06/09/2016 13:45

Supreme Court of Canada | Cour suprême du Canada

INVENTORY OF FILE CONTENTS

INVENTAIRE DES DOCUMENTS

Casefile No.: 7240

Date Initiated: 1946

Short Style of Cause: Re Orders in Council of December 15th, 1945 (Japanese Race)

Nº de Dossier: _____

Date du dossier: _____

Intitulé: _____

_____

MOST COMMONLY OCCURRING COURT DOCUMENTS:

DOCUMENTS COURANTS:

A) Application for Leave

- Notice of Motion on Application for leave
- Application for leave to Appeal
- Respondent's memorandum of Argument
- Discontinuance
- Minute Sheet
- Order Granting Leave to Appeal/Formal Judgment
- Bill of Costs taxed

A) Requête en autorisation

- Avis de requête en autorisation de pourvoi
- Requête en autorisation de pourvoi
- Mémoire de l'intimé
- Désistement
- Feuille des minutes
- Ordonnance/jugement
- Taxation des dépens

B) Appeal

- Notice of Appeal
- Case Book
- Discontinuance
- Appellant's Factum
- Inscription
- Respondent's Factum
- Intervener's Factum
- Minute Sheet
- Formal Judgment/Oral Judgment
- Reasons for Judgment
- Taxation Documents

B) Pourvoi

- Avis de pourvoi
- Dossier imprimé sur appel
- Désistement
- Mémoire de l'appelant
- Inscription
- Mémoire de l'intimé
- Mémoire de l'intervenant
- Feuille des minutes
- Jugement/jugement oral
- Motifs de jugement
- Taxation des dépens

3. The Commission shall report to the Governor in Council.

4. Any person of the Japanese race who is recommended by the Commission for deportation shall be deemed to be a person subject to deportation under the provisions of Order in Council P.C. 7355 of the 15th day of December, 1945, and the provisions thereof shall apply, mutatis mutandis, to such person.

5. Where any person is recommended for deportation pursuant to this Order he shall, as and from the date on which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

6. The Commission shall, for the purpose of all inquiries and investigations made pursuant to this Order, have all the powers and authority of Commissioners appointed under Part One of the Inquiries Act.

7. The Commission is authorized to engage the services of such clerks, reporters, assistants and counsel as they deem advisable to aid and assist in the performance of their duties.

8. The Commissioners shall be paid such remuneration, allowances and expenses as the Governor in Council may fix.

9. All expenses incurred in connection with the inquiries and investigation of the Commission pursuant to this Order, including the remuneration, allowances and expenses of the commissioners, shall be paid from amounts allowed from the War Appropriation to the Department of Labour for such purpose.

A.D.P. Heeney,
Clerk of the Privy Council.

06/09/2016 13:46

06/09/2016 13:58

In The Supreme Court of Canada

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

FACTUM OF THE ATTORNEY-GENERAL

OF SASKATCHEWAN

ALEX. BLACKWOOD, K.C.,
Deputy Attorney-General, Solicitor for The Attorney-General of Saskatchewan.

McILRAITH & McILRAITH,
56 Sparks St., Ottawa,
Ottawa Agents.

In The Supreme Court of Canada

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

FACTUM OF THE ATTORNEY-GENERAL OF SASKATCHEWAN

In this Reference The Attorney-General of Saskatchewan adopts and relies on the Factum filed herein by the Co-Operative Committee on Japanese Canadians.

DATED this 17th day of January, 1946.

Respectfully submitted,

ALEX. BLACKWOOD,
Of Counsel for the Attorney-General of Saskatchewan.

06/09/2016 13:58

06/09/2016 13:58

In the Supreme Court of Canada

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

FACTUM OF THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

THE HON. R. L. MAITLAND, K.C.,
Counsel.

EWART, SCOTT, & CO.,
Ottawa Agents.

06/09/90 13:58

In the Supreme Court of Canada

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

FACTUM OF THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

THE HON. R. L. MAITLAND, K.C.,
Counsel.

EWART, SCOTT, & CO.,
Ottawa Agents.

In the Supreme Court of Canada

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

FACTUM OF THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

The question for determination is whether Orders in Council dated the 15th day of December, 1945, being P.C. 7355, 7356, and 7357 are *ultra vires* of the Governor in Council, either in whole or in part, and, if so, in what particular or particulars and to what extent. The Orders in Council are set out in the case, page ——, and are made under the authority of the "War Measures Act," R.S.C. 1927, chap. 206. The question of their validity involves a consideration of "The National Emergency Transitional Powers Act, 1945" (hereinafter referred to as the "Emergency Act"), which was assented to on the —— day of December, 1945, and which came into force on the 1st day of January, 1946. Section 4 of that Act provides:—

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

Section 5 provides:—

> "This Act shall come into force on the first day of January one "thousand nine hundred and forty-six, and on and after that day the "war against Germany and Japan shall for the purposes of the 'War "Measures Act' be deemed no longer to exist."

Pursuant to the powers contained in section 4, the Governor in Council on the 28th day of December, 1945, passed Order in Council P.C. 7414 (case, p. ——), under which it is ordered that all orders and regulations lawfully made under the "War Measures Act" or pursuant to authority created under the said Act in force immediately before the day the "Emergency Act" comes into force, shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act. It is noted that this Order in Council purports also to be made pursuant to

section 12 of the "Interpretation Act," which gives authority to make an Order in Council under an Act which is not yet in force, for the purpose of making the Act effective at the date of the commencement thereof. It will be seen therefore that, *prima facie*, Orders in Council Nos. 7355, 7356, and 7357 made under the "War Measures Act" are now in force pursuant to the provisions of the "Emergency Act" and P.C. 7414 made thereunder.

The validity of the Orders in Council in question depends upon, first, whether they were a valid exercise of the powers contained in the "War Measures Act" at the time they were passed—i.e., 15th December, 1945—and second, whether they are now validly in force by virtue of the "Emergency Act" and the Order in Council made thereunder.

As to the first, there is now no doubt that the "War Measures Act" is within the legislative competence of the Dominion Parliament, *re Gray*, 57 S.C.R. 150; *Fort Frances Pulp and Power Co. v. Manitoba Free Press* (1923), A.C. 695, Cameron, Vol. 2, p. 302; *The Chemicals Reference* (1943), S.C.R. 1. The *Fort Frances* case is also authority for the exercise of the powers under the "War Measures Act" after the cessation of hostilities, provided the national emergency resulting from the war still exists. The sole question for determination, therefore, is whether the emergency resulting from the war existed at the time the Orders in Council were passed. The emergency is stated in the preamble to Order in Council P.C. 7355 as follows:—

> "Whereas during the course of the war with Japan certain Japa-
> "nese nationals manifested their sympathy with or support of Japan
> "by making requests for repatriation to Japan and otherwise;
>
> "And whereas other persons of the Japanese race have requested
> "or may request that they be sent to Japan;
>
> "And whereas it is deemed desirable that provisions be made to
> "deport the classes of persons referred to above;
>
> "And whereas it is considered necessary by reason of the war, for
> "the security, defence, peace, order and welfare of Canada, that pro-
> "vision be made accordingly."

This statement of fact must be taken to be conclusive. The Courts do not overrule the Government in a matter of this sort, except upon very clear evidence that it was wrong. On this point Lord Haldane in the *Fort Frances* case said, p. 706:—

> "The effect of the economic and other disturbance occasioned
> "originally by the war may thus continue for some time after it is
> "terminated. The question of the extent to which provision for cir-
> "cumstances such as these may have to be maintained is one on which
> "a Court of law is loath to enter. No authority other than the central
> "government is in a position to deal with a problem which is essen-
> "tially one of statesmanship. It may be that it has become clear that
> "the crisis which arose is wholly at an end and that there is no justifi-
> "cation for the continued exercise of an exceptional interference which

06/09/2016 13:59

"becomes *ultra vires* when it is no longer called for. In such a case
"the law as laid down for distribution of powers in the ruling instru-
"ment would have to be invoked. But very clear evidence that the
"crisis had wholly passed away would be required to justify the
"judiciary, even when the question raised was one of *ultra vires* which
"it had to decide, in overruling the decision of the government that
"exceptional measures were still requisite. In saying what is almost
"obvious, their Lordships observe themselves to be in accord with the
"view taken under analogous circumstances by the Supreme Court of
"the United States, and expressed in such decisions as that in *Hamil-*
"*ton v. Kentucky Distilleries Co.* 251 U.S. 146."

See also the judgment of Sir Lyman Duff, *C.J.*, in *The Chemicals Reference* (1943), S.C.R. 1, at p. 12, as follows:—

"I cannot agree that it is competent to any court to canvass the
"considerations which have, or may have, led him (the Governor-in-
"Council) to deem such regulations necessary or advisable for the
"transcendent objects set forth. The authority and the duty of pass-
"ing on that question are committed to those who are responsible for
"the security of the country—the Executive Government itself, under,
"I repeat, its responsibility to Parliament. The words are too plain
"for dispute: the measures authorized are such as the Governor-in-
"Council (not the courts) deems necessary or advisable."

In *A.G. v. Wilts United Dairies*, 1922, 91 L.J.K.B. 897, an order of the Food Controller made in April, 1919, came into question, whereby he regulated the sale of milk by licence and imposed a charge of 2d. a gallon as a condition of granting a licence. It was held he had no authority to impose the licence fee. As stated by Lord Buckmaster, p. 700:—

"The only question here is, Were such powers granted?"

In *Halliday's Case*, 1917, A.C. 260, Lord Finlay, *L.C.*, stated, p. 268–9:—

"It may be necessary in time of great public danger to entrust
"great powers to His Majesty in Council, and that Parliament may do
"so feeling certain that such powers will be reasonably exercised."

It is submitted, therefore, that with respect to the persons mentioned in the Orders in Council in question there existed a national emergency as a result of the war sufficient to justify the passage of the Orders in Council, and that this question is not now open to debate.

Apart from the question of the existence of a national emergency, the Orders in Council are a valid exercise of the powers of the Governor in Council under the "War Measures Act" within the meaning of section 3 of that Act as an "order deemed necessary or advisable for the security, defence, peace, order and welfare of Canada" and comes within clause (*b*) of the said section—"Arrest, detention, exclusion and deportation," also

clause (*f*)—"Appropriation, control, forfeiture and disposition of property and of the use thereof." The Act also provides that all orders made under section 3 shall have the force of law. On this point *see* Rinfret, *J.*, as he then was, in the *Chemicals Reference* (*supra*), p. 17–8:—

> "The powers conferred upon the Governor in Council by the 'War "Measures Act' constitute a law-making authority, an authority to "pass legislative enactments such as should be deemed necessary and "advisable by reason of war; and, when acting within those limits, "the Governor in Council is vested with plenary powers of legislation "as large and of the same nature as those of Parliament itself (Lord "Selborne in *The Queen v. Burah*, 1878, 3 A.C., 889). Within the "ambit of the Act by which his authority is measured, the Governor in "Council is given the same authority as is vested in Parliament itself. "He has been given a law-making power."

For these reasons it is submitted the Orders in Council were a valid exercise of the powers contained in the "War Measures Act" at the time they were passed.

With regard to the second branch of the question—i.e., the validity of the "Emergency Act" and P.C. 7414 made thereunder—it is convenient to deal with the Order in Council first.

The preamble to the Order in Council shows the authority under which the Order is made and the enacting part of the Order follows closely the wording of the Act, so that assuming the Act to be valid there is no objection to the Order in Council.

As to the Act itself, under the reasoning of the *Fort Frances* case the only objection that can be raised against the Act is that there was no emergency in existence sufficient to justify the passing of the Act, and conversely it would appear that if it can be said that such an emergency existed the Act is valid. In this connection attention is called to the long recital in the preamble to the Act setting out the nature of the emergency which existed at the time the Act was passed, and, as stated in the *Fort Frances* case and quoted above, very clear evidence would be required to justify the judiciary in overruling the decision of the Government that exceptional methods were still requisite. No such evidence is before the Court. It might be argued that the Government was exceeding its powers in passing an Act such as the Act in question some eight months after hostilities had ceased, but a close parallel can be found between the action of the Government in this respect and what was done at the conclusion of the first Great War in regard to paper control, which was the subject of the *Fort Frances* case. In that case the impugned Orders in Council were made pursuant to an Act passed on the 7th of July, 1919, 9–10 Geo. V., chap. 63, some eight months after the cessation of hostilities, confirming and extending the powers, jurisdiction, and authority of the Commissioner and Controller of Paper to such extent as might be necessary to enable the Commissioner and Controller to fully complete all work and investigations begun by him under previous Orders in Council made under the "War Measures Act," and to

determine all questions and to make all necessary orders with respect to matters begun or coming before them prior to the publication in the Canada Gazette of a proclamation that the war no longer existed. It further extended the powers of the Paper Control Tribunal to determine all matters pending at the declaration of peace and subsequent appeals, and further provided that except for the purpose of finally completing all matters undertaken and determining all questions arising prior to the declaration of peace the powers, authority, and jurisdiction of the Commissioner, Controller of Paper, and the Paper Control Tribunal should cease upon the publication of the proclamation of peace. The validity of that Act came into question in the *Fort Frances* case, and after disposing of the constitutional issue in favour of the Dominion, Lord Haldane stated as follows, p. 705–6:—

> " The other point which arises is whether such exceptional neces-
> " sity as must be taken to have existed when the war broke out, and
> " almost of necessity for some period subsequent to its outbreak, con-
> " tinued through the whole of the time within which the questions in
> " the present case arose.
>
> " When war has broken out it may be requisite to make special
> " provision to ensure the maintenance of law and order in a country
> " even when it is in no immediate danger of invasion. Public opinion
> " may become excitable, and one of the causes of this may conceivably
> " be want of uninterrupted information in newspapers. Steps may
> " have to be taken to ensure supplies of these and to avoid shortage, and
> " the effect of the economic and other disturbance occasioned originally
> " by the war may thus continue for some time after it is terminated.
> " . . . When then, in the present instance, can it be said that the
> " necessity altogether ceased for maintaining the exceptional measure
> " of control over the newspaper print industry introduced while the war
> " was at its height? At what date did the disturbed state of Canada
> " which the war had produced so entirely pass away that the legislative
> " measures relied on in the present case became *ultra vires*? It is
> " enough to say that there is no clear and unmistakable evidence that
> " the government was in error in thinking that the necessity was still
> " in existence at the dates on which the action in question was taken by
> " the Paper Control Tribunal."

Lord Haldane then goes on to deal with statements which had been made to the effect that the war itself was at an end and refers to the statement to that effect made by the Government itself in an Order in Council on December 20th, 1919, some seven months before the passage of the Order in Council in question in the case, and observed that the first-mentioned Order in Council dealt only with the results following from the cessation of actual war conditions, and excepted from repeal certain measures concerned with consequential conditions arising out of war, which might obviously continue to produce effects remaining in operation after war itself was over, and concluded (page 708):—

06/09/2016 13:59

" Their Lordships find themselves unable to say that the Dominion " Government had no good reason for thus temporarily continuing the " paper control after actual war had ceased, but while the effects of " war conditions might still be operative."

It is submitted that the reasoning of Lord Haldane in the *Fort Frances* case applies in all respects to the case at bar. In the present case various Orders were made under the " War Measures Act " dealing with the custody and control of persons of the Japanese race and their property during the war, and Parliament, recognizing that a national emergency still existed as a result of war conditions, passed the " Emergency Act " some eight months after hostilities had ceased, and by section 4 empowered the Governor in Council to make an Order that orders and regulations made under the " War Measures Act " should continue in force for another year.

It might further be contended that the fact of enacting the " Emergency Act " and by that Act declaring (section 5) that after that Act came into force, the war against Germany and Japan shall, for the purposes of the " War Measures Act," be deemed no longer to exist, in itself was an indication that the emergency had ceased to exist, otherwise it would have been sufficient to have left the orders and regulations made under the " War Measures Act " in operation until they were revoked or until peace was declared, and in this connection reference is made to section 2 of the " War Measures Act," which provides that the issue of a proclamation shall be conclusive evidence that war exists and of its continuance until by the issue of a further proclamation it is declared that the war no longer exists. This latter proclamation has of course not yet been issued. As to this contention it is submitted that the same reasoning applies here as to what was said by Lord Haldane in the *Fort Frances* case dealing with the statements made in the Order in Council of December 20th, 1919, that the war no longer existed (p. 707), where he pointed out that this Order in Council deals only with the results following from the cessation of actual war conditions, and excepts from repeal certain measures concerned with consequential conditions arising out of war which may obviously continue to produce effects remaining in operation after war itself is over. What was done in the present case is merely an extension or enlargement of what was done in the matter of paper control at the end of the first Great War, and instead of continuing the Orders in Council made under the " War Measures Act " relating solely to persons of the Japanese race, the Government has continued in force all the orders and regulations made under the " War Measures Act " which existed on 31st December, 1945, for a further period of one year. No different principle is involved, and it is submitted that as long as the Government was satisfied that an emergency existed as a result of the war requiring the legislation in question, it was competent to enact it. Parliament has said in the preamble to the " Emergency Act " that the emergency existed, and it is not for the Courts to question that statement unless there is strong and clear evidence that the Government was mistaken. Much and strong evidence could be adduced to show the reason why the

06/09/2016 13:59

C O P Y

Teletype Message

From:The Secretary of State for External Affairs, Ottawa,
To: The Canadian Ambassador to the United States, Washington.

Ottawa, September 17th, 1945.

No. EX-3366
SECRET
CYPHER

Please ask United States authorities to transmit the following message by the most appropriate channel from Canadian Government to General MacArthur as Supreme Commander for the Allied Powers.
Begins:

There are approximately 24,000 people of Japanese origin now resident in Canada. About 10,000 (including dependents) have expressed a desire to be repatriated to Japan. There are also about 500 Japanese nationals now interned whom it will probably be desired to deport. At a later date it is probable that there will be some additional deportees and voluntary repatriates who will also have to be removed. The Canadian Government is anxious to proceed with repatriation and deportation as soon as this can be done without causing you embarrassment. It is difficult to proceed with redistribution and relaxation of control over Japanese remaining in Canada until repatriates and deportees are removed.

It is proposed that repatriates and deportees from Canada should be given free transportation for themselves and their effects and provided with a maintenance grant upon repatriation sufficient to take care of their immediate needs, also that they be permitted to transfer remainder of their funds to Japan.

You will appreciate the desire of the Canadian Government to proceed with these plans as soon as possible. The Canadian Government would be grateful for your advice as to the earliest date on which you would be prepared to have these people arrive in Japan. Ends.

For your own information the whole difficult subject of repatriation and relocation of persons of Japanese race is under consideration by a special Cabinet Committee. It would obviously simplify the problem if we were able to proceed immediately to return to Japan the elements referred to in the above message and we would be obliged if you would let us know what action is contemplated by U.S. authorities in this connection. It occurs to us that if the United States have it in mind to repatriate any considerable numbers of disloyal Japanese simultaneous arrangements might be made which might expedite and simplify the problems involved.

Secretary of State for External Affairs.

06/09/2016 13:46

Government came to that conclusion, but on a reference of this kind such evidence is not and can not be before the Court for consideration, and the Court is limited to the consideration of the question as to whether it was competent for the Government to enact the legislation, and if the answer to this question is in the affirmative that is an end to the question.

For these reasons it is respectfully submitted that the answer to the question submitted for the consideration of this Court should be that the Orders in Council in question are wholly *intra vires* of the Governor in Council.

10

E. PEPLER,
Of Counsel for the Attorney-General of British Columbia.

Victoria, B.C., 17th January, 1946.

06/09/2016 13:59

THE SUPREME COURT OF CANADA

February 20th, 1946.

In the matter of a Reference as to the Validity of Orders-in-Council of the 15th day of December, 1945, (P.C. 7355, 7356 and 7357), in relation to persons of the Japanese race.

The following question was referred to the Supreme Court of Canada for hearing and consideration pursuant to Section 55 of the Supreme Court Act:

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

ANSWER

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

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

Rand, J. is of opinion that:

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

(2) Order-in-Council 7356 is not ultra vires in so far

ment granting the naturalization.

06/09/2016 13:59

as it takes away incidental rights and privileges of persons of the Japanese race as Canadian nationals; but that it is ultra vires of the Governor in Council to the extent that it purports to revoke the naturalization of such persons under the Naturalization Act; and that:

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

Kellock, J. is of opinion that:

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

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

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

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

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

ment granting the naturalization.

06/09/2016 14:00

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

SUPREME COURT OF CANADA FEB 20 1946

CORAM: The Chief Justice, Kerwin, Hudson, Taschereau, Rand, Kellock and Estey, JJ.

RAND, J.

His Excellency in Council has referred to this Court the following question arising out of certain Orders in Council which deal with the deportation of persons of the Japanese race:

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

The Orders provide for the deportation in certain circumstances of:

(a) Japanese nationals;

(b) Naturalized British subjects of the Japanese race resident in Canada;

(c) Natural born British subjects of the Japanese race resident in Canada; and

(d) The wives and children under 16 years of age of persons in classes (a), (b) and (c).

The power of the Governor in Council to enact legislation by Order is derived from section 3 of the War Measures Act, which so far as it is pertinent here, is as follows:

> "3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:-
>
> . . . . . .
>
> (b) Arrest, detention, exclusion and deportation."

Apart from a consideration I shall deal with later, I

ment granting the naturalization.

06/09/2016 14:00

am bound by decisions of this Court and of the Judicial Committee to attribute to Parliament the intention of clothing the Governor in Council with authority to enact by Order, subject to the provisions of the Act, legislation in a field as wide as that possessed by Parliament itself subject only to any restriction of the power of Parliament under the British North American Act to delegate to the Governor in Council: Duff, C.J., Chemicals Reference (1943) S.C.R. at page 10. The condition of the exercise of that power is that the Governor in Council should by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada the acts and things which by Order he purports to do. It is not for the courts to substitute their view of any such necessity or advisability: but it must appear from the Order or be presumed that that decision has been made, or the condition laid down by Parliament is not fulfilled.

The preamble of Order P.C. 7355 contains the following recitals:

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

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

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

AND WHEREAS it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

NOW, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order:"

A request for repatriation is defined as a written request or statement of desire to be repatriated or sent

to Japan. Then follow specific provisions dealing with the different classes of persons affected.

Of these classes there is first that of Japanese nationals. The preamble quoted recites certain conclusions of the Governor in Council pertinent to jurisdiction, and we are to say whether from these and the operative provisions of the Order we find that the decision which the statute has prescribed as its condition has not been made: in re Price Bros. 60 S.C.R. 265, Duff, J. (as he then was):

> "In this connection the sole point requiring examination is that which arises out of Mr. Biggar's contention in his admirable argument that orders-in-council made by the Governor-General in Council professedly under the authority of section 6 of that Act are not judicially revisable. I think such orders are reviewable, in this sense that when in a proper proceeding the validity of them is called into question, it is the duty of a court of justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not being fulfilled, to pronounce the sentence of the law upon the illegal order.
>
> One of the conditions of jurisdiction is, in my judgment, that the Governor-in-Council shall decide that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war -- (I leave the case of insurrection out of view as having no relevancy) or as having some relation to the prosecution of the war or the objects of it."

Rex v. Comptroller (1941) 2 K.B. 306 at 316. The language of the preamble is not precisely that employed by the statute, but in relation to this class of persons it appears, I should say, from the Order that the condition has been satisfied. The words "deport" and "repatriation" are appropriate to the return to his native country of an alien. The power of Parliament to deal with aliens is unquestioned, and that field is under delegation to the Governor in Council. The obligation of his own state to receive him must be deemed correlated with the power of the foreign state to expel him, and this has been implemented here by a direction of General MacArthur to which I shall refer later.

As is seen, the second recital of the preamble speaks of "other persons of the Japanese race", but from the operative pa ra-

06/09/2016 14:00

graphs of the Order it is clear that this language refers to both naturalized persons of the Japanese race and natural born British subjects of Canada who have a Japanese racial origin. The Order in relation to naturalized subjects must be read with Order 7356 which deals only with that class and is as follows:

"WHEREAS by Order in Council P.C. 7356 of 15th December, 1945, provision is made for the deportation of persons who, during the course of the war, have requested to be removed or sent to an enemy country or otherwise manifested their sympathy with or support of the enemy powers and have by such actions shown themselves to be unfit for permanent residence in Canada;

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Secretary of State (concurred in by the Secretary of State for External Affairs) and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to order and doth hereby order as follows:

1. Any person who, being a British subject by naturalization under the Naturalization Act, Chapter 138, R.S.C. 1927, is deported from Canada under the provisions of Order in Council P.C. 7355 of 15th December, 1945, shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

2. The Secretary of State shall publish in the Canada Gazette the names of all persons who have ceased to be British subjects or Canadian nationals by virtue of this Order."

As in the case of Japanese nationals, these two Orders show the jurisdictional decision of the Governor in Council in relation to naturalized Japanese. But a question arises of the relation between revocation by Order 7356 on deportation under 7355. No doubt the expulsion was intended to be followed by alienage of the deported persons; but if no or only a partial effect has been brought about by Order 7356, does that modify the operation of Order 7355?

The Naturalization Act contains a number of grounds upon which the revocation of naturalization can be effected, but the only one of interest here is that set forth in section 9 of Chapter 138, Revised Statutes of Canada, 1927 which is as follows:

06/09/2016 14:00

> "Where the Governor in Council, upon report of the Secretary of State of Canada, is satisfied . . . . that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Governor in Council shall, by order, revoke the certificate."

Order 7356 does not refer to any naturalized person being "disaffected or disloyal"; it deals only with the deportation of a person under Order 7355, and this in turn puts the deportation on the fact of a request for repatriation which has not been revoked in writing prior to September 1st, 1945. Are we to imply from this language that the Governor in Council is satisfied in each case of the disaffection or disloyalty of the naturalized person? Here is a penal provision of a drastic nature, and as it affects British subjects, I am unable to supply that conclusion by implication. The revocation for that cause seems to require the aid of the War Measures Act to enable the Governor in Council, as distinguished from the Secretary of State for Canada, to act under the Naturalization Act, but in either case, action must be strictly within the provisions of the latter as to grounds in order to bring about the revocation. It was argued that as Parliament could rescind the adoption, the Governor in Council could revoke on any ground he might see fit: but that view, I think, misconceives the foundation of the Naturalization Act. The legislative efficacy under which the naturalization arises is that of the British Nationality Act, Part II of which has been "adopted" by the Canadian Parliament. That word would seem to mean simply that the Canadian Parliament has cleared the way for the extension to Canada of an Imperial Act providing an empire naturalization. That Act directly authorizes the Canadian Government to exercise the powers it creates. The form of the Canadian Statute is not ex facie strictly in accordance with that conception, but if we look upon it as an exercise of Canadian legislative jurisdiction then that jurisdiction must be deemed to be by way of a specific investment additional to the British North America Act, but limited strictly to the precise language of the Imperial Act. No question of the Col-

06/09/2016 14:00

onial Laws Validity Act arises because of the express power under the statute to rescind the adoption. But naturalisation effecting an empire-wide status lies outside of the legislative power of Canada under section 91 of the Constitutional Act; and as the conditions of revocation have not been complied with, the status of British subject has not been destroyed.

Another view of these statutes might be that each member of the Commonwealth with concurrent action of the others itself enacts empire-wide legislation which in relation to grant or revocation of naturalization it would be at liberty to amend at its pleasure without affecting the recognition accorded by the other members. But that is not the legislative design of the British Nationality Act.

But Order 7356 declares a cessor also of being a Canadian national and in this goes beyond status. By the Canadian Nationals Act, Chapter 21 of the Revised Statutes (1927) a Canadian national is a British subject who is a Canadian citizen within the definition of the Immigration Act. The latter for the purpose here requires a Canadian domicile; and the right to residence in Canada appears to be what the Order takes away from the deported person. With the country of origin consenting to his return, the requirement for permanent exclusion is obtained. In these circumstances I am unable to say that the failure in revocation of naturalisation is of such a nature as to affect the operation of Order 7356.

In relation to the third class, natural born British subjects resident in Canada, serious questions arise.

I observe first that the expulsion of persons in the other two classes is in conjunction with an order or the equivalent of an order made by General MacArthur for their reception as repatriates in Japan. The letters passing between the Governments of Canada and the United States make it clear that what was asked for and conceded was "repatriation". That word is defined in Order 7356 in effect as either a "return" to Japan

06/09/2016 14:00

or "being sent" to that country, but obviously that definition is irrelevant to the meaning of the word as it is used in the communications between the two countries. "Repatriation" means simply a return to the patria or fatherland, and it has no relation to the compulsory transfer of a natural born British subject to a foreign country. Whatever legal rights it may confer to enter or to remain in Japan do not apply to such a subject.

Banishment with or without the loss of citizenship status or rights, as an effective exile over a period of time, whatever its feasibility in the early political organization of the world is today, considering the tenacity with which every foot of land and water is now sought and held, a legislative and executive impossibility. Admittedly one sovereignty has no legal power to force its own citizen into the territory of another. It is quite the case that banishment and exile were known to the common law, but in each it was either a deportation to politically unorganized lands, a transportation to a British colony by way of punishment for a criminal offence, or a voluntary exile made either by way of abjuration of the realm or as fulfillment of a condition in a pardon or other remission or as an avoidance of punishment requiring self-exile. In none of these situations is there the slightest suggestion of compulsory invasion of another's territory.

The process and effects of deportation of natural born British subjects under the Order seem to be these: a physical compulsion to leave Canadian shores; a de facto but not de jure entry upon Japanese territory; no citizenship rights in Japan and a retention of the rights of Canadian citizenship.

Now I must deal with this case as if, instead of a Canadian national of Japanese origin, I were dealing with that of a natural born Canadian national of English extraction who sympathized with Mosley or a French-Canadian national who supported Petain or an Irish-Canadian national who thought deValera's

06/09/2016 13:46

COPY

TELETYPE

From: The Canadian Ambassador to the United States

To: The Secretary of State for External Affairs, Canada.

CYPHER

TELETYPE

WA-5545

WASHINGTON, October 29th, 19

WA-5545. Further my Wa-5323 of October 15th and in reply to Mr. Wrong's letter to Mr. Pearson of October 27th respecting repatriation to Japan of persons of Japanese race in Canada. I have been advised this morning by State Department that a reply has been received from General MacArthur.

2. The reply is to the effect that he authorizes the immediate repatriation of some 160 special cases now held in the United States. In addition, repatriation of all Japanese now held in the United States and Canada who desire to return, or whose return is desired by the two Governments, is authorized subject only to provision of shipping.

3. State Department are proceeding immediately with the repatriation of the special cases and intend to hold a meeting within the next week to review the situation respecting the balance of the persons to be repatriated. A representative of the Embassy will attend the meeting and I would appreciate the following:

(a) Most recent figure on the Number of Japanese in Canada who will be involved;

(b) Whether any representative may offer to assist by the provision of transportation, and, if so, to what extent.

Charge D'Affaires.

course justified. I am asked to hold that, without a convention with those countries, the Government may, under the War Measures Act, without affecting the national status or the citizenship rights of those persons, issue an order for their deportation, to those foreign shores. I am unable to agree with that contention.

In these days, we are familiar with exchanges or transfers of sections of population from one country to another by agreement or imposed, but they are carried out as changes of nationality as well as of country: a deprivation of citizenship rights by one state and an investment of them by the other. That is not what is done or intended to be done by the Order with which I am dealing.

I think that Parliament in enacting the War Measures Act must have contemplated, as a fundamental assumption underlying the statute, the delegation of legislative power of a strictly legal character only, and must have intended to restrict the Governor in Council to measures or actions in which full juridical quality would inhere: that power without recognised legal character would be excluded. What is proposed here is not juridical: it is an act envisaging the violation of the sovereign rights of another state by an invasion of its territory and an affront to its dignity as represented by the occupying power. This quality, of course, is not present in the case of an alien: there the authority of expulsion is a necessary corollary to that of the right to exclude: Attorney General v. Cain (1906) A.C. 542: but the fundamental distinction between the two cases is, I think, unquestionable. As a further illustration of the principle invoked, I mention the presumption against the power to make retroactive orders, which I suggest would bind the Governor in Council, though there is no such restriction on Parliament.

On another ground I would come to the same conclusion.

06/09/2016 14:01

In Order 7355 the recital which, among others, relates to natural born British subjects, refers only to a request to be sent to Japan, implying, as I think, a continuing request: the general recital of "desirability" that provision be made to deport and the declaration of the necessity to make provision accordingly, apply to all three classes. The right to revoke the request by the natural born Canadian national is preserved up to the issue of the Order for deportation and this time limit is simply an administrative convenience. "Deportation" connotes only a single act and no period of time beyond the accomplishment of the expulsion. There is nothing in the Order to prevent such a Canadian from returning at once to the land of his birth. The contrast with the alien is obvious; once an alien leaves this country, he must establish a right given him by the legislature to return: at common law he has no right to enter which is recognized in our courts: Musgrove v. Toy (1891) A.C. 272. Considering, then, that the operation of the Order against the British subject by birth is placed solely upon a request which implies a continuing desire to leave this country, that the Order contemplates as well the withdrawal of persons voluntarily and enables the Minister to make financial arrangements to that end, in conjunction with the other circumstances I have detailed, I find in the Order clear evidence that that act of expulsion is not deemed by the Governor in Council either necessary or advisable for the peace, order or welfare of this country by reason of war; and the essential condition of the provision for compulsion is lacking.

The members of the family of a Canadian national may under Order 7355 be included in the deportation order. If revocation of naturalisation takes place, the status of the wife and minor children may thereby be affected. But where by the Order only incidents of the status of the husband and father are reached, the full citizenship rights of the wife and minor children continue. It was not seriously urged that the Governer

06/09/2016 14:01

in Council has deemed the expulsion of such persons advisable or necessary to the peace or welfare of Canada for any reason arising out of war; the most suggested was that it was advisable to the peace and welfare of individual families; but that purpose does not seem to be among the objects of Parliament's delegation of legislative power to the Governor in Council.

Mr. Cartwright argued that the war emergency must be deemed to have ended when the War Measures Act became inoperative on January 1st of this year. But that, I think, confuses the emergency with a particular period of it to which particular legislation is related. The emergency as a state of fact underlies both the War Measures Act and the Transitional Powers Act which came into force on January 1st, 1946.

Then it was argued that section 9 of Order 7355 is ultra vires because of conflict with section 5 of the War Measures Act. But an "order" for deportation under Order 7355 means one that carries with it the force of law. The "legal custody" which is declared relates only to the agents or instruments by which the restraint is effected: Liversidge v. Sir John Anderson (1942) A.C. 206 at p. 273.

I would therefore answer the question as follows:

1. Order 7355 is intra vires of the Governor in Council in relation to Japanese nationals and to persons of the Japanese race naturalized under the Naturalization Act of Canada as well as to persons voluntarily leaving Canada; but is ultra vires in relation to the compulsory deportation of natural born British subjects resident in Canada, and of wives and children under 18 who do not come within the first two classes.

2. Order 7355 is ultra vires of the Governor in Council to the extent that it purports to revoke the naturalization of persons of the Japanese race under the Naturalisation Act, but it is intra vires so far as it takes away incidental rights and privileges of such persons as Canadian nationals.

3. Order 7357 is intra vires of the Governor in Council,

06/09/2016 14:01

subject to the observance of the requirements of the Naturalisation Act as to grounds for the revocation of naturalization.

I HEREBY CERTIFY to His Excellency the Governor General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

06/09/2016 14:01

06/09/2016 14:01

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

RAND, J.

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

SUPREME COURT OF CANADA FEB 20 1946

BEFORE: The Chief Justice, Kerwin, Hudson, Taschereau, Rand, Kellock and Estey, JJ.

Estey, J.:- The three Orders in Council numbered P.C. 7355, 7356 and 7357, with which we are here concerned, were passed under the authority of the War Measures Act, 1927, R.S.C., c. 206, on the 15th of December, 1945, and continued by Order in Council P.C. 7414 passed under the authority of section 4 of The National Emergency Transitional Powers Act, 1945, (1945 R.S.C., c. 25).

Counsel for the Committee submits, apart from any other question respecting the validity of these Orders, they ceased to be effective when The National Emergency Transitional Powers Act came into force on January 1st, 1946. He points out that these Orders to be valid must be within the ambit of the War Measures Act and therefore passed as provided in the third section thereof "by reason of the existence of real or apprehended war". That Parliament in enacting The National Emergency Transitional Powers Act embodied in section 5 thereof a declaration that on and after the 1st day of January, 1946, the war against Germany and Japan, for the purposes of the War Measures Act, should be deemed no longer to exist, and that therefore these Orders, even if valid when made on the 15th day of December, 1945, ceased to be effective as of the 1st day of January, 1946. Section 5 of The National Emergency Transitional Powers Act, 1945, reads as follows:

> "5. This Act shall come into force on the first day of January, one thousand nine hundred and forty-six, and on and after that day the war against Germany and Japan shall, for the purposes of the War Measures Act, be deemed no longer to exist."

06/09/2016 14:01

This provision that "the war against.....Japan shall.....be deemed no longer to exist" is specifically limited in its application to the provisions of the War Measures Act and in effect merely removes the basis on which Orders in Council may be passed under that Act. It is not and does not purport to be a proclamation under section 2 of the War Measures Act declaring "that the war, invasion or insurrection no longer exists". Section 2 of the War Measures Act provides:

> "2. The issue of a proclamation by His Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists."

This section contemplates a period after the conclusion of actual combat during which the period of emergency caused by the war will continue. Parliament gave expression to the same view when it passed The National Emergency Transitional Powers Act, 1945, and embodied in the preamble thereof:

> ".....the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing;"

Parliament did recognize that the intensity and magnitude of the emergency had changed and diminished and under the provisions of this Act curtailed the extensive powers exercised by the Governor in Council under the War Measures Act.

The question whether an emergency exists or not is primarily a matter for Parliament, and through The National Emergency Transitional Powers Act, 1945, Parliament is doing in a general way what was done in special cases following the last war. One of these was considered in Fort Frances Pulp and Power Co. v. Manitoba Free Press, (1923) A.C. 695; 2 Can.

06/09/2016 14:01

302, where at p. 310 of the latter volume Viscount Haldane, in delivering the judgment of the Privy Council, stated:

> "But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite."

And at p. 311:

> "At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became ultra vires? It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal."

Apart from the provision embodied in section 5 of The National Emergency Transitional Powers Act, 1945, there was no suggestion that the emergency arising out of the war no longer existed.

Then it is provided in section 4 of The National Emergency Transitional Powers Act, 1945:

> "4. Without prejudice to any other power conferred by this Act, the Governor in Council may order that the orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day this Act comes into force shall, while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act."

Parliament by this provision expressly authorized the Governor in Council to continue not some but any or all of the Orders in Council already passed and still in force under the War Measures Act. The Governor in Council, acting under this authority, on the 28th day of December, 1945, passed Order in Council P.C. 7414 whereby it was ordered that:

> ".....all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day The National Emergency Transitional Powers Act, 1945 comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act."

06/09/2016 14:01

This Order in Council, passed under said section 4, continues as effective the Orders in Council here in question, namely P.C. 7355, 7356 and 7357.

The fact that Order in Council P.C. 7414 was made and dated the 28th day of December, 1945, and therefore prior to the coming into force of The National Emergency Transitional Powers Act, 1945, on January 1st, 1946, does not affect its validity as such a procedure is provided for in section 12 of the Interpretation Act, 1927 R.S.C., c. 1.

Counsel for the Committee submitted that if these Orders were still effective as above indicated that the provisions thereof, at least in part, exceeded the powers delegated by Parliament under the War Measures Act to the Governor in Council. That the Governor in Council can only legislate by Order in Council within the powers so delegated is stated by my Lord the Chief Justice in Re Chemicals, (1943) S.C.R. 1 at p. 17:

> "The powers conferred upon the Governor in Council by the War Measures Act constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself (Lord Selborne in The Queen v. Burah, (1878) 3 App. Cas. 889). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power."

That it is an enactment to enable the government to deal effectively in time of emergency with matters of security, defence, peace, order and welfare of Canada, and that its language should be so construed has been emphasized in this Court. Fitzpatrick, C.J.:

> "It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers."
> In re Gray, (1918) 57 S.C.R. 150 at p. 158.

06/09/2016 14:01

Kerwin, J.:

"The provisions of subsection 1 of section 3 are in as wide terms as may be imagined. As Mr. Justice Anglin stated in In Re Gray, (1918) 57 Can. S.C.R. 150, 'more comprehensive language it would be difficult to find'."
In Re Chemicals, (1943) S.C.R. 1 at p. 29.

It is under the War Measures Act that these three Orders in Council have been passed. There is much to be said for the view that they should be read and construed as a code or a unit designed in the main to carry out the express desires of those of the Japanese race who have requested the government to arrange for their going to Japan. It is true that in addition to those who have made requests, these Orders provide for the return to Japan of those Japanese nationals who were interned during the war and remained so on September 1st, 1945. They also provide for a Commission to inquire and recommend with respect to certain Japanese nationals and naturalized persons of the Japanese race in Canada. They also provide that the wives and the children under sixteen of any one with respect to whom an order for deportation has been made "may be included". These provisions will be more particularly discussed hereafter, but they do not detract from the main intent and purpose underlying the passage of these Orders in Council.

That these Orders do not apply to all of the Japanese race in Canada but in the main to those only who have requested that they be sent to Japan is made plain in the recitals to P.C. 7355:

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

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

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

"And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;"

06/09/2016 14:02

Order in Council continuing after the 31st day of December, 1945, in full force and effect Orders and Regulations made under the War Measures Act.

P.C. 7414

AT THE GOVERNMENT HOUSE AT OTTAWA

FRIDAY, the 28th day of DECEMBER, 1945.

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS The National Emergency Transitional Powers Act, 1945 comes into force on the first day of January, 1946 and by its terms provides that on and after that day the war shall for the purposes of the War Measures Act be deemed no longer to exist;

AND WHEREAS under section 4 of The National Emergency Transitional Powers Act, 1945 the Governor in Council may, without prejudice to any other power conferred by that Act, order that orders and regulations lawfully made under the War Measures Act or pursuant to authority created thereunder in force immediately before the day The National Emergency Transitional Powers Act, 1945 comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation thereunder;

AND WHEREAS section 12 of the Interpretation Act provides that where an Act is not to come into operation immediately on the passing thereof and confers power to make any order, that power may, unless the contrary intention appears, so far as may be necessary or expedient for the purpose of making the Act effective at the date of the commencement thereof, be exercised at any time after the passing of the Act, subject to this restriction, that any such order shall not come into operation until the Act comes into operation;

AND WHEREAS it is necessary and expedient for the purpose of making The National Emergency Transitional Powers Act, 1945 effective at the date of the commencement thereof that those orders and regulations made under the War Measures Act or pursuant to authority created thereunder in force immediately before the first day of January, 1946 should be in full force and effect from such commencement and that there should be no cessation in the operation of such orders and regulations resulting from the War Measures Act (sections 3, 4 and 5 thereof) ceasing to operate;

NOW, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, and under the powers conferred by The National Emergency Transitional Powers Act, 1945, is pleased to order and doth hereby order that all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day The National Emergency Transitional Powers Act, 1945 comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act.

A.D.P. Heeney,

Clerk of the Privy Council.

06/09/2016 13:47

This Order includes provisions for revocation of the request on the part of those of the Japanese race who were naturalized ~~xxxxxxxx~~ or born in Canada. It seems appropriate that this purpose and intent be kept in mind throughout an examination of the provisions and construction of these Orders in Council. Such was the position taken in England as evidenced by the statement of Lord Maugham:

> "My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention."
> Liversidge v. Sir John Anderson, (1942) A.C. 206 at p. 219.

Counsel for the Committee submitted that the word "deportation" as used in section 3 of the War Measures Act is restricted to the deportation of aliens, and as these Orders made under that Act deal with other than aliens, the Governor in Council has exceeded his authority. The standard dictionaries do not agree as to the precise meaning of this word. It is restricted to aliens in Fong Yue Ting v. U.S.A., (1892) 149 U.S.R., 698 at p. 709. It is applied to native-born in Eshugbayi Eleko v. Government of Nigeria (Officer Administering), (1931) A.C. 662. As defined in the Immigration Act, 1927, R.S.C., c. 93, it is not restricted to aliens. Upon this reference it is not necessary to precisely define the word. It is enough to emphasize that as it is applied in law it is a compulsory sending out of, or as stated in the Oxford Dictionary "a forcible removal", and that while it need not be restricted to aliens, it does apply to them.

The first of these Orders in Council, P.C. 7355, deals with four groups. Para. 2(1) provides for those Japanese nationals who either have made a request for repatriation since December 8th, 1941, or were detained under the Defence of Canada Regulations and so detained on September 1st,

06/09/2016 14:02

1945. These Japanese nationals are aliens and as such are subject to deportation. The provision of the Order in Council providing for their deportation is valid. Attorney-General for Canada v. Cain, (1906) A.C. 542; 1 Cam. 631, where Lord Atkinson at p. 634 states as follows:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interest."

The second group is dealt with under para. 2(2) of P.C. 7355. It provides for the deportation of those of the Japanese race who have become naturalized, who have requested repatriation since the declaration of war and who have not revoked that request prior to midnight of the first day of September, 1945. It is contended that the Parliament of Canada has no power to revoke this naturalization except by virtue of the provisions of the Naturalization Act, 1927, R.S.C., c. 138. More particularly because it adopts, as Part II of the Naturalization Act, Part II of the British Nationality and Status of Aliens Act, 1914, being c. 17, 4 & 5 Geo. V, and amendments thereto as contemplated by the latter Act; the purpose and intent being to make for greater uniformity in the procedure and requirements of British nationality and the granting of naturalization certificates throughout specified parts of the British Commonwealth of Nations. It also provides for the revocation of these certificates. Section 9 in part reads as follows:

> "9. (1) Where the Governor in Council, upon the report of the Minister, is satisfied..... that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Governor in Council shall by order revoke the certificate."

06/09/2016 14:02

This provision was enacted by the Parliament of Great Britain in 1918, being an Act to amend the British Nationality and Status of Aliens Act, 1914 (8 & 9 Geo. V, c. 38), and was enacted in Canada by an Act to revise and amend the Naturalization Act, 1914 (1920, R.S.C., c. 59). These amendments were made as a result of the experiences arising out of the last war and deal specifically with and greatly enlarge the provisions for revocation of naturalization. Westlake's Private International Law, 7th Ed. at p. 371, referring to this particular legislation:

> "The powers of revocation are large and somewhat vague; and the idea of a nationality conditional on good behaviour and on keeping in close touch with the British dominions is one new in English law. Experience alone will show whether it will be desirable to keep it as a permanent variety of citizenship."

And again, referring to the same legislation, at p. 372:

> "The legislature or government of any British possession has the same power to grant a certificate of naturalization as the secretary of state has under the Act; and the provisions of the Act as to the grant and revocation of the certificate of naturalization apply,....."

This section 9 provides authority for the revocation of a certificate of naturalization when the recipient thereof shows "himself by act or speech to be disaffected or disloyal to His Majesty". A revocation at least by that government which has granted same and issued the certificate therefor. This appears from the entire section, but is made abundantly clear by subsection (6) hereafter quoted, which goes further and envisages the cancellation by one government of a naturalization granted by another government in some other part of His Majesty's dominions. It was contended by Mr. Geoffrion that Canada had not adopted Part II but had enacted a new Act modelled after the British Act. In either view, in my opinion the legislation provides for revocation by the government granting the naturalization.

06/09/2016 14:02

It seems to me that if during a state of war and the emergency resulting therefrom one so naturalized makes a request in writing for repatriation, he does so because of the war and matters associated therewith. The making of such a request and the persistence therein, as in this case to September 1st, 1945, a date after the cessation of hostilities, provides evidence that with respect to such a person his affections are not with Canada, the land of his adoption, but rather with the country from which he originally came. The effect of such conduct is a matter for the consideration of the responsible authorities of the State.

The only question with which we are here concerned is whether the Governor in Council had authority under the War Measures Act to provide for the deportation and the revocation of certificates of naturalization by Order in Council P.C. 7355. In my opinion the authority here exercised could in peacetime be exercised under the Naturalization Act. In time of emergency this can be accomplished under the War Measures Act through the medium of the Governor in Council passing an Order in Council and therefore in my opinion this paragraph in Order in Council P.C. 7355 is valid. In Re Gray, 57 S.C.R., 150.

The same section 9 contains a sub-paragraph (6) reading as follows:

> "6. Where a person to whom a certificate of naturalization has been granted in some other part of His Majesty's dominions is resident in Canada, the certificate may be revoked in accordance with this section by the Governor in Council, with the concurrence of the Government of that part of His Majesty's dominions in which the certificate was granted."

A paragraph to the same effect is in the Imperial Act (sec. 7(5) 8 & 9 Geo. V). It expressly contemplates the revocation of naturalization certificates granted by some other government