MEMORANDUM FOR CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS ON THE JUDGMENT OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The text of the reasons for judgment of the Privy Council is now available.

It contains nine closely printed pages and detailed reasoning on a number of technical points. The following matters, however, may be of special interest.

Their Lordships point out that 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." The judgment then proceeds in an important paragraph to say "Again if it be clear that an emergency .....no longer exists there can be no justification for the continued exercise of the exceptional powers.....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."

This paragraph is of very great importance because it indicates that the Orders in question in this case can only be justified if the continued exercise of exceptional powers is made necessary by reason of the emergency arising out of the war.

Although the courts are loathe to overrule the decision of Parliament or of the Government that such exceptional measures are not still required, the Government itself and Parliament itself do have the responsibility of considering whether any emergency still exists. If the emergency no longer exists, then there can be no justification for the continued exercise of these powers.

It could hardly be disputed at the present time that there is no present emergency (whatever may have been the situation during and shortly after the termination of the war,) which requires the continuous exercise of the exceptional power of deportation of Canadian citizens for no offence of their own and simply because they are of a certain racial origin. The fact that most of those concerned have been resettled and dispersed throughout Canada by the Government itself is enough to indicate that in this respect the emergency no longer exists. The presence of Japanese Canadians in Canada now could not in any sense be said to be an emergency that endangers the state or justifies interference with their ordinary rights as citizens.

The Judicial Committee proceed; "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."

These two paragraphs make it abundantly clear that the decision of the Privy Council is in no sense an endorsement or approval of the policy of the Orders themselves. Indeed the emphasis which their Lordships put upon this matter and upon the fact that they are not concerned with the justice or practicality of the proposed orders, clearly indicates that their Lordships found it necessary in the view of the nature of the Orders, to make it clear that it was no part of their function to consider these matters, no matter what they thought themselves about the matter.

The judgment proceeds to state that their Lordships were satisfied that all possible grounds of criticism were in one form or another included in the grounds upon which the Appellants relied and proceed to deal with each of those objections in order.

It had been argued that the War Measures Act in providing that the powers of the Governor-in-Council (the Dominion Government) extended to orders for "deportation" had by implication limited the very general powers given to "deportation" in the sense in which it is usually used in statutes in reference to aliens and by implication the power to make order to send Canadian citizens to Japan or elsewhere was not included in the powers delegated by Parliament.

Their Lords concede that commonly in statutes the word "deportation" does apply only to aliens and that the suggestion that aliens only are under immediate consideration may then be important. As a matter of construction, however, of the War Measures Act which is in sweeping terms and is directed to dealing with emergencies, their Lordships held that the word "deportation" is used in a general sense and as an action applicable to all persons irrespective of nationality.

Also the ordinary rule of interpretation which favours a construction which is consistent with accepted principles of international law has no application to the construction of the War Measures Act. Their Lordships state "the accepted rules of international law applicable in times of peace can hardly have been in contemplation when the War Measures Act was passed".

It will be noted that the reasoning of the board does not in any sense depend upon either the fact that the orders refer to people of the Japanese "race" or upon any of the reasons given by the Governor-in-Council for making the orders. The effect of the Judgment is that the Government may in war time under the War Measures Act deport to any place at all in the world any person in Canada subject to the laws of Canada, whether a citizen or not, and of whatever racial origin, and for whatever reasons it sees fit to advance and that the courts cannot interfere.

While the logic of this reasoning may be unassailable the result is such as to give rise to the question of whether or not some constitutional limitation of the powers of Parliament or the executive, such as is embodied in the Bill of Rights, and in the first amendment to the American constitution has not now become necessary for Canada.

It may well be considered that under present conditions the completely unfettered powers of executive to act in emergencies are capable of abuse and that historic civil liberties are sufficiently in danger, that constitutional limitations, subject to all proper freedom of action for the executive in war time in the interests of the state are now called for.

The other arguments dealt with by the Committee are of a highly technical nature and are interesting to students of constitutional law. It had been argued by the Appellants that the orders were inconsistent with the British Nationality

and Status of Aliens Act which conferred the status of a British subject on those naturalized in any part of the empire to which the act applied, and recognized that status within the empire.

Their Lordships considered that the orders were in fact inconsistent with the Imperial Statutes but as a matter of interpretation of the Statute of Westminster arrived at the conclusion that since the passing of that statute not only the Parliament of Canada acting directly through its own acts, but also its agencies such as the Governor-in-Council acting under statutes like the War Measures Act passed before the Statute of Westminster, can now make laws inconsistent with the Imperial Statutes. This matter is of constitutional and theoretical interest but perhaps has little practical importance now, as most Canadian statutes will have been reenacted since the Statute of Westminster in 1931.

Another point of interest to those not familiar with our system of appeals is that the decision of the Privy Council is given in the form of advice to His Majesty by a branch of the Privy Council and the cabinet rule therefore applies that no minority or dissenting views can be announced.

This practice is, of course, different to that in the Supreme Court of Canada and in the Supreme Court of the United States and in the House of Lords which is the ultimate court of appeal for Great Britain, where frequently dissenting judgments are delivered. There is no such thing as a dissenting judgment in the Privy Council.

In reviewing the whole reference of the validity of these orders to the Supreme Court of Canada and the Judicial Committee it may be said that although the ultimate decision is that the orders are valid in their entirety, there was considerable judicial dissent in the Supreme Court of Canada as to the validity of some parts of the orders, and no opportunity for dissent in the Judicial Committee.

To conclude, those who supported this appeal may have the satisfaction of knowing that the review of the orders by the courts, despite the ultimate result, has enabled important questions of principle to be elucidated, the responsibility of the Government in Parliament and ultimately, the people of Canada to be clearly indicated and has procured time for the whole policy of these orders to receive full and careful consideration. There is good reason for optimism that this opportunity for reviewing the policy will have the result that none of these orders will ever in fact be enforced.

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The Co-operative Committee on Japanese Canadians
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