M ANN SUNAHARA
9809 91 Avenue
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(403) 433 - 8104

June 23, 1989,

Ms. Cassandra Kobayashi,
3245 West 12th Avenue,
Vancouver, B.C.,
V6K 2R8

Dear Cassandra,

Re: Citizenship Status of the Children Born in Japan to Japanese Canadians Sent to Japan in 1946

In preparing for the first meeting of the Redress Advisory Committee I have been giving further thought to this issue, which I understand is still under discussion with the government. I also understand that the government's position is that such children were not deprived of any rights by actions of the Government of Canada under the War Measures Act or the National Emergency Transition Powers Act of 1945 and hence do not qualify for compensation.

With respect, I think the government is greatly mistaken. You will recall from my earlier opinion on the status of these children that the Department of External Affairs had a policy in 1947 of denying passports and other consular assistance to Japanese Canadians. You will recall also that at page 11 and 12 of that opinion that I quote the Minutes of the meeting of the Cabinet Committee on Japanese Questions held on September 3, 1947. There an official from the Department of External Affairs, A.R. Menzies, admitted that:

> "The Department of External Affairs recognize the right, under existing law, of Canadian citizens and Japanese nationals retaining Canadian domicile to re-enter Canada, but lays down that the Canadian Liaison Mission in Tokyo shall not for the present (a) help persons of Japanese race to obtain exit permits or buy passage, (b) issue visas to Japanese aliens even if they have technically retained Canadian domicile; and (c) issue or renew passports to Canadian Citizens of Japanese origin except in special circumstances"

In short, what we have here is an admission that children born in Japan who retained their Canadian status were being denied the right to reenter Canada. That this is a fundamental right as required by the Order in Council awarding compensation (88-990) is amply proven by the fact that this right is now enshrined in Section 6 of the Charter of Rights and Freedoms.

The question then is, by what authority was the Government of Canada denying this right to those Canadians? There can be only one answer: Order in Council P.C. 946, passed under the powers of the War Measures Act on February 5, 1943, as amended and as continued under the National Emergency Powers Act of 1945. That Order in Council is the legal basis for all policies "relative to the further placement, control and maintenance of persons of the Japanese race in Canada."

No other legislation applies. This is not an immigration matter; they are not immigrants. Had a Japanese Canadian in Japan contested the denial of a passport in a court of law, or arrived by whatever means at a Canadian port or airport, the only grounds on which the Government could deny entry to Canada would be P.C. 946.

The only alternative is that the policy of denying reentry was ultra vires; that is, made without legal authority. If that is the case, then the present Minister is lending official support to an illegal policy. He is basically saying that Japanese Canadians are being compensated only for the loss of rights and freedoms from the those acts of the Canadian government which were legal to the extent that they were authorized by the War Measures Act or its successor. No compensation is being given for any illegal or arbitrary exercise of power. I doubt that that was the intention of Parliament when it endorsed the Order in Council.

Sincerely yours,

M. Ann Sunahara.

M ANN SUNAHARA
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November 11, 1988

Ms. Cassandra Kobayashi,
Box 46265 Station G,
Vancouver, B.C.,
V6R 4G6

Dear Cassandra,

Further to my opinion on the status of the children of those sent to Japan in 1946, I have had the following idea which may expand the number of eligible children.

You will recall that the legislation of the period is discriminatory in that only the children of Canadian fathers (or mothers if and only if illegitimate) are Canadians. Accordingly I have been thinking about how we can force the government to interpret "father" in the 1927 and 1947 Acts as "parent".

I now think that an argument can be made that the Acts in question must be "read up" to conform with the Charter.

While the application of the Charter is not retrospective, it is arguable that old Acts which determine rights based on an Order in Council passed after the Charter has become law must be interpreted to conform with the Charter. While the old Acts may not be subject to the Charter directly, the Order in Council invoking them would be. If by relying on an old pre-Charter law a government could discriminate in a post-Charter order, then the government would be doing indirectly what it could not do directly. The old Act, therefore, must be interpreted as if it were still in force and effect.

Today the courts would find the old Act to be prima facie discriminatory (at least in Alberta (See Dickason v. Governors of the University of Alberta)). In B.C. it may be necessary to prove firstly that gaining status through the father only is in fact discriminatory; i.e. "invidious: See Andrews v. The Law Society of British Columbia. The onus would then be on the government to prove it a reasonable limitation (which would be politically stupid for them to try). The court would then have to rule

the section contrary to the Charter unless it can be construed broadly or "read up" to avoid offending the Charter. The best example of this process is probably Addy v. Canada in which a Federal Court Judge challenged the mandatory retirement age of seventy in the Federal Court Act. The court found that that section offended the Charter and was without force and effect to the extent to which it did. The court also held that Federal Court Judges must retire at 75 like all other Superior Court Judges. The court seems to have "read up" the 70 in the Federal Court Act to 75.

Of course there may not be any claimants in this category (although Marie's child in Berton's article may be one). If the NAJC wants to pursue this matter, let me know. The government should pay to determine this matter out of the three million administrative pool.

Yours truly,

M. Ann Sunahara

The Winnipeg School Division No. 1 *Appellant* (*Respondent*);

and

Doreen Maud Craton *Respondent* (*Applicant*);

and

The Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society (*Respondent*).

File No.: 17933.

1985: May 15; 1985: September 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Civil rights — Discrimination — Age — Mandatory retirement — The Public Schools Act provision for mandatory retirement in conflict with The Human Rights Act — Whether or not mandatory retirement requirement void — The Human Rights Act, 1974 (Man.), c. 65, s. 6(1); C.C.S.M., c. H175, s. 6(1) — The Public Schools Act, R.S.M. 1970, c. P250, s. 39(2); The Public Schools Act, 1980 (Man.), c. 33, s. 50; C.C.S.M., c. P250, s. 50.

Respondent, a teacher, was required by her collective agreement to retire at a fixed date following her sixty-fifth birthday. *The Human Rights Act*, however, prohibited discrimination in employment on account of age while *The Public Schools Act*, which was enacted before and consolidated after *The Human Rights Act* was passed, allowed the fixing of a compulsory retirement age for teachers. Respondent successfully sought a declaration in the Court of Queen's Bench that mandatory retirement contravened *The Human Rights Act* and was invalid, and that her employment therefore could not be terminated. The Court of Appeal upheld that decision. At issue in this appeal was the conflict between the provisions of *The Human Rights Act* and *The Public Schools Act*.

Held: The appeal should be dismissed.

The mandatory retirement provision in *The Public Schools Act* was invalid in that it contravened *The Human Rights Act*. *The Human Rights Act*, since it was passed after *The Public Schools Act*, prevailed over and implicitly repealed any earlier legislation in so far as

The Winnipeg School Division No. 1 *Appelante* (*Intimée*);

et

Doreen Maud Craton *Intimée* (*Requérante*);

et

The Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society (*Intimée*).

N° du greffe: 17933.

1985: 15 mai; 1985: 19 septembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Libertés publiques — Discrimination — Âge — Retraite obligatoire — Conflit entre les dispositions de The Public Schools Act prescrivant la retraite obligatoire et celles de The Human Rights Act — L'exigence de retraite obligatoire est-elle nulle? — The Human Rights Act, 1974 (Man.), chap. 65, art. 6(1); C.C.S.M., chap. H175, art. 6(1) — The Public Schools Act, R.S.M. 1970, chap. P250, art. 39(2); The Public Schools Act, 1980 (Man.), chap. 33, art. 50; C.C.S.M., chap. P250, art. 50.

La convention collective de l'intimée, une enseignante, l'obligeait à prendre sa retraite à une date fixe après son soixante-cinquième anniversaire de naissance. Cependant, *The Human Rights Act* interdisait la discrimination dans l'emploi en raison de l'âge, alors que *The Public Schools Act*, dont l'adoption a précédé mais la refonte a suivi l'adoption de *The Human Rights Act*, permettait de fixer un âge de retraite obligatoire pour les enseignants. L'intimée a obtenu de la Cour du Banc de la Reine un jugement déclarant que la retraite obligatoire contrevenait à *The Human Rights Act* et était invalide, et qu'on ne pouvait donc mettre fin à son emploi. La Cour d'appel a confirmé cette décision. Ce pourvoi porte sur le conflit entre les dispositions de *The Human Rights Act* et celles de *The Public Schools Act*.

Arrêt: Le pourvoi est rejeté.

La disposition de *The Public Schools Act* relative à la retraite obligatoire est invalide parce que contraire à *The Human Rights Act*. Vu qu'elle a été adoptée après *The Public Schools Act*, *The Human Rights Act* prévaut sur tout texte législatif antérieur qu'elle abroge

there was conflict. *The Public Schools Act* of 1980 was not specific legislation designed to reaffirm the Board's right to set a mandatory retirement age, notwithstanding *The Human Rights Act*, but rather was a mere re-enactment and consolidation. Indeed, given the special nature of human rights legislation, any amendment or repeal or exception to that legislation must be by clear legislative pronouncement and not by implication. Were it otherwise, the human rights legislation would be robbed of its special nature and would give scant protection to the rights proclaimed.

The Human Rights Act was legislation declaring public policy and therefore could not be avoided by private contract. The parties could not contract out of the Act's provisions by agreeing to article 14 of the Collective Agreement.

Cases Cited

Ontario Human Rights Commission v. Borough of Etobicoke, [1982] 1 S.C.R. 202; *Morisse v. Royal British Bank* (1856), 1 C.B. (N.S.) 67; 140 E.R. 27; *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, referred to; *Winnipeg School Division No. 1 v. MacArthur*, [1982] 3 W.W.R. 342, distinguished.

Statutes and Regulations Cited

Human Rights Act, 1974 (Man.), c. 65, s. 6(1).
Public Schools Act, R.S.M. 1970, c. P250, s. 39(2).
Public Schools Act, 1980 (Man.), c. 33, s. 50.

APPEAL from a judgment of the Manitoba Court of Appeal, [1983] 6 W.W.R. 87, 149 D.L.R. (3d) 542, dismissing an appeal from a judgment of Deniset J. granting an application for a declaration that a provision of a collective agreement concerning mandatory retirement was invalid. Appeal dismissed.

Robert Simpson, for the appellant.

Mel Myers, Q.C., for the respondent.

The judgment of the Court was delivered by

McINTYRE J.—This appeal must resolve the conflict between s. 6(1) of *The Human Rights Act*, 1974 (Man.), c. 65, as amended; C.C.S.M., c. H175, which prohibits discrimination in employ-

implicitement dans la mesure où il y a conflit. *The Public Schools Act* de 1980 est non pas une loi spécifique qui vise à réaffirmer le droit du Conseil de fixer un âge de retraite obligatoire nonobstant les dispositions de *The Human Rights Act*, mais plutôt simplement une nouvelle adoption et une refonte. D'ailleurs, compte tenu de la nature spéciale d'une loi sur les droits de la personne, toute modification, abrogation ou exception relative à cette loi doit se faire par déclaration législative claire et non implicitement. S'il en était autrement, la loi sur les droits de la personne serait dépouillée de sa nature spéciale et ne protégerait que fort inadéquatement les droits qu'elle proclame.

The Human Rights Act est une loi qui énonce une politique générale et à laquelle on ne saurait donc déroger par contrat privé. Les parties ne pouvaient pas renoncer par contrat aux dispositions de la Loi en acceptant l'article 14 de la convention collective.

Jurisprudence

Arrêts mentionnés: *Commission ontarienne des droits de la personne c. Municipalité d'Etobicoke*, [1982] 1 R.C.S. 202; *Morisse v. Royal British Bank* (1856), 1 C.B. (N.S.) 67; 140 E.R. 27; *Insurance Corporation of British Columbia c. Heerspink*, [1982] 2 R.C.S. 145; distinction faite d'avec *Winnipeg School Division No. 1 v. MacArthur*, [1982] 3 W.W.R. 342.

Lois et règlements cités

Human Rights Act, 1974 (Man.), chap. 65, art. 6(1).
Public Schools Act, R.S.M. 1970, chap. P250, art. 39(2).
Public Schools Act, 1980 (Man.), chap. 33, art. 50.

POURVOI contre un arrêt de la Cour d'appel du Manitoba, [1983] 6 W.W.R. 87, 149 D.L.R. (3d) 542, qui a rejeté l'appel d'un jugement du juge Deniset qui avait fait droit à une demande visant à faire déclarer qu'une disposition d'une convention collective concernant la retraite obligatoire était invalide. Pourvoi rejeté.

Robert Simpson, pour l'appelante.

Mel Myers, c.r., pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE McINTYRE—Dans ce pourvoi, il faut résoudre le conflit entre le par. 6(1) de *The Human Rights Act*, 1974 (Man.), chap. 65 et modifications, C.C.S.M., chap. H175, qui interdit

** Unedited **

Indexed as:
Schachter v. Canada

Between
Shalom Schachter, Plaintiff, and
Her Majesty the Queen and Canada Employment and Immigration Commission, Defendants, and
Women's Legal Education and Action Fund, Intervenor

Federal Court Judgments: [1988] F.C.J. No. 522
Action no. T-2345-86

Federal Court of Canada - Trial Division
Toronto, Ontario
Strayer J.
Heard: April 12-15, 18-20, 1988
Judgment: June 7, 1988

Judicial review -- Unemployment insurance -- Adoption --

Adoptive parents -- Natural parents -- Equality rights.

B. Morgan and A. Dodson, for the Plaintiff.
M. Levine and Y. Cote, for the Defendants.
M. Eberts and E.J. Babin, for the Intervener.

STRAYER J.:--

Introduction

This is an action for a declaration, in various alternative forms, to the effect that benefits should be payable under the Unemployment Insurance Act, S.C. 1970-71-72, c. 48, to the natural fathers of newly-born infant-children in respect of time taken off work by fathers to look after such children after their arrival at home, on the same basis as such benefits are now payable to adoptive parents under section 32 of the Act. Some suggested alternative forms of a declaration would expressly ensure that such entitlement would not affect existing maternity benefits for the natural mother under section 30 of the Act, while one would involve a sharing between the natural parents of benefits equivalent to section

32 benefits provided for adoptive parents.

The plaintiff also seeks an order that he is entitled to benefits with respect to time so spent by him with his newly-born infant child in 1985.

These pleas are based on section 15 of the Canadian Charter of Rights and Freedoms. The statement of claim also asks for a declaration that the refusal of the Commission to pay the plaintiff such benefits is a discriminatory practice contrary to section 5 of the Canadian Human Rights Act, S.C. 1977-78, c. 33. This request was abandoned at trial.

This case was tried consecutively with that of Richard M. Taylor v. Her Majesty the Queen and Canada Employment and Immigration Commission, number T-2861-86 and the evidence in this case was applied, by agreement, to the Taylor case. The substantive issues are essentially the same and I will deal with the Taylor case in only brief separate reasons.

By orders of Joyal J. of June 30, 1987, the Women's Legal Education and Action Fund was given leave to intervene in these

actions and to exercise all the rights of a party. Through its counsel it played a very helpful role during these proceedings.

Statutory Background

It will be useful first to set out the principal current statutory provisions and their history.

The provision of the Unemployment Insurance Act which is said to create discrimination contrary to section 15 of the Canadian Charter of Rights and Freedoms is the following:

32. (1) Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

(2). Subject to subsection 22(3), initial benefit is payable under this section for each week of unemployment in the

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Dear Cassandra,

Re: Citizenship Status of the Children Born in Japan to Japanese Canadians Sent to Japan in 1946

You have asked me to research the citizenship status of the children born in Japan in the period 1946 to 1949 to Japanese Canadians who had been sent there in 1946 under the so-called "repatriation" program.

BIRTH IN 1946:

The relevant legislation is confusing to say the least, particularly for those children born in 1946. Under the pre-1946 legislation a "Canadian National", was, inter alia, "any person born out of Canada whose father was a Canadian National at the time of that person's birth.": Canadian Nationals Act, R.S.C. 1927, c. 21, s. 2. Canadian nationality could be obtained by birth or naturalization: See Naturalization Act., R.S.C. 1927, c. 138 as am. S.C. 1931, c. 39. The Immigration Act R.S. 1927, c. 93 also defines "Canadian Citizen" as (a) a person who is a Canadian citizen under the Canadian Citizenship Act; (b) a British subject with Canadian domicile; and (c) a person naturalized under the Nationalization Act or its predecessors.

However in 1946 Parliament passed a new Canadian Citizenship Act, S.C. 1946, c. 15. This Act defines "natural-born Canadian citizen" differently from the definition of Canadian national above, and differently for those born outside Canada before January 1, 1947 for those born outside Canada after January 1, 1947. At section 4, a person born outside Canada prior to January 1, 1947, and who was still a minor on that date, is a natural born Canadian citizen if his or her father, (or if born "out of wedlock", his mother):

> (a) was born in Canada and had not become an alien at the time of his or her birth, or,

(b) was a British subject with a Canadian domicile at the time of the minor child's birth.

British subject is not defined in the 1946 Act. If the definition in the 1927 Act obtains then the minor child of a naturalized Canadian with a Canadian domicile would be a Canadian citizen. Domicile is defined as a place in which a person has his home or in which he resides and to which he returns as his place of permanent abode. Canadian domicile is defined as a domicile maintained in Canada for at least five years.

To complicate matters even further there is some indication in the 1946 Act that category (b) above is not intended to apply to the naturalized situation. The ambiguity arises because section 9 of the 1946 Act dealing with "Canadian Citizens Other Than Natural-Born" distinguishes between persons holding certificates of naturalization and British subjects with Canadian domicile. This same distinction occurs in the definition of "Canadian Citizen" in the Immigration Act, R.S. 1927, c. 93. If this distinction in intended, then it appears that section 4 of the 1946 Act is silent with respect to the status of children of naturalized Canadians when born outside Canada. This matter does not appear to have ever been judicially considered.

The ambiguity is continued in sections 23 and 24 of the Act which deal with the status of the wife and minor children of a naturalized Canadian who has been stripped of his naturalization. Section 23 provides that "the citizenship or status as to nationality of the spouse and minor children of the said person shall not be affected" unless the Governor in Council directs that "the said wife or the said children shall cease to be Canadian citizens or British subjects". No distinction is made here between minor children born in Canada and minor children born outside Canada. Nor is any distinction made in section 18(2) which permits a child of a Canadian citizen who has lost his Canadian citizenship after the birth of the child to apply for Canadian citizenship within one year of attaining the age of 21, or such longer period as the Minister consents to. This section suggests that the sins of the father will not be visited upon the children if they declare their Canadian status in the proper form, and that their status as Canadians is only suspended, not revoked, and can be reactivated on application.

The above ambiguities suggest that under the 1946 Act children born outside Canada in 1946 to whose fathers (or, if illegitimate, mothers) are naturalized Canadians are:

(a) stateless, at least at the date of the proclamation of the 1946 Act. To become a naturalized Canadians, Japanese immigrants, where they could do so, divested themselves of their Japanese nationality, although not all were able to under the law of Japan: See "Note of Mr. Robertson - Policy with Regard to Japanese in Canada", March 20, 1944, p. 7. (Gordon Robertson, one of King's assistants wrote this memo to Norman Robertson, the Under-Secretary of External Affairs. Please note that page 7 also provides evidence of why a lot of Japanese immigrants could not get naturalization status -- they had not completed their military service in Japan!!!) Therefore, unless the child of a naturalized Japanese Canadian who had renounced his Japanese nationality gained Japanese status from the fact of his or her birth in Japan, the child would have no claim to any state. I understand that under Japanese law at that time, birth in Japan was insufficient to grant Japanese citizenship. We will need to clarify this point; or,

(b) citizens of Canada if their father retained Canadian domicile, or,

(c) in a state of suspended citizenship or legal limbo which may be rectified by making a declaration of Canadian citizenship at age 21 or "with the consent of the Minister within any longer period than one year" after reaching the age of 21: Section 18(2)

It would appear, therefore, that in 1946 there are varying definitions of "Canadian" status which are produce significantly different results, at least for the children of the naturalized. Under the 1927 Act the children of naturalized Japanese Canadians would be Canadian nationals if the naturalization of their father, and only their father, remained valid. Under 1946 Act, however, if the father (or mother, if the child is illegitimate) while remaining a British subject no longer had a Canadian domicile at the time of the child's birth, then the child would not have Canadian citizenship. If the child had not become Japanese by birth, the child would be stateless.

This contradiction produces interesting results for us. If eligibility for redress requires only that the child have Canadian nationality sometime in the period 1946 to 1949, but not the entire period, then a strong argument can be made that the children of the naturalized, if their father's naturalization remained valid, had the status of Canadian nationals from the date of their birth until January 1, 1947. On that date they would have lost it

because of their father's (or mother's, if the child is illegitimate) lack of a Canadian domicile.

Therefore children born in Japan in 1946 would have Canadian citizenship/nationality if:

(a) their father, or if illegitimate, their mother, was Canadian-born; or,

(b) their father was a naturalized British subject or Canadian national and had not become an alien prior to the child's birth. In this case the child would retain that nationality only until January 1, 1947.

BIRTH AFTER JANUARY 1, 1947:

The status of children born in Japan after January 1, 1947 is less complicated. Under section 5 of the 1946 Act, a person born outside of Canada is a Canadian citizen if his father (or if illegitimate, his mother) is a Canadian citizen either by birth or naturalization, and that person's birth was registered with the appropriate Canadian authority within two years of the birth, or such other time as the Minister permits.

The Act is silent on the status of the child in the period between birth and registration. The conjunctive nature of the section, however, suggests that citizenship is suspended not lost in that period.

The suspended nature of the citizenship is reinforced by section 6 of the 1946 Act. Section 6 provides that a child born outside Canada after January 1, 1947 (no mention of registration) "shall cease to be a Canadian Citizen upon the expiration of one year after he attains the age of twenty-one years" unless he asserts his Canadian citizenship and divests himself of any nationality or citizenship he holds in any country "under the law of which he can ... divest himself." The section further provides that the Minister can extend the period for asserting Canadian citizenship. Registration, I suggest, is arguably a matter of form, not substance. The right to Canadian citizenship remains until age 22 or such other time as the Minister allows.

SUMMARY:

In summary, therefore, it appears that:

(a) children born in Japan before January 1, 1947 of Canadian-born persons of Japanese ancestry have Canadian citizenship;

(b) children born after January 1, 1947 of Canadian-born persons of Japanese ancestry have Canadian citizenship if registered, or the right to assert Canadian citizenship even if not registered.

(c) children of naturalized Japanese Canadians, if their fathers have retained their naturalization, and if born before January 1, 1947, had Canadian nationality at least from their birth to January 1, 1947.

(d) children of naturalized Japanese Canadians, if their fathers have retained their naturalization, and if born after January 1, 1947, had Canadian citizenship if registered, or the right to assert Canadian citizenship even if not registered.

RETENTION OF NATURALIZATION:

The children of naturalized Japanese Canadians can only claim citizenship if their fathers have retained their naturalization after leaving Canada. Between 1946 and 1949 naturalization could be revoked:

(a) before January 1, 1947, under the Naturalization Act, R.S. 1927, c. 138, s. 9;

(b) under P.C. 10773, November 26, 1942. This order affects only those repatriated on the exchange ship in 1942.

(c) under P.C. 7355 and 7356, December 15, 1945. These are the so-called "repatriation" orders.

(d) after January 1, 1947, under the Canadian Citizenship Act, c. 15, s. 21;

Distinction must be made between being liable for revocation of naturalization and actually losing naturalization. It is arguable that naturalization is not revoked until and unless all the conditions precedent are met and the proper procedures are invoked and completed. Further, the legislation employed must be intra vires Parliament or the Governor-in-Council to have force and effect.

NATURALIZATION ACT:

Under the Naturalization Act naturalization was revokable where, inter alia, the naturalized person (a) unlawfully traded with or assisted the enemy; or, (b) remained a subject of a state at war with Canada; or, (c)

"has shown himself by act or speech to be disaffected or disloyal to His Majesty": Section 9. No-one was ever charged with unlawful trading or assisting the enemy. However, not all naturalized Japanese Canadians had been able under Japanese law to renounce their Japanese citizenship. Japanese law required that the renouncee have completed his military service before he could renounce his citizenship (!!??) Those naturalized Japanese Canadians, therefore, were prima facie subject to losing there naturalized status upon the outbreak of war with Japan. However, it does not appear that any order under the Naturalization Act was ever in fact made which would strip this group of their naturalization.

The question of denaturalization on the basis of evidence of disaffection or disloyalty was considered in 1944: See "Note of Mr. Robertson - Policy with Regard to Japanese in Canada", March 20, 1944, p. 7. At that time the government was considering a "loyalty survey" along the lines of the one carried out in the United States in 1943. Naturalized who refused to swear allegiance would be subject to denaturalization. However this policy was never implemented.

In summary, no one appears to have lost their naturalized status under the Naturalization Act.

P.C. 10773:

P.C. 10773 was passed under the authority of the War Measures Act in November, 1942, when various consular officials, their families, and some Japanese Canadians left for Japan in exchange for their Canadian counterparts who simultaneously departed from Japan. The order expressly strips not only naturalized Canadians but Canadian-born Japanese, both adults and minors, of their Canadian status upon departure from Japan. It also provides that naturalized and Canadian-born who assert allegiance to Japan or apply to the Protecting power for Japan or applies for repatriation to Japan "may, in the discretion of the Secretary of State, be deprived of his status as a British subject", together with his wife and minor children. The order also requires the Secretary of State to publish the names of those stripped or their Canadian or British Status. of those stripped of their status as British.

P.C. 10773 raises interesting legal questions. Primary among them is the question of whether it is intra vires the Governor in Council to make orders stripping (i) the naturalized or (ii) their wives and minor children of the citizenship? It must be remembered that the Supreme Court of Canada in Cooperative Committee on Japanese Canadians et al. v. A.G. Canada et al. [1946] 3 D.L.R. 321 held that the government could not deport unwilling wives and minor children of deported males. While the Privy

Council upheld the order, it did so in a seriously flawed judgment. Moreover, the deportation case did not consider the issue of stripping citizenship from Canadian-born or the wives of naturalized Japanese Canadians. It did uphold the order which would allow the naturalized to be deprived of their citizenship, but again, in a flawed decision and without any factual findings. I submit that arguments could be made that the attempt to strip the Canadian-born and the minors ~~stripped~~ of their Canadian status under this order is ultra vires and without force and effect.

If I am right, the NAJC may have to decide what position it is going to take with respect to these individuals. While the adults may be said to have voluntarily chosen to go to Japan on this ship, what about the children?

While consideration was given in 1944 to using this order to strip some Japanese Canadians of their citizenship, it does not appear that the Secretary of State in fact made any such orders, and certainly not in the period 1946 to 1949. Unless this order was continued under the National Emergency Transition Powers Act of 1945, it ceased to have force and effect as of January 1, 1946.

P.C. 7335 AND 7336:

P.C. 7335 and 7336 are two of the three "Deportation Orders" passed by Cabinet against the will of Parliament in the dying days of the War Measures Act. (The third which authorized a Loyalty Commission is irrelevant since nothing was ever done with it.) These orders were challenged in law within days. A reference was made to the Supreme Court, which resulted in a split and incomplete decision, and then to the Privy Council. After the Privy Council ruled them intra vires they were withdrawn for political reasons on January 22, 1947.

During the life of these orders ~~4000~~ 3964 persons of Japanese ancestry left Canada for Japan. The first question is whether those persons were in law deported under those orders. I submit that, in fact, they were not. Internal government documents from immediately after the split decision of the Supreme Court clearly show that the deportation program was put on hold pending the appeal to the Privy Council. In a memorandum dated February 27, 1946, Norman Robertson, the Under-Secretary of State for External Affairs, advised Prime Minister King of the recommendation of the Cabinet Committee on the Japanese problem [sic !!!]:

> "That arrangements would be made at as early a date as possible for any Japanese who wished to do so, to leave Canada for Japan on a purely

> voluntary basis under the conditions already laid down by Order in Council. The other aspects of the deportation policy would be held in abeyance pending the appeal.": Canada, Department of External Affairs, Documents: External Relations: Vol. 12, 1946, (Ottawa, 1977) at 329.

It is further submitted that the "Order in Council" referred to in the above quote is only P.C. 7355. Robertson is referring to the provisions within it with respect to the assets of the person leaving Canada. This interpretation is supported by the balance of the Memorandum which deals with the problems attendant on transfers of the assets of Japanese Canadians.

P.C. 7356 stripping naturalized deportees of their Canadian status appears never to have been used. Firstly the necessary condition precedent, that the person must have been "deported from Canada under the provisions of Order in Council P.C. 7355", never obtained. Further proof is found in the fact that no list of denaturalized Japanese Canadians was ever published in the Canada Gazette as required by section 2 of the order. If P.C. 7356 was never used, then no naturalized Japanese Canadian, in fact or law, was ever stripped of his Canadian status by this order.

If I am wrong and any naturalized person who left Canada on the ships provided in 1946 or 1947 was deported in law then several issues arise including:

> (a) Did the person concerned in fact request to be sent to an enemy country or otherwise manifest their sympathy with or support of an enemy power? and
>
> (b) Is the failure to publish the name of the person mean the process is incomplete and the person retains his status until it is published.

The first issue raises sub-issues of voluntariness and non est factum. The documents of the day blither on about choices made on a "purely voluntary basis": See External Affairs Memorandum, February 27, 1946, supra. In fact, the historical evidence is that few who went to Japan in 1946 did so of their own free will. The three most common reasons were:

> (a) the person was near or over retirement age, had been wiped out economically by the dispossession policy, and often had minor dependants to support because of the late age at which many men commenced their families;

(b) the Canadian government was refusing to issue passports to or otherwise assist Japanese Canadians caught in Japan during the Second World War, including over 1,500 children. The announced policy of the Canadian government was that no immigration would be permitted from Japan. If a person of Japanese ancestry in Canada, whatever his status, wanted to be reunited with his children or other family member caught in Japan, he had to go to Japan. They could not come to him; and,

(c) where immigrant parents at or near retirement who had been wiped out economically by the dispossession policy chose to go to Japan, their Canadian-born children felt obliged to go with them to care for them in their old age. Also the deportation policy classified 16 year old children as adults. Such children were normally dependant on their parents and would necessarily be compelled to agree with their decisions.

The fact situation of each person who went to Japan is different. None can be said to have made a "purely voluntary" choice. The American cases arising from the policy of inducing Japanese Americans to renounce their citizenship so they would be eligible for deportation provide support for arguments in law that choices made under the conditions faced by Japanese Canadians are not voluntary choices.

The non est factum issues are raised by documents which indicate that persons signing up for "repatriation" did so on the basis of erroneous information and misrepresentations.

It is submitted that P.C. 7356 would be without force and effect if the person being stripped of their naturalized status did not in fact make a bona fide and voluntary request to be sent to Japan or otherwise manifest their sympathy with or support of an enemy power. In the absence of voluntariness there is no mens rea to support the conditions precedent to deportation or denaturalization.

The publication of the names, it is submitted, is more than a formality. Rather it has substantial effect. It is notice to the individual and the world that an order has been made against him. Unless the individual were otherwise specifically served with notice of his denaturalization, then he cannot know, in law, of the change in his status, and hence it ought not to bind him. This is analogous to the cases where the enforcement of unpublished regulations has been rejected.

CANADIAN CITIZENSHIP ACT:

The provisions in section 21 of this Act are virtually the same as those of the Naturalization Act of 1946. There is one important exception. Mere retention of the citizenship of a country at war with Canada does not create a prima facie liability to be stripped of naturalization. Further, while the Canada Gazette contains notices of denaturalization under this Act, none of the persons named therein is Japanese Canadian.

SUMMARY:

In summary, there are strong arguments that no naturalized Japanese Canadian lost his status as a Canadian during the Second World War.

JAPANESE NATIONALS:

The following is a comment on the status of Japanese nationals in Canada in the period 1920 through 1950. I raise the issue because of the suggestion that Japanese nationals, as aliens, are fair game in time of war. The problem with that argument is that the choice of becoming naturalized was not available to immigrants throughout this entire period.

There were three major obstacles:

(a) the refusal of some judges to accept Japanese Canadians for naturalization, refusals based on racial prejudice. One was quoted in a Vancouver newspaper in 1922 as follows:

"the question is whether or not this country of ours is to be filled up with Orientals from across the Pacific. ... When I die I want to leave a country a fit place for my children to live in. My duty is not to report any person [as eligible for citizenship] whom I don't believe would make the country better or keep it as good as it is.": as quoted in Patricia E. Roy, "The Oriental 'Menace' in British Columbia" in M. Horn and R. Saborin (eds), Studies in Canadian Social History, (1974, McClelland and Stewart) at 292.

(b) Japanese laws that required fulfillment of military service before renunciation of Japanese nationality: See "Note of Mr. Robertson - Policy with Regard to Japanese in Canada", March 20, 1944, E.A.A. 104(5)-1 at p. 7.

(c) Canadian policy and particularly P.C. 1760, August 13, 1934.

Further, as you have pointed out, the behavior of the federal government in the period between September 2, 1945 and April 1, 1949 toward Japanese nationals suggests the presumption of some status other than alien. The mere fact that the Canadian government applied the same restrictions to the aliens that it was imposing on its own citizens while usually interpreted as implying that the Canadian government regarded Japanese Canadians as aliens, is equally open to the interpretation that in the postwar period Canada treated Japanese nationals as if they were Canadian citizens. The absence of treatment in accordance with the Geneva Convention, and the continuation of discriminatory policies against Japanese nationals when no state of war existed between Canada and Japan, reinforces this inference. Postwar government documents also assist. While the initial internal records indicate an intention to deport all Japanese nationals after the war, the political inadvisability of expelling people who have lived in Canada all their adult lives and have Canadian-born family is recognized very early. In short, the Canadian government seems to have extended to the Japanese nationals the obligations attached to naturalization, if not the benefits. It could be argued that the postwar policies were tacit recognition that the 3,500 Japanese nationals in Canada in 1941 were qualified for naturalization and if not prevented from doing so would likely have become naturalized.

If the present government were truly interested in a fair resolution of this issue they should deem any Japanese national who was qualified to be naturalized on January 1, 1942 to have been naturalized on that date.

ABILITY OF JAPANESE CANADIANS TO RETURN TO CANADA IN THE PERIOD 1946 TO 1949:

I understand that government officials have suggested to you that Japanese Canadians who went to Japan in 1946 were free to return to Canada at any time. In reply I quote the Minutes of the Cabinet Committee on Japanese Questions for September 3, 1947 at page 4:

> '3. Return to Canada of Persons of Japanese Origin
>
> Mr. [A.R.] Menzies explained in detail the present policy regarding persons of Japanese origin (canadian-born, naturalized or nationals retaining Canadian domicile) who left Canada before the war or who were repatriated [sic] and who wish to obtain Consular protection and assistance in Japan and who want to re-enter

Canada. The Department of External Affairs recognize the right, under existing law, of Canadian citizens and Japanese nationals retaining Canadian domicile to re-enter Canada, but lays down that the Canadian Liaison Mission in Tokyo shall not for the present (a) help persons of Japanese race to obtain exit permits or buy passage, (b) issue visas to Japanese aliens even if they have technically retained Canadian domicile; and (c) issue or renew passports to Canadian Citizens of Japanese origin except in special circumstances" (Emphasis added)

The Minutes further disclose that the Committee approved the policies set out in "Reference Document JAP 3 circulated April 16, 1947" including the policy that:

> "Passports shall not be issued to Canadian citizens of Japanese origin to enable them to leave Japan unless they are able to produce evidence that they have secured passage for Canada and will be able to obtain the necessary exit permit from Japan.": at 5.

Returning to Canada required leaping three hurdles: (a) getting a passport; (b) having sufficient funds to pay for the trip; and (c) getting a Japanese exit visa. The difficulties of extracting a passport from Canadian authorities are painfully evident from the above. White Canadians in Japan would have received full consular services, including passage to Canada. Racism alone determined the discriminatory policy against Japanese Canadians. The requirements for an exit visa are not known to me. Perhaps the Department of External Affairs can provide us with that information.

The evidence suggests that funding the trip was a major obstacle. The Reports by Lieutenant-Colonel O. Orr, the Officer-in-Charge, War Crimes Liaison Detachment, set out in Volume 12 of Documents: External Relations make clear the dire straits and impecuniousity of the "Canadian repatriates," as he calls them. Reporting at page 349 on the search for the baggage of a man who changed his mind about going to Japan at the last minute, Orr states:

> 4. This man may consider himself very fortunate that he decided not to repatriate, and if he never recovers his baggage he will still be a great deal better off than those who have returned. In this connection I think that proper representation should be made to someone to protect future repatriates from having the greater part of their money taken from them by either the American Government or the Japanese Government by way of

exchange and banking regulations, the plain fact of matter being that the money with which the Japanese repatriate leaves Canada shrinks in transmission to a small fraction of its real value, then on top of this, all except 1000 yen per head is placed in a frozen bank account by the Japanese government, this latter expression meaning that while the depositor gets the bank book showing a credit, he cannot withdraw money except at a specified monthly rate, this specified monthly rate being considerably less than what is required to live on, and I am not sure whether they are allowed to draw it out in addition to any money they may be earning.

5. I occasionally come in contact with some of these repatriates, and also hear from them by letter. A great many of them are having a hard time to get enough food, others have been fortunate enough to get employment with the army of occupation, etc., but even their employment does not help much because they are only permitted to draw a certain part of their salary in cash, the rest is frozen in bank accounts again."

The official exchange rate was 13 1/2 yen per dollar. The black market rate was 40 yen per dollar. Even the worst of food was expensive. As Orr reports at page 346:

"A loaf of rationed bread made of a mixture of barley, wheat, rice polishings, potatoes, ground silk worms, etc costs 2 yen 10 sen per loaf (1 kilo). Rice of second quality costs from 2 yen 10 sen to 2 yen 30 sen per kilo. Fish costs from 2 to 5 yen per pound.

The majority of the younger people, especially those in their teens were obviously depressed and desirous of returning as soon as possible. ... Most of them in the teen age group were unable to eat the food supplied."

Japanese Canadians who did make it back to Canada tell of Japanese Canadian women being forced into prostitution to feed their families, and of deaths among the old from pneumonia compounded by malnutrition and the exorbitant black market price of penicillin that might have prevented those deaths.

Between frozen bank accounts and worthless yen it was virtually impossible to save passage to Canada. Capt. George Tsuruda of Edmonton, who recently retired from the Canadian Armed Forces, reports that even as a single man

without dependants he could not save enough to pay his passage to Canada. His determination to return was evident from the day he arrived when he tried to stow away on the ship that had brought him and his parents. He finally got back only because the American soldiers for whom he worked gave him his passage money. Bunny Nagamori of Winnipeg reports that a married sister who remained in Canada mortgaged her house in Canada to pay the passage for seven of her siblings from Japan. Even with the pledge of passage money it took three years of bureaucratic hassles and agitation by Stanley Knowles, M.P. for Winnipeg North, before all 7 children got back to Canada.

Pierre Berton's article "Marie Went Back to the Dark Ages", Maclean's Magazine, July 15, 1951, confirms that throughout the period 1946 to 1950 the cost of living in Japan remained high and the buying power of the yen low. Berton equates the 1000 yen per month salary received by office workers to little more than $6.00 Canadian, and the 50,000 yen per month salary of Marie's Japanese American husband to $140.00 Canadian: at 48 and 49.

The evidence suggests that the practical obstacles facing Japanese Canadians wishing to return to Canada were almost insurmountable without outside help. The number who could not return because of obligations to aging parents and the need to support other family members can only be speculated on at this point. I submit, however, that any policy with respect to Canadians in Japan must begin with the recognition that few went voluntarily and that getting back to Canada in the period 1946 to 1949 was impractical or extremely difficult.

The difficulty is also evident from the small numbers of those who made it in those years. The desire of the young to return to Canada is clear from Orr's reports. The fact that only a handful made it back in those years illustrates the effectiveness of the obstructive policies of the Canadian government, policies which capitalized on the economic difficulties of Japanese Canadians whose presence in Japan was due entirely to the repressive measures adopted by the Canadian government during the Second World War.

With respect, Japanese Canadians ended up in Japan as a result of deliberate policies intended to rid Canada of as many persons of the Japanese race as possible. From the beginning of the attempt to deport Japanese Canadians it was the intention of the government of the day that ideally they should have no right of re-entry. Gordon Robertson's "Note for Mr. Robertson" dated March 20, 1944, E.A.A. 104(5)-1, has the notation "No right of re-entry" written in Norman Robertson's crabbed handwriting beside the suggestion that "all possible assistance be given to any persons of Japanese race who wish to return to Japan". Memoranda and diplomatic

messages in the External Affairs Archives, and the Department Labour papers and Ian Mackenzie's papers at the Public Archives of Canada all demonstrate the intention to deport as many Japanese Canadians as politically possible. The persistence of some Cabinet members, notably Louis St. Laurent, and Ian Mackenzie, to sought that objective is evidente even in the records of the meeting at which the Cabinet finally gave into public pressure and removed the threat of deportation from over the heads of 10,000 Japanese Canadians: W.L. Mackenzie King, Diary, January 22, 1947. For other particulars see M.A.G. Sunahara, The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War. (1981, Lorimer) Chapters 6 and 7.

SUMMARY:

Canadians of Japanese ancestry who went to Japan in 1946 were not "free" to return to Canada. Their return was obstructed by discriminatory consular policies and practical difficulties on which those who wished to prevent the re-entry of Japanese Canadians capitalized. If the government of today attempts to argue otherwise, they put themselves in the same moral position as the architects of the deportation policy. The Canadian people soundly rejected that policy in 1946. I am confident that they would do so again today.

Yours truly,

M. Ann Sunahara.