the rights of all Canadian citizens. In deciding that the Executive cannot, even in war time, without clear authority from Parliament, exile Canadian citizens, the Privy Council has vindicated the rule of law which is the protection and safeguard of the liberties of all citizens. Racial legislation has no place in our conceptions of justice.

The Co-operative Committee now call on the Government to remove the last remaining restrictions on Japanese Canadians who are as much entitled to their full rights as citizens as any of us.

The chapter of injustice to Japanese Canadians cannot be closed until provision is made for the restoration of the heavy property losses inflicted on the innocent Japanese Canadians who were forced to abandon their property during war.

We ask the Government to set up a commission to deal with this matter.

DRAFT PRESS STATEMENT

RE PRIVY COUNCIL DECISION

1. If we Win

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The Co-operative Committee now call on the Government to remove the last remaining restrictions on Japanese Canadians who are as much entitled to their full rights as citizens as any of us.

The chapter of injustice to Japanese Canadians cannot be closed until provision is made for the restoration of the heavy property losses inflicted on the innocent Japanese Canadians who were forced to abandon their property during war.

We ask the Government to set up a commission to deal with this matter.

Much credit for this victory goes to people from every part of Canada who joined to resist what they recognized as a threat not only to a persecuted minority but democracy itself. The spontaneous reaction of these people revealed democracy in action & the success that has crowned their efforts is an historic event of great significance.

DRAFT PRESS STATEMENT

RE PRIVY COUNCIL DECISION

2. If we Lose

The Privy Council have decided that, in the emergency of war, the Government, acting under the powers conferred by the War Measures Act, has the legal power to ~~can~~ exile Canadian citizens for such reasons as seem good to it.

The sweeping nature of the powers conferred on the Government require that the Parliament and people of Canada should be vigilant in seeing that such great and arbitrary powers are not ~~in~~ abused.

~~To use these~~ extraordinary powers ~~to provide for~~ To provide for mass deportation on racial grounds, would indeed be a grave abuse of the extraordinary powers that the Privy Council have now said, were conferred by Parliament solely for the emergency of war. The war is now over. All the Japanese Canadians who wish to do so have left for Japan. The remainder have been resettled throughout Canada and are making a substantial contribution by their labour and skill to various communities across Canada. The hard feelings of war time have died down.

The Government has promised to review its policy in the light of the Privy Council's decision.

We now call upon it in the altered circumstances since the orders were passed, to announce that the policy of forcible deportation has been abandoned, that remaining restrictions on Japanese Canadians are to be removed and that fair compensation will be made for the grievous property losses that they have sustained through no fault of their own.

FORM 6122

EXCLUSIVE CONNECTION WITH WESTERN UNION CABLE SERVICE

CANADIAN NATIONAL TELEGRAPHS

W M ARMSTRONG, GENERAL MANAGER
TORONTO

CABLEGRAM

STANDARD TIME

1946 NOV 28 AM 9 37

TR254 LONDON 6 28/224P

RUERMAS MASON CAMERON AND BREWIN
372 BAY ST

982 TOR=

JAPANESE JUDGMENT MONDAY=

LAURENTIAN.

RECEIVED
NOV 28 1946
MASON
CAMERON & BREWIN

TEL. NO. AD4391 TIME 1005P
TO BY
CALLS LEFT
ATTEMPTS
MSG. MAIL DELIVER

EXCLUSIVE CONNECTION WITH WESTERN UNION CABLE SERVICE

FORM 6122

CANADIAN NATIONAL TELEGRAPHS

W M ARMSTRONG, GENERAL MANAGER
TORONTO

CABLEGRAM

STANDARD TIME 1946 DEC 2 AM 7 47

TR239 LONDON 18 2/1240P

RUERMAS MASON CAMERON & BREWIN

1473 TOR= 372 BAY ST

JUDGMENT READS QUOTE NONE OF THE ORDERS IN COUNCIL IS IN ANY RESPECT ULTRA VIRES=

LAURENTIAN.

PRIVY COUNCIL APPEAL NO. 55 of 1946

THE CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS

AND ANOTHER - Appellants.

v.

THE ATTORNEY-GENERAL OF CANADA AND ANOTHER - - - -Respondents.

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 2nd December , 1946.

Present at the Hearing:

VISCOUNT SIMON

LORD WRIGHT

LORD PORTER

LORD UTHWATT

SIR LYMAN DUFF

(Delivered by LORD WRIGHT)

These are appeals by special leave brought by the Co-operative Committee on Japanese Canadians and the A-G of Saskatchewan from the opinion certified on the 20th February, 1946, by the Supreme Court of Canada upon a reference ordered by the Governor General in Council under Section 55 of the Supreme Court Act, Revised Statutes of Canada 1927, cap 35. The question referred for hearing and consideration was as follows:

"Are the Orders-in-Council dated the 15th December, 1945, being P. C. 7355, 7356, 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 recitals to the Orders-in-Council which it is sought to impeach show that they purport to have been made under the authority of The War Measures Act. That Act was first passed by the Parliament of Canada in 1914 and is now chap. 206 of The Revised Statutes of Canada 1927. Section 2 provides that the issue of a proclamation by His Majesty or under the authority of the Governor-in-Council shall be conclusive that war, invasion or insurrection real or apprehended exists and of its continuance

until by the issue of a further proclamation it is declared that war, invasion or insurrection no longer exists. The proclamation first called for by this section was duly made but no proclamation that the war no longer existed has been made.

The relevant sections of this Act are as follow:-

"3. 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; 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 mentioned, that is to say:-

(a) Censorship and the control and suppression of publications, writings, maps, plans photographs, communications and means of communication;

(b) Arrest, detention, exclusion and deportation;

(c) Control of the harbours, ports and territorial waters of Canada and the movement of vessels;

(d) Transportation by land, air or water and the control of the transport of persons and things;

(e) Trading, exportation, importation, production and manufacture;

(f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

(2) All orders and regulations made under this section shall have the force of law....."

"6. The provisions of the three sections last preceding, shall only be in force during war, invasion or insurrection, real or apprehended."

The three Orders-in-Council were all made on the 15th December 1945.

The preamble to the first Order (P.C. 7355) contains the following recitals:-

Whereas during the course of the war with Japan certain Japanese Nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

And whereas it is considered necessary for the security defence peace order and welfare of Canada that provision be made accordingly.

The first Order (Section 2, subsection 2, 3 and 4) then authorizes the Minister of Labour to make orders for deportation "to Japan" of the following persons.

(1) Every person of 16 years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who had since the 8th December, 1941 (the date of the declaration of war by the Dominion against Japan) made a request for repatriation or who had been detained under certain regulations and was so detained on 1st September, 1945.

(2) Every naturalized British Subject of the Japanese Race of 16 years of age or over resident in Canada who had made request for repatriation provided that such request had not been revoked in writing before midnight on 1st September, 1945.

(3) Natural born British Subjects of the Japanese Race of 16 years of age or over resident in Canada, who made a request for repatriation and did not revoke it in writing before the Minister had made an Order for "deportation."

Subsection 4 of Section 2 provided as follows:-

(4) The wife and children under 16 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.

The remaining provisions of this Order are of an ancillary or administrative nature.

The second Order (P. C. 7356) provides that any person being a British Subject by naturalization under the Naturalization Act, cap. 138, A.S.C. 1927, 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.

The third Order (P. C. 7357) provides for the appoint-

ment of a Commission to make inquiry concerning the activities, loyalties and extent of co-operation with the government of Canada during the war, of Japanese National and naturalized persons of the Japanese race in cases where their names are referred to the Commission by the Minister of Labour for investigation with a view to recommendation whether in the circumstances of any such case, such persons should be deported. The Commission was also at the request of the Minister of Labour to inquire into the case of any naturalized British Subject of the Japanese Race who had made a request for repatriation, and make recommendations. It was then provided that any person of the Japanese Race who was recommended by the Commission for deportation, should be deemed to be a person subject to deportation under the provisions of P.C. 7355, and as and from the date upon which he left Canada in the course of deportation, he should cease to be either a British Subject or a Canadian National.

There is one further Act of the Parliament of the Dominion to which it is necessary to refer--the National Emergency Transitional Powers Act 1945. This Act was assented to on the 18th December 1945. It was to come into force on the 1st January,1946, and on and after that day the war against Germany and Japan was for the purposes of the War Measures Act to be deemed no longer to exist. The Act was to continue in force until the 31st December, 1946, or if Parliament were not then sitting until a date determined by the sitting of Parliament.

The Act recites the War Measures Act and the continuance of a national emergency arising out of the war since the unconditional surrender of Germany and Japan, and the necessity that the Governor-in-Council should exercise certain transitional powers during the continuation of the exceptional conditions brought about by the war and the necessity that certain acts and things done and authorized, and certain orders and regulations made under the War Measures Act be continued in force, and that it was essential that the Governor-in-Council be authorized to do and authorize such further acts, and make such further orders and regulations as he might deem necessary or advisable by reason of the emergency and for the purpose of discontinuance in an orderly manner as the emergency permits, of measures adopted during and

by reason of the emergency.

By Section 2 of the Act the Governor-in-Council was given power to make orders and regulations as he might, by reason of the continued existence of the National emergency, arising out of the war against Germany and Japan, deem necessary or advisable for certain purposes set out therein. Those purposes do not include arrest, detention, deportation, or exclusion but do include under subsection (e)

"Continuing or discontinuing in an orderly manner as the emergency permits, measures adopted during and by reason of the war." Subsection 3 of Section 2 provides for every Order-in-Council passed under the Act, being laid before Parliament and being annulled upon resolution of the Senate or the House of Commons. Section 4 provides as follows:

"Without prejudice to any other power conferred by this Act, the Governor-in-Council may order that the Orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day this Act comes into force, shall while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act."

On 28th December, 1945 the Governor-in-Council passed Order-in-Council P. C. 7414, pursuant to Section 4 of the National Emergency Transitional Powers Act, 1945 providing that all order and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day the National Emergency Transitional Powers Act, 1945, should come into force, should, while the latter Act is in force, continue in full force and effect subject to amendment or revocation under the latter Act.

The result of this legislation is that the Orders-in-Council are now in force, if at all, by virtue of the Transitional Act.

In connection with the question raised by this case, three Acts of the Imperial Parliament are relevant.

The first of these is the Colonial Laws Validity Act,1865: Section 2 and 3 of that Act run as follws:-

"2 Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending

to the Colony to which such law may relate or repugnant to any Order or Regulation made under Authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No Colonial Law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, Order or Regulation as aforesaid."

The second is the Statute of Westminster passed in the year 1931 which was duly adopted by the Parliament of Canada. Section 2 of that Act is in the following terms:-

"2.- (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

The third Act is the British Nationality and Status of Aliens Act, 1914. Part I of that Act relates to Natural Born British Subjects. Part II relates to the Naturalization of Aliens and Section 9 provides that Part II shall not nor shall any certificate of naturalization granted thereunder have effect within any of the Dominions specified in the Schedule (which includes Canada) unless the legislature of the Dominions adopts Part II. The Act of the Imperial Parliament was subsequently amended. The Parliament of Canada by the Naturalization Act, 1914 did not in terms "adopt" the Imperial Act of 1914, but passed almost identical legislation. In 1915 the parliament of Canada amended the Naturalization Act so as to introduce the amendments that had been

made by the Parliament of Great Britain in Part II of the British Nationality and Status of Aliens Act, 1914. That Act of 1915 contained a recital to the effect that the Dominion had adopted Part II of the British Act.

It is convenient at this stage to deal with the question raised as to the effect of this legislation of the Dominion on this topic.

The contention of the Appellants was that the Parliament of Canada did "adopt" Part II of The Imperial Act in the sense in which that word was used in the Imperial Act and that in consequence Part II formed part of the law of the United Kingdom extending to the Dominion. The contention of the Respondents was that the Canadian Statutes are only parallel legislation. In arriving at a conclusion as to the advice their Lordships think it right to tender to His Majesty they find it unnecessary to express an opinion as to the correctness or otherwise of the contention of the Appellants. Their Lordships will assume that the Appellants are right in their contention, but they do not express any opinion one way or another upon it.

There was a considerable diversity of opinion between the members of the Supreme Court on some of the points which fell for decision under the reference. In one important respect at least--the invalidity of sub-section (4) of Section 2 of P. C. 7355-the views of the majority of the Court were adverse to the respondents. No cross appeal was lodged. This in the circumstances was only the absence of a formality. A determination upon the legal effect of the orders as a whole is necessary in order to arrive at a conclusion upon the matters in respect of which the appellants appealed. The whole matter was fully debated before their Lordships and their Lordships accordingly propose to deal with the orders in their entirety.

Their Lordships now turn to the question at issue.

Upon certain general matters of principle there is not since the decision in Fort Francis Pulp and Power Co. v. Manitoba Free Press (1923) A. C. 695, any room for dispute. Under the British North America Act property and civil rights in the several provinces are committed to the Provincial Legislatures, but the Parliament of the Dominion in a sufficiently great emergency such as

that arising out of war has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge.

Again if it be clear that an emergency has not arisen or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the provinces comes into play. But very clear evidence that an emergency has not arisen or that the emergency no longer exists is required to justify the judiciary even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.

To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers.

Lastly it should be observed that the judiciary are not concerned when considering a question of ultra vires with the question whether the Executive will in fact be able to carry into effective operation the emergency provisions which the Parliament of the Dominion either directly or indirectly has made.

It is unnecessary therefore for their Lordships to take into review or even to recount the particular circumstances obtaining within the Dominion that led to the Orders in question or the arrangements made with a view to their execution.

The validity of the War Measures Act was not attacked before their Lordships and consistently with the principles stated was not open to attack. The validity of the Orders was challenged on many grounds. Their Lordships have considered not only the points put forward on behalf of the Appellants but whether the orders were susceptible of criticism for reasons not put forward. Their Lordships

are satisfied that all possible grounds of criticism were in one form or another included in the grounds on which the Appellants relied.

For the validity of the orders it is necessary First that upon the true construction of the War Measures Act, they fall within the ambit of the powers duly conferred by the Act on the Governor General in Council Second that, assuming the orders were within the terms of the War Measures Act, they were not for some reason in law invalid.

The points taken were first that the War Measures Act did not on its true construction authorise orders for deportation to be made as respects British subjects or Canadian Nationals and that it should in certain respects receive a limited construction; second that if the Act purported on its construction to authorise the making of such orders, yet the orders made would be contrary to the Imperial Statute British Nationality and Status of Aliens Act and therefore to that extent invalid; third that the provision contained in para. 2 (4) of P.C. 7355(relating to the wives and children of persons in respect of whom an order for deportation had been made) was for a specific reason invalid; fourth that in any event the order made under the National Emergency Transitional Powers Act continuing the former orders of the Governor-in-Council was invalid.

The first point raises questions of construction with which their Lordships must now deal.

The language of the War Measures Act is in general terms but it was argued that certain limitations were as a matter of construction of the Act to be implied and that to the extent to which any order purporting to be made under the Act fell outside its proper ambit, the order would of necessity be invalid.

The first suggested limitation was based on the Colonial Laws Validity Act, 1865. At the date when the War Measures Act came into force legislation made by the Parliament was in its effect subject to the provisions as to repugnancy contained in the Act of 1865 and it was argued that the War Measures Act should be construed as confined in its possible ambit to the making of orders which would consistently with the Colonial Laws Validity

Act, 1865, then be valid as law within the Dominion. If that was so the orders were not authorised by the War Measures Act in so far as they were repugnant to the British Nationality and Status of Aliens Act, 1914-18, which was an Act of the Imperial Parliament and in the appellants' contention extended to the Dominion as part of the law of the United Kingdom.

Their Lordships are unable to accept this contention. The effect of the Colonial Laws Validity Act, 1865, was only that Canadian legislation repugnant to the statutory law of the United Kingdom applying to the Dominion was inoperative. The only conclusion to be drawn from a consideration of the Colonial Laws Validity Act is that the War Measures Act did not on its true construction confer a power beyond the extent to which it might at the date of its use be validly exercised. The statutory law of the United Kingdom is not static and in their Lordships' opinion there is no justification for the imputation that the Parliament of Canada legislated upon the footing that it is static. The effectiveness of legislation of the Parliament of the Dominion at the date when those delegated powers are exercised, not the limitation on that legislation at the date when the War Measures Act was passed, is, so far as the Act of 1865 is concerned, the relevant matter.

Secondly, it was argued that, as a matter of construction, the War Measures Act did not authorise the making of orders having an extra territorial operation. This point was relevant by reason that the orders in question in terms authorised "deportation."

This point may be shortly disposed of. Extra-territorial constraint is incident to the exercise of the power of deportation (A.G. for Canada v. Cain (1906) A. C. 542) and was, therefore in contemplation. Any lingering doubts as to the validity in law of an Act which for its effectiveness requires extra-territorial application were, it may be added set at rest by the Canadian Statute the Extra-Territorial Act, 1933.

Thirdly, it was argued that the War Measures Act should be construed as authorising only such orders as are consistent with the accepted principles of International Law and that the forcible

removal to a foreign country of British subjects was contrary to the accepted rules of International Law. The Act therefore as a matter of construction did not, it was said, purport to authorise orders providing for such removal.

It may be true that in construing legislation some weight ought in an appropriate case to be given to a consideration of the accepted principles of International Law (cf. Croft v. Dunphy (1932) A. C. 156), but the nature of the legislation in any particular case has to be considered in determining to what extent, if at all, it is right on a question of construction to advert to those principles. In their Lordships' view those principles find no place in the construction of the War Measures Act. The Act is directed to the exercise by the Governor-in-Council of powers vested in the Parliament of the Dominion at a time when war, invasion or insurrection or their apprehension exists. The accepted rules of International Law applicable in times of peace can hardly have been in contemplation and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested.

The next question of construction arising under the Act has more substance. It was said that there was inherent in the word "deportation" as part of its meaning the necessity that the person to be deported was--as respects the state exercising the power--an alien. The express power given to expel persons from Canada was therefore limited to aliens i.e., persons who were not Canadian Nationals. It was not permissible to treat as authorised by the general power a power to make orders for deportation in relation to a class of persons impliedly excluded from deportation by the terms of the specific power. There was therefore an implied prohibition against the deportation of Canadian Nationals.

Upon this argument it may be conceded that commonly it is only aliens who are made liable to deportation and that in consequence, where reference is made to deportation, there is often imported the suggestion that aliens are under immediate consideration.

eration.

The dictionaries as might be expected do not altogether agree as to the meaning of deportation but the New English Dictionary gives as its definition "The action of carrying away: forcible removal especially into exile; transportation."

As a matter of language their Lordships take the view that "deportation" is not a word which is mis-used when applied to persons not aliens. Whether or not the word "deportation" is in its application to be confined to aliens or not remains therefore open as a matter of construction of the particular statute in which it is found.

In the present case the Act is directed to dealing with emergencies: throughout it is in sweeping terms; and the word is found in the combination "arrest, detention, exclusion and deportation." As regard the first three of these words nationality is obviously not a relevant consideration. The general nature of the Act and the collocation in which the word is found establish in their Lordships' view that in this statute the word "deportation" is used in a general sense and as an action applicable to all persons irrespective of nationality. This being in their Lordships' judgment the true construction of the Act, it must apply to all persons who are at the time subject to the laws of Canada. They may be so subject by the mere fact of being in Canada, whether they are aliens or British subjects or Canadian Nationals. Nationality per se is not a relevant consideration. An order relating to deportation would not be unauthorised by reason that it related to Canadian Nationals or British subjects.

Even if this were not the case the same result may be reached by another route. The general power given to the Governor-in-Council in the opening part of Section3 of the Act is not in this statute limited by reference to the acts particularly enumerated and their Lordships see no reason for differing from the view expressed by Rinfret C.J.C. that the order was justifiable under that general power (See King Emperor v. Sibnath Banerji(1945) L.R. 72 I.A. 247).

There remains one further question of construction of The

War Measures Act, namely, whether it authorised the making of an order which provided that deported persons should cease to be either British subjects or Canadian Nationals. That matter must be considered in light of views which their Lordships have already expressed as to the construction of the Act. They see no reason for excluding from the scope of the matters covered by the general power contained in Section 3 a power to take from persons who have in fact under an order for deportation left Canada their status under the Law of Canada as British subjects and Canadian Nationals.

The result is that upon its true construction The War Measures Act authorised the making of orders for deportation of any person whatever be his nationality and the deprivation so far as the law of Canada was concerned of his status under that law as a British subject or Canadian National.

The next question is whether The Colonial Laws Validity Act, 1865 applies to the Orders of the Governor-in-Council. If it does, then in so far as they are repugnant to The British Nationality and Status of Aliens Act (which their Lordships are assuming to be an Act of the Imperial Parliament extending to Canada) they are invalid unless the provisions of the Statute of Westminster can be relied upon.

The contention of the Appellants was that the orders, though law made after the date of the Statute of Westminster, were not law made after that date by the Parliament of the Dominion. The activities of Parliament in the matter in question had, it was said, ceased in 1927. The orders were not of its making. The passing by the Parliament of The National Emergency Transitional Powers Act, 1945 was for the purpose in hand immaterial, for the reason that Section 4 empowered the Governor-in-Council to order the continuance only of orders and regulations "lawfully" made under the War Measures Act.

Their Lordships agree that in considering this particular matter the National Emergency Transitional Powers Act, 1945 cannot be prayed in aid of the validity of the orders, but in their opinion the orders in question were made "after the passing of this

Act (i.e., the Statute of Westminster) by the Parliament of the Dominion" as that phrase is used in the Statute of Westminster. This again is a question of construction.

Both in sub-sections 1 and 2 of Section (2) of the Statute of Westminster the matter which is dealt with is "law", and that is a general term which includes not only statutes but also orders and regulations made under statutes. Undoubtedly the law as embodied in an order or regulation is made at the date when the power conferred by the Parliament of the Dominion is exercised.

Is it made after that date by the Parliament of the Dominion? That Parliament is the only legislative authority for the Dominion as a whole and it has chosen to make the law through machinery set up and continued by it for that purpose. The Governor-in-Council has no independent status as a law making body. The legislative activity of Parliament is still present at the time when the orders are made and these orders are "law". In their Lordships' opinion they are law made by the Parliament at the date of their promulgation. A contrary conclusion would in their Lordships' view place an artificial and narrow construction on wide terms used in an Act of Parliament the subject matter of which demands that a liberal construction should be put upon the language used.

In the result therefore the Colonial Laws Validity Act,1865, affords no ground for questioning the validity of the orders.

The next matter arises on sub-para. (4) of para. (2) of P.C. 7355. Under that provision an order for deportation may be made as respects the wives and children (not over the age of 16 years) of persons with respect to whom an order for deportation has been made.

The case sought to be made runs as follows:

The recitals in the order relate only to the desirability of making provision for the deportation of persons referred to in sub-paras. 1, 2 and 3 of para. (2) of the order. In the case of the classes of persons referred to in sub-paras. 1, 2 and 3 (leaving aside detainees) request for repatriation was at some stage necessary; a request was considered by the Governor-in-Council to be a substantive matter, but no such request is required as respects the persons mentioned in sub-para. 4 and the

only apparent reason for subjecting them to liability for deportation is that an order for deportation has been made as respects the husband or father. The order therefore not only does not show that by reason of the existence of real or apprehended war it was thought necessary for the security, peace, order, defence or welfare of Canada to make provision for their deportation but, when considered in substance, shows that these matters were not taken into consideration. A deportation of the family consequential on the deportation of the father might indeed be thought desirable on grounds other than those requisite for a due execution of the powers given and, it is contended, it is apparent that it is grounds not set out in the statute which alone have here been taken into consideration.

The incompleteness of the recital is in their Lordships' view of no moment. It is the substance of the matter that has to be considered. Their Lordships do not doubt the proposition that an exercise of the power for an unauthorised purpose would be invalid and the only question is whether there is apparent any matter which justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorised purpose. In their Lordships' opinion there is not. The first three sub-paragraphs of paragraph 2 no doubt deal with the matter which primarily engaged the attention of the Governor-in-Council, but it is not in their Lordships' view a proper inference from the terms of those sub-paragraphs that the Governor-in-Council did not also deem it necessary or advisable for the security defence peace order and welfare of Canada that the wives and children under 16 of deportees should against their will also be liable to deportation. The making of a deportation order as respects the husband or father might create a situation with which, with a view to forwarding this specified purpose, it was proper to deal. Beyond that it is not necessary to go.

The last matter of substance arises on the National Emergency Transitional Powers Act, 1945.

It was contended by the Appellants that at the date of the passing of this Act there did not exist any such emergency as justified the Parliament of Canada in empowering the Governor-in-Council to continue the orders in question. The emergency which had dictated

~~Confidential~~ 5TH PROOF

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FROM

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Present at the Hearing:

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[*Delivered by* LORD WRIGHT]

These are appeals by special leave brought by the Co-operative Committee on Japanese Canadians and the A-G of Saskatchewan from the opinion certified on the 20th February, 1946, by the Supreme Court of Canada upon a reference ordered by the Governor General in Council under Section 55 of the Supreme Court Act, Revised Statutes of Canada 1927, cap 35. The question referred for hearing and consideration was as follows:

"Are the Orders-in-Council dated the 15th December, 1945, being P.C. 7355, 7356, 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 recitals to the Orders-in-Council which it is sought to impeach show that they purport to have been made under the authority of The War Measures Act. That Act was first passed by the Parliament of Canada in 1914 and is now chap. 206 of The Revised Statutes of Canada 1927. Section 2 provides that the issue of a proclamation by His Majesty or under the authority of the Governor-in-Council shall be conclusive that war, invasion or insurrection real or apprehended exists and of its continuance until by the issue of a further proclamation it is declared that war, invasion or insurrection no longer exists. The proclamation first called for by this section was duly made but no proclamation that the war no longer existed has been made.

The relevant sections of this Act are as follow:—

"3. 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; 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 mentioned, that is to say:—

(*a*) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(*b*) Arrest, detention, exclusion and deportation;

(*c*) Control of the harbours, ports and territorial waters of Canada and the movement of vessels;

(*d*) Transportation by land, air or water and the control of the transport of persons and things;

(*e*) Trading, exportation, importation, production and manufacture;

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

(2) All orders and regulations made under this section shall have the force of law. . . ."

" 6. The provisions of the three sections last preceding, shall only be in force during war, invasion or insurrection, real or apprehended."

The three Orders-in-Council were all made on the 15th December, 1945.

The preamble to the first Order (P.C. 7355) contains the following recitals:—

Whereas during the course of the war with Japan certain Japanese Nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

And whereas it is considered necessary for the security defence peace order and welfare of Canada that provision be made accordingly.

The first Order (Section 2, subsections 2, 3 and 4) then authorizes the Minister of Labour to make orders for deportation " to Japan " of the following persons.

(1) Every person of 16 years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who had since the 8th December, 1941 (the date of the declaration of war by the Dominion against Japan) made a request for repatriation or who had been detained under certain regulations and was so detained on 1st September, 1945.

(2) Every naturalized British Subject of the Japanese Race of 16 years of age or over resident in Canada who had made request for repatriation provided that such request had not been revoked in writing before midnight on 1st September, 1945.

(3) Natural born British Subjects of the Japanese Race of 16 years of age or over resident in Canada, who made a request for repatriation and did not revoke it in writing before the Minister had made an Order for " deportation."

Subsection 4 of Section 2 provided as follows:—

(4) The wife and children under 16 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.

The remaining provisions of this Order are of an ancillary or administrative nature.

The second Order (P.C. 7356) provides that any person being a British Subject by naturalization under the Naturalization Act, cap. 138, A.S.C. 1927, 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.

The third Order (P.C. 7357) provides for the appointment of a Commission to make inquiry concerning the activities, loyalties 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 where their names are referred to the Commission by the Minister of Labour for

investigation with a view to recommendation whether in the circumstances of any such case, such persons should be deported. The Commission was also at the request of the Minister of Labour to inquire into the case of any naturalized British Subject of the Japanese Race who had made a request for repatriation, and make recommendations. It was then provided that any person of the Japanese Race who was recommended by the Commission for deportation, should be deemed to be a person subject to deportation under the provisions of P.C. 7355, and as and from the date upon which he left Canada in the course of deportation, he should cease to be either a British Subject or a Canadian National.

There is one further Act of the Parliament of the Dominion to which it is necessary to refer—the National Emergency Transitional Powers Act 1945. This Act was assented to on the 18th December, 1945. It was to come into force on the 1st January, 1946, and on and after that day the war against Germany and Japan was for the purposes of the War Measures Act to be deemed no longer to exist. The Act was to continue in force until the 31st December, 1946, or if Parliament were not then sitting until a date determined by the sitting of Parliament.

The Act recites the War Measures Act and the continuance of a national emergency arising out of the war since the unconditional surrender of Germany and Japan, and the necessity that the Governor-in-Council should exercise certain transitional powers during the continuation of the exceptional conditions brought about by the war and the necessity that certain acts and things done and authorized, and certain orders and regulations made under the War Measures Act be continued in force, and that it was essential that the Governor-in-Council be authorized to do and authorize such further acts, and make such further orders and regulations as he might deem necessary or advisable by reason of the emergency and for the purpose of discontinuance in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency.

By Section 2 of the Act the Governor-in-Council was given power to make orders and regulations as he might, by reason of the continued existence of the National emergency, arising out of the war against Germany and Japan, deem necessary or advisable for certain purposes set out therein. Those purposes do not include arrest, detention, deportation, or exclusion but do include under subsection (e)

" Continuing or discontinuing in an orderly manner as the emergency permits, measures adopted during and by reason of the war." Subsection 3 of Section 2 provides for every Order-in-Council passed under the Act, being laid before Parliament and being annulled upon resolution of the Senate or the House of Commons. Section 4 provides as follows:

" Without prejudice to any other power conferred by this Act, the Governor-in-Council may order that the Orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day this Act comes into force, shall while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act."

On 28th December, 1945 the Governor-in-Council passed Order-in-Council P.C. 7414, pursuant to Section 4 of the National Emergency Transitional Powers Act, 1945 providing that all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day the National Emergency Transitional Powers Act, 1945, should come into force, should, while the latter Act is in force, continue in full force and effect subject to amendment or revocation under the latter Act.

The result of this legislation is that the Orders-in-Council are now in force, if at all, by virtue of the Transitional Act.

In connection with the question raised by this case, three Acts of the Imperial Parliament are relevant.

The first of these is the Colonial Laws Validity Act, 1865:

Sections 2 and 3 of that Act run as follows:—

> "2. Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
>
> 3. *No Colonial Law shall be or be deemed to have been void* or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, Order or Regulation as aforesaid."

The second is the Statute of Westminster passed in the year 1931 which was duly adopted by the Parliament of Canada. Section 2 of that Act is in the following terms:—

> "2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

The third Act is the British Nationality and Status of Aliens Act, 1914. Part I of that Act relates to Natural Born British Subjects. Part II relates to the Naturalization of Aliens and Section 9 provides that Part II shall not nor shall any certificate of naturalization granted thereunder have effect within any of the Dominions specified in the Schedule (which includes Canada) unless the legislature of the Dominions adopts Part II. The Act of the Imperial Parliament was subsequently amended. The Parliament of Canada by the Naturalization Act, 1914 did not in terms "adopt" the Imperial Act of 1914, but passed almost identical legislation. In 1915 the Parliament of Canada amended the Naturalization Act so as to introduce the amendments that had been made by the Parliament of Great Britain in Part II of the British Nationality and Status of Aliens Act, 1914. That Act of 1915 contained a recital to the effect that the Dominion had adopted Part II of the British Act.

It is convenient at this stage to deal with the question raised as to the effect of this legislation of the Dominion on this topic.

The contention of the Appellants was that the Parliament of Canada did "adopt" Part II of The Imperial Act in the sense in which that word was used in the Imperial Act and that in consequence Part II formed part of the law of the United Kingdom extending to the Dominion. The contention of the Respondents was that the Canadian Statutes are only parallel legislation. In arriving at a conclusion as to the advice their Lordships think it right to tender to His Majesty they find it unnecessary to express an opinion as to the correctness or otherwise of the contention of the Appellants. Their Lordships will assume that the Appellants are right in their contention, but they do not express any opinion one way or another upon it.

There was a considerable diversity of opinion between the members of the Supreme Court on some of the points which fell for decision under the reference. In one important respect at least—the invalidity of sub-section (4) of Section 2 of P.C. 7355—the views of the majority of the Court

were adverse to the respondents. No cross appeal was lodged. This in the circumstances was only the absence of a formality. A determination upon the legal effect of the orders as a whole is necessary in order to arrive at a conclusion upon the matters in respect of which the appellants appealed. The whole matter was fully debated before their Lordships and their Lordships accordingly propose to deal with the orders in their entirety.

Their Lordships now turn to the question at issue.

Upon certain general matters of principle there is not since the decision in *Fort Francis Pulp and Power Co.* v. *Manitoba Free Press* [1923] A.C. 695, any room for dispute. Under the British North America Act property and civil rights in the several provinces are committed to the Provincial Legislatures, but the Parliament of the Dominion in a sufficiently great emergency such as that arising out of war has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge.

Again if it be clear that an emergency has not arisen or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the provinces comes into play. But very clear evidence that an emergency has not arisen or that the emergency no longer exists is required to justify the judiciary even though the question is one of *ultra vires*, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.

To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers.

Lastly it should be observed that the judiciary are not concerned when considering a question of *ultra vires* with the question whether the Executive will in fact be able to carry into effective operation the emergency provisions which the Parliament of the Dominion either directly or indirectly has made.

It is unnecessary therefore for their Lordships to take into review or even to recount the particular circumstances obtaining within the Dominion that led to the Orders in question or the arrangements made with a view to their execution.

The validity of the War Measures Act was not attacked before their Lordships and consistently with the principles stated was not open to attack. The validity of the Orders was challenged on many grounds. Their Lordships have considered not only the points put forward on behalf of the Appellants but whether the orders were susceptible of criticism for reasons not put forward. Their Lordships are satisfied that all possible grounds of criticism were in one form or another included in the grounds on which the Appellants relied.

For the validity of the orders it is necessary *First* that upon the true construction of the War Measures Act, they fall within the ambit of the powers duly conferred by the Act on the Governor General in Council *Second* that, assuming the orders were within the terms of the War Measures Act, they were not for some reason in law invalid.

The points taken were first that the War Measures Act did not on its true construction authorise orders for deportation to be made as respects British subjects or Canadian Nationals and that it should in certain respects receive a limited construction: second that if the Act

purported on its construction to authorise the making of such orders, yet the orders made would be contrary to the Imperial Statute British Nationality and Status of Aliens Act and therefore to that extent invalid: third that the provision contained in para. 2 (4) of P.C. 7355 (relating to the wives and children of persons in respect of whom an order for deportation had been made) was for a specific reason invalid: fourth that in any event the order made under the National Emergency Transitional Powers Act continuing the former orders of the Governor-in-Council was invalid.

The first point raises questions of construction with which their Lordships must now deal.

The language of the War Measures Act is in general terms but it was argued that certain limitations were as a matter of construction of the Act to be implied and that to the extent to which any order purporting to be made under the Act fell outside its proper ambit, the order would of necessity be invalid.

The first suggested limitation was based on the Colonial Laws Validity Act, 1865. At the date when the War Measures Act came into force legislation made by the Parliament was in its effect subject to the provisions as to repugnancy contained in the Act of 1865 and it was argued that the War Measures Act should be construed as confined in its possible ambit to the making of orders which would consistently with the Colonial Laws Validity Act, 1865, then be valid as law within the Dominion. If that was so the orders were not authorised by the War Measures Act in so far as they were repugnant to the British Nationality and Status of Aliens Act, 1914-18, which was an Act of the Imperial Parliament and in the appellants' contention extended to the Dominion as part of the law of the United Kingdom.

Their Lordships are unable to accept this contention. The effect of the Colonial Laws Validity Act, 1865, was only that Canadian legislation repugnant to the statutory law of the United Kingdom applying to the Dominion was inoperative. The only conclusion to be drawn from a consideration of the Colonial Laws Validity Act is that the War Measures Act did not on its true construction confer a power beyond the extent to which it might at the date of its use be validly exercised. The statutory law of the United Kingdom is not static and in their Lordships' opinion there is no justification for the imputation that the Parliament of Canada legislated upon the footing that it is static. The effectiveness of legislation of the Parliament of the Dominion at the date when those delegated powers are exercised, not the limitation on that legislation at the date when the War Measures Act was passed, is, so far as the Act of 1865 is concerned, the relevant matter.

Secondly, it was argued that, as a matter of construction, the War Measures Act did not authorise the making of orders having an extra territorial operation. This point was relevant by reason that the orders in question in terms authorised "deportation."

This point may be shortly disposed of. Extra-territorial constraint is incident to the exercise of the power of deportation (*A.G. for Canada* v. *Cain* [1906] A.C. 542) and was, therefore in contemplation. Any lingering doubts as to the validity in law of an Act which for its effectiveness requires extra-territorial application were, it may be added, set at rest by the Canadian Statute the Extra-Territorial Act, 1933.

Thirdly, it was argued that the War Measures Act should be construed as authorising only such orders as are consistent with the accepted principles of International Law and that the forcible removal to a foreign country of British subjects was contrary to the accepted rules of International Law. The Act therefore as a matter of construction did not, it was said, purport to authorise orders providing for such removal.

It may be true that in construing legislation some weight ought in an appropriate case to be given to a consideration of the accepted principles of International Law (cf. *Croft* v. *Dunphy* [1933] A.C. 156), but the nature of the legislation in any particular case has to be considered

in determining to what extent, if at all, it is right on a question of construction to advert to those principles. In their Lordships' view those principles find no place in the construction of the War Measures Act. The Act is directed to the exercise by the Governor-in-Council of powers vested in the Parliament of the Dominion at a time when war, invasion or insurrection or their apprehension exists. The accepted rules of International Law applicable in times of peace can hardly have been in contemplation and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested.

The next question of construction arising under the Act has more substance. It was said that there was inherent in the word " deportation " as part of its meaning the necessity that the person to be deported was—as respects the state exercising the power—an alien. The express power given to expel persons from Canada was therefore limited to aliens i.e., persons who were not Canadian Nationals. It was not permissible to treat as authorised by the general power a power to make orders for deportation in relation to a class of persons impliedly excluded from deportation by the terms of the specific power. There was therefore an implied prohibition against the deportation of Canadian Nationals.

Upon this argument it may be conceded that commonly it is only aliens who are made liable to deportation and that in consequence, where reference is made to deportation, there is often imported the suggestion that aliens are under immediate consideration.

The dictionaries as might be expected do not altogether agree as to the meaning of deportation but the New English Dictionary gives as its definition " The action of carrying away: forcible removal especially into exile: transportation."

As a matter of language their Lordships take the view that " deportation " is not a word which is mis-used when applied to persons not aliens. Whether or not the word " deportation " is in its application to be confined to aliens or not remains therefore open as a matter of construction of the particular statute in which it is found.

In the present case the Act is directed to dealing with emergencies: throughout it is in sweeping terms; and the word is found in the combination " arrest, detention, exclusion and deportation." As regard the first three of these words nationality is obviously not a relevant consideration. The general nature of the Act and the collocation in which the word is found establish in their Lordships' view that in this statute the word " deportation " is used in a general sense and as an action applicable to all persons irrespective of nationality. This being in their Lordships' judgment the true construction of the Act, it must apply to all persons who are at the time subject to the laws of Canada. They may be so subject by the mere fact of being in Canada, whether they are aliens or British subjects or Canadian Nationals. Nationality *per se* is not a relevant consideration. An order relating to deportation would not be unauthorised by reason that it related to Canadian Nationals or British subjects.

Even if this were not the case the same result may be reached by another route. The general power given to the Governor-in-Council in the opening part of Section 3 of the Act is not in this statute limited by reference to the acts particularly enumerated and their Lordships see no reason for differing from the view expressed by Rinfret C.J.C. that the order was justifiable under that general power (See *King Emperor* v. *Sibnath Banerji* [1945] L.R. 72 I.A. 247).

There remains one further question of construction of The War Measures Act, namely, whether it authorised the making of an order which provided that deported persons should cease to be either British subjects or Canadian Nationals. That matter must be considered in light of views which their Lordships have already expressed as to the construction of the Act. They see no reason for excluding from the scope of the matters covered by the general power contained in Section 3 a power to take from persons who have in fact under an order for deportation left Canada their status under the Law of Canada as British subjects and Canadian Nationals.

The result is that upon its true construction The War Measures Act authorised the making of orders for deportation of any person whatever be his nationality and the deprivation so far as the law of Canada was concerned of his status under that law as a British subject or Canadian National.

The next question is whether The Colonial Laws Validity Act, 1865 applies to the Orders of the Governor-in-Council. If it does, then in so far as they are repugnant to The British Nationality and Status of Aliens Act (which their Lordships are assuming to be an Act of the Imperial Parliament extending to Canada) they are invalid unless the provisions of the Statute of Westminster can be relied upon.

The contention of the Appellants was that the orders, though law made after the date of the Statute of Westminster, were not law made after that date by the Parliament of the Dominion. The activities of Parliament in the matter in question had, it was said, ceased in 1927. The orders were not of its making. The passing by the Parliament of The National Emergency Transitional Powers Act, 1945 was for the purpose in hand immaterial, for the reason that Section 4 empowered the Governor-in-Council to order the continuance only of orders and regulations "lawfully" made under the War Measures Act.

Their Lordships agree that in considering this particular matter the National Emergency Transitional Powers Act, 1945 cannot be prayed in aid of the validity of the orders, but in their opinion the orders in question were made "after the passing of this Act (i.e., the Statute of Westminster) by the Parliament of the Dominion" as that phrase is used in the Statute of Westminster. This again is a question of construction.

Both in sub-sections 1 and 2 of Section (2) of the Statute of Westminster the matter which is dealt with is "law", and that is a general term which includes not only statutes but also orders and regulations made under statutes. Undoubtedly the law as embodied in an order or regulation is made at the date when the power conferred by the Parliament of the Dominion is exercised.

Is it made after that date by the Parliament of the Dominion? That Parliament is the only legislative authority for the Dominion as a whole and it has chosen to make the law through machinery set up and continued by it for that purpose. The Governor-in-Council has no independent status as a law making body. The legislative activity of Parliament is still present at the time when the orders are made and these orders are "law". In their Lordships' opinion they are law made by the Parliament at the date of their promulgation. A contrary conclusion would in their Lordships' view place an artificial and narrow construction on wide terms used in an Act of Parliament the subject matter of which demands that a liberal construction should be put upon the language used.

In the result therefore the Colonial Laws Validity Act, 1865, affords no ground for questioning the validity of the orders.

The next matter arises on sub-para. (4) of para. (2) of P.C. 7355. Under that provision an order for deportation may be made as respects the wives and children (not over the age of 16 years) of persons with respect to whom an order for deportation has been made.

The case sought to be made runs as follows:

The recitals in the order relate only to the desirability of making provision for the deportation of persons referred to in sub-paras. 1, 2 and 3 of para. (2) of the order. In the case of the classes of persons referred to in sub-paras. 1, 2 and 3 (leaving aside detainees) request for repatriation was at some stage necessary; a request was considered by the Governor-in-Council to be a substantive matter, but no such request is required as respects the persons mentioned in sub-para. 4 and the only apparent reason for subjecting them to liability for deportation is that an order for deportation has been made as respects the husband or father. The order therefore not only does not show that by reason of the

existence of real or apprehended war it was thought necessary for the security, peace, order, defence or welfare of Canada to make provision for their deportation but, when considered in substance, shows that these matters were not taken into consideration. A deportation of the family consequential on the deportation of the father might indeed be thought desirable on grounds other than those requisite for a due execution of the powers given and, it is contended, it is apparent that it is grounds not set out in the statute which alone have here been taken into consideration.

The incompleteness of the recital is in their Lordships' view of no moment. It is the substance of the matter that has to be considered. Their Lordships do not doubt the proposition that an exercise of the power for an unauthorised purpose would be invalid and the only question is whether there is apparent any matter which justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorised purpose. In their Lordships' opinion there is not. The first three sub-paragraphs of paragraph 2 no doubt deal with the matter which primarily engaged the attention of the Governor-in-Council, but it is not in their Lordships' view a proper inference from the terms of those sub-paragraphs that the Governor-in-Council did not also deem it necessary or advisable for the security defence peace order and welfare of Canada that the wives and children under 16 of deportees should against their will also be liable to deportation. The making of a deportation order as respects the husband or father might create a situation with which, with a view to forwarding this specified purpose, it was proper to deal. Beyond that it is not necessary to go.

The last matter of substance arises on the National Emergency Transitional Powers Act, 1946.

It was contended by the Appellants that at the date of the passing of this Act there did not exist any such emergency as justified the Parliament of Canada in empowering the Governor-in-Council to continue the orders in question. The emergency which had dictated their making—namely active hostilities—had come to an end.

A new emergency justifying exceptional measures may indeed have arisen. But it was by no means the case that measures taken to deal with the emergency which led to the Proclamation bringing the War Measures Act into force were demanded by the emergency which faced the Parliament of Canada when passing the Transitional Act. The order under the Act continuing the orders in question was therefore *prima facie* invalid.

This contention found no favour in the Supreme Court of Canada and their Lordships do not accept it. The Preamble to the Transitional Act states clearly the view of the Parliament of the Dominion as to the necessity of imposing the powers which were exercised. The argument under consideration invites their Lordships on speculative grounds alone to overrule either the considered decision of Parliament to confer the powers or the decision of the Governor-in-Council to exercise it. So to do would be contrary to the principles laid down in *Fort Francis Pulp and Power Co.* v. *Manitoba Free Press* (*ubi supra*) and accepted by their Lordships earlier in this opinion.

One remaining matter relied upon by the Appellants should be mentioned. First it was said that the words " of the Japanese race " were so vague as to be incapable of application to ascertained persons. It is sufficient to say that in their Lordships' opinion they are not. All that can be said is that questions may arise as to the true construction of the phrase and as to its applicability to any particular person But difficulties of construction do not affect the validity of the Orders.

In the result their Lordships find themselves in agreement with the conclusion at which Rinfret C.J.C. and Kerwin and Tachereau J.J. arrived and for the reasons they have expressed will humbly advise His Majesty that none of the Orders-in-Council is in any respect *ultra vires* and that the Appeal should be dismissed. There will be no order as to costs.

(52065) Wt. 8013—5 12, 4, 6, 12, 8, 25 11/46 D.L. G. 338

In the Privy Council

THE CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS AND ANOTHER

v.

THE ATTORNEY-GENERAL OF CANADA AND ANOTHER

DELIVERED BY LORD WRIGHT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1946

Privy Council Appeal No. 58 *of* 1946

The Co-operative Committee on Japanese Canadians and another - - - - - - - - - *Appellants*

v.

The Attorney-General of Canada and another - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD WRIGHT
LORD PORTER
LORD UTHWATT
SIR LYMAN DUFF

[*Delivered by* LORD WRIGHT]

These are appeals by special leave brought by the Co-operative Committee on Japanese Canadians and the A-G of Saskatchewan from the opinion certified on the 20th February, 1946, by the Supreme Court of Canada upon a reference ordered by the Governor General in Council under Section 55 of the Supreme Court Act, Revised Statutes of Canada 1927, cap 35. The question referred for hearing and consideration was as follows:

"Are the Orders-in-Council dated the 15th December, 1945, being P.C. 7355, 7356, 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 recitals to the Orders-in-Council which it is sought to impeach show that they purport to have been made under the authority of The War Measures Act. That Act was first passed by the Parliament of Canada in 1914 and is now chap. 206 of The Revised Statutes of Canada 1927. Section 2 provides that the issue of a proclamation by His Majesty or under the authority of the Governor-in-Council shall be conclusive evidence that war, invasion or insurrection real or apprehended exists and of its continuance until by the issue of a further proclamation it is declared that war, invasion or insurrection no longer exists. The proclamation first called for by this section was duly made but no proclamation that the war no longer existed has been made.

The relevant sections of this Act are as follow:—

"3. 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; and for greater certainty but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

(*a*) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(*b*) Arrest, detention, exclusion and deportation;

(*c*) Control of the harbours, ports and territorial waters of Canada and the movement of vessels;

(*d*) Transportation by land, air or water and the control of the transport of persons and things;

(*e*) Trading, exportation, importation, production and manufacture;

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

(2) All orders and regulations made under this section shall have the force of law. . . ."

" 6. The provisions of the three sections last preceding, shall only be in force during war, invasion or insurrection, real or apprehended."

The three Orders-in-Council were all made on the 15th December, 1945.

The preamble to the first Order (P.C. 7355) contains the following recitals:—

Whereas during the course of the war with Japan certain Japanese Nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

And whereas it is considered necessary for the security defence peace order and welfare of Canada that provision be made accordingly.

The first Order (Section 2, subsections 1, 2, 3 and 4) then authorizes the Minister of Labour to make orders for deportation " to Japan " of the following persons.

(1) Every person of 16 years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who had since the 8th December, 1941 (the date of the declaration of war by the Dominion against Japan) made a request for repatriation or who had been detained under certain regulations and was so detained on 1st September, 1945.

(2) Every naturalized British Subject of the Japanese Race of 16 years of age or over resident in Canada who had made request for repatriation provided that such request had not been revoked in writing before midnight on 1st September, 1945.

(3) Natural born British Subjects of the Japanese Race of 16 years of age or over resident in Canada, who made a request for repatriation and did not revoke it in writing before the Minister had made an Order for " deportation."

Subsection 4 of Section 2 provided as follows:—

(4) The wife and children under 16 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.

The remaining provisions of this Order are of an ancillary or administrative nature.

The second Order (P.C. 7356) provides that any person being a British Subject by naturalization under the Naturalization Act, cap. 138, R.S.C. 1927, 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.

The third Order (P.C. 7357) provides for the appointment of a Commission to make inquiry concerning the activities, loyalties 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 where their names are referred to the Commission by the Minister of Labour for

investigation with a view to recommendation whether in the circumstances of any such case, such persons should be deported. The Commission was also at the request of the Minister of Labour to inquire into the case of any naturalized British Subject of the Japanese Race who had made a request for repatriation, and make recommendations. It was then provided that any person of the Japanese Race who was recommended by the Commission for deportation, should be deemed to be a person subject to deportation under the provisions of P.C. 7355, and as and from the date upon which he left Canada in the course of deportation, he should cease to be either a British Subject or a Canadian National.

There is one further Act of the Parliament of the Dominion to which it is necessary to refer—the National Emergency Transitional Powers Act 1945. This Act was assented to on the 18th December, 1945. It was to come into force on the 1st January, 1946, and on and after that day the war against Germany and Japan was for the purposes of the War Measures Act to be deemed no longer to exist. The Act was to continue in force until the 31st December, 1946, or if Parliament were not then sitting until a date determined by the sitting of Parliament.

The Act recites the War Measures Act and the continuance of a national emergency arising out of the war since the unconditional surrender of Germany and Japan, and the necessity that the Governor-in-Council should exercise certain transitional powers during the continuation of the exceptional conditions brought about by the war and the necessity that certain acts and things done and authorized, and certain orders and regulations made under the War Measures Act be continued in force, and that it was essential that the Governor-in-Council be authorized to do and authorize such further acts, and make such further orders and regulations as he might deem necessary or advisable by reason of the emergency and for the purpose of discontinuance in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency.

By Section 2 of the Act the Governor-in-Council was given power to make orders and regulations as he might, by reason of the continued existence of the National emergency, arising out of the war against Germany and Japan, deem necessary or advisable for certain purposes set out therein. Those purposes do not include arrest, detention, deportation, or exclusion but do include under subsection (e)

"Continuing or discontinuing in an orderly manner as the emergency permits, measures adopted during and by reason of the war." Subsection 3 of Section 2 provides for every Order-in-Council passed under the Act, being laid before Parliament and being annulled upon resolution of the Senate or the House of Commons. Section 4 provides as follows:

"Without prejudice to any other power conferred by this Act, the Governor-in-Council may order that the Orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day this Act comes into force shall, while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act."

On 28th December, 1945 the Governor-in-Council passed Order-in-Council P.C. 7414, pursuant to Section 4 of the National Emergency Transitional Powers Act, 1945 providing that all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day the National Emergency Transitional Powers Act, 1945, should come into force, should, while the latter Act is in force, continue in full force and effect subject to amendment or revocation under the latter Act.

The result of this legislation is that the Orders-in-Council are now in force, if at all, by virtue of the Transitional Act.

In connection with the question raised by this case, three Acts of the Imperial Parliament are relevant.

The first of these is the Colonial Laws Validity Act, 1865.

Sections 2 and 3 of that Act run as follows:—

> "2. Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
>
> 3. No Colonial Law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, Order or Regulation as aforesaid."

The second is the Statute of Westminster passed in the year 1931 which was duly adopted by the Parliament of Canada. Section 2 of that Act is in the following terms:—

> "2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

The third Act is the British Nationality and Status of Aliens Act, 1914. Part I of that Act relates to Natural Born British Subjects. Part II relates to the Naturalization of Aliens and Section 9 provides that Part II shall not nor shall any certificate of naturalization granted thereunder have effect within any of the Dominions specified in the Schedule (which includes Canada) unless the legislature of the Dominion adopts Part II. The Act of the Imperial Parliament was subsequently amended. The Parliament of Canada by the Naturalization Act, 1914 did not in terms "adopt" the Imperial Act of 1914, but passed almost identical legislation. In 1915 the Parliament of Canada amended the Naturalization Act so as to introduce the amendments that had been made by the Parliament of Great Britain in Part II of the British Nationality and Status of Aliens Act, 1914. That Act of 1915 contained a recital to the effect that the Dominion had adopted Part II of the British Act.

It is convenient at this stage to deal with the question raised as to the effect of this legislation of the Dominion on this topic.

The contention of the Appellants was that the Parliament of Canada did "adopt" Part II of The Imperial Act in the sense in which that word was used in the Imperial Act and that in consequence Part II formed part of the law of the United Kingdom extending to the Dominion. The contention of the Respondents was that the Canadian Statutes are only parallel legislation. In arriving at a conclusion as to the advice their Lordships think it right to tender to His Majesty they find it unnecessary to express an opinion as to the correctness or otherwise of the contention of the Appellants. Their Lordships will assume that the Appellants are right in their contention, but they do not express any opinion one way or another upon it.

There was a considerable diversity of opinion between the members of the Supreme Court on some of the points which fell for decision under the reference. In one important respect at least—the invalidity of sub-section (4) of Section 2 of P.C. 7355—the views of the majority of the Court

were adverse to the respondents. No cross appeal was lodged. This in the circumstances was only the absence of a formality. A determination upon the legal effect of the orders as a whole is necessary in order to arrive at a conclusion upon the matters in respect of which the appellants appealed. The whole matter was fully debated before their Lordships and their Lordships accordingly propose to deal with the orders in their entirety.

Their Lordships now turn to the question at issue.

Upon certain general matters of principle there is not since the decision in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* [1923] A.C. 695, any room for dispute. Under the British North America Act property and civil rights in the several provinces are committed to the Provincial Legislatures, but the Parliament of the Dominion in a sufficiently great emergency such as that arising out of war has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge.

Again if it be clear that an emergency has not arisen or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the provinces comes into play. But very clear evidence that an emergency has not arisen or that the emergency no longer exists is required to justify the judiciary even though the question is one of *ultra vires*, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.

To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers.

Lastly it should be observed that the judiciary are not concerned when considering a question of *ultra vires* with the question whether the Executive will in fact be able to carry into effective operation the emergency provisions which the Parliament of the Dominion either directly or indirectly has made.

It is unnecessary therefore for their Lordships to take into review or even to recount the particular circumstances obtaining within the Dominion that led to the Orders in question or the arrangements made with a view to their execution.

The validity of the War Measures Act was not attacked before their Lordships and consistently with the principles stated was not open to attack. The validity of the Orders was challenged on many grounds. Their Lordships have considered not only the points put forward on behalf of the Appellants but whether the orders were susceptible of criticism for reasons not put forward. Their Lordships are satisfied that all possible grounds of criticism were in one form or another included in the grounds on which the Appellants relied.

For the validity of the orders it is necessary *First* that upon the true construction of the War Measures Act, they fall within the ambit of the powers duly conferred by the Act on the Governor General in Council *Second* that, assuming the orders were within the terms of the War Measures Act, they were not for some reason in law invalid.

The points taken were, first, that the War Measures Act did not on its true construction authorise orders for deportation to be made as respects British subjects or Canadian Nationals and that it should in certain respects receive a limited construction: second, that if the Act

purported on its construction to authorise the making of such orders, yet the orders made would be contrary to the Imperial Statute British Nationality and Status of Aliens Act and therefore to that extent invalid: third, that the provision contained in para. 2 (4) of P.C. 7355 (relating to the wives and children of persons in respect of whom an order for deportation had been made) was for a specific reason invalid: fourth, that in any event the order made under the National Emergency Transitional Powers Act continuing the former orders of the Governor-in-Council was invalid.

The first point raises questions of construction with which their Lordships must now deal.

The language of the War Measures Act is in general terms but it was argued that certain limitations were as a matter of construction of the Act to be implied and that to the extent to which any order purporting to be made under the Act fell outside its proper ambit, the order would of necessity be invalid.

The first suggested limitation was based on the Colonial Laws Validity Act, 1865. At the date when the War Measures Act came into force legislation made by the Parliament was in its effect subject to the provisions as to repugnancy contained in the Act of 1865 and it was argued that the War Measures Act should be construed as confined in its possible ambit to the making of orders which would consistently with the Colonial Laws Validity Act, 1865, then be valid as law within the Dominion. If that was so the orders were not authorised by the War Measures Act in so far as they were repugnant to the British Nationality and Status of Aliens Act, 1914-18, which was an Act of the Imperial Parliament and in the appellants' contention extended to the Dominion as part of the law of the United Kingdom.

Their Lordships are unable to accept this contention. The effect of the Colonial Laws Validity Act, 1865, was only that Canadian legislation repugnant to the statutory law of the United Kingdom applying to the Dominion was inoperative. The only conclusion to be drawn from a consideration of the Colonial Laws Validity Act is that the War Measures Act did not on its true construction confer a power beyond the extent to which it might at the date of its use be validly exercised. The statutory law of the United Kingdom is not static and in their Lordships' opinion there is no justification for the imputation that the Parliament of Canada legislated upon the footing that it is static. The effectiveness of legislation of the Parliament of the Dominion at the date when those delegated powers are exercised, not the limitation on that legislation at the date when the War Measures Act was passed, is, so far as the Act of 1865 is concerned, the relevant matter.

Secondly, it was argued that, as a matter of construction, the War Measures Act did not authorise the making of orders having an extra territorial operation. This point was relevant by reason that the orders in question in terms authorised "deportation."

This point may be shortly disposed of. Extra-territorial constraint is incident to the exercise of the power of deportation (*A.G. for Canada* v. *Cain* [1906] A.C. 542) and was, therefore in contemplation. Any lingering doubts as to the validity in law of an Act which for its effectiveness requires extra-territorial application were, it may be added, set at rest by the Canadian Statute the Extra-Territorial Act, 1933.

Thirdly, it was argued that the War Measures Act should be construed as authorising only such orders as are consistent with the accepted principles of International Law and that the forcible removal to a foreign country of British subjects was contrary to the accepted rules of International Law. The Act therefore as a matter of construction did not, it was said, purport to authorise orders providing for such removal.

It may be true that in construing legislation some weight ought in an appropriate case to be given to a consideration of the accepted principles of International Law (cf. *Croft* v. *Dunphy* [1933] A.C. 156), but the nature of the legislation in any particular case has to be considered

in determining to what extent, if at all, it is right on a question of construction to advert to those principles. In their Lordships' view those principles find no place in the construction of the War Measures Act. The Act is directed to the exercise by the Governor-in-Council of powers vested in the Parliament of the Dominion at a time when war, invasion or insurrection or their apprehension exists. The accepted rules of International Law applicable in times of peace can hardly have been in contemplation and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested.

The next question of construction arising under the Act has more substance. It was said that there was inherent in the word " deportation " as part of its meaning the necessity that the person to be deported was—as respects the State exercising the power—an alien. The express power given to expel persons from Canada was therefore limited to aliens i.e., persons who were not Canadian Nationals. It was not permissible to treat as authorised by the general power a power to make orders for deportation in relation to a class of persons impliedly excluded from deportation by the terms of the specific power. There was therefore an implied prohibition against the deportation of Canadian Nationals.

Upon this argument it may be conceded that commonly it is only aliens who are made liable to deportation and that in consequence, where reference is made to deportation, there is often imported the suggestion that aliens are under immediate consideration.

The dictionaries as might be expected do not altogether agree as to the meaning of deportation but the New English Dictionary gives as its definition " The action of carrying away: forcible removal especially into exile: transportation."

As a matter of language their Lordships take the view that " deportation " is not a word which is mis-used when applied to persons not aliens. Whether or not the word " deportation " is in its application to be confined to aliens or not remains therefore open as a matter of construction of the particular statute in which it is found.

In the present case the Act is directed to dealing with emergencies: throughout it is in sweeping terms; and the word is found in the combination " arrest, detention, exclusion and deportation." As regard the first three of these words nationality is obviously not a relevant consideration. The general nature of the Act and the collocation in which the word is found establish in their Lordships' view that in this statute the word " deportation " is used in a general sense and as an action applicable to all persons irrespective of nationality. This being in their Lordships' judgment the true construction of the Act, it must apply to all persons who are at the time subject to the laws of Canada. They may be so subject by the mere fact of being in Canada, whether they are aliens or British subjects or Canadian Nationals. Nationality *per se* is not a relevant consideration. An order relating to deportation would not be unauthorised by reason that it related to Canadian Nationals or British subjects.

Even if this were not the case the same result may be reached by another route. The general power given to the Governor-in-Council in the opening part of Section 3 of the Act is not in this statute limited by reference to the acts particularly enumerated and their Lordships see no reason for differing from the view expressed by Rinfret C.J.C. that the order was justifiable under that general power (See *King Emperor* v. *Sibnath Banerji* [1945] L.R. 72 I.A. 247).

There remains one further question of construction of The War Measures Act, namely, whether it authorised the making of an order which provided that deported persons should cease to be either British subjects or Canadian Nationals. That matter must be considered in light of the views which their Lordships have already expressed as to the construction of the Act. They see no reason for excluding from the scope of the matters covered by the general power contained in Section 3 a power to take from persons who have in fact under an order for deportation left Canada their status under the Law of Canada as British subjects and Canadian Nationals.

The result is that upon its true construction The War Measures Act authorised the making of orders for deportation of any person whatever be his nationality and the deprivation so far as the law of Canada was concerned of his status under that law as a British subject or Canadian National.

The next question is whether The Colonial Laws Validity Act, 1865 applies to the Orders of the Governor-in-Council. If it does, then in so far as they are repugnant to The British Nationality and Status of Aliens Act (which their Lordships are assuming to be an Act of the Imperial Parliament extending to Canada) they are invalid unless the provisions of the Statute of Westminster can be relied upon.

The contention of the Appellants was that the orders, though law made after the date of the Statute of Westminster, were not law made after that date by the Parliament of the Dominion. The activities of Parliament in the matter in question had, it was said, ceased in 1927. The orders were not of its making. The passing by the Parliament of The National Emergency Transitional Powers Act, 1945 was for the purpose in hand immaterial, for the reason that Section 4 empowered the Governor-in-Council to order the continuance only of orders and regulations " lawfully " made under the War Measures Act.

Their Lordships agree that in considering this particular matter the National Emergency Transitional Powers Act, 1945 cannot be prayed in aid of the validity of the orders, but in their opinion the orders in question were made " after the passing of this Act (i.e., the Statute of Westminster) by the Parliament of the Dominion " as that phrase is used in the Statute of Westminster. This again is a question of construction.

Both in sub-sections 1 and 2 of Section (2) of the Statute of Westminster the matter which is dealt with is " law ", and that is a general term which includes not only statutes but also orders and regulations made under statutes. Undoubtedly the law as embodied in an order or regulation is made at the date when the power conferred by the Parliament of the Dominion is exercised.

Is it made after that date by the Parliament of the Dominion? That Parliament is the only legislative authority for the Dominion as a whole and it has chosen to make the law through machinery set up and continued by it for that purpose. The Governor-in-Council has no independent status as a law-making body. The legislative activity of Parliament is still present at the time when the orders are made and these orders are " law ". In their Lordships' opinion they are law made by the Parliament at the date of their promulgation. A contrary conclusion would in their Lordships' view place an artificial and narrow construction on wide terms used in an Act of Parliament the subject matter of which demands that a liberal construction should be put upon the language used.

In the result therefore the Colonial Laws Validity Act, 1865, affords no ground for questioning the validity of the orders.

The next matter arises on sub-para. (4) of para. (2) of P.C. 7355. Under that provision an order for deportation may be made as respects the wives and children (not over the age of 16 years) of persons with respect to whom an order for deportation has been made.

The case sought to be made runs as follows:

The recitals in the order relate only to the desirability of making provision for the deportation of persons referred to in sub-paras. 1, 2 and 3 of para. (2) of the order. In the case of the classes of persons referred to in sub-paras. 1, 2 and 3 (leaving aside detainees) request for repatriation was at some stage necessary; a request was considered by the Governor-in-Council to be a substantive matter, but no such request is required as respects the persons mentioned in sub-para. 4 and the only apparent reason for subjecting them to liability for deportation is that an order for deportation has been made as respects the husband or father. The order, therefore, not only does not show that by reason of the

existence of real or apprehended war it was thought necessary for the security, peace, order, defence or welfare of Canada to make provision for their deportation but, when considered in substance, shows that these matters were not taken into consideration. A deportation of the family consequential on the deportation of the father might indeed be thought desirable on grounds other than those requisite for a due execution of the powers given and, it is contended, it is apparent that it is grounds not set out in the statute which alone have here been taken into consideration.

The incompleteness of the recital is in their Lordships' view of no moment. It is the substance of the matter that has to be considered. Their Lordships do not doubt the proposition that an exercise of the power for an unauthorised purpose would be invalid and the only question is whether there is apparent any matter which justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorised purpose. In their Lordships' opinion there is not. The first three sub-paragraphs of paragraph 2 no doubt deal with the matter which primarily engaged the attention of the Governor-in-Council, but it is not in their Lordships' view a proper inference from the terms of those sub-paragraphs that the Governor-in-Council did not also deem it necessary or advisable for the security defence peace order and welfare of Canada that the wives and children under 16 of deportees should against their will also be liable to deportation. The making of a deportation order as respects the husband or father might create a situation with which, with a view to forwarding this specified purpose, it was proper to deal. Beyond that it is not necessary to go.

The last matter of substance arises on the National Emergency Transitional Powers Act, 1946.

It was contended by the Appellants that at the date of the passing of this Act there did not exist any such emergency as justified the Parliament of Canada in empowering the Governor-in-Council to continue the orders in question. The emergency which had dictated their making—namely active hostilities—had come to an end.

A new emergency justifying exceptional measures may indeed have arisen. But it was by no means the case that measures taken to deal with the emergency which led to the Proclamation bringing the War Measures Act into force were demanded by the emergency which faced the Parliament of Canada when passing the Transitional Act. The order under the Act continuing the orders in question was therefore *prima facie* invalid.

This contention found no favour in the Supreme Court of Canada and their Lordships do not accept it. The Preamble to the Transitional Act states clearly the view of the Parliament of the Dominion as to the necessity of imposing the powers which were exercised. The argument under consideration invites their Lordships on speculative grounds alone to overrule either the considered decision of Parliament to confer the powers or the decision of the Governor-in-Council to exercise it. So to do would be contrary to the principles laid down in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (*ubi supra*) and accepted by their Lordships earlier in this opinion.

One remaining matter relied upon by the Appellants should be mentioned. First it was said that the words " of the Japanese race " were so vague as to be incapable of application to ascertained persons. It is sufficient to say that in their Lordships' opinion they are not. All that can be said is that questions may arise as to the true construction of the phrase and as to its applicability to any particular person. But difficulties of construction do not affect the validity of the Orders.

In the result their Lordships find themselves in agreement with the conclusion at which Rinfret C.J.C. and Kerwin and Taschereau J.J. arrived and for the reasons they have expressed will humbly advise His Majesty that none of the Orders-in-Council is in any respect *ultra vires* and that the Appeal should be dismissed. There will be no order as to costs.

(52065) Wt. 8013—5 200 12/46 D.L. G. 338

In the Privy Council

THE CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS AND ANOTHER

v.

THE ATTORNEY-GENERAL OF CANADA AND ANOTHER

DELIVERED BY LORD WRIGHT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1946

L.S.

At the Court at Buckingham Palace

The 21st day of December, 1946

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
EARL OF LISTOWEL
MR. ALEXANDER
SIR ALAN LASCELLES

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 2nd day of December, 1946, in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Supreme Court of Canada between The Co-operative Committee on Japanese Canadians and The Attorney General of Saskatchewan Appellants and the Attorney General of Canada and The Attorney General of British Columbia Respondents 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 and 7357) in relation to persons of the Japanese Race (Privy Council Appeal No. 58 of 1946) and likewise the humble Petition of the Appellants setting forth: that by Order of Reference made by the Governor-in-Council of Canada dated the 8th January 1946 there was referred to the Supreme Court under and by virtue of the authority conferred by Section 55 of the Supreme Court Act the following question 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?": that the question came before the Supreme Court on the 24th and 25th January 1946 and on the 20th February 1946 the Court certified the Opinions of the Justices of the Court as recited in the Petition: that the Appellants obtained special leave to appeal by Order in Council dated the 18th April 1946: And humbly praying Your Majesty in Council to take this Appeal into consideration and that the Opinions certified by the Supreme Court on the 20th February 1946 may be reversed altered or varied and for further and other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be dismissed and that it ought to be declared that none of the Orders-in-Council dated the 15th day of December 1945 being P.C. 7355, 7356 and 7357 is in any respect *ultra vires*."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Printed by His Majesty's Stationery Office Press,
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