R. v. Shim

Shin Shim, Appellant; and
His Majesty the King, Respondent.

[1938] S.C.J. No. 16

[1938] 4 D.L.R. 88

Supreme Court of Canada

1938: April 26 / 1938: June 23.

Present: Duff C.J. and Cannon, Crocket, Davis and Hudson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Denis Murphy, for the appellant.
Elmore Meredith, for the respondent.

Solicitor for the appellant: Harold Freeman. Solicitor for the respondent: Elmore Meredith.

The judgment of the Chief Justice and Cannon, Davis and Hudson JJ. was delivered by

DUFF C.J.:-- I have read the Chinese Immigration Act many times and am still in real doubt as to the precise meaning of some of its cardinal provisions. I do not think I am justified in concluding that it was the intention of Parliament to prevent Canadian citizens of Chinese origin or descent generally from entering Canada.

Section 8 prohibits certain classes of persons of Chinese origin and descent from entering Canada, including idiots and insane persons, persons afflicted with a loathsome disease, criminals, prostitutes, procurers, professional beggars and vagrants, persons who are likely to become a public charge, members of unlawful organizations, persons who are certified as mentally or physically defective, persons who are utterly illiterate. But even as respects these classes, section 8 has no application to a person who is a Canadian citizen within the meaning of the Chinese Immigration Act.

Section 11 contains a proviso that Canadian citizens shall be permitted to land in Canada.

Now, in view of these provisions, it would be an extraordinary thing if it were enacted in section 5 that the only Canadian citizens permitted to enter Canada are such as fall within section 5, subsection (b). I am by no means satisfied that such is the proper construction of that section. I am disposed to think it means that the classes of persons enumerated in subsections (a), (b) and (c), and they alone, are permitted to enter or land in Canada without regard to any question of allegiance or citizenship; and that the effect of the section is not to take away the right of Canadian citizens (Brit-

ish subjects domiciled in Canada or persons born in Canada who have not become aliens) to enter or land in Canada.

The question is, no doubt, a debatable one, but the construction adopted by the Controller and contended for by the Crown ought, I think, not to be accepted in the absence of plain language. This view I think is strengthened by reference to section 37 which, inferentially, appears to recognize the right of persons who are Canadian citizens or persons who have acquired a Canadian domicile to invoke the jurisdiction of the courts to review the decision or order of the Minister or Controller relating to "status, condition, origin, descent, detention or deportation."

One naturally differs from the Court of Appeal for British Columbia on such a point with very considerable hesitation. The subject has been frequently before that Court, and, although there are no reported reasons of the Court of Appeal before us, we have been given to understand that, in arriving at their decision the Court of Appeal followed the observations of Mr. Justice Martin in Re Low Hong Hing [(1926) 37 B.C.R. 295, at 300, 301.] in delivering the judgment of the Court.

Especially, however, in dealing with a statute of the Parliament of Canada affecting the fundamental rights of Canadian citizens, it is our duty to give effect to the views concerning the construction of the statute at which, after due consideration, we ourselves have arrived.

A number of authorities have been cited which appear to show that the view of the statue indicated in this judgment has been acted upon more than once in British Columbia. I refer to In Re Lee Chow Ying [(1929) 39 B.C.R. 322.] (Hunter C.J.); Rex v. Jung Suey Mee [(1933) 46 B.C.R. 535.] (Macdonald C.J. and McPhillips J.A.); The King v. Lim Cooie Foo [(1931) 43 B.C.R. 56.] (Macdonald C.J.); Re Munshi Singh [(1914) 20 B.C.R. 243, at 263, 270.] (Irving J.A. and Martin J.A.).

Such being our opinion as to the effect of the statute, it follows that the return of the Controller was insufficient to establish conclusively that his detention of the applicant was a lawful one, and to preclude inquiry into the issue of citizenship, for it is virtually limited to setting forth his decision that the applicant did not fall within any of the classes enumerated in section 5.

I am not insensible to the difficulties attending the administration of the Chinese Immigration Act. If, however, it was the intention of Parliament to pass an enactment taking effect conformably to the argument of the Crown presented in this case, that intention could and ought to have been expressed in words of unmistakeable meaning.

The appeal is allowed and the order of McDonald J. restored with costs throughout.

CROCKET J.:-- This is an appeal from the judgment of the Court of Appeal for British Columbia allowing an appeal from the decision of Honourable Mr. Justice McDonald on the return of an order nisi for a writ of Habeas Corpus and Certiorari in aid, ordering the discharge of the applicant out of the custody of the Controller of Chinese Immigration of the city of Vancouver.

The judgment of the Court of Appeal merely states that upon hearing counsel for the parties and upon reading the appeal book the judgment of Mr. Justice McDonald is set aside, with costs to be paid by the respondent to the appellant forthwith after taxation thereof, and does not disclose the particular ground or grounds upon which the judgment proceeded.

It is stated, however, in the appellant's factum in this court that the evidence taken before the trial judge was not introduced into the appeal book on the appeal to the British Columbia Court of Appeal; that the learned trial judge's finding on the hearing before him that the applicant was in fact

a Canadian citizen and was born in the city of Victoria was not disputed on the appeal; that the only question that arose was as to whether or not the learned judge had the right under the Chinese Immigration Act to review the decision of the Controller; and that the Court of Appeal without itself reviewing the evidence substantiating the Controller's finding held that the learned trial judge had no jurisdiction to do so.

This statement is not disputed and seems to be borne out by the notice of appeal to the Court of Appeal, so that I think it must be taken that the judgment of the Court of Appeal proceeded wholly on the ground that Mr. Justice McDonald had no jurisdiction to review the finding of the Controller on the Habeas Corpus application.

The Crown contends that His Lordship was precluded from doing so by s. 37 of the Chinese Immigration Act, R.S.C., c. 95, which reads as follows:--

> No court and no judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any controller relating to the status, condition, origin, descent, detention or deportation of any immigrant, passenger or other person upon any ground whatsoever, unless such person is a Canadian citizen, or has acquired Canadian domicile.

There seems to be no doubt that the intention of this section is to restrain the courts of justice throughout the country from determining the validity of any proceeding, decision or order of the Minister of Immigration, or any Controller of Chinese Immigration, under which any immigrant, passenger or other person may be detained in custody, upon any ground whatsoever, if the person affected is not a Canadian citizen or has not acquired Canadian domicile. No exception is made in favour of British subjects, who are not Canadian citizens or have not acquired Canadian domicile. The concluding words "unless such person is a Canadian citizen or has acquired Canadian domicile" are the only reservation in the otherwise all embracing enactment.

The learned counsel for the Crown contends that the question as to whether the person affected by the proceeding, decision or order of the Minister or of the Controller of Chinese Immigration, is or is not a Canadian citizen or one who has acquired Canadian domicile, is a question for the determination of the Controller only, subject to appeal to the Minister. If this contention were upheld it is self-evident that the prohibition, which is so expressly directed against all courts of justice throughout Canada, would be absolute so far as any proceeding, decision or order in relation to the administration of the Chinese Immigration Act is concerned. Under no circumstances, once a Controller of Chinese Immigration had, rightly or wrongly, found that a person seeking entry into Canada was not a Canadian citizen or one who had acquired Canadian domicile, and had taken such person into his custody, would any court have any power to entertain an application for a writ or order in the nature of a writ of Habeas Corpus for the purpose of obtaining his discharge from the Controller's custody on any ground whatever.

The question of the constitutionality of an enactment of the Parliament of Canada to prohibit provincial courts from judicially investigating the validity of the detention of British subjects in connection with the administration of the Chinese Immigration Act does not arise on this appeal. The only question with which we are concerned is whether upon its true construction s. 37 precludes a judge of a provincial Supreme Court from hearing an application under the Habeas Corpus

Act for the purpose of proving that, notwithstanding the contrary opinion of the Chinese Immigration Controller, the applicant was in fact born in Canada and as a Canadian citizen was entitled to her discharge from that officer's custody.

With great respect I am of opinion that it does not do so. Reading the whole section it seems to me that its clear intendment is that where the applicant for discharge from the Controller's custody is in fact a Canadian citizen or one who has acquired Canadian domicile, the prohibition against the courts has no application at all. The words "upon any ground whatever" manifestly apply to the intended prohibition against the courts. I think it is equally clear that the words "unless such person is a Canadian citizen," etc., which immediately follow, do the same, so that their collocation would seem necessarily to imply that the fact of the applicant being a Canadian citizen or a person who has acquired Canadian domicile, is for the determination of the court or judge, to whom the application for discharge is made, and not for that of the Immigration Controller who is himself responsible for the alleged illegal custody.

If the section were open to any other possible construction, I should have no hesitation in accepting that one which does least violence to the long recognized right of the judges of the Supreme Courts of the provinces, in the matter of Habeas Corpus, to protect, by means of this time-honoured writ or by an order in the nature thereof, the personal liberty of any Canadian citizen, or indeed of any other person, by investigating the legality of the warrant, process or order under which anyone has been arrested and is detained in custody within their territorial jurisdiction.

It is now the settled law of England that nothing short of express language, or language which admits of no other possible construction, can avail to defeat the object of the Habeas Corpus Act and also that, once a writ of Habeas Corpus has been directed to issue by a competent court and the discharge of a prisoner has been ordered, no appeal lies from such order to any Superior Court. See judgment of the House of Lords in The Secretary of State for Home Affairs v. O'Brien [[1923] A.C. 603.], and the authorities there discussed in the reasons of Lords Birkenhead, Dunedin, Finlay and Shaw. The ground of the decision in that case was that the essential feature of the procedure under the Habeas Corpus Act, as stated by Lord Birkenhead, was to provide a swift and imperative remedy in all cases of illegal restraint and confinement. It is interesting to note in this connection that the Supreme Court of New Brunswick, a court of five judges, sitting en banc, in the case of Ex parte Byrne [(1883) 22 N.B. Rep. 427.], unanimously refused in 1883 to rescind an order of Mr. Justice Weldon for the discharge of a prisoner from a county gaol upon precisely the same grounds as those set forth in the O'Brien case [[1923] A.C. 603.] in the House of Lords forty years later. The grounds of this New Brunswick decision were recognized by the judges of the Appeal Division of that Court in 1921, after the coming into force of the Judicature Act, in the case of The King v. Lantalum, ex parte Offman [(1921) 48 N.B. Rep. 448.], in which it was held that, although the language of the appeal provisions of the Judicature Act could not be relied upon to provide an appeal from an order of discharge made under the Habeas Corpus Act for the reasons given in Ex parte Byrne [(1883) 22 N.B. Rep. 427.], those reasons did not apply to the case of an order refusing an application for discharge and that an appeal, therefore, does lie from an order refusing to discharge a prisoner from custody.

In 1932 this Court considered an appeal from the Appeal Court of British Columbia, which on an equal division sustained a judgment of Mr. Justice Murphy refusing the application of a Japanese subject, one Samajima, under a writ of Habeas Corpus for his discharge from custody on a complaint for violation of the provisions of the general Immigration Act. The British Columbia

Court of Appeal Act, it should be said, expressly provides for an appeal to that Court from any judgment or order of a judge of the Supreme Court in any and every matter, and specifically names Habeas Corpus so that, notwithstanding the settled law of England, and of other provinces of Canada, an appeal from an order of discharge would appear to lie in that province from an order of discharge granted on a writ of Habeas Corpus as well as from an order refusing a discharge. In the Samajima case [[1932] S.C.R. 640.], this Court allowed the appeal, and directed the discharge of the applicant per Duff, Lamont and Cannon JJ., Anglin C.J. and Smith J. dissenting, on the ground that the original complaint on which the applicant was detained for deportation was not an order made in accordance with the provision of the Act and was, therefore, void. It seems that Mr. Justice Fisher on a previous application had ordered the discharge of the applicant on the ground that the complaint against him was defective, and that the applicant had been rearrested on an amended warrant. This Court held that the first warrant, being void, could not be amended. The case involved the consideration of s. 23 of the general Immigration Act, as the Lantalum case [(1921) 48 N.B. Rep. 448.] in New Brunswick did in 1921. In delivering judgment, Duff J., as our present Chief Justice then was, said:--

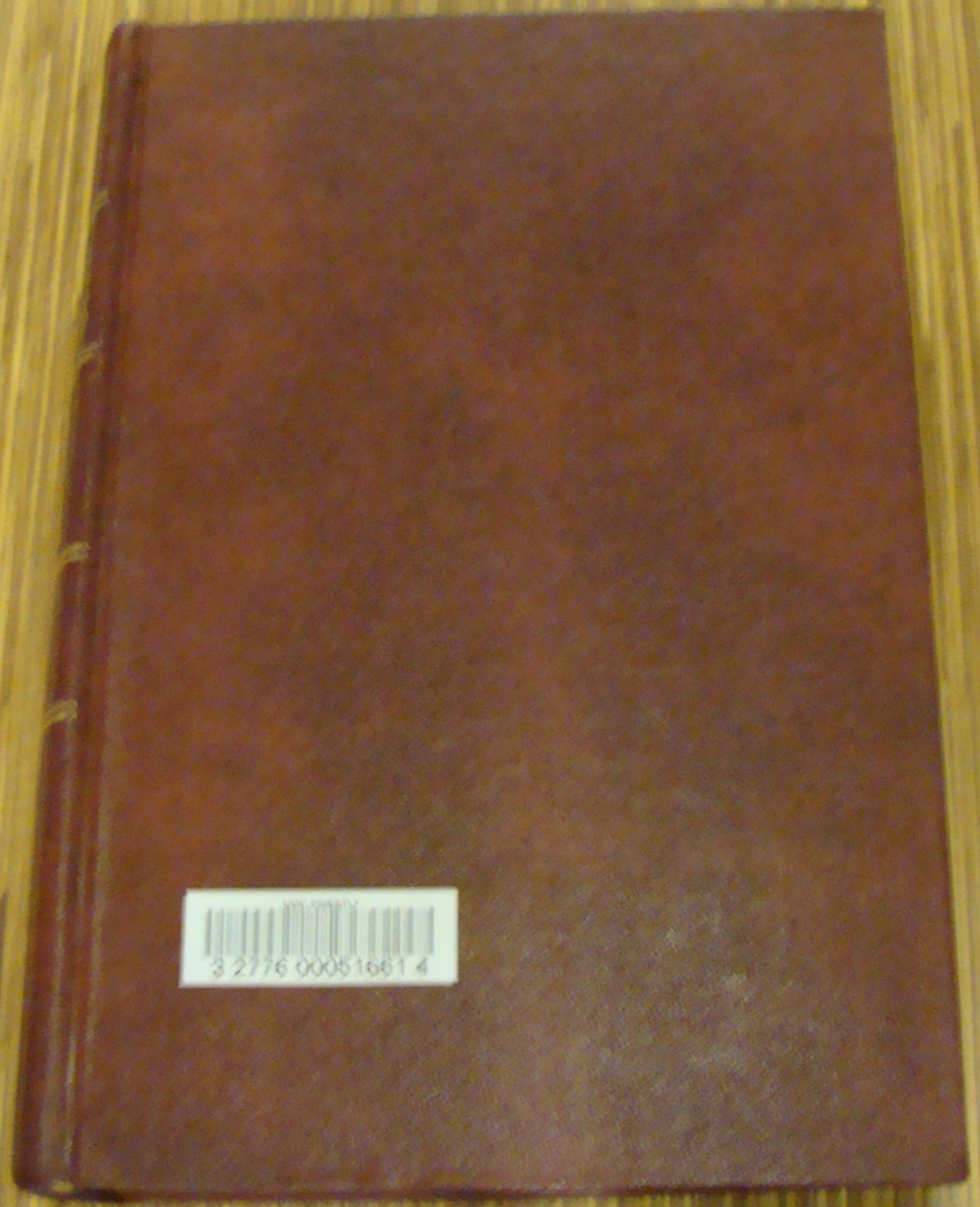
> I gravely fear that too often the fact that these enactments are, in practice, most frequently brought to bear upon Orientals of a certain class, has led to the generation of an atmosphere which has obscured their true effect. They are, it is needless to say, equally applicable to Scotsmen. I admit I am horrified at the thought that the personal liberty of a British subject should be exposed to the hugger-nugger which, under the name of legal proceedings, is exemplified by some of the records that have incidentally been brought to our attention. Courts, of course, must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance. I have no difficulty in giving a construction to section 23, which does not deprive British subjects who are not Canadians, of all redress, in respect of arbitrary and unauthorized acts committed under the pretence of exercising the powers of the Act.

I refer to these cases merely for the purpose of exemplifying the reverence with which the law of England regards the ancient writ of Habeas Corpus and the strictness with which the courts, not only of the Mother Country, but of Canada, scrutinize all enactments affecting the liberty of the subject.

Quite independently, however, of these cases I think the clear intendment of s. 37 of the Chinese Immigration Act is, as I have already said, that the prohibition against the courts has no application to any case where the applicant is a Canadian citizen or a person who has acquired Canadian domicile, and that this is always a question for the decision of the judge to whom the application is made.

I think the appeal must be allowed and the applicant discharged.

Appeal allowed with costs.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VOL. 4

[1938]

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SHIN SHIM v. THE KING.

Supreme Court of Canada, Sir Lyman P. Duff, C.J.C., Cannon, Crocket, Davis and Hudson, JJ. June 23, 1938.

Aliens I—Deportation of Orientals — Canadian citizen — Review by Courts—Habeas Corpus.

The prohibition against interference by the Courts under s. 37 of the Chinese Immigration Act with the decision of the Controller of Immigration in the detention or deportation of immigrants or passengers entering Canada is expressly made inapplicable when the person detained is a Canadian citizen or has acquired a Canadian domicile; the question of status is one for the Courts not for the Controller of Immigration to decide. A Chinese person of Canadian citizenship detained by the immigration authorities was ordered released on *habeas corpus*.

Cases Judicially Noted: *Rex* v. *Lantalum, Ex p. Offman*, 62 D.L.R. 223, 35 Can. C.C. 295, 48 N.B.R. 448; *Ex p. Byrne*, 22 N.B.R. 427; *Samejima* v. *The King*, [1932], 4 D.L.R. 246, S.C.R. 640, 58 Can. C.C. 300; *Re Low Hong Hing*, [1926] 3 D.L.R. 692, 46 Can. C.C. 65, apld.

Statutes Considered: *Chinese Immigration Act*, R.S.C. 1927, c. 95, s. 37.

EDITORIAL NOTE: As to Deportation and Exclusion from Canada of British Subjects of Oriental Origin, see Annotation 1 D.L.A. 564. See also ALL-CANADA DIGEST, Vol. 1 col. 66, and CANADIAN ANNUAL DIGESTS, under Aliens I. RECENT CASES: *Varin* v. *Cormier* (Que.), [1937] 3 D.L.R. 588, 69 Can. C.C. 142.

APPEAL from judgment of British Columbia Court of Appeal, 52 B.C.R. 79, reversing McDonald, J., in his order discharging applicant out of custody of Controller of Chinese Immigration. Reversed.

D. Murphy, for appellant.

E. Meredith, for respondent.

The judgment of Sir Lyman P. Duff, C.J.C., Cannon, Davis and Hudson, JJ., was rendered by

SIR LYMAN P. DUFF, C.J.C.:—I have read the Chinese Immigration Act, R.S.C. 1927, c. 95, many times and am still in real doubt as to the precise meaning of some of its cardinal provisions. I do not think I am justified in concluding that it was the intention of Parliament to prevent Canadian citizens of Chinese origin or descent generally from entering Canada.

Section 8 prohibits certain classes of persons of Chinese origin and descent from entering Canada, including idiots and insane persons, persons afflicted with a loathsome disease, criminals, prostitutes, procurers, professional beggars and vagrants, persons who are likely to become a public charge, members of unlawful organizations, persons who are certified as mentally or physically defective, persons who are utterly illiterate. But even as respects these classes, s. 8 has no application to a person

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who is a Canadian citizen within the meaning of the *Immigration Act*.

Section 11 contains a proviso that Canadian citizens shall be permitted to land in Canada.

Now, in view of these provisions, it would be an extraordinary thing if it were enacted in s. 5 that the only Canadian citizens permitted to enter Canada are such as fall within s. 5(*b*). I am by no means satisfied that such is the proper construction of that section. I am disposed to think it means that the classes of persons enumerated in s-ss. (*a*), (*b*) and (*c*), and they alone, are permitted to enter or land in Canada without regard to any question of allegiance or citizenship; and that the effect of the section is not to take away the right of Canadian citizens (British subjects domiciled in Canada or persons born in Canada who have not become aliens) to enter or land in Canada.

The question is, no doubt, a debatable one, but the construction adopted by the Controller and contended for by the Crown ought, I think, not to be accepted in the absence of plain language. This view I think is strengthened by reference to s. 37 which, inferentially, appears to recognize the right of persons who are Canadian citizens or persons who have acquired a Canadian domicile to invoke the jurisdiction of the Courts to review the decision or order of the Minister or Controller relating to "status, condition, origin, descent, detention or deportation."

One naturally differs from the Court of Appeal for British Columbia on such a point with very considerable hesitation. The subject has been frequently before that Court, and although there are no reported reasons of the Court of Appeal before us, we have been given to understand that, in arriving at their decision the Court of Appeal followed the observations of Mr. Justice Martin in *Re Low Hong Hing*, [1926] 3 D.L.R. 692, at pp. 696-7, 46 Can. C.C. 65, at pp. 70-1, 37 B.C.R. 295, at pp. 300-1, in delivering the judgment of the Court.

Especially, however, in dealing with a Canadian statute affecting the fundamental rights of Canadian citizens, it is our duty to give effect to the views concerning the construction of the statute at which, after due consideration, we ourselves have arrived.

A number of authorities have been cited which appear to show that the view of the statute indicated in this judgment has been acted upon more than once in British Columbia. I refer to *Re Lee Chow Ying* (1928), 49 Can. C.C. 168, 39 B.C.R. 322 (Hunter, C.J.B.C.); *Rex* v. *Jung Suey Mee*, (1932), 46 B.C.R. 533, at p. 535 (Macdonald, C.J.B.C. and McPhillips, J.A.);

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Rex v. *Lim Cooie Foo* (1931), 54 Can. C.C. 383, at p. 384, 43 B.C.R. 54 (Macdonald, C.J.B.C.); *Re Munshi Singh* (1914), 20 B.C.R. 243, at pp. 263, 270 (Irving, J.A. and Martin, J.A.).

Such being our opinion as to the effect of the statute, it follows that the return of the Controller was insufficient to establish conclusively that his detention of the applicant was a lawful one, and to preclude inquiry into the issue of citizenship, for it is virtually limited to setting forth his decision that the applicant did not fall within any of the classes enumerated in s. 5.

I am not insensible to the difficulties attending the administration of the *Chinese Immigration Act*. If, however, it was the intention of Parliament to pass an enactment taking effect conformably to the argument of the Crown presented in this case, that intention could and ought to have been expressed in words of unmistakeable meaning.

The appeal is allowed and the order of McDonald, J., restored with costs throughout.

CROCKET, J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia allowing an appeal from the decision of Honourable Mr. Justice McDonald on the return of an order nisi for a writ of *habeas corpus* and *certiorari* in aid, ordering the discharge of the applicant out of the custody of the Controller of Chinese Immigration of the City of Vancouver.

The judgment of the Appeal Court merely states that upon hearing counsel for the parties and upon reading the appeal book the judgment of Mr. Justice McDonald is set aside, with costs to be paid by the respondent to the appellant forthwith after taxation thereof, and does not disclose the particular ground or grounds upon which the judgment proceeded.

It is stated, however, in the appellant's factum in this Court that the evidence taken before the trial Judge was not introduced into the appeal book on the appeal to the British Columbia Court of Appeal; that the learned trial Judge's finding on the hearing before him that the applicant was in fact a Canadian citizen and was born in the City of Victoria was not disputed on the appeal; that the only question that arose was as to whether or not the learned Judge had the right under the *Chinese Immigration Act* to review the decision of the Controller; and that the Court of Appeal without itself reviewing the evidence substantiating the Controller's finding held that the learned trial Judge had no jurisdiction to do so.

This statement is not disputed and seems to be borne out by the notice of appeal to the Court of Appeal, so that I think

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it must be taken that the judgment of the Appeal Court proceeded wholly on the ground that Mr. Justice McDonald had no jurisdiction to review the finding of the Controller on the *habeas corpus* application.

The Crown contends that His Lordship was precluded from doing so by s. 37 of the *Chinese Immigration Act*, R.S.C. 1927, c. 95, which reads as follows:—

"No court and no judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any controller relating to the status, condition, origin, descent, detention or deportation of any immigrant, passenger or other person upon any ground whatsoever, unless such person is a Canadian citizen, or has acquired Canadian domicile."

There seems to be no doubt that the intention of this section is to restrain the Courts of Justice throughout the country from determining the validity of any proceeding, decision or order of the Minister of Immigration, or any Controller of Chinese Immigration, under which any immigrant, passenger or other person may be detained in custody, upon any ground whatsoever, if the person affected is not a Canadian citizen or has not acquired Canadian domicile. No exception is made in favour of British subjects, who are not Canadian citizens or have not acquired Canadian domicile. The concluding words "unless such person is a Canadian citizen or has acquired Canadian domicile" are the only reservation in the otherwise all embracing enactment.

The learned counsel for the Crown contends that the question as to whether the person affected by the proceeding, decision or order of the Minister or of the Controller of Chinese Immigration, is or is not a Canadian citizen or one who has acquired Canadian domicile, is a question for the determination of the Controller only, subject to appeal to the Minister. If this contention were upheld it is self-evident that the prohibition, which is so expressly directed against all Courts of Justice throughout Canada, would be absolute so far as any proceeding, decision or order in relation to the administration of the *Chinese Immigration Act* is concerned. Under no circumstances, once a Controller of Chinese Immigration had, rightly or wrongly, found that a person seeking entry into Canada was not a Canadian citizen or one who had acquired Canadian domicile, and had taken such person into his custody, would any Court have any power to entertain an application for a writ or order in the nature of a writ of *habeas corpus* for the purpose of obtaining

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his discharge from the Controller's custody on any ground whatever.

The question of the constitutionality of an enactment of the Parliament of Canada to prohibit provincial Courts from judicially investigating the validity of the detention of British subjects in connection with the administration of the *Chinese Immigration Act* does not arise on this appeal. The only question with which we are concerned is whether upon its true construction s. 37 precludes a Judge of a provincial Supreme Court from hearing an application under the *Habeas Corpus Act* (1816 (Imp.), c. 100) for the purpose of proving that, notwithstanding the contrary opinion of the Chinese Immigration Controller, the applicant was in fact born in Canada and as a Canadian citizen was entitled to her discharge from that officer's custody.

With great respect I am of opinion that it does not do so. Reading the whole section it seems to me that its clear intendment is that where the applicant for discharge from the Controller's custody is in fact a Canadian citizen or one who has acquired Canadian domicile, the prohibition against the Courts has no application at all. The words "upon any ground whatever" manifestly apply to the intended prohibition against the Courts. I think it is equally clear that the words "unless such person is a Canadian citizen," etc., which immediately follow, do the same, so that their collocation would seem necessarily to imply that the fact of the applicant being a Canadian citizen or a person who has acquired Canadian domicile, is for the determination of the Court or Judge, to whom the application for discharge is made, and not for that of the Immigration Controller who is himself responsible for the alleged illegal custody.

If the section were open to any other possible construction, I should have no hesitation in accepting that one which does least violence to the long recognized right of the Judges of the Supreme Courts of the Provinces, in the matter of *habeas corpus*, to protect by means of this time honoured writ or by an order in the nature thereof, the personal liberty of any Canadian citizen, or indeed of any other person, by investigating the legality of the warrant, process or order under which anyone has been arrested and is detained in custody within their territorial jurisdiction.

It is now the settled law of England that nothing short of express language, or language which admits of no other possible construction, can avail to defeat the object of the *Habeas Corpus Act* and also that, once a writ of *habeas corpus* has been directed to issue by a competent Court and the discharge of a prisoner

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has been ordered, no appeal lies from such order to any Superior Court. See judgment of the House of Lords in the *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603, and the authorities there discussed in the reasons of Lords Birkenhead, Dunedin, Finlay and Shaw. The ground of the decision in that case was that the essential feature of the procedure under the *Habeas Corpus Act*, as stated by Lord Birkenhead, was to provide a swift and imperative remedy in all cases of illegal restraint and confinement. It is interesting to note in this connection that the Supreme Court of New Brunswick, a Court of five Judges, sitting *en banc*, in the case of *Ex p. Byrne*, 22 N.B.R. 427, unanimously refused in 1883 to rescind an order of Mr. Justice Weldon for the discharge of a prisoner from a county gaol upon precisely the same grounds as those set forth in the *O'Brien* case in the House of Lords 40 years later. The grounds of this New Brunswick decision were recognized by the Judges of the Appeal Division of that Court in 1921, after the coming into force of the *Judicature Act*, in the case of *Rex* v. *Lantalum, Ex p. Offman*, 62 D.L.R. 223, 35 Can. C.C. 295, 48 N.B.R. 448, in which it was held that, although the language of the appeal provisions of the *Judicature Act* could not be relied upon to provide an appeal from an order of discharge made under the *Habeas Corpus Act* for the reasons given in *Ex p. Byrne*, those reasons did not apply to the case of an order refusing an application for discharge and that an appeal, therefore, does lie from an order refusing to discharge a prisoner from custody.

In 1932 this Court considered an appeal from the Appeal Court of British Columbia, which on an equal division sustained a judgment of Mr. Justice Murphy refusing the application of a Japanese subject, one Samejima, under a writ of *habeas corpus* for his discharge from custody on a complaint for violation of the provisions of the general *Immigration Act*. The *British Columbia Court of Appeal Act*, it should be said, expressly provides for an appeal to that Court from any judgment or order of a Judge of the Supreme Court in any and every matter, and specifically names *habeas corpus* so that, notwithstanding the settled law of England, and of other Provinces of Canada, an appeal from an order of discharge would appear to lie in that Province from an order of discharge granted on a writ of *habeas corpus* as well as from an order refusing a discharge. In the *Samejima* case, [1932] 4 D.L.R. 246, 58 Can. C.C. 300, this Court allowed the appeal, and directed the discharge of the applicant *per* Duff, Lamont and Cannon, JJ., Anglin, C.J.C., and Smith, J., dissenting, on the ground that

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the original complaint on which the applicant was detained for deportation was not an order made in accordance with the provisions of the Act and was, therefore, void. It seems that Mr. Justice Fisher on a previous application had ordered the discharge of the applicant on the ground that the complaint against him was defective, and that the applicant had been re-arrested on an amended warrant. This Court held that the first warrant, being void, could not be amended. The case involved the consideration of s. 23 of the general *Immigration Act*, as the *Lantalum* case in New Brunswick did in 1921. In delivering judgment Duff, J., as our present Chief Justice then was, said (p. 251 D.L.R., p. 305 Can. C.C.) :—

"I gravely fear that too often the fact that these enactments are, in practice, most frequently brought to bear upon Orientals of a certain class, has led to the generation of an atmosphere which has obscured their true effect. They are, it is needless to say, equally applicable to Scotsmen. I admit I am horrified at the thought that the personal liberty of a British subject should be exposed to the hugger-nugger which, under the name of legal proceedings, is exemplified by some of the records that have incidentally been brought to our attention.

"Courts, of course, must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance. I have no difficulty in giving a construction to s. 23, which does not deprive British subjects, who are not Canadians, of all redress, in respect of arbitrary and unauthorized acts committed under the pretence of exercising the powers of the Act."

I refer to these cases merely for the purpose of exemplifying the reverence with which the law of England regards the ancient writ of *habeas corpus* and the strictness with which the Courts, not only of the Mother Country, but of Canada, scrutinize all enactments affecting the liberty of the subject.

Quite independently, however, of these cases I think the clear intendment of s. 37 of the *Chinese Immigration Act* is, as I have already said, that the prohibition against the Courts, has no application to any case where the applicant is a Canadian citizen or a person, who has acquired Canadian domicile, and that this is always a question for the decision of the Judge to whom the application is made.

I think the appeal must be allowed and the applicant discharged.

Appeal allowed.

THE KING v. IMPERIAL TOBACCO Co.

Can.
Ex. Ct.
1938.

Exchequer Court of Canada, Angers, J. April 20, 1938.

Taxes VII—**Constitutional Law II—Special War Revenue Act, R.S.C. 1927, c. 179, s. 119—Collection of excess over tax—Ultra vires.**

Section 119 of the Special War Revenue Act, requiring a manufacturer or producer to pay to the Crown any amount collected by him under colour of the statute in excess of that required to be collected and paid as consumption or sales tax, is *ultra vires* (except for the provision imposing a penalty) as it imposes an obligation constituting an interference with "property and civil rights"—the exclusive jurisdiction of the Provinces—and cannot be considered as ancillary or incidental to the collection of the tax imposed by s. 86.

Statutes Considered: *Special War Revenue Act*, R.S.C. 1927, c. 179, s. 119.

EDITORIAL NOTE: It is suggested that various cases in which so-called ancillary legislation has been upheld are cases in which the enactment in controversy dealt with an aspect of the subject upon which provincial legislation would have been incompetent: Clement's Law of Canadian Constitution, 3rd ed., p. 506. In conferring a benefit or creating a right, the Dominion Parliament may enact a condition which might otherwise be *ultra vires*: Lefroy's Canadian Constitutional Law, pp. 94-5.

As to constitutional aspect of taxation, see Annotation, 2 D.L.A. 1830. For cases as to sales tax under Special War Revenue Act, see ALL-CANADA DIGEST and CANADIAN ANNUAL DIGESTS under Taxes VII.

INFORMATION exhibited by the Attorney-General of Canada to recover monies collected by defendant allegedly under colour of the Special War Revenue Act, in excess of the sum it was required to pay to His Majesty as consumption or sales tax, and penalty.

J. G. Ahearn, K.C., and *H. H. Ellis*, for plaintiff.

L. A. Forsyth, K.C., and *Colville Sinclair*, K.C., for defendant.

ANGERS, J. :—The plaintiff, by his action, seeks to recover from the defendant the sum of $68,132.54, made up as follows: $67,632.54 allegedly collected by the defendant, under colour of the *Special War Revenue Act*, in excess of the sum it was required to pay to His Majesty as consumption or sales tax and $500 penalty. The action is brought under the provisions of s. 119 of the Act.

The information says in substance as follows:—

By s. 86 of the *Special War Revenue Act*, R.S.C. 1927, c. 179, it is enacted that, since April 7, 1932, "there shall be imposed, levied and collected a consumption or sales tax of six per cent. on the sale price of all goods, produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof," of