COPY

REPORT OF THE LEGAL COMMITTEE
of the National Association of Japanese Canadians
for the Annual General Meeting, October 8, 9, and 10, 1988

by: Cassandra Kobayashi, Chairperson

This Committee has operated informally in response to the research by Davis & Company concerning a possible civil action. The following lawyers have been asked for their input on various issues:

Shin Imai, Toronto
Maryka Omatsu, Toronto
Ann Sunahara, Edmonton
Alan Hoyano, Edmonton
Don Rosenbloom, Vancouver
Tom Berger, Vancouver

In addition, Roy Miki, Chairperson of the Vancouver JCCA Redress Committee, and Art Miki, NAJC President, have been active members of the Committee.

Civil Action

At the April 1988 Council Meeting in Ottawa, a motion was passed, "Moved that Davis & Co. be asked to proceed to the stage of an opinion letter and that there be Council approval before the issuing of the writ." Davis & Co. had volunteered to do some research on the limitation periods affecting possible causes of action, and upon hearing of the Council's motion, continued to prepare their opinion documentation.

It was through Robert Banno, who is a partner at Davis & Co. that the law firm undertook this research on its own initiative. Mr. Banno is also General Secretary of the Greater Vancouver JCCA Board of Directors, and a member of the Redress Committee.

On June 4, 1988, Roy Miki and I met with Robert Banno and Peter Voith, the lawyer who had done the research. We received a four-page letter, and a longer memorandum of law, outlining four areas where the limitation periods might be favourable. I circulated a memo to the Legal Committee and Strategy Committee asking for their views on how we should proceed.

Following verbal consultation with Roy Miki and myself, Davis & Co. then made a proposal dated July 13, 1988 concerning their fees. This letter was also circulated.

Source: Nikkei National Museum, 2018-16-2-11-1-1
www.nikkeimuseum.org

Ann Sunahara responded with a memo outlining her concerns. As well, the action was discussed at a meeting attended by with Tom Berger, Don Rosenbloom, Roy Miki, Art Miki, and myself. When a political settlement seemed certain, no further action was taken with respect to the civil suit.

Future of the Committee

With the Redress settlement in place, it will not be necessary to proceed with research on a legal action, and this committee's work is at an end. I recommend that this committee be joined with the Legal Affairs Committee to promote a reference to the Supreme Court of Canada concerning the Emergencies Act and the Charter of Rights, and to deal with other legal issues that may arise.

I would like to propose the following motion for Council's consideration:

> "That in view of the Redress settlement, the NAJC not proceed any further with legal research for a possible civil action."

If that motion is successful, I also propose:

> "That we thank Davis & Co. for their generous donation of research and time towards the Redress campaign."

All of which is respectfully submitted,

Cassandra Kobayashi

Source: Nikkei National Museum, 2018-16-2-11-1-2
www.nikkeimuseum.org

Ann

.pn

August 1, 1988

TO: Art Miki

COPY

FROM: Cassandra Kobayashi, 3245 West 12th Ave.,
Vancouver, B.C. V6K 2R8
(604) 731-8455 home, 731-0311 work or messages

RE: Redress Claim - Fee agreement with Davis & Co.

Further to my previous memo on the opinion letter from Davis & Co., Bob Banno has now provided me with a letter dated July 13, 1988 outlining their expectations regarding fees.

I have discussed this letter in detail with Bob Banno, and will share what we discussed. Numbers refer to the numbered paragraphs in his letter.

1. The percentages apply to any amount paid either in settlement of the court action, or politically. If the government offer consists of amounts to individuals, with no lump sum from which to pay Davis & Co., they would expect us to do our best to obtain a settlement including an amount to cover their fees. I discussed with Bob the possibility of the government offering a settlement prior to issuing the writ. In that case, we would be liable for paying 100% of their regular fees based on time, with no percentage of the settlement.

2. I intend to ask Bob for the billing rates of the various parties likely to work on this case. He indicated that he'd like Peter Voith to be the primary counsel in this case, with advice and guidance from John Hunter who is a senior litigation expert in the firm. Voith has been practicing about 7 years and Hunter about 13. Ross Clark would also help. Hunter's main client is MacMillan Bloedel.

3. & 4. & 5. By way of illustration, if Davis & Company does $250,000 in work, plus $50,000 in disbursements in the first year, we are to pay half the fees and all the disbursements - $175,000. Under para. #5, all disbursements are due when billed. However, under para. #4, we can opt to pay only $100,000 towards fees per year, and the balance of the fees will bear interest at 12% until paid.

6. If a court awards "costs" to us, or if in settling the court action "costs" are negotiated as part of the settlement, Davis & Co. gets 100% of this amount, in addition

Source: Nikkei National Museum, 2018-16-2-11-2-1
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to the rest of the contingent fee payable.

page 3 - A mutually acceptable firm of chartered accountants can be appointed if we cannot agree with the amount of the settlement (e.g. if it is amounts to individuals phased in over time) from which to calculate the contingent legal fees.

In our discussion, Bob indicated about 20% of the time spent in this case will be spent prior to issuing the writ, or about $200,000 in fees of which we would have to pay $100,000, plus disbursements. I asked what would happen if prior to issuing the writ, they come back with an opinion on the substantive merits of the case which indicated a very poor chance of staying in the court until the issue can be heard on its merits. If we decide not to go ahead, we would be liable for 100% of the fees and disbursements.

Please call me to discuss this information. Bob Banno is very keen to go ahead, and feels we should act as soon as possible to preserve whatever limitation periods we still have in our favour.

In response to my previous memo, Ann Sunahara sent the enclosed memo. Don Rosenbloomm and Tom Berger also responded with similar concerns about the substantive issues. On the other hand, Bob Banno stressed to me that although it is unlikely we will get an assurance that we will "win" the case, the action is intended to bring pressure to bear on the government who fear a generous award by the liberal Supreme Court of Canada. The possibility of losing in the SCC would be sufficient inducement to settle with us, Bob says.

Please advise what you think our next step is. Are we happy with Davis & Co. handling the case? Can our community fundraise to that extent? Is Ann Sunahara available for research starting in the next few months?

Cassandra Kobayashi

Source: Nikkei National Museum, 2018-16-2-11-2-2
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WRITER'S DIRECT LINE
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FILE NO. 50739-37599/#132
REPLY TO R.T. Banno

July 13, 1988

COPY

JUL 19 1988

National Association of Japanese Canadians
c/o Mr Roy Miki
2995 West 15th Avenue
Vancouver, B.C.
V6K 3A2

Attention: Mr. Roy Miki and Ms. Cassandra Kobayashi

Dear Sirs:

Re: Redress Claim

This letter is in reference to the above matter, our letter to you of June 3, 1988, and the meeting with you in our office of June 4, 1988.

You have requested a fee structure proposal in respect of the possible claim against the Federal Government and other appropriate defendants for compensation for the internment of Japanese Canadians, the confiscation and sale of their property, and their deportation during and after World War II.

We would be prepared to act for you in respect of the claim on the following understanding:

1. If a Court award or a settlement is made, you will pay our firm a fee based on the aggregate of the following:

(a) 2.5 per cent of that part of the first $50,000,000 in excess of $12,000,000;

(b) 2 per cent of that amount in excess of $50,000,000 up to $100,000,000;

Source: Nikkei National Museum, 2018-16-2-11-3-1
www.nikkeimuseum.org

(c) 1.5 per cent of that amount in excess of $100,000,000 up to $150,000,000;

(d) 1 per cent of that amount in excess of $150,000,000 up to $200,000,000; and

(e) 0.5 per cent of any excess over $200,000,000.

You will note that since the Federal Government has already offered $12 million, we do not propose to charge a contingent fee on the first $12 million.

2. If the Court award or settlement results in a contingent fee to us less than the value of time normally chargeable by our firm, you will pay our firm a fee based on chargeable time.

3. If there is no court award and no settlement is made, you will pay our firm a fee based on 50 per cent of all time normally chargeable by our firm. Subject to paragraph 4 of this letter, these amounts will become due and owing immediately upon the rendering of accounts by Davis & Co. to you.

4. The fees payable by you pursuant to paragraph 3 may, at your option, be payable at the rate of $100,000 per year until the account or accounts are satisfied. The unpaid balance of the account or accounts will bear interest at the rate of 12 per cent per annum calculated half yearly not in advance both before and after maturity.

5. You will pay all disbursements incurred by our firm including fees and charges of expert witnesses and consultants immediately upon billing.

6. As an additional fee, you will pay our firm a fee based on 100 per cent of all costs awarded in your favor by any Court or as part of any negotiated settlement.

7. You will not be required to make any payments to our firm except pursuant to paragraphs 3, 4, and 5 of this letter, until an award of a Court or a settlement award is paid. If an award of a Court or a settlement is established and is retained by any of the defendants in any account for you or for the Japanese Canadian plaintiffs, you will authorize and instruct the defendants to disburse the fees to our firm immediately.

Source: Nikkei National Museum, 2018-16-2-11-3-2
www.nikkeimuseum.org

We are aware that it may be difficult to provide for fees to be payable on a percentage basis in circumstances where a fund is established or community projects are to be funded by award monies or if payments are to be made to individuals as no cash payments may be made to you. We would expect in such circumstances that you would negotiate with the government for a separate amount for legal fees.

We are also aware that it may be difficult to establish what the amount of the settlement is in some circumstances. We are prepared in such circumstances to rely on the opinion as to the amount of the award or settlement of a mutually acceptable firm of chartered accountants.

If the financial arrangements described in this letter are acceptable to you, we will prepare a simple letter agreement which we would ask that you have reviewed on your behalf by another law firm.

Please do not hesitate to contact us if you have any questions or comments on this matter.

Yours very truly,

DAVIS & COMPANY

Per:

RTB/sw

Source: Nikkei National Museum, 2018-16-2-11-3-3
www.nikkeimuseum.org

Naj c. mas p. 4-8

M ANN SUNAHARA
Barrister & Solicitor
9809 91 Avenue
Edmonton, Alberta
T6E 2T5
(403) 433 - 8104

June 29, 1988

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

Dear Cassandra,

Re: Davis and Co. Opinion

The following comments are based on a fairly quick review of the Davis and Co. opinion and can be expanded upon later, if necessary. I will discuss each of the four causes of action set out and then make some general comments.

(a) Constitutional Validity:

I think that their argument that limitation periods cannot exclude a challenge to the constitutional validity of an act has strength for reasons quite separate from those advanced. Limitation periods do not wipe out a claim, but only the right to enforce the claim. Proof that a piece of legislation is unconstitutional is a necessary precondition to establishing a claims for injury or damage, whether that claim is enforceable or unenforceable. There is a presumption that all legislation is constitutional (except where the challenge is that the legislation breaches the Charter) and, therefore, that all actions taken in good faith under the legislation are right and proper. Only when the presumption of constitutionality is rebutted does the issue of whether there is any enforceable claim arise. Enforceability and constitutionality, therefore, are two different issues. Constitutionality must always be capable of being tested. To hold otherwise would place our entire system in peril.

The concern raised at pages 10 - 14 that the orders may not be able to be challenged constitutionally because of their subordinate nature can safely be ignored. Orders under the War Measures Act can have the force and effect of statutes: See Chemicals Reference [1943] S.C.R. 1 at 17. The orders uprooting and detaining Japanese Canadians and stripping them of their property are legislative in nature, not administrative or judicial. They

Source: Nikkei National Museum, 2018-16-2-11-4-1
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are an exercise by the executive of legislative powers delegated to it in the War Measures Act. Since in the absence of the War Measures Act Parliament would have had to pass statutes to do what these orders did, we can be confident that they are not subordinate instruments.

The greater difficulty with a challenge of this type is that, notwithstanding the fact that these orders infringe on provincial jurisdiction (i.e. property and civil rights), they are probably constitutional under Parliament's peace, order and good government powers (preamble s. 91 Constitution Act, 1867). There are several precedents for the principle that Parliament can infringe on provincial jurisdiction in time of "extraordinary peril to the national life of Canada": See Hogg, Constitutional Law of Canada, at 249. Those perils, as you will recall from first year in law school, have included war, including its economic aftermath; apprehended insurrection; double digit inflation; and possibly national intemperance or famine. Infringing s. 92 property and civil rights powers was upheld in Fort Frances Pulp and Power Co. v. Manitoba Free Press [1923] A.C.695 at 705 (J.C.P.C.) and in Wartime Leasehold Reference (1950) [1950] S.C.R. 124.

It would be necessary, therefore, to distinguish these cases. This might be accomplished two ways:

(a) on the grounds of the substantial difference in principle between detention without trial and forfeiture in the case of Japanese Canadians and the general application of rationing and rent controls in the above cases; and,

(b) on the evidentiary ground that there was no emergency supporting the orders.

To succeed on the second ground it will be necessary first to convince the court to distinguish between the general emergency of the war and the particular emergency alleged with respect to Japanese Canadians. It would be a significant victory in law if the Supreme Court of Canada holds that a general state of war is not sufficient to legitimize every exercise of Parliament's POGG powers by the executive. Further, if the court examines the constitutionality of the orders on the basis of the particular "emergency" (in this case the alleged threat to national security arising from the presence of 20,881 Japanese Canadians on the Pacific Coast), then adducing evidence of the absence an emergency becomes considerably easier. If the court can be persuaded to examine the particular emergency, a precedent would be established that could be used to restrain in law the potential for abuse of power in time of emergency.

Source: Nikkei National Museum, 2018-16-2-11-4-2
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(b) Orders as arbitrary, in bad faith and beyond jurisdiction

This is a variation on the "no emergency" argument. No order passed in bad faith is within the bounds of the War Measures Act and hence is ultra vires the executive passing it. The main problem I see with a bad faith argument is that my review of the evidence suggests that only 4 Cabinet ministers actively acted in bad faith. They either lied to their Cabinet colleagues or misled them. On the other hand there is evidence that other members of the Cabinet were quite willing to accept any repressive measure against Japanese Canadians under the argument that it was "politically necessary". It would be necessary, therefore, to argue that the bad faith of the few irrepairably taints the actions of the whole. It would also be necessary to argue that the failure of the Cabinet to accept the advice of Canada's senior military and police officers, is evidence of bad faith. I have my doubts that any court would decide that implementing a policy that it contrary to that recommended by the civil service is, in itself, bad faith. The court will always seek to give the executive room for political considerations.

Political considerations are also the primary defence to arbitrariness. Courts historically have been very reluctant to find any action by a government to be arbitrary. Both in Canada and internationally, they have consistantly taken the line that the executive has the best access to information and can make the most informed choice. Even where the courts feels matters ought to have been handled differently, they will require very clear evidence that there was no basis for the decision before they will find arbitrariness: See Anti-Inflation Reference for example.

Because of this element we may end up with mixed results. For instance a court might find that the decision to uproot Japanese Canadians was not entirely arbitrary because of political considerations, but that the detention of Japanese Canadians and the subsequent orders were.

This will largely be a question of the quality of our evidence. Since the political considerations that most strongly support the actions of the Cabinet (at least for the uprooting) are B.C. public opinion and the potential for civil disorder, it will be necessary to produce as much evidence as possible to the contrary. (It is inevitable that at some point in this action the matter may degenerate, at least temporarily, into an evidentiary war over whether JC's were a "threat to national security" --- and all the worms will come out of the woodwork to put in their two cents) The fact that the RCMP has consistantly refused to open its files in this matter is a serious difficulty. My

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attempts in the 1970's were directed through normal channels. It may be necessary to approach the RCMP at the highest level for cooperation --- after all we are vindicating their position --- or to make a formal request under the Access to Information Act, which will probably be refused on Privacy Act grounds, followed by a motion to compell production of these documents (another interim step).

(c) Personal status declaration

I like this idea, particularly if it gives us a good head of damages to prevent the Crown arguing that the suit is frivilous because the orders-in-council have been revoked and enforcement of damages is out of time. Damages for abuse of the rights of citizenship is a new head but could well prove very effective as a means of restraining abuse of power. (Native Canadians may also be very interested if we succeed here!) This issue could also result in the automatic restoration of the Canadian citizenship of those deported in 1946 -- one of the redress demands.

(d) Fraudulant breach of trust

This has been tried before: See Nakashima et al v. The King [1947] E.C.R. 486; Iwasaki v. The Queen [1969] 1 E.C.R 281; and Laurent v. The Queen (1976) 66 D.L.R. (3d) 764. In the last case, Thorson J's conclusion in Nakashima that there had been no breach of trust by the Custodian was strongly criticized. Addy J found that the Custodian's "absolute discretionary power to sell and deal with property and to pay expenses incurred" was "easily reconciled" with the existance of a trust, and that that trust possibly extended to the property itself where the former owner, "being a Canadian", continues to claim his property.

Of advantage here also is the fact that we have a great deal of new evidence with respect to the bad faith of the order to sell property. In short, where the above cases are concerned with the carrying out of the order, we can also attack the order itself.

As a word of caution, when choosing plaintiff's be sure to pick persons who were Canadians in 1942. Remember also that in law prior to 1947 a woman on her marriage automatically assumed the nationality of her husband and may by marriage lose her birth nationality (which she held through her father only -- we have come a long way, baby).

Fees:

I note the semi-continguency basis proposed by Davis and Co. The only caution I give is that any work done

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by Davis & Co's Ontario agent is a disbursement, which would become therefore immediately payable in full. If this matter is proceeded with it may be necessary to have a similar agreement with the Ontario agent chosen by the NAJC in conjunction with Davis and Co.

Secondly, a lot of money may be saved having any agreement specify that Davis and Co. or their agents use my services as research counsel doing legal research and collecting the evidence. There are several reasons for this suggestions:

(a) I have done a lot of the work already -- both legal and historical;

(b) my rates are one-half to one-third of those of a big downtown lawfirm (My overhead is minimal compared to that of a regular lawfirm)

(c) I have considerable experience as a junior on big lawsuits;

(d) I can give it the time and attention that a firm working on continguency may not be able to give it.

This action could be very useful to both push the redress issue and to clarify the legal and historical problems that arise from the experience of Japanese Canadians during and after the Second World War. Dangerous legal precedents were established at that time and there has never been an official inquiry into those events, continuing the cloud over Japanese Canadians. I would very much like to see the record put straight.

I hope this is of some assistance to you.

Yours truly,

M. Ann Sunahara

Source: Nikkei National Museum, 2018-16-2-11-4-5
www.nikkeimuseum.org

NAJC-MOS pp 3

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

July 5, 1988

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

Dear Cassandra,

Further to your letters of June 9, 1988 and June 16, 1988 and our conversation of June 27, 1988, please find enclosed:

(a) the missing page from my memo of law to Art on what is wrong with the Minister's opinion;

(b) a copy of Hansard for June 21, 1988 with my submission to the Senate;

(c) a copy of my reporting letter to Art with the bad news that the Senate did not make the amendments we requested (the exact amendment is found in the copy of my letter to Senator Molgat which accompanied the memo of law to Art);

(d) a copy of the draft letter for supporters of our request for a reference included in the letter to Art of today's date; and,

(e) my comments on the Davis and Co. brief, which are separate from this letter in order that you may circulate them better.

This should bring you up to date. Take care.

Yours truly,

M. Ann Sunahara

Source: Nikkei National Museum, 2018-16-2-11-5
www.nikkeimuseum.org

Cassandra Kobayashi *lawyer*

Box 46265 Station G 731-0311
Vancouver, B.C.
V6R 4G6

June 9, 1988

Dear Ann,

Thank you for your correspondence - the response to the Minister on the Charter override, and the letter regarding your good work contacting Tim Christian and the articles for Canadian Lawyer and the CBR.

I think that your idea of approaching the Senate is a good one. I'm glad you're coming up with these wonderful ideas and have the energy to pursue them!

As you can see by the enclosed letter, I have written to the Canadian Council for Social Development which funds certain Charter equality cases, I believe. I'll keep you posted as to their response.

Also, please send me a copy of the page or pages in your memo which Art was to send to the Minister from the end of para. 2.6 to whatever comes before para. 3.0. It was missing from my copy. I've forwarded copies of your letter beginning "Another update!" to Don Rosenbloom and Roy Miki.

Keep up the good work! See you here in Vancouver later this month.

Yours truly,

Cassandra Kobayashi

cc: Art Miki

Source: Nikkei National Museum, 2018-16-2-11-6-1
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Cassandra Kobayashi *lawyer*

Box 46265 Station G 731-0311
Vancouver, B.C.
V6R 4G6

June 9, 1988

COPY

Canadian Council for
Social Development
55 Parkdale Avenue
Box 3505
Station C
OTTAWA, Ont.
K1Y 4G1

Dear Madam/Sir,

Re: Funding for legal actions or other projects

I am interested in knowing what types of funding you make available through your programs.

In particular, I am interested in the Charter "equality cases" you would fund. As well, do you fund research or other court cases?

Thank you for responding to this inquiry.

Yours truly,

Cassandra Kobayashi

cc: Ann Sunahara

Source: Nikkei National Museum, 2018-16-2-11-6-2
www.nikkeimuseum.org

Box 46265 Station G
Vancouver, B.C.
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Ms. Ann Sunahara
9809 - 91 Ave.
EDMONTON, Alta.
T6E 2T5

Source: Nikkei National Museum, 2018-16-2-11-6-3
www.nikkeimuseum.org

retainer by the C.N.R. requires them to research again documents or facts of the same class? They learned about it, and possibly its relevance to the plaintiffs' strategy, during the course of their retainer by the plaintiffs, but they cannot disregard their knowledge of such documents or facts if the areas of investigation requested by the C.N.R. overlap, as they may, with the work performed for the plaintiffs. These are issues which I cannot weigh on this application.

As I think the plaintiffs have established a fair case to be tried, it is necessary to consider the balance of convenience. It is impossible to assess the harm that may accrue to the plaintiffs by the purported employment of the defendants by the C.N.R. or the Attorneys General in connection with the *C.N.R.* case. There may be no harm at all but it may be substantial. On the other hand, the defendants' loss, if the order is confirmed, may be quantified. While the plaintiffs are presently underfunded, I have no real doubt they can satisfy an award of damages. There is another loss to the defendants, however, and that is the loss of opportunity to work in their chosen discipline at a time when there is significant activity arising out of land claim litigation.

I do not think the plaintiffs have raised an arguable case against the defendants accepting employment by the Attorneys General for work on cases other than the *C.N.R.* case. I think the balance of convenience heavily favours the plaintiffs in connection with work related to the *C.N.R.* action against which the defendants are protected by the plaintiffs' undertaking.

I would therefore vary the order to reflect the foregoing but otherwise maintain until trial the injunction made 11th September 1986 unless counsel wish to speak to its specific terms which were not discussed at the hearing. It goes without saying that the plaintiffs' entitlement to confidentiality must be protected.

As this order gives the plaintiffs almost the complete remedy they would expect to obtain at trial, and as the principal land claim cases are or are soon to be set for trial, I would look favourably upon an application for a very early trial date if the defendants wish to have these issues explored at a trial.

Application dismissed in part.

Source: Nikkei National Museum, 2018-16-2-11-7-1
www.nikkeimuseum.org

AIR CANADA v. ATTORNEY GENERAL OF BRITISH COLUMBIA

[Indexed as: **Air Can. v. B.C. (A.G.)**]

Supreme Court of Canada,
Dickson C.J.C., McIntyre, Chouinard,
Wilson, Le Dain and La Forest JJ.

Heard – November 4, 1985.
Judgment – November 27, 1986.

Crown – Proceedings against the Crown – Procedure – In provinces retaining petition of right – Provincial Attorney General not having discretion to advise Lieutenant Governor to refuse fiat to petition of right under which claim made for return of money levied under statute alleged to be unconstitutional.

The petitioner commenced an action in the Supreme Court of British Columbia seeking a declaration that the Gasoline Tax Act did not apply to it or was ultra vires, an accounting of money paid under that Act and a declaration that it was entitled to have the money repaid. the petitioner had been paying taxes under the Act since 1937, and, pursuant to the Crown Proceeding Act, it also issued a petition of right with respect to moneys paid prior to 1st August 1974. On the advice of the Attorney General, the Executive Council advised the Lieutenant Governor to deny the fiat. The petitioner then brought an application under the Judicial Review Procedure Act for an order in the nature of mandamus compelling the Attorney General to consider the petition and to advise the Lieutenant Governor to grant the fiat; the petitioner also sought a declaration that the Attorney General had omitted to exercise a statutory power of decision and an order directing him to reconsider and determine whether the Lieutenant Governor should be advised to grant the fiat. The application was denied and the petitioner's appeal was dismissed. The petitioner further appealed.

Held – Appeal allowed.

All executive powers must be adapted to conform to constitutional imperatives, and the Attorney General did not have the discretion to advise the Lieutenant Governor to refuse a fiat to a petition of right under which a claim is made for the return of money levied under a statute alleged to be unconstitutional. As moneys obtained under an unconstitutional statute cannot be retained by the government, it cannot achieve the same result under a purported exercise of a discretion to refuse a fiat, whatever the legal foundation of that supposed discretion. Even if there was a residual power to refuse a fiat in a truly frivolous case, this was not such a case. As the only machinery for obtaining a judgment for money against the Crown in the circumstances of this case was by petition of right, a fiat was necessary.

The Attorney General was the appropriate person against whom an order by way of mandamus should issue. By virtue of s. 2 of the Attorney General Act he is entrusted with the sole power and duty to advise the Lieutenant Governor whether or not to issue a fiat. Although the Provincial Secretary is assigned the task of receiving petitions by virtue of the Crown Procedure Act, he must seek the advice of the Attorney General before

referring the matter to the Executive Council, which in turn advises the Lieutenant Governor in accordance with the recommendation of the Attorney General. In giving advice, the Attorney General must conform to constitutional requirements and accordingly must advise the Lieutenant Governor to grant his fiat. Even assuming that the Executive Council had a meaningful role in the decision, it would also be obligated to decide in accordance with constitutional requirements.

Cases considered

A.G. Can. v. Inuit Tapirisat of Can., [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.] – referred to.

Amax Potash Ltd. v. Sask., [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222 – applied.

B.C. Power Corp. v. B.C. Elec. Co., [1962] S.C.R. 642, 38 W.W.R. 701, 34 D.L.R. (2d) 274 [B.C.] – applied.

Bombay & Persia Steam Navigation Co. v. MacLay, [1920] 3 K.B. 402 – referred to.

Irwin v. Grey (1862), 3 F. & F. 635, 176 E.R. 290 [affirmed L.R. 2 H.L. 20] – referred to.

Orpen v. A.G. Ont., 56 O.L.R. 327, [1925] 2 D.L.R. 366 (H.C.) [varied 56 O.L.R. 530, [1925] 3 D.L.R. 301 (C.A.)] – considered.

Padfield v. Min. of Agriculture, Fisheries & Food, [1968] A.C. 997, [1968] 2 W.L.R. 924, [1968] 1 All E.R. 694 (H.L.) – referred to.

R. v. Inland Revenue Commr.; Re Nathan (1884), 12 Q.B.D. 461 (C.A.) – considered.

Ryves v. Wellington (Duke) (1846), 9 Beav. 579, 50 E.R. 476 (Ch.) – referred to.

Teh Cheng Poh v. Pub. Prosecutor (Malaysia), [1980] A.C. 458, [1979] 2 W.L.R. 623 (P.C.) – referred to.

Thorson v. A.G. Can., [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225 [Ont.] – applied.

Statutes considered

Attorney General Act, R.S.B.C. 1979, c. 23
s. 2(*a*), (*e*)
Crown Procedure Act, R.S.B.C. 1960, c. 89
s. 4
Crown Proceeding Act, R.S.B.C. 1979, c. 86
Gasoline Tax Act, R.S.B.C. 1979, c. 152
Interpretation Act, R.S.B.C. 1979, c. 206
s. 29 "Lieutenant Governor", "Lieutenant Governor in Council"
Judicial Review Procedure Act, R.S.B.C. 1979, c. 209

Authorities considered

Edwards, The Law Officers of the Crown (1964), p. 154.
9 Hals. (2d) 694, para. 1180, note (c).

Canadian Encyclopedic Digest Classification (West. 3rd)

Crown
XVII. 2. c.

Canadian Abridgment (2d) Classification

Crown
XVII. 3. a.

Source: Nikkei National Museum, 2018-16-2-11-7-2
www.nikkeimuseum.org

APPEAL from judgment of the British Columbia Court of Appeal, 47 B.C.L.R. 341, [1983] 6 W.W.R. 689, 5 Admin. L.R. 270, 150 D.L.R. (3d) 653, dismissing appeal from decision, 41 B.C.L.R. 41, [1982] 6 W.W.R. 415, 141 D.L.R. (3d) 530, refusing application to compel Attorney General to recommend to Lieutenant Governor to grant fiat permitting petitioner's action against the Crown.

D.M.M. Goldie, Q.C., and *W.S. Martin*, for appellant.
E.R.A. Edwards, Q.C., and *R.V. Farley*, for respondent.

(No. 18089)

November 27, 1986. The judgment of the court was delivered by

LA FOREST J.:– The issue in this case is whether an order may be issued directing a provincial Attorney General to advise the Lieutenant Governor to grant a fiat to a petition of rights under which a claim is made for the return of money alleged to have been levied by the province under an unconstitutional statute.

In July 1980 the appellant, Air Canada, commenced an action in the Supreme Court of British Columbia seeking a declaration that the Gasoline Tax Act, R.S.B.C. 1979, c. 152, does not apply to Air Canada or is ultra vires the province, an accounting of all moneys paid under that Act by Air Canada and a declaration that the appellant is entitled to be repaid all moneys paid after 1st August 1974. This action represented only a portion of Air Canada's claim. It had been paying taxes under the Act since 1937. However, as regards causes of action that arose before 1st August 1974, the Crown Proceeding Act, R.S.B.C. 1979, c. 86, preserved the traditional method of suit against the Crown by way of petition of right which requires those seeking redress from the Crown to obtain a fiat. In conformity with this procedure, Air Canada in July 1981 issued a petition of right seeking substantially the same relief as in the action described above, but for moneys paid before 1st August 1974. It is with this petition of rights that we are concerned on this appeal.

The petition was duly served on the Provincial Secretary and a copy was forwarded to the provincial Attorney General. The Attorney General advised the Executive Council to recommend that the Lieutenant Governor deny the fiat. The Provincial Secretary then forwarded a copy of the petition to the Lieutenant Governor along with the following advice:

> After due deliberation and on the recommendation of the Attorney General, the Executive Council humbly advises that this is not an appropriate case for the granting of a Fiat. The Executive Council has instructed me to transmit this advice.

Pursuant to this advice, the Lieutenant Governor accordingly declined to grant the fiat and the Provincial Secretary communicated this fact to Air Canada.

Air Canada then applied to the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, for:

(a) an order in the nature of mandamus compelling the Attorney General to consider the petition of right and then advise the Lieutenant Governor whether to grant his fiat;

(b) a declaration that the Attorney General has omitted to exercise his statutory power of decision to advise the Lieutenant Governor and that he has a duty to do so;

(c) a direction to the Attorney General to reconsider and determine whether the Lieutenant Governor should be advised to grant his fiat together with reasons.

Air Canada's application was heard by Callaghan J., who dismissed it in a judgment pronounced on 1st October 1982 [reported at 41 B.C.L.R. 41, [1982] 6 W.W.R. 415, 141 D.L.R. (3d) 530]. Air Canada then appealed to the British Columbia Court of Appeal which, by majority (Taggart and Aikins JJ.A., Anderson J.A. dissenting), dismissed the appeal [reported at 47 B.C.L.R. 341, [1983] 6 W.W.R. 689, 5 Admin. L.R. 270, 150 D.L.R. (3d) 653]. Air Canada was then granted leave to appeal to this court.

In this court, counsel for Air Canada did not press the arguments regarding judicial review of statutory powers, but essentially sought an order in the nature of mandamus, which formed the basis of the judgment of Anderson J.A., the dissenting judge in the Court of Appeal. Since I am substantially in agreement with Anderson J.A., I need not enter into a discussion of the other issues raised in the case.

The applicable law on this issue evolved from the well established principle that neither Parliament nor a legislature can preclude a determination of the constitutional validity of legislation. That principle was thus expressed by Laskin J. in *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138 at 151, 43 D.L.R. (3d) 1, 1 N.R. 225 [Ont.]:

> The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied . . .

Source: Nikkei National Museum, 2018-16-2-11-7-3
www.nikkeimuseum.org

I cannot believe that if there was no Crown Proceeding Act permitting suits against the Crown, a court could, where the case was not frivolous, refuse access to the court to test the constitutionality of a statute simply because a fiat was refused. What is sought here, however, is more involved. The action is an attempt to obtain redress from the Crown for benefits obtained pursuant to an invalid statute.

This court took an important step in that direction in *B.C. Power Corp. v. B.C. Elec. Co.*, [1962] S.C.R. 642, 38 W.W.R. 701, 34 D.L.R. (2d) 274 [B.C.]. There the plaintiff sought the appointment of a receiver over property owned by a corporation whose common shares had been vested in the Crown in right of the province by a statute whose constitutional validity was contested. The Crown resisted the appointment of the receiver on the ground that this would affect its property and interests. This court, however, rejected the Crown's contention. Kerwin C.J.C., giving the majority judgment, set forth the following principles at pp. 644-45:

> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid.

In *Amax Potash Ltd. v. Sask.*, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222, this court went further and held ultra vires a statute that prohibited the recovery of taxes paid under protest pursuant to an unconstitutional statute. Dickson J. succinctly put the principle in these terms at p. 592:

> The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means.

Let us examine the present situation in the light of these principles. Until the passage of the Crown Proceeding Act, the traditional way to sue the Crown, we saw, was by petition of right, but no court would take cognizance of a case until the Lieutenant Governor had issued his fiat. This traditional procedure has been retained in British Columbia in respect of causes of action against the Crown that arose before 1st August 1974. The present is such an action. The Lieutenant Governor has refused his fiat. Thus, if this refusal is constitutionally permissible, what *Amax* declared was not possible has been effectively, if indirectly, accomplished by the exercise of the Crown's prerogative power to refuse a fiat.

In my view, if even a statute cannot permit the retention of moneys obtained under an unconstitutional statute, that result cannot be achieved under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives.

There was considerable discussion in the courts below regarding the extent of the discretion of the Lieutenant Governor to grant or deny his fiat. There are indications in some cases that there is, in effect, a duty to grant the fiat unless a claim is frivolous: see *Ryves v. Duke of Wellington* (1846), 9 Beav. 579, 50 E.R. 467 at 475 (Ch.); *R. v. Inland Revenue Commr.; Re Nathan* (1884), 12 Q.B.D. 461 at 479 (C.A.). The fiat, Bowen L.J. states in the latter case, is granted as a matter of "invariable grace" by the Crown and it is the constitutional duty of his adviser not to advise refusal of a fiat unless the claim is frivolous. In *Orpen v. A.G. Ont.*, 56 O.L.R. 327, [1925] 2 D.L.R. 366 at 372 (H.C.), however, Riddell J. explained these remarks as simply reflecting the usual practice. The constitutional duty of the sovereign's advisers in such a case, he stated, is to act conscientiously in their best judgment (p. 375).

I need not consider which of these views should prevail in ordinary cases. For, whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution. Assuming there might still be a residual power to refuse a fiat in a truly frivolous case, no one can claim this is such a case, and no such contention was put forward.

Source: Nikkei National Museum, 2018-16-2-11-7-4
www.nikkeimuseum.org

It does not follow, as Taggart J.A. suggested, that if the foregoing constitutional position is correct, then there is no need for Air Canada to seek a fiat. The principle I have enunciated must be applied within the context of the institutional arrangements provided by law. The only machinery provided for obtaining a judgment for money against the Crown in circumstances like the present is, by virtue of the Crown Proceeding Act, by petition of rights, and to pursue a claim in that way, a fiat is necessary.

To achieve this result, Air Canada seeks to obtain an order by way of mandamus directing the Attorney General to advise the Lieutenant Governor to grant a fiat because the Lieutenant Governor acts on his advice in considering the grant of a fiat. This power of the Attorney General is exercised in conformity with s. 2(*a*) and (*e*) of the Attorney General Act, R.S.B.C. 1979, c. 23, which reads as follows:

> 2. The Attorney General
>
> (*a*) is the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council;
>
> (*e*) is entrusted with the powers and charged with the duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as the same powers and duties are applicable to the Province, and also with the powers and duties which, by the laws of Canada and of the Province to be administered and carried into effect by the government of the Province, belong to the office of the Attorney General and Solicitor General.

These provisions make the Attorney General the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council and, by s. 2(*e*), entrust him with the duties of the Attorney General of England as far as these are applicable to the province. This includes the right to advise the Crown regarding the grant of a fiat; see J.Ll.J. Edwards, The Law Officers of the Crown (1964), at p. 154; *Re Nathan*, supra, at pp. 468, 475, 479; 9 Hals. (2d) 694, para. 1180, note (c). It is true that some cases mention that in England the sovereign acted on the advice of the Secretary of State: see *Bombay & Persia Steam Navigation Co. v. MacLay*, [1920] 3 K.B. 402 at 408; *Irwin v. Grey* (1862), 3 F. & F. 635, 176 E.R. 290 at 291.But, as is obvious from the latter case, the Secretary's duties in this area were essentially to receive petitions of right and, after seeking the opinion of the law officers thereon, to advise Her Majesty accordingly.

A similar position prevails in British Columbia. There the Provincial Secretary is assigned the task of receiving peti-

tions for transmittal to the Lieutenant Governor for consideration. This is done by s. 4 of the Crown Procedure Act, R.S.B.C. 1960, c. 89, which reads as follows:

> 4. (1) The petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he thinks fit, may grant his fiat that right be done.
>
> (2) No fee or sum of money shall be payable by the suppliant on so leaving the petition, or upon his receiving back the same.

As Taggart and Anderson JJ.A. in the Court of Appeal explain, however, the Provincial Secretary seeks the advice of the Attorney General, the legal member of the Executive Council, before referring the matter to the Executive Council. The Executive Council then advises the Lieutenant Governor as to the manner in which he should dispose of the matter on the recommendation of the Attorney General.

From the foregoing, it seems to me that the appropriate officer against whom an order by way of mandamus should issue in this case is the Attorney General. He is the Lieutenant Governor's principal legal adviser, and I am inclined to agree with Anderson J.A.'s view that, by virtue of s. 2 of the Attorney General Act, he is entrusted with the sole power and duty to advise the Lieutenant Governor whether or not to issue a fiat. That was the English position, which s. 2(*e*) adopts. One must make a distinction here between the Lieutenant Governor and the Lieutenant Governor in Council. The latter includes the Executive Council; the former does not: see Interpretation Act, R.S.B.C. 1979, c. 206, s. 29. It is to the Lieutenant Governor alone that the power to issue a fiat is given by the Crown Procedure Act. That being so, as Anderson J.A. notes, there is no legal scope for the involvement of the Executive Council. The referral to the council becomes a mere formality.

It is not really necessary, however, to pronounce definitively on the latter issues. Even on the assumption that under ordinary circumstances there is a meaningful role for the Executive Council to play in deciding whether or not a fiat should issue, I would retain the same view. Technicality must be tempered with realism. The Attorney General is the Lieutenant Governor's principal legal adviser and the legal member of the Executive Council. Though his duty is technically simply to advise, the issue here is a legal one, one moreover to which, under the Constitution, there is only one answer. In giving advice, the Attorney General must conform to the requirements imposed by the federal structure of the Constitution. He is bound to advise the Lieutenant Governor to grant his fiat. I

cannot accept the proposition advanced by Callaghan J. and the majority of the Court of Appeal to the effect that the Attorney General complied with his duty to advise the Lieutenant Governor when he advised him to refuse a fiat.

The Executive Council is in turn bound to accept the advice of the Attorney General in a case like the present. For, even if it has a right to advise the Lieutenant Governor, it, too, is under an obligation to exercise that right consistently with constitutional imperatives. In any event, one could look at the order sought as being directed to the Attorney General in a representative capacity: see *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.].

Finally, I would note that there is precedent for the kind of order sought here. *Teh Cheng Poh v. Pub. Prosecutor, Malaysia*, [1980] A.C. 458, [1979] 2 W.L.R. 623 (P.C.) (Malaysia), stands for the proposition that mandamus lies to compel a minister to properly advise the executive where there has been a constitutional abuse of power by the Crown; see also *Padfield v. Min. of Agriculture, Fisheries & Food*, [1968] A.C. 997, [1968] 2 W.L.R. 924, [1968] 1 All E.R. 694 (H.L.).

Finally, counsel for the respondent argued that a judgment along these lines would preclude the province's relying not only on Crown immunity, but also on limitation periods, retroactive remedial legislation and mutual mistake of law to retain moneys collected under ultra vires legislation. While I do not wish to enter into these issues at any length, I do not think this conclusion necessarily follows. There is a difference between an executive act directly interfering with a recourse to the courts for the recovery of moneys under an allegedly unconstitutional statute and relying on general principles of law like limitation periods which are aimed at different purposes, in that case, barring stale claims. The significance of this distinction is best left to be raised in the principal action when the matter, which was simply touched upon in this court, can be examined in depth.

For these reasons, I would allow the appeal, set aside the decision of the judge who heard the application, reverse the judgment of the Court of Appeal of British Columbia, and direct that an order in the nature of mandamus issue directing the Attorney General to advise the Lieutenant Governor to grant his fiat to the petition of right in this case.

Appeal allowed.

Source: Nikkei National Museum, 2018-16-2-11-7-5
www.nikkeimuseum.org

The comments made by caller No. 4 that the persons being discussed were in fact drinking with public money during work hours could be defamatory. But, if they are defamatory, are Mr. Moore and the radio station liable because they allowed them to be said over the broadcast? The answer is no. The statement made by the caller was unsolicited and unconfirmed. It was made during a broadcast dealing with another subject. Mr. Moore did not know the statement was defamatory, therefore neither he nor the radio station is liable.

Accordingly, the action is dismissed with costs.

Action dismissed.

AIR CANADA v. R. in Right of BRITISH COLUMBIA and ATTORNEY GENERAL OF BRITISH COLUMBIA; PACIFIC WESTERN AIRLINES LTD. v. R. in Right of BRITISH COLUMBIA and ATTORNEY GENERAL OF BRITISH COLUMBIA; CANADIAN PACIFIC AIRLINES LTD. v. R. in Right of BRITISH COLUMBIA and ATTORNEY GENERAL OF BRITISH COLUMBIA

[Indexed as: **Air Can. v. B.C. (Govt.)**]

Court of Appeal, Hinkson, Lambert and Esson JJ.A.

Judgment — July 18, 1986.

Taxation (federal and provincial) — Powers of taxation — Provincial — Plaintiffs appealing refusal of declaration that Gasoline Tax Act ultra vires provincial legislation or of no application to operators of federally regulated interprovincial airlines — Statute intra vires as imposing direct tax within province even though much of fuel purchased consumed outside of province — Appeal dismissed.

Statutes — Operation — Amendments — 1976 amendment to Gasoline Tax Act providing new definition of "purchaser" — Previous definition rendering Act ultra vires — 1981 amendment purporting to confiscate tax paid under ultra vires Act also ultra vires.

The plaintiffs brought an action for declarations that the Gasoline Tax Act was ultra vires the provincial legislature or, alternatively, that it did not apply to them as operators of federally regulated interprovincial airlines. The trial judge concluded that during the period 1st August 1974 to 30th June 1976 the Act was ultra vires, upon the ground that it imposed an indirect tax, something beyond the powers of the province. A 1976 amendment cured the defect, but it was held that the plaintiffs were entitled to an order for repayment of the taxes paid during the period of invalidity. The actions of

the plaintiffs seeking a declaration that the statute, as amended in 1976, was ultra vires, were dismissed. The plaintiffs appealed that decision, while the defendants appealed the repayment order.

Held — Appeal and cross-appeal dismissed.

Per HINKSON and LAMBERT JJ.A.: The substance of the matter is that the tax is one imposed upon purchases within the province. The tax does not cease to be a direct tax within the province simply because the airlines consume outside the province much of the fuel purchased. The statute limits the incidence of the tax to those who purchase or receive gasoline for their own use or consumption. The purpose of that limitation is to ensure that the tax will have no tendency to be passed on.

The trial judge properly ordered repayment of the tax paid under the ultra vires statute. Section 25 of the Finance Statutes Amendment Act, 1981, which purported to confiscate the tax paid, was ultra vires. If a statute is found to be ultra vires the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must be equally ultra vires.

Per ESSON J.A. (dissenting in part): The repayment order should not have been made. The tax imposed and collected from the plaintiffs was a tax clearly within the competence of the province. There was no reason why the province, having discovered the defect in the statute, could not have validly imposed a retroactive tax and deemed the payments made under the defective statute to have been made in payment of the retroactive tax. The 1981 amendment went some way in that direction. Aside from the 1981 amendments, the plaintiffs failed to make out a case for recovery. By retaining the money, the province would not get a windfall. Justice and conscience dictated that the plaintiffs' action for recovery be dismissed.

Cases considered

Considered by majority:

Air Can. v. R. in Right of B.C., 67 B.C.L.R. 1, [1986] 1 W.W.R. 342 (C.A.) — considered.

Air Can. v. Turner, 57 B.C.L.R. 322, [1984] 6 W.W.R. 346 (S.C.) — referred to.

Alworth v. Min. of Fin.; Lintner v. Min. of Fin.; Can. Trust Co. v. Min. of Fin., [1978] 1 S.C.R. 447, [1977] 4 W.W.R. 268, 76 D.L.R. (3d) 99, 15 N.R. 405 — referred to.

Amax Potash Ltd. v. Sask., [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222 — applied.

Atlantic Smoke Shops Ltd. v. Conlon, [1943] A.C. 550, [1943] 3 W.W.R. 113, [1943] 4 D.L.R. 81, [1943] 2 All E.R. 393, affirming with a variation [1941] S.C.R. 670, [1941] 4 D.L.R. 129 (P.C.) — considered.

A.G. Alta. v. A.G. Can.; A.G. Can. v. A.G. Alta., [1947] A.C. 503, [1947] 2 W.W.R. 401, [1947] 4 D.L.R. 1 (P.C.) — applied.

A.G.B.C. v. Can. Trust Co., [1980] 2 S.C.R. 466, 23 B.C.L.R. 86, [1980] 5 W.W.R. 591, [1980] C.T.C. 338, 7 E.T.R. 93, 112 D.L.R. (3d) 592, 32 N.R. 326 — applied.

A.G.B.C. v. C.P.R., [1927] A.C. 934, [1927] 3 W.W.R. 460, [1927] 4 D.L.R. 113 (P.C.) — considered.

Source: Nikkei National Museum, 2018-16-2-11-8-1
www.nikkeimuseum.org

A.G.B.C. v. Kingcome Navigation Co., [1934] A.C. 45, [1933] 3 W.W.R. 353, [1934] 1 D.L.R. 31 (P.C.) — considered.

B.C. Power Corp. v. B.C. Elec. Co., [1962] S.C.R. 642, 38 W.W.R. 701, 34 D.L.R. (2d) 274 — considered.

Kerr v. Supt. of Income Tax, [1942] S.C.R. 435, [1942] 4 D.L.R. 289 [Alta.] — referred to.

Kiriri Cotton Co. v. Dewani, [1960] A.C. 192, [1960] 2 W.L.R. 127, [1960] 1 All E.R. 177 (P.C.) — considered.

Marine Petrobulk Ltd. v. R. in Right of B.C., 64 B.C.L.R. 17, [1985] 4 W.W.R. 663, 18 D.L.R. (4th) 451, affirming 52 B.C.L.R. 318, [1984] 4 W.W.R. 155, 11 D.L.R. (4th) 138 (C.A.) — followed.

Nepean Hydro Elec. Comm. v. Ont. Hydro, [1982] 1 S.C.R. 347, 16 B.L.R. 215, 132 D.L.R. (3d) 193, 41 N.R. 1 — considered.

R. in Right of Man. v. Air Can., [1980] 2 S.C.R. 303, [1980] C.T.C. 428, 111 D.L.R. (3d) 513, 32 N.R. 244, 4 Man. R. (2d) 278 — referred to.

Considered in dissent:

A.J. Severson Inc. v. Qualicum Beach, 35 B.C.L.R. 192, [1982] 4 W.W.R. 374, 135 D.L.R. (3d) 122 (C.A.) — referred to.

Amax Potash Ltd. v. Sask., [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222 — considered.

A.G.B.C. v. Kingcome Navigation Co., [1934] A.C. 45, [1933] 3 W.W.R. 353, [1934] 1 D.L.R. 31 (P.C.) — referred to.

Can. Indust. Gas & Oil Ltd. v. Sask., [1978] 2 S.C.R. 545, [1977] 6 W.W.R. 607, 80 D.L.R. (3d) 449, 18 N.R. 107, reversing [1976] 2 W.W.R. 356, which affirmed [1975] 2 W.W.R. 481 — considered.

Eadie v. Brantford, [1967] S.C.R. 573, 63 D.L.R. (2d) 561 [Ont.] — referred to.

Kiriri Cotton Co. v. Dewani, [1960] A.C. 192, [1960] 2 W.L.R. 127, [1960] 1 All E.R. 177 (P.C.) — referred to.

Marine Petrobulk Ltd. v. R. in Right of B.C., 52 B.C.L.R. 318, [1984] 4 W.W.R. 155, 11 D.L.R. (4th) 138, affirmed 64 B.C.L.R. 17, [1985] 4 W.W.R. 663, 18 D.L.R. (4th) 451 (C.A.) — considered.

Nepean Hydro Elec. Comm. v. Ont. Hydro, [1982] 1 S.C.R. 347, 16 B.L.R. 215, 132 D.L.R. (3d) 193, 41 N.R. 1 — considered.

R. in Right of Man. v. Air Can., [1980] 2 S.C.R. 303, [1980] C.T.C. 428, 111 D.L.R. (3d) 513, 32 N.R. 244, 4 Man. R. (2d) 278 — considered.

Storthoaks v. Mobil Oil Can. Ltd., [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, 55 D.L.R. (3d) 1, 5 N.R. 23 [Sask.] — considered.

Statutes considered

Constitution Act, 1867, ss. 91(13), 92.

Crown Corporations (Provincial Taxes and Fees) Act, R.S.C. 1970, c. C-37, s. 3(*b*).

Source: Nikkei National Museum, 2018-16-2-11-8-2
www.nikkeimuseum.org

Finance Statutes Amendment Act, S.B.C. 1981, c. 5, ss. 20, 62(5).

Fuel-oil Tax Act, S.B.C. 1923, c. 71.

Gasolene Tax Act, S.B.C. 1923, c. 72, ss. 2 "purchaser", 3, 6.

Gasoline Tax Act, S.B.C. 1928, c. 45.

Gasoline Tax Act, R.S.B.C. 1960, c. 162, ss. 2 "purchaser" [re-en. 1976, c. 32, s. 7(*b*)], 3 [re-en. 1973, c. 34, s. 3], 6 [am. 1961, c. 22, s. 3; 1971, c. 20, s. 2; 1973, c. 34, s. 4; 1975, c. 24, s. 2], 13 [en. 1976, c. 32, s. 7(*h*)].

Gasoline Tax Act, R.S.B.C. 1979, c. 152, ss. 1 "purchaser", 25 [en. 1981, c. 5, s. 20].

Gasoline (Coloured) Tax Act, R.S.B.C. 1979, c. 151.

Limitation Act, R.S.B.C. 1979, c. 236.

Proceedings Against the Crown Act, R.S.S. 1965, c. 87, s. 5(7).

Tobacco Tax Act, S.N.B. 1940, c. 44, ss. 2 "consumer" or "consumer of tobacco", 4.

Authorities considered

Hogg, Constitutional Law of Canada, 2nd ed. (1985), pp. 349-50.

[Note up with 32 C.E.D. (West. 3rd) *Statutes*, VI 2, a; 20 C.E.D. (West. 2nd) *Taxation*, s. 27; 36 Can. Abr. (2d) *Statutes*, III, 7; 36 Can. Abr. (2d) *Taxation (Federal & Provincial)*, I, 2, c.]

APPEAL and CROSS-APPEAL from judgment of Macdonald J., 51 B.C.L.R. 175, [1984] 3 W.W.R. 353, dismissing application for declarations that taxation statute ultra vires and giving judgment for return of taxes paid.

D. M. M. Goldie, Q.C., and *W. S. Martin*, for appellant Air Canada.

M. R. V. Storrow, Q.C., and *W. Baker*, for appellant Pacific Western Airlines.

N. D. Mullins, Q.C., for respondent C.P. Air Lines.

J. J. Arvay, for respondent (appellant) Her Majesty the Queen and Attorney General of British Columbia.

(Vancouver Nos. CA002027, CA002052, CA002106)

18th July 1986. HINKSON J.A.:— The three plaintiffs brought action against the defendants in 1980, seeking declarations of non-applicability or invalidity of the Gasoline Tax Act, R.S.B.C. 1979, c. 152. That statute was first enacted under the name Gasolene Tax Act, S.B.C. 1923, c. 72.

The three actions were tried together. The trial judge [at 51 B.C.L.R. 175, [1984] 3 W.W.R. 353] concluded that during the period 1st August 1974 to 30th June 1976 the Act was ultra vires, upon

the ground that it imposed an indirect tax, something beyond the powers of the province under s. 92 of the British North America Act, 1867. The Crown conceded that during that period the tax imposed was ultra vires the province, but resisted repayment of such taxes to the plaintiffs. Ultimately the trial judge held that the plaintiffs were entitled to repayment of the taxes paid during that period and those moneys have been so repaid.

The reason the date of 1st August 1974 was selected by the plaintiffs was that from that date it was no longer necessary to obtain a fiat in order to sue the Crown Provincial. The date of 30th June 1976 was chosen as a possible cut-off because on 1st July 1976 the amendment to the definition of ''purchaser'' under the Gasoline Tax Act came into force.

At trial the plaintiffs contended that amendments to the Gasoline Tax Act made in 1976 with respect to the definition of ''purchaser'' did not apply to the plaintiffs and that they were therefore entitled to repayment of taxes for the period 1st July 1976 to the date of trial. That claim was rejected by the trial judge.

The plaintiffs appealed the decision of the trial judge with respect to their claim for repayment of taxes for the foregoing period and the three appeals came on for hearing together. The Crown cross-appealed from the decision of the trial judge that it was obliged to repay the moneys collected from the plaintiffs under the Gasoline Tax Act for the period 1st August 1974 to 30th June 1976.

Initially, the plaintiffs intended to contend on the appeal that the definition of ''purchaser'' which came into force on 1st July 1976 did not impose a direct tax. However, on the hearing of this appeal, the plaintiffs accepted the decision of this court in *Marine Petrobulk Ltd. v. R. in Right of B.C.*, 64 B.C.L.R. 17, [1985] 4 W.W.R. 663, 18 D.L.R. (4th) 451, and did not advance a submission that the amended definition of ''purchaser'' did not impose a direct tax.

The 1923 statute contained the following definition of ''purchaser'':

> 2. . . .
>
> ''Purchaser'' means any person who within the Province purchases gasolene when sold for the first time after its manufacture in or importation into the Province.

That definition was also contained in the Fuel-oil Tax Act, S.B.C. 1923, c. 71. That Act was also passed in 1923 at the same time as the Gasolene Tax Act. The Fuel-oil Tax Act was declared to be ultra vires the province by the Judicial Committee of the Privy Council in *A.G.B.C. v. C.P.R.*, [1927] A.C. 934, [1927] 3 W.W.R. 460, [1927] 4 D.L.R. 113. The definition of ''purchaser'' was not amended in the Gasoline Tax Act until 1976. By the Statutes of British Columbia 1976, c. 32, s. 7, the definition of ''purchaser'' as enacted in 1923 was repealed and the following was substituted:

> ''purchaser'' means any person who, within the Province, purchases or receives delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for, a principal who is acquiring the gasoline for use or consumption by the principal or by other persons at his expense.

The three plaintiffs purchase gasoline for their aircraft at various locations within British Columbia. The evidence at trial disclosed that 1 per cent of such gasoline is consumed on the ground while aircraft are taxiing, preparing for take-off, and that 99 per cent of such gasoline is consumed after take-off. Upon the basis of the decision in *R. in Right of Man. v. Air Can.*, [1980] 2 S.C.R. 303, [1980] C.T.C. 428, 111 D.L.R. (3d) 513, 32 N.R. 244, 4 Man. R. (2d) 278, the plaintiffs contend that the air through which aircraft pass over a province is not a situs for provincial taxation and that therefore the Gasoline Tax Act has no application to the plaintiffs.

The trial judge characterized the tax imposed pursuant to the Gasoline Tax Act as a transaction tax. To begin with, the plaintiffs say that the trial judge erred in describing the tax as a transaction tax. Reference was made to the decision of *A.G.B.C. v. Kingcome Navigation Co.*, [1934] A.C. 45, [1933] 3 W.W.R. 353, [1934] 1 D.L.R. 31 (P.C.). Lord Thankerton said at p. 57:

> As has already been pointed out the ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax.

It was the submission of the plaintiffs that, properly construed, the tax imposed by the Gasoline Tax Act was a tax on consumption. The plaintiffs contend that gasoline is a marketable commodity. They then assert that a province cannot enact a valid, direct tax in respect of a marketable commodity if the purchaser consumes virtually all of the commodity purchased outside that province.

Reference was made to the decision in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 3 W.W.R. 113, [1943] 4 D.L.R. 81, [1943] 2 All E.R. 393 (P.C.). In that case the court was considering the Tobacco Tax Act, 1940 [S.N.B. 1940, c. 44] of New Brunswick which provided, by s. 2, in part:

Source: Nikkei National Museum, 2018-16-2-11-8-3
www.nikkeimuseum.org

> 2. In this Act, unless the context otherwise requires,
>
> (*a*) "Consumer" or "Consumer of Tobacco" means any person who within the Province, purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal.

Section 4 provided:

> 4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

The Privy Council, in holding the tax intra vires the province, approved the reasons of Taschereau J. in the Supreme Court of Canada. The judgment of the Supreme Court of Canada is reported at [1941] S.C.R. 670, [1941] 4 D.L.R. 129. Taschereau J. said at p. 717:

> The purchaser pays the tax at the time and place he purchases the commodity. Although this tax has been called a consumption tax, it is more a purchasing tax which is paid by the last purchaser who is deemed to be the consumer. As section 2(*a*) of the Act says, "consumer" means any person who within the Province purchases . . . for his own consumption. As the purchase is made within the Province, it seems clear that the taxation is imposed within the Province, even if by exception the tobacco purchased is consumed in a different Province. It is only in exceptional cases resulting from the act of the purchaser that the tobacco may be consumed outside the Province.

Upon the basis of that passage, the plaintiffs contend that if, as here, 99 per cent of the commodity is consumed outside the province, then the court should conclude that the legislation does not apply to impose a tax on such consumption.

The Crown makes two answers to that proposition. First, it says that Taschereau J. was construing the Act as imposing a purchase tax upon one who purchased the commodity within the province. Second, and alternatively, the Crown contends that the New Brunswick legislation was imposing two forms of tax: first, a purchase tax; and second, a consumption tax upon the basis of s. 4 of the Act and that with respect to a consumption tax, Taschereau J. was indicating that other than in an exceptional case the Act intended to impose a tax on consumption of the commodity within the province.

Source: Nikkei National Museum, 2018-16-2-11-8-4
www.nikkeimuseum.org

It thus becomes necessary to consider the whole of the statute to determine the nature of the tax imposed by the 1976 version of the Gasoline Tax Act. The purpose in amending the definition of "purchaser" in 1976 was to convert the tax from an indirect tax to a direct tax, the latter being within the constitutional power of the province to impose. The purpose of the reference in the definition of purchaser to ". . . for his own use or consumption . . ." was to indicate that the person referred to in the definition was intended to be the last one in the chain of transactions involving the purchase and sale of this marketable commodity. Upon the basis that that person would not incorporate the tax paid by him into the price of the commodity and then pass on that tax, the tax imposed upon that person was construed as a direct tax. Therefore the incidence of the tax was to impose a tax on a person who purchased or obtained delivery of gasoline for his own use or consumption.

Upon the basis of the decision in the *Kingcome* case, supra, I would not describe that tax as a transaction tax. Nor would I describe it as a consumption tax. Rather, in my opinion, the tax being imposed by the 1976 Gasoline Tax Act was a purchase tax. The incidence of the tax was upon a person within British Columbia who purchased gasoline with the intention of consuming it, rather than reselling it. In my opinion, the legislature was not concerned, and need not be concerned, as to where that person consumes the gasoline so purchased. Upon the basis of the reasoning in *A.G.B.C. v. Can. Trust Co.*, [1980] 2 S.C.R. 466, 23 B.C.L.R. 86, [1980] 5 W.W.R. 591, [1980] C.T.C. 338, 7 E.T.R. 93, 112 D.L.R. (3d) 592, 32 N.R. 326, I conclude that where the province imposes a direct tax on a purchase made within the province by a purchaser who is within the province, that the tax so imposed is intra vires the province.

For these reasons, I would dismiss the appeal.

Turning to the cross-appeal, it is the submission of the Crown that the trial judge erred in directing that the moneys paid by the plaintiff pursuant to the indirect tax imposed by the Gasoline Tax Act between 1st August 1974 and 30th June 1976 must be repaid to the plaintiffs. In the same enactment that amended the definition of purchaser to impose a direct tax as of 1st July 1976, a further provision in s. 13 of the Statutes of British Columbia, 1976 provided:

> 13. Subject to sections 7C and 11, no proceedings shall be taken against the Crown in respect of a right or claim for repayment of taxes, penalties or interest paid pursuant to this Act as it stood before July 1, 1976.

The next step taken by the Crown in an effort to avoid repayment of the taxes for the period was to enact the Finance Statutes Amendment Act, S.B.C. 1981, c. 5, s. 20, which added s. 25 in the following terms:

> 25.(1) In this section "purchaser" means any person who, within the Province, after August 1, 1974 and before July 8, 1976, purchased or received delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of or as an agent for a principal who was acquiring the gasoline for use or consumption by the principal or by other persons at his expense.
>
> (2) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 15¢ a gallon on all gasoline purchased by him after August 1, 1974 and before February 28, 1975, but
>
> (*a*) where gasoline was purchased for use in an aircraft the tax shall be 3¢ a gallon, and
>
> (*b*) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 10¢ a gallon.
>
> (3) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 17¢ a gallon on all gasoline purchased by him after February 27, 1975 and before July 8, 1976, but
>
> (*a*) where gasoline was purchased for use in an aircraft the tax shall be 5¢ a gallon, and
>
> (*b*) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 12¢ a gallon.
>
> (4) Where a purchaser is liable to pay tax under subsection (2) or (3) and the gasoline was used or consumed for
>
> (*a*) the operation of logging trucks other than on public highways,
>
> (*b*) the operation of a motor vehicle on a public highway by any person who had suffered the loss of a limb, or who was permanently confined to a wheelchair, or who was in receipt of a 100% disability pension through active service in any war while in Her Majesty's service, or
>
> (*c*) the operation of the power unit of a motor vehicle, while the vehicle was stationary, for any industrial purpose approved by the minister,
>
> the taxes of 17¢ a gallon and 12¢ a gallon shall be reduced to 5¢ a gallon, and the taxes of 15¢ a gallon and 10¢ a gallon shall be reduced to 3¢ a gallon.
>
> (5) Where, after August 1, 1974 and before July 8, 1976, money was collected or purported to have been collected as taxes, penalties or interest under this Act, the money shall by this section be conclusively deemed to have been confiscated by the government without compensation.

Source: Nikkei National Museum, 2018-16-2-11-8-5
www.nikkeimuseum.org

The 1981 legislation represented the second effort by the Crown to avoid repayment of the taxes collected between 1st August 1974 and 30th June 1976. In passing, it is to be observed that s. 25 refers to 8th July 1976. Counsel were unable to offer any explanation as to why that date appeared rather than 30th June 1976.

In view of the decision in *Amax Potash Ltd. v. Sask.*, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222, the Crown indicated that it experienced some difficulty in supporting s. 25(5) of the 1981 amendment. Further, the Crown indicated that it had never attempted to rely in these proceedings upon the provisions of s. 13 of the 1976 amendment. In *Amax*, Dickson J. (as he then was), speaking for the court, said at p. 592:

> The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means. The same thought found expression in the headnote to the *Antill* case, *supra*, in these words:
>
> ". . . the immunity accorded by that Act (the *Barring Act* of 1954) to the unlawful exactions was as offensive to the Constitution as the unlawful exactions themselves . . ."

In view of that decision, the Crown contended that s. 25(5) should be severed from the remainder of the section. Section 62(5) of the 1981 amendment provided:

> (5) Section 20 shall be deemed to have come into force on August 1, 1974 and is retroactive to the extent necessary to give it effect on and after that date.

Thus the Crown contended that s. 25(1)-(4) imposed a valid retroactive tax for the period 1st August 1974 to 30th June 1976.

The position of the Crown with respect to s. 25(5) was that there is no power in s. 92 of the Constitution Act, 1867 which would permit the enactment of that subsection. In particular, the Crown declined to rely upon the provisions of s. 91(13) and said that the provisions of s. 25(5) did not deal with the subject-matter of property and civil rights in the province. I agree with that submission.

In seeking to sever s. 25(5), reference was made to the decision in *A.G. Alta. v. A.G. Can.; A.G. Can. v. A.G. Alta.*, [1947] A.C. 503 at 518, [1947] 2 W.W.R. 401, [1947] 4 D.L.R. 1 (P.C.), where the test was stated in these terms:

> There remains the second question, whether when Part II has been struck out from the Act as invalid what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter. This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is intra vires "either in whole or in part," but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

Applying that test to the provisions of s. 25, I am of the opinion that the legislature would not have enacted subs. (1) to (4) without also enacting subs. (5). Section 25 departs from the former scheme of the Act in that rather than imposing the collection of the tax upon the vendor as an agent for the Crown, the tax imposed by s. 25 is upon the purchaser. Having imposed that tax retroactively, subs. (5) makes it clear that the intention of the legislature was not to impose double taxation for the period in question. Rather, after imposing the tax, payment thereof was to be met by confiscating the moneys already paid by purchasers of gasoline during that period. In those circumstances it would seem clear that the legislature would not have imposed a retroactive tax if such tax was not simply a vehicle for avoiding repayment of moneys paid during the same period pursuant to an ultra vires tax. Approached in that way, it would appear that subs. (5) was necessary to give proper meaning to the intent of the legislature in enacting the first four subsections of s. 25. Thus I conclude that the legislature would not have enacted s. 25(1)-(4) if it had not also enacted subs. (5). As I have indicated, it is really that subsection that gives the true meaning to the whole of the section. But subs. (5), in my opinion, clearly offends the principle discussed in the *Amax* decision and must be construed as ultra vires the legislature of the province. Section 25(5), which gives purpose and meaning to the balance of the section, so taints the balance that, in my opinion, the whole of the section is ultra vires the province.

Alternatively, the Crown contended that if it could not rely upon the provisions of s. 25(1)-(4) as a basis for refusing repayment of the moneys it received during the period of 1st August 1974 to 30th June 1976, then upon the basis of common law principles it was entitled to do so. It relied upon the decision in *Nepean Hydro Elec. Comm. v. Ont. Hydro*, [1982] 1 S.C.R. 347, 16 B.L.R. 215, 132 D.L.R. (3d)

193, 41 N.R. 1. In that case one Crown agency was purchasing electric power from another Crown agency. Ultimately, the purchasing agency challenged the right of the selling agency to certain moneys collected by the selling agency. It was held that such moneys were not lawfully collected in that the demand for payment was not authorized by the act governing the selling agency's operations. Estey J., speaking for the majority, concluded that it was a case of unauthorized acts and of mutual mistake of law and that in the circumstances the moneys could not be recovered.

In this case the Crown contended that mutuality should apply and that either the plaintiffs and the Crown were proceeding upon the basis of a mutual mistake of law or, alternatively, that all parties were aware that the Act before its amendment in 1976 imposed an indirect tax which was beyond the powers of the province.

In my opinion, the evidence at trial does not support that submission. The history of the Gasoline Tax Act shows that after the decision of the Privy Council in *A.G.B.C. v. C.P.R.*, supra, in 1927 another Gasoline Tax Act was enacted by the province which defined "purchaser" so as to impose a direct tax and which repealed the old Gasoline Tax Act. That enactment was subject to proclamation. Thereafter, in the intervening years up to 1976, from time to time both the Gasoline Tax Act as proclaimed and the companion statute that had not been proclaimed were amended. So they proceeded forward in step. Thus, in the event that the Gasoline Tax Act which was in force was challenged as to its constitutional validity, the province could replace it at a moment's notice by proclaiming the Gasoline Tax Act that imposed a direct tax. The inference I would draw from this evidence was that the province from 1927 onwards was aware that the Gasoline Tax Act, then in force, imposed an indirect tax which was unconstitutional.

The Crown sought to contend that if the court should conclude that the province was aware that the tax imposed by the Gasoline Tax Act was ultra vires equally, the plaintiffs should be held to have known or they ought to have known that the tax was unconstitutional. In support of that submission, reference was made to a letter from Air Canada to its supplier of gasoline, Shell Canada Limited, of 14th July 1975. Mr. Cyrenne, who wrote on behalf of Air Canada on that occasion, referred to the fact that "In the past our company voluntarily paid gasoline taxes so that B.C. could derive its fair share of revenue". The Crown sought to rely on that sentence as indicating that Air Canada was well aware of the fact that the tax imposed was unconstitutional and that Air Canada, as a good corporate citizen, was

Source: Nikkei National Museum, 2018-16-2-11-8-6
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simply paying its fair share of the taxes. However, an examination of all the correspondence on that subject introduced into evidence at trial discloses that, because the tax on gasoline to Air Canada had been increased by 400 percent in 1975, Air Canada was seeking to avoid payment of such tax on the basis that it was entitled to an exemption by virtue of s. 3(*b*) of the Crown Corporations (Provincial Taxes and Fees) Act, R.S.C. 1970, c. C-37. This correspondence would indicate that in July 1975 Air Canada had no suspicion that the tax imposed for purchase of gasoline was unconstitutional. Likewise there is no evidence to suggest that Pacific Western Airlines or Canadian Pacific Airlines Ltd. were aware during the period in question that the tax was unconstitutional.

Therefore, the conclusion I would reach is that the Crown was aware from 1927 onwards that the Gasoline Tax Act was unconstitutional. The plaintiffs did not suspect that fact until they decided to challenge the legislation. This conclusion has two important consequences. First, it refutes the submission that this is a case of mutual mistake of law. Secondly, it refutes the suggestion that during the period in question the payments made by the plaintiffs were voluntary upon the basis that they were aware that the tax was unconstitutional.

As part of this submission, the Crown contended that the parties were in pari delicto. It was important for the Crown to establish that if the province was to blame for imposing an ultra vires tax, the plaintiffs were equally to blame for paying it. In this way the Crown sought to distinguish the judgment of the Judicial Committee of the Privy Council in *Kiriri Cotton Co. v. Dewani*, [1960] A.C. 192, [1960] 2 W.L.R. 127, [1960] 1 All E.R. 177. In *Nepean*, supra, Estey J. dealt with the decision in *Kiriri* and said at p. 411:

> Mistake of law "without more" and without "something more in addition" (in the words of Lord Denning in *Kiriri, supra*, at p. 204) may be an allusion to the need to find compulsion or illegality to introduce a right of recovery on the happening of mutual mistake of law. In compulsion, recovery is allowed as the payment is not made voluntarily and there is no reason to suppose, only because of the fact of payment, that the plaintiff had surrendered his right to recover his moneys paid under practical compulsion. In the case of illegal transactions, the concept of *in pari delicto* is introduced to determine entitlement to recovery. In the absence of either of these elements, the "something more in addition to a mistake of law", *supra*, is missing, and the rule applicable on mutual mistake of law operates to deny recovery.

Upon the basis of that decision, the Crown contends that there was a mistake of law in the present case "without more" within the meaning of the decision in *Nepean* and that therefore the taxpayer is not entitled to repayment.

Source: Nikkei National Museum, 2018-16-2-11-8-7
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Upon the basis of the meaning of "illegal" as described by Estey J. in *Nepean*, it is not possible to say that the imposition of the unconstitutional tax in this case was in the nature of an illegal transaction. However, the plaintiffs did seek to show that the payment of the tax was as a result of practical compulsion. They contended that the Act imposed an obligation on the vendor to collect the tax. They pointed to correspondence between Air Canada and its supplier, Shell Canada Ltd., in which Air Canada sought to take the position, as I have previously discussed, that it was entitled to exemption from such tax. The plaintiffs contended that, upon the basis of the exchange of correspondence between Air Canada and Shell and the subsequent correspondence between Shell and the Director of the Consumer Taxation Branch, there was a very real possibility that rather than being caught in the middle of the dispute Shell, to avoid the imposition of penalties for failure to collect the tax, would have refused to make deliveries to Air Canada. That situation never occurred, however, because Air Canada, on 8th September 1975, wrote to Shell indicating that it had decided to resume payment of the fuel tax in order to avoid controversy with, at that time, the British Columbia government, and any possible interruption in the supply of fuel. Air Canada indicated that it questioned the constitutionality and applicability to Air Canada of the tax, and that it was seeking legal advice in this respect. In the meantime, Air Canada indicated it was resuming payment of the tax under protest and that all future payments would likewise be made under protest.

I am not persuaded that on the evidence Shell would have refused to make deliveries to Air Canada. Thus I do not conclude that Air Canada paid the tax as a result of practical compulsion.

In further answer, the plaintiffs point out that *Nepean* was not a constitutional case. The court was not there concerned with the division of powers under the Constitution. In *Nepean* no reference was made to the earlier decision of the court in *Amax*. In *Amax*, supra, the court was concerned with an attempt by the province to invade the federal sphere and exercise powers reserved to the federal government by s. 91 of the Constitution. Dickson J., in discussing the proper role of the courts, said at p. 590:

> A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but

> it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

Dickson J. continued on the same page:

> Section 5(7) of *The Proceedings against the Crown Act*, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under *The British North America Act, 1867*. It also brings into question the right of a Province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial Legislature can tax beyond the limit of its powers, and by prior or *ex post facto* legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

Dickson J. continued at p. 591 by quoting with approval a passage from the judgment of Kerwin C.J. in *B.C. Power Corp. v. B.C. Elec. Co.*, [1962] S.C.R. 642 at 644, 38 W.W.R. 701, 34 D.L.R. (2d) 274, as follows:

> "In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself."

Then Dickson J. continued:

> It is true that the issue in the *British Columbia Electric* case was not taxation nor the constitutionality of a provision such as s. 5(7) but rather the Crown's immunity from a judicial order. The present case, however, would seem to be governed by the very considerations which led to the decision in the earlier case. In each case, the concern is with the preservation of the Constitution which is paramount.

On the cross-appeal, the plaintiffs rely upon these passages from the decision in *Amax* as showing that when a legislature does transgress the limits of its constitutional mandate and engages in an illegal exercise of power it cannot be permitted to assert rights claimed

under such legislation to achieve the same results as if the legislation were valid. In a federal state the Crown cannot engage in an illegal exercise of power by way of taxation and then call in aid either legislation enacted by it or common law rights asserted by it to retain the proceeds of such taxation. As Dickson J. indicated, "In each case, the concern is with the preservation of the Constitution which is paramount". I understand that passage to mean that other rights asserted by the legislature which has exercised that illegal power must yield to that paramount concern.

The Crown sought to suggest that the indirect tax imposed by the legislature prior to 1st July 1976 was only a matter of correcting the definition of "purchaser" by adding the words ". . . for his own use or consumption . . ." If that correction had been made prior to 1st August 1974, then the tax would have been a direct tax and the plaintiffs would have been liable to pay it. In this way the Crown sought to portray the invasion of the federal sphere as of little consequence. In my opinion there is no middle ground in considering the separation of powers under the Constitution. If, as here, a province deliberately invades the federal sphere and continues to do so after it becomes aware that legislation is ultra vires, it is no answer to point to the ease with which the province could have enacted a tax within its powers.

The contest here is over whether or not the province can retain the moneys paid by the plaintiffs during the period in question. The method followed by the Crown is to seek to retain those moneys while it passed retroactive legislation which would justify the imposition of a tax which would yield the same amounts that were in fact paid during the period. I conclude that the Crown is not entitled to retain such moneys either on the basis of the legislation it enacted to do so or on the basis of common law principles.

In reaching that conclusion, I do not intend to suggest that the province cannot, by appropriate legislation, impose a retroactive tax. If it does so, by appropriate legislation, it will then be required to take steps to collect such tax. In the event the province should follow such a course, the taxpayers will be in a position to raise whatever defences may then be available to them.

Proceeding in that way, the legislature will be confined to operating within its proper sphere under the Constitution.

For these reasons, I would dismiss the cross-appeal.

Source: Nikkei National Museum, 2018-16-2-11-8-8
www.nikkeimuseum.org

LAMBERT J.A.:— The reasons for judgment of Macdonald J. at trial are reported at 51 B.C.L.R. 175, [1984] 3 W.W.R. 353. The facts and the issues are set out there and in the reasons of Hinkson J.A.

I THE 1976 LEGISLATION

The Gasolene Tax Act was enacted in 1923. It had two charging sections. Section 3 imposed a tax on purchasers of gasoline when the gasoline was sold for the first time after its manufacture or importation. Section 6 imposed a tax on every person who kept gasoline for his own use or consumption on which no tax had been paid under s. 3.

The constitutionally significant features of the Act remained unchanged until 1976, when the definition of "purchaser" was changed to read:

> "purchaser" means any person who, within the Province, purchases or receives delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for, a principal who is acquiring the gasoline for use or consumption by the principal or by other persons at his expense.

That new definition affected s. 3, the principal charging section, which then read:

> 3. Every purchaser shall pay to Her Majesty for the raising of a revenue for Provincial purposes a tax equal to fifteen cents per gallon of all gasoline purchased by him, but
>
> (*a*) where gasoline is purchased for use in an aircraft the tax shall be equal to three cents per gallon; and
>
> (*b*) where gasoline in the form of liquefied petroleum gas or natural gas is purchased to propel a motor-vehicle the tax shall be equal to ten cents per gallon.

The first part of the appeal relates to the validity and effect of the 1976 amendments. The second part of the appeal, and the cross-appeal, relate to further amendments made in 1981, and to the right to recover money paid as taxes under an ultra vires taxing statute.

II. THE ACT BEFORE THE 1976 AMENDMENTS

At some time in the course of the trial, the Crown conceded that the Act was unconstitutional when it was enacted in 1923 and had remained unconstitutional until the 1976 amendments. I understand that this concession was based on the legal conclusion that the tax imposed by s. 3 was an indirect tax, and that the tax imposed by s. 6, as well as the rest of the Act, could not stand independently from s. 3.

Source: Nikkei National Museum, 2018-16-2-11-8-9
www.nikkeimuseum.org

Amending an ultra vires statute

Air Canada and Pacific Western Airlines Ltd. ("P.W.A.") argued, at trial, that the legislature could not amend a wholly ultra vires statute. Macdonald J. decided, on conflicting authorities, that such a statute could be amended, both without affecting its unconstitutionality, as was done in this case several times between 1923 and 1976, and also to remove the feature which made it unconstitutional, replacing it with a constitutional provision. Macdonald J. also decided that when the unconstitutional feature was removed and a constitutional provision substituted, the whole Act was then constitutional and effective. No argument was directed to this issue on this appeal. Consequently, the argument must be considered to have been wholly abandoned.

Direct taxation

Shortly after Macdonald J. gave judgment in this case, Legg J. gave judgment in *Marine Petrobulk Ltd. v. R. in Right of B.C.*, a case concerning the constitutionality of the Gasoline (Coloured) Tax Act in its application to the purchase of bunker fuel in British Columbia for use by foreign ships on the high seas. Legg J. decided that the tax, in that application, was constitutional. An appeal to this court was dismissed. The reasons in *Marine Petrobulk* are reported at 52 B.C.L.R. 318, [1984] 4 W.W.R. 155, 11 D.L.R. (4th) 138 (S.C.) and 64 B.C.L.R. 17, [1985] 4 W.W.R. 663, 18 D.L.R. (4th) 451 (C.A.).

The constitutionally relevant features of the Gasoline (Coloured) Tax Act are indistinguishable from the constitutionally relevant features of the Gasoline Tax Act, after the 1976 amendments. The issue of whether the tax was a direct tax was argued in the *Marine Petrobulk* case. It was decided that it was. Counsel for Air Canada and P.W.A. conceded that this court, sitting in a division of three, ought to regard ourselves as bound by convention to follow the ratio decidendi of the *Marine Petrobulk* case. But the point was reserved for argument in the Supreme Court of Canada if an appeal is heard there.

In those circumstances I do not propose to address this point further.

The raising of a revenue for provincial purposes

Counsel for Air Canada and P.W.A. raised in their factums an argument that the Gasoline Tax Act, as amended in 1976, in its application to fuel purchases by them for use in their aircraft was not a tax for provincial purposes because no benefits of the tax were received by the airlines. Having regard to the decision in *Marine*

Petrobulk, where the same point was argued in this court in constitutionally similar circumstances, and having regard to the decision of this court in *Air Can. v. R. in Right of B.C.*, 67 B.C.L.R. 1, [1986] 1 W.W.R. 342, where a similar point was argued with respect to the application of the Social Service Tax Act to the purchase of aircraft and tangible personal property relating to aircraft, this point was not pressed. Again, it was conceded that a three-member division of this court ought to regard ourselves as bound by convention to follow those two decisions. Again, the point was reserved for argument in the Supreme Court of Canada if an appeal is heard there.

Within the province

The point that if the tax after 1976 was a direct tax, it was not, in its application to the airlines, a direct tax within the province, was the principal point argued on behalf of Air Canada and P.W.A. The point, so expressed, is not among the points explicitly decided in *Marine Petrobulk*, though, in my opinion, it is encompassed by the decision there on direct taxation.

The argument on behalf of Air Canada, adopted by P.W.A., is that a transaction tax on a marketable commodity cannot be intra vires. If its application is restricted to the end-user, then it becomes an in personam tax on the end-user and ceases to be a transaction tax. If it is an in personam tax on the end-user, then, so the argument goes, not only must the end-user be within the province, the end-use must also be within the province.

The established mode of analysis of this issue requires, first, a categorization of the incidence, focus or subject-matter of the tax. All taxes are paid by legal entities. But the entity which makes the payment may not be the focus of the tax. That focus may be a transaction, a benefit received, the ownership of property, or some other incident or state of affairs; or the focus may be on a person. Once the incidence, focus or subject-matter is determined, then the second stage of the analysis is to say that the presence of that incidence, focus or subject-matter within the province, at the moment when the liability attaches, determines whether the tax itself constitutes taxation within the province. See *Kerr v. Supt. of Income Tax*, [1942] S.C.R. 435, [1942] 4 D.L.R. 289 [Alta.], *Alworth v. Min. of Fin.; Lintner v. Min. of Fin.; Can. Trust Co. v. Min. of Fin.*, [1978] 1 S.C.R. 447, [1977] 4 W.W.R. 268, 76 D.L.R. (3d) 991, 15 N.R. 405, and *A.G.B.C. v. Can. Trust Co.*, [1980] 2 S.C.R. 466, 23 B.C.L.R. 86, [1980] 5 W.W.R. 591, [1980] C.T.C. 338, 7 E.T.R. 93, 112 D.L.R. (3d) 592, 32 N.R. 326.

In the *Can. Trust* case, Dickson J., for the Supreme Court of Canada, decided that the correct approach to the identification of the subject-matter is to examine the Act as a whole and not merely the charging section. He also decided that the existence of a jumble of inconsistencies in legislation that has come together piecemeal is no reason to frustrate the obvious intention of the legislature to impose an intra vires tax.

And, of course, there is a long-standing principle that an intra vires construction is to be preferred to an ultra vires construction, if the intra vires construction is one that the statute will reasonably bear. I would think that the same principle should apply to determining the incidence, focus or subject-matter of the tax. A focus that makes the statute intra vires should, in a case of doubt, be preferred.

In this case, an examination of the Act as a whole, following the 1976 amendments, involves the examination of a tax scheme designed originally to impose a transaction tax on the first purchaser of gasoline manufactured or imported into the province, and a related tax on possession for consumption. That original tax was unconstitutional, and all of the provisions of the Act were unconstitutional. Then the definition section that affected the charging section was changed in 1976. The new principal incidence of the tax (obtained by combining s. 3 with the new definition of "purchaser") falls on "Every purchaser . . . who, within the Province, purchases . . . gasoline for his own use or consumption . . ." The charging section is particularly significant in this case because the remainder of the Act was unconstitutional when linked to an indirect tax charging section. But to the extent that the remainder of the Act is relevant, it must support an incidence like the original incidence, that is, an incidence on the transaction of purchase.

In my opinion, the charging section and the remainder of the Act, taken together, establish that the incidence, focus and subject-matter of the Gasoline Tax Act, after the 1976 amendments, fall either on the transaction of purchase for the purpose of consumption, or on the personal status of being a purchaser for the purpose of consumption. The qualification that the purchase must be for the purchaser's own use or consumption is a condition of the application of the tax, just as the fact that the purchase must take place within the province is a condition of the application of the tax, but those conditions do not affect the true incidence, focus or subject-matter of the tax, which is the transaction of purchase for consumption, or the personal status of being a purchaser with a purpose of consumption.

Source: Nikkei National Museum, 2018-16-2-11-8-10
www.nikkeimuseum.org

Barring proceedings to recover money paid as taxes under an ultra vires statute

The 1976 amendments to the Gasoline Tax Act added a new s. 13, in these terms:

> 13. Subject to sections 7C and 11, no proceedings shall be taken against the Crown in respect of a right or claim for repayment of taxes, penalties or interest paid pursuant to this Act as it stood before July 1, 1976.

The Crown did not contend that this section was constitutional. It is contrary to the ratio decidendi of the decision of the Supreme Court of Canada in *Amax Potash Ltd. v. Sask.*, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222.

III The 1981 Legislation

The Gasoline Tax Act was amended in 1981. By s. 20 of the Financial Statutes Amendment Act, 1981 [S.B.C. 1981, c. 5], a new s. 25 was added at the end of the Act, in these terms:

> 25.(1) In this section "purchaser" means any person who, within the Province, after August 1, 1974 and before July 8, 1976, purchased or received delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of or as an agent for a principal who was acquiring the gasoline for use or consumption by the principal or by other persons at his expense.
>
> (2) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 15¢ a gallon on all gasoline purchased by him after August 1, 1974 and before February 28, 1975, but
>
> (*a*) where gasoline was purchased for use in an aircraft the tax shall be 3¢ a gallon, and
>
> (*b*) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 10¢ a gallon.
>
> (3) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 17¢ a gallon on all gasoline purchased by him after February 27, 1975 and before July 8, 1976, but
>
> (*a*) where gasoline was purchased for use in an aircraft the tax shall be 5¢ a gallon, and
>
> (*b*) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 12¢ a gallon.
>
> (4) Where a purchaser is liable to pay tax under subsection (2) or (3) and the gasoline was used or consumed for
>
> (*a*) the operation of logging trucks other than on public highways,

> (*b*) the operation of a motor vehicle on a public highway by any person who had suffered the loss of a limb, or who was permanently confined to a wheelchair, or who was in receipt of a 100% disability pension through active service in any war while in Her Majesty's service, or
>
> (*c*) the operation of the power unit of a motor vehicle, while the vehicle was stationary, for any industrial purpose approved by the minister,
>
> the taxes of 17¢ a gallon and 12¢ a gallon shall be reduced to 5¢ a gallon, and the taxes of 15¢ a gallon and 10¢ a gallon shall be reduced to 3¢ a gallon.
>
> (5) Where, after August 1, 1974 and before July 8, 1976, money was collected or purported to have been collected as taxes, penalties or interest under this Act, the money shall by this section be conclusively deemed to have been confiscated by the government without compensation.

The new section was governed by this provision:

> 62. . . .
>
> (5) Section 20 shall be deemed to have come into force on August 1, 1974 and is retroactive to the extent necessary to give it effect on and after that date.

Section 25(5): Confiscation

The *Amax* case dealt with a legislative provision which applied, in its terms, to bar legal proceedings for the recovery of money paid as taxes under an ultra vires statute. But the Crown, in this case, did not rely on s. 25(5); indeed, the Crown conceded that s. 25(5) must be considered to be contrary to the principle underlying the decision in the *Amax* case, even though not contrary to the most strict ratio decidendi of that case. The principle underlying the *Amax* decision was stated by Dickson J., for the Supreme Court of Canada, at p. 592:

> The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means.

Section 25(5): Severability

The test for determining whether an unconstitutional provision is severable from the rest of the enactment is set out by Viscount Simon in *A.G. Alta. v. A.G. Can.; A.G. Can. v. A.G. Alta.*, [1947] A.C. 503 at 518, [1947] 2 W.W.R. 401, [1947] 4 D.L.R. 1 (P.C.):

Source: Nikkei National Museum, 2018-16-2-11-8-11
www.nikkeimuseum.org

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

Whether ss. 25(1) to 25(4) are constitutional or not, those subsections meet Viscount Simon's test for being severed from subs. (5), that is, the legislature would have sought to impose the retroactive tax, even if it had considered that confiscation of the money paid as taxes under the ultra vires statute would itself be unconstitutional.

But subs. (5), though severed, can still be used, if it is helpful, to elucidate the meaning of ss. 25(1) to 25(4), so long as that meaning is one that is supported by the wording of the subsections themselves.

Sections 25(1) to 25(4): Constitutionality

I have concluded that the 1976 amendments to the Gasoline Tax Act make the whole Act constitutional. Sections 25(1) to 25(4) of the 1981 amendments are indistinguishable in any relevant respect, in their wording, apart from the retroactive feature, to the principal charging section of the Gasoline Tax Act, as amended in 1976.

There can be no doubt that a sovereign legislature can, in general, pass legislation that has a retroactive effect. Indeed, retroactivity is a common feature of taxation legislation, which usually takes effect from the day of announcement of the government's intentions in the Budget speech. The retroactivity in this case is true retroactivity and not merely retrospectivity. The intention is to attach new legal consequences to past events as of the date of the past events.

Once s. 25(5) is severed, ss. 25(1) to 25(4) seem to me, in their wording, to impose a constitutional tax.

The next question is whether we should look behind the wording to decide, in the context and from all the circumstances, that what looks like a constitutional tax is really a colourable attempt to retain money paid to the Crown under an unconstitutional taxing statute. I do not think so. If there had been no Gasoline Tax Act until 1976, and if a constitutional Act had been passed then for the first time, then the constitutional Act could have been amended in 1981 to make it retroactive to 1st August 1974. Does the existence of an ultra vires Act before 1976 make it impossible to pass the new intra vires retroactive legislation? I do not see why it should. There is no reason why the fact that legislation has been passed once, unconstitutionally, makes it unconstitutional to pass it, or similar legislation, a second time, constitutionally.

Source: Nikkei National Museum, 2018-16-2-11-8-12
www.nikkeimuseum.org

So the question of colourability narrows down to this: Is this particular enactment colourable not because it is retroactively replacing an ultra vires tax with an intra vires tax but because the true legislative intent was to confiscate and keep the money paid as taxes under the ultra vires tax? In my opinion, the answer to that question is "No". If it could have survived the *Amax* decision, the wording of s. 25(5) would have achieved the effect of confiscation without anything more. It did not have to be linked to an intra vires retroactive tax. And linking subs. (5) to an intra vires tax cannot save subs. (5) from the principle underlying the *Amax* case.

An important aspect of this question is whether the effect of the legislation will be to defeat the principle in the *Amax* case. As long as the effect given to the legislation does not result in a legislative confiscation of the money paid as taxes under the ultra vires statute, the *Amax* principle will not be subverted and the legislation will not have the effect of doing indirectly what could not be done directly. So it will not be colourable.

I do not think there is anything in ss. 25(1) to 25(4) that could support a legislative confiscation of the money paid under the ultra vires statute, once s. 25(5) is severed. Accordingly, I conclude, as Macdonald J. concluded at trial, that the four subsections are constitutional.

Sections 25(1) to 25(4): Effectiveness

I wish to add that I make no decision about the effectiveness or enforceability of the tax imposed by the four subsections. An effort was made by the Crown to issue an assessment of tax levied under the four subsections as charging subsections. Air Canada applied under the Judicial Review Procedure Act to quash the assessment. Murray J. quashed it. See *Air Can. v. Turner*, 57 B.C.L.R. 322, [1984] 6 W.W.R. 346 (S.C.). The questions that were before Murray J. were not before us in this appeal, and I make no comment on them. But, ineffectiveness or unenforceability do not affect constitutionality unless they show that so little attention has been paid to the mechanics of the legislation that the substantive provision must be considered to be colourable. That, I think, is just another way of stating the point made by Dickson J., for the Supreme Court of Canada, with respect to a jumble of inconsistencies not being permitted to frustrate the true intention of the legislature, in *A.G.B.C. v. Can. Trust Co.*, supra, at p. 488. No argument along these lines was sufficiently developed to influence my opinion on colourability.

Retention by the Crown of the money paid under the ultra vires statute

I have had the advantage of reading the reasons prepared by Esson J.A. He has pointed out the strict ratio decidendi of the *Amax* decision. I do not disagree with his analysis of that case and what it decides.

But, in my opinion, the *Amax* decision and the decision of the Supreme Court of Canada in *Nepean Hydro Elec. Comm. v. Ont. Hydro*, [1982] 1 S.C.R. 347, 16 B.L.R. 215, 132 D.L.R. (3d) 193, 41 N.R. 1, are perfectly reconcilable. I have reached this conclusion on the basis of two separate arguments.

The first argument is a constitutional one. It is that even if the *Nepean* case could be considered to extend common law principles of mistake, compulsion, protest and unjust enrichment to money paid under a wholly ultra vires statute, constitutional principles would require that the money paid under the wholly ultra vires statute must be recoverable, notwithstanding those common law principles, otherwise the Constitution would be flouted in the result. In short, there is a constitutional exception to the *Nepean* case with respect to money paid under a taxing statute that is beyond the legislative competence of the legislature which enacted it under s. 92 of the Constitution Act.

The second argument applies the common law principles, with the same result. If money is paid as taxes under a wholly ultra vires statute, that money should be considered to have been paid under the irresistible practical compulsion of state power, whether the statute was thought by either the state or the taxpayer to be ultra vires, and whether the taxpayer protested or not, or complained about the compulsion or not. I think, in the relevant sense of "compulsion", under the common law principles, all taxes are paid by compulsion.

I also consider that it would be unjust and against conscience for the Crown to retain money paid as taxes under an ultra vires statute. In this case, the fact that the Crown is retaining the money paid by other taxpayers does not make it just to retain it against the airlines. And I do not think that the retention of the money paid under an ultra vires statute can be regarded as just or in accordance with good conscience merely because the legislature could have enacted a constitutional tax imposing a levy that would have had the same practical results as the unconstitutional levy.

I would like to add a note about a point that was not argued. The Crown has paid to the airlines the amounts that they paid as taxes under the ultra vires statute. That payment was made after the judgment of Macdonald J. at trial, but before the hearing of this appeal. The

common law principles about money paid under mistake, or by compulsion, or under protest do not relate to the ownership of the money; they relate to the retention of the money even though it may not be owned by the person who retains it. Once possession is lost, the legal rights may change. I raise this point only to make it clear, since it was not argued, that I am making no decision about it.

IV Opinion

I have reached the same conclusion as Macdonald J., the trial judge, on all the issues argued in these appeals. It follows that I would dismiss the appeals and that I would dismiss the cross-appeals.

Esson J.A. (dissenting in part):— These appeals arise out of the judgment of Macdonald J. which is now reported at 51 B.C.L.R. 175, [1984] 3 W.W.R. 353. He held the three airlines which are the plaintiffs in these actions to be entitled to recover from the province of British Columbia all amounts paid by them as taxes under the Gasoline Tax Act in the period 1st August 1974 to 30th June 1976, during which period that Act was admittedly ultra vires the province. He dismissed the actions of Air Canada and Pacific Western Airlines seeking a declaration that the statute, as amended in 1976, is ultra vires. Those two airlines appeal against that decision. The province appeals against the judgment ordering repayment of taxes paid to 30th June 1976. All three airlines are respondents on that cross-appeal.

The appeal of Air Canada and Pacific Western

I have read the reasons prepared by Hinkson J.A. and agree, substantially for the reasons given by him and those of the learned trial judge, that the appeal should be dismissed. The substance of the matter is that the tax is one imposed upon purchases within the province. The tax does not cease to be a direct tax within the province simply because the airlines consume outside the province much of the fuel purchased by them. The statute limits the incidence of the tax to those who purchase or receive gasoline for their own use or consumption. The purpose of that limitation is, of course, to ensure that the tax will have no tendency to be passed on. That limitation does not make it a tax upon consumption. So there is no reason why it can validly apply only to fuel purchased for consumption within the province.

I wish to add a reference to *Marine Petrobulk Ltd. v. R. in Right of B.C.* which, on this aspect of the case, is directly in point. The decision of the trial judge, Legg J., is reported at 52 B.C.L.R. 318, [1984] 4 W.W.R. 155, 11 D.L.R. (4th) 138; that of this court at 64 B.C.L.R. 17, [1985] 4 W.W.R. 663, 18 D.L.R. (4th) 451.

Source: Nikkei National Museum, 2018-16-2-11-8-13
www.nikkeimuseum.org

The case concerned a tax imposed upon the delivery of bunker fuel in British Columbia to foreign ships engaged in international trade. The fuel was used for propulsion of the ships and almost entirely outside British Columbia. At trial, it was held that the tax was direct and was validly applied to the plaintiff notwithstanding that the fuel delivered in British Columbia was for consumption elsewhere.

The appeal to this court was confined to the question whether the tax was direct. On that question, this court upheld the judgment of Legg J. On this appeal, the appellants, accepting the binding authority of that aspect of the decision, have not submitted that the tax imposed by the Gasoline Tax Act after the 1976 amendments is indirect. On the question of place of consumption, the decision is not binding upon this court but it is persuasive. I agree with the conclusion and with the reasons given by Legg J. At p. 329, he said:

> The facts stated in the petition show that the purchase or delivery takes place in the harbour of the port of Vancouver and the person purchasing or receiving the fuel oil is subject to a tax notwithstanding that the fuel oil may be used elsewhere.
>
> I do not consider that the legislature intended to make use or consumption of the bunker fuel the subject matter of the tax. The subject matter is the purchase or delivery of the bunker fuel. The fact that the marked bunker fuel was originally acquired from suppliers in Seattle does not alter the conclusion that the Act imposes a tax "within the Province".

The airlines rely particularly upon the decision in *R. in Right of Man. v. Air Can.*, [1980] 2 S.C.R. 303, [1980] C.T.C. 428, 111 D.L.R. (3d) 513, 32 N.R. 244, 4 Man. R. (2d) 278. They say that it establishes that any fuel consumed by an aircraft, except when it is in physical contact with the ground in British Columbia, is consumed outside the province. The facts dealt with in *Man. v. Air Can.* were quite different than those in these cases, and I think there is a serious question whether the case can be taken to decide that fuel consumed in the air within the borders of a province is consumed outside the province. But, because the place of consumption is irrelevant, the point need not be decided. The relevant distinction between these cases and *Man. v. Air Can.* is essentially that made by Legg J. at p. 330 of *Marine Petrobulk:*

> The difference between the Manitoba legislation and the British Columbia legislation is significant. The British Columbia Act does not impose a tax "in respect of the consumption" of the property purchased as does the Manitoba legislation. The reference to "use or consumption" in the British Columbia legislation is designed to ensure that the tax is direct but it is the transaction of purchase or delivery which the legislature intended should attract the tax. Under both taxing statutes, the tax could not be imposed if the purchaser could prove that the purchase was not for use or consumption but for resale. In such a case the tax would be inapplicable because in that application the tax would be indirect. The difference between the application of the Manitoba and British Columbia legislation is that the Manitoba tax is only payable if the consumption occurs within the province. In British Columbia, the situs of the consumption is irrelevant.
>
> As I have earlier indicated the subject matter taxed by the British Columbia legislation is the delivery or purchase. The question which must be answered is whether the delivery of the fuel has "reality" in terms of its delivery or purchase in the province of British Columbia.

Legg J. went on to hold that the delivery of the fuel had "reality" in the appropriate sense. It is clear that the transactions within British Columbia which are the subject-matter of this case have reality in that sense.

As in *Marine Petrobulk*, the consumption of the fuel was not the subject matter of the tax. It is therefore irrelevant that the fuel, or at least a large part of it, was consumed outside British Columbia.

The cross-appeal

I begin by stating my conclusion. That is that the learned trial judge erred in holding that the province must repay to the airlines the taxes paid by them prior to 1st July 1976. The salient fact upon which I base that conclusion arises from the decision on the main appeal that the airlines are in the same position as all others who purchase fuel within British Columbia for their own consumption. Before July 1976, although the tax was imposed under an invalid statute, it was in essence the same tax as the present one. Then, as now, it was imposed "at the pump", i.e., at the point of purchase for consumption. The statute was, until 1976, beyond the powers of the province because it authorized a tax in terms which could have resulted in it being passed on to others. It was capable of being indirect and therefore was indirect. But the money which the airlines now seek to recover was not paid by them in satisfaction of an indirect tax. As actually administered, the tax was within the powers of the province. In that sense, the defect was one of constitutional form rather than substance.

On this part of the case, the trial judge rested his judgment entirely upon the decision of the Supreme Court of Canada in *Amax Potash Ltd. v. Sask.*, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222. He found that decision to "foreclose" all of the arguments which might otherwise have been put forward in answer to the case of the plaintiffs, particularly those based upon the

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decision of the Supreme Court of Canada in *Nepean Hydro Elec. Comm. v. Ont. Hydro*, [1982] 1 S.C.R. 347, 16 B.L.R. 215, 132 D.L.R. (3d) 193, 41 N.R. 1. In so stating, the trial judge accepted the submission of the plaintiffs that *Amax* laid down a new principle of constitutional law, i.e., any money paid to a government as taxes under a statute later held to be ultra vires as being in breach of the division of powers must be paid back; and that "private law" considerations, such as mistake of fact, voluntary payment and the like, are irrelevant. In support of that contention, the airlines also rely upon the decision of the Supreme Court of Canada in *Can. Indust. Gas & Oil Ltd. v. Sask.*, [1978] 2 S.C.R. 545, [1977] 6 W.W.R. 607, 80 D.L.R. (3d) 449, 18 N.R. 107, to which I will refer as "*CIGOL*". In that case a taxing statute was held ultra vires, the plaintiffs were given judgment for the taxes collected under it without any reference to the considerations dealt with in *Nepean* which was, of course, not a constitutional case.

Neither *Amax* nor *CIGOL*, in my view, supports the broad contention of the plaintiffs. To demonstrate that, regard must be had to the facts of the cases and the course of proceedings. The two cases can properly be considered together because, although they dealt with different statutes, the nature of the defect in the legislation and the issues raised were the same.

Amax came to the Supreme Court at the interlocutory stage. The plaintiffs were a group of potash producers. They brought action for a declaration that provincial legislation imposing certain taxes upon them was ultra vires, and for repayment of all moneys paid by them on account of that tax. The province defended on two grounds. One was that the legislation was intra vires. The second was based upon s. 5(7) of the Proceedings Against the Crown Act which, it contended, had the effect of barring any action against the Crown to recover the moneys paid, even if the legislation was ultra vires. In an attempt to avoid the consequences of s. 5(7) should the legislation be held invalid, the plaintiffs applied for the appointment of a receiver. Their application having been dismissed by the Saskatchewan courts, they were given leave to appeal to the Supreme Court of Canada and, on that appeal, were given leave to raise the question whether s. 5(7) was itself constitutionally valid. The Supreme Court did not appoint a receiver but held that s. 5(7), insofar as it purported to bar recovery of taxes paid under a statute which was beyond the legislative jurisdiction of the province, was itself beyond that jurisdiction. That is the important aspect of the *Amax* decision. The attempt to bar access to the courts on the repayment issue was struck down.

The submission of the province in support of the validity of s. 5(7) was that it was open to the Crown to rely upon its immunity from suit to bar such an action. The constitutional principle established by *Amax* is that Crown immunity cannot be relied upon by either Parliament or a provincial legislature to protect itself against the consequences of having taxed beyond the limits of its powers. The issue before the court was not what the consequences would be in any given case. The language of the judgment is not, in my view, directed to any such issue.

The submission of the plaintiffs is founded particularly upon this passage in the judgment of Dickson J. (now C.J.C.) speaking for the court at p. 590:

> Section 5(7) of *The Proceedings against the Crown Act*, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under *The British North America Act, 1867*. It also brings into question the right of a Province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial Legislature can tax beyond the limit of its powers, and by prior or *ex post facto* legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

The plaintiffs rely particularly upon the last sentence of that passage. It is said to imply that in no circumstances can a government be allowed to retain moneys collected under an ultra vires statute. In my view, the language of the sentence falls short of supporting that contention and, when regard is had to the factual context, it becomes clear that no such proposition was laid down.

The facts relevant to this question consist largely of the nature and course of the proceedings. The action, as appears from the first paragraph on p. 589, was one framed in respect of moneys paid under compulsion or mistake of fact. The reasons of Dickson J. do not discuss the components of that cause of action in any detail but do not, on the other hand, suggest that the plaintiffs, in order ultimately to succeed, would not have to establish the elements of that cause of action. In the sentence particularly relied upon, Dickson J. refers to money paid under compulsion. That is part of the language of the cause of action in *Amax* and in this case. There is no reference in the *Amax* reasons to mistake. That is understandable. The facts were such that no issue of mistake could realistically have been raised. From the

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first threat of imposition of the tax, the potash companies had objected, had taken the position that the legislation was ultra vires, and had paid under protest and under compulsion of the most direct kind. As Dickson J. put it at p. 593, the case involved ''. . . the assertion by a Province of a right to retain moneys exacted illegally and under protest''.

The reason why the province did not seek to raise any defence based on the common law cause of action is no doubt that the facts could support no such defence. The position of the province, in the event the legislation was ultra vires, was admirable in its simplicity, if not in other ways. It amounted to saying: we know that, if the statute is invalid, the general law gives us no possible defence to your claim for repayment; but we rely on our legislative power to invoke Crown immunity to bar you from the judgment seat, and we intend to do so to keep your money.

In this case, the plaintiffs rely upon the statement by Dickson J. at p. 590 that:

> . . . it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

Again, when that statement is read in context, it can be seen to have no application to facts such as those of this case. The next three sentences at p. 590 make it clear what was under consideration:

> Both Saskatchewan and Alberta inform the Court that justice and equity are irrelevant in this case. If injustice results, it is the electorate which must administer a rebuke, and not the Courts. The two Provinces apparently find nothing inconsistent or repellent in the contention that a subject can be barred from recovery of sums paid to the Crown under protest, in response to the compulsion of the legislation later found to be ultra vires.

That passage is wholly inconsistent with the thesis that the court laid down a constitutional rule that repayment must be ordered simply because the taxes were paid under an ultra vires statute. Clearly, the court did not agree that justice and equity were irrelevant. Justice and equity can only be decided by reference to the facts of the case. What the court did lay down was that, in a case of this kind, Crown immunity cannot be employed to prevent the issues of justice and equity being tried.

So with the passage from the judgment of Dickson J. at p. 590 of *Amax*, which I have quoted at p. 000 and which is particularly relied upon by the plaintiffs. It is directed against the particular position

adopted by Saskatchewan in that case and must, in my view, be read in that light. The court regarded the position as repellent. If the province could bar access to the court by taxpayers seeking to repay money paid under an ultra vires statute, that would be to allow it to ''do indirectly what it could not do directly''. That would be to allow it ''by covert means to impose illegal burdens''. It was that barring of access to the courts which was the indirect or covert means. I see no reasonable basis for applying that language to the facts of this case. British Columbia, in seeking to retain the money paid it while a statute was in an ultra vires form, seeks merely to do what it could have done directly. It did not ''tax beyond the limits of its powers''. It did not, in the sense in which the words are used in *Amax*, transgress the limits of its constitutional mandate or engage in an illegal exercise of power.

For the same reasons that *Amax* does not support the plaintiff's broad proposition, neither does *CIGOL*. The issues in that case were stated by the trial judge, Hughes J. at [1975] 2 W.W.R. 481 at 484 (Q.B.):

> The specific relief sought includes a declaration of ultra vires and an order for the return of payments made to the Province of Saskatchewan under the legislation, which the plaintiff says have been made under compulsion.
>
> The defence filed alleges the impugned statutes and Regulations to be within the legislative competence of the province. The defendant has then pleaded ownership of all petroleum and natural gas rights referred to in the statement of claim as being vested in the province and therefore as owner, entitlement to impose the taxes and royalties through the legislation in question. The defendant then pleads that the legislation is also within the legislative competence of the province by virtue of the 1930 agreement between the Government of Canada and the Government of the Province of Saskatchewan with respect to ownership by the province of all public lands and mines and minerals within the province, together with the right to administer and control the natural resources in the province from the time of Confederation in 1905. Finally, to the whole of the plaintiff's claim the defendant has pleaded the provisions of The Proceedings Against the Crown Act, R.S.S. 1965, c. 87, to which the plaintiff has replied that said statute is no answer to its claim and that if s. 5(7) thereof should be a bar thereto it is itself ultra vires.

CIGOL was decided by the Supreme Court of Canada shortly after *Amax*. So the defence based on s. 5(7) was gone. That explains why the court, having held the legislation to be beyond the legislative competence of the province, went on to give judgment for return of the moneys paid without reference to any issues arising from the private law. On the facts of the case, there was no possible defence. It does not follow that in no case can there be a defence to such an action.

Source: Nikkei National Museum, 2018-16-2-11-8-16
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The plaintiffs refer to no other case authority in support of their position but there is support for it in Professor Hogg's excellent work, Constitutional Law of Canada, 2nd ed. (1985). Under the heading "Taxes paid under unconstitutional law", the author says at pp. 349-50:

> Where a tax has been paid to government under a statute subsequently held to be unconstitutional, can the tax be recovered by the taxpayer? In principle, the answer should be yes. The government's right to the tax was destroyed by the holding of unconstitutionality, and the tax should be refunded to the taxpayer. Neither governments nor courts have so far embraced this simple solution, although, as I will argue later, it may well be the law. Governments have often tried to retain taxes paid under an unconstitutional statute (or an invalid regulation or by-law), and taxpayers have often been unsuccessful in enforcing recovery in the courts.
>
> The taxpayer's problem is caused by the doctrine of the law of restitution that payments made under a mistake of law are irrecoverable, while payments made under a mistake of fact are recoverable. Translated into a taxing context, it can be said that a person who pays taxes under a statute subsequently held to be invalid has made a mistake of law, that is, a mistake as to the validity of the statute. Consequently, the payment is irrecoverable. This result has little intuitive appeal, and courts have struggled to find ways of finding for the taxpayer. In one case, the Supreme Court of Canada held that a payment had been made under a mistake as to the *existence* of a by-law, which the Court characterized as a mistake of fact. In another case, the Court held that the taxes had been paid under duress, which was an exception to the mistake-of-law rule. But for the most part payments of invalid taxes have been held to be irrecoverable.
>
> It is possible that taxes paid under an unconstitutional statute stand on a different footing than taxes paid under a regulation or by-law that is held to be ultra vires on non-constitutional grounds. In *Amax Potash v. Government of Saskatchewan* (1976), the Supreme Court of Canada held that the Saskatchewan Legislature could not enact a statute purporting to bar the recovery of taxes that had been paid to the Saskatchewan government under an unconstitutional statute. This decision was said to be demanded by a principle of federalism: a restriction on the province's legislative power to tax should not be evaded by the indirect means of barring recovery of taxes levied in violation of the restriction. The Court did not have to decide, and did not decide, whether the taxes paid were recoverable at common law (having regard to the mistake-of-law doctrine), and so the case can be construed as implying nothing about that issue. But it would be anomalous if a court could deny recovery of taxes on the basis of a common law rule that the Legislature would be powerless to enact. In other words, the reasoning based on federalism would seem to apply with equal force to a common law bar as to a statutory bar. If so, *Amax Potash* requires a new exception to the mistake-of-law doctrine for the case where taxes have been paid under a statute subsequently held to be unconstitutional. In that case, the holding of unconstitutionality should make the taxes recoverable.

In my view, that "simple solution" is not the law and there are good reasons why it should not be. The nub of the argument is in the last few sentences, particularly in the suggestion that the reasoning based on federalism seems to apply with equal force to a common law as to a statutory bar. The author is there equating s. 5(7), "a statutory bar", with the mistake of law doctrine (a common law bar). As I understand the argument, it is this. Both laws bar recovery of taxes. If the constitutional principle prevents a province from relying on Crown immunity to bar recovery, it should also prevent it from relying on the mistake of law doctrine for that purpose.

The flaw in that argument, I think, is that it ignores the essential difference between the two kinds of "bars". It is not that one is statutory and the other a product of the common law. It arises from the special nature of the statutory bar created by s. 5(7). What Saskatchewan sought to do by invoking that section was to bar access to the courts and thus to bar the plaintiffs from proving their cause of action based on the common law. To put it another way, s. 5(7) was designed to prevent access to the general law of which the mistake of law rule is only one aspect.

It is, I suggest, barely apt to describe the mistake of law rule as a bar to recovery. That rule is an integral part of the general law relating to actions for money had and received. A plaintiff who proves that he paid money under a mistake will fail if that mistake was one of law rather than fact. That is analogous to the plaintiff who sues in negligence and who succeeds in proving want of care but not damage. Recovery would be "barred" only because, under the general law, the plaintiff did not have a good case.

What *Amax* decided was that fundamental principles of federalism preclude a province from barring access to the general law where the issue is whether the province has exceeded its powers and whether, if it has, the taxpayer is entitled to a remedy. It is a bar of that kind that the legislature is powerless to enact. This principle probably would extend to deprive the legislature of power to amend the general law if that was done in a "colourable" attempt to bar recovery of taxes paid under an ultra vires statute. Apart from that, the *Amax* principle does not fetter the power of a sovereign legislature to pass laws within the field of its competence. The province (or the federal Parliament) cannot prevent the issue being decided according to the general law which is based on principles of justice and equity. Professor Hogg's thesis would amount to saying that the province must repay without regard to questions of justice and equity.

Source: Nikkei National Museum, 2018-16-2-11-8-17
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It is instructive to consider what the consequences might be if Professor Hogg's thesis were to be applied to the Gasoline Tax Act. The tax imposed under it for decades before 1976 was a tax of broad general application. It has long been a major component of the provincial budget. Every operator of a vehicle contributed to the provincial coffers in this way. The total number of such taxpayers must be in the millions. The amount involved in these three actions is "only" something over six million dollars. In the modern scale of things, that will not have a major additional impact on the already sorry financial state of the province. A few more schoolrooms and a few more hospital wards may have to be closed and a few roads may go unrepaired; or perhaps the matter will be dealt with by a further increase in the deficit so that future generations will bear the burden. The blow will, however, be greater than that inflicted by these cases. We are told that other large taxpayers, including one of the national railways, commenced action before the period of limitation expired and await the outcome of these actions to decide whether to go ahead. As the assessment on the airlines was at a lower rate per gallon or litre than for most consumers, those claims may involve much larger amounts. Before us, it was suggested by counsel that the risk to the province will end with those actions because the limitation period expired, at the latest, sometime in 1982. So those thousands or millions of other potential claimants cannot recover. The justice of that may not be apparent to them but, if the plaintiffs' thesis is correct, even those myriad claims may not be barred. The Limitation Act is a statute of British Columbia. Can the province invoke it to bar recovery of taxes? If the plaintiffs and Professor Hogg are right, surely not. Perhaps all those who have paid gasoline tax between 1923 and 1976 are entitled to recover. If the new constitutional ruling is as simple as it is said to be, I do not know what answer could be made to that. Laches could not be relied upon because that is, after all, a "common law" equitable doctrine which, as Professor Hogg puts it, the province would be "powerless to enact" to bar recovery.

I will not pursue these fancies further. The answer to them is, in my view, that the general law is applicable. The plaintiffs can recover only if they can satisfy the requirements of the action for money had and received, which are rooted in principles of justice and equity.

The leading case in this area of the law is now *Nepean*, supra. A more recent decision of this court which is in point is *A.J. Severson Inc. v. Qualicum Beach*, 35 B.C.L.R. 192, [1982] 4 W.W.R. 374, 135 D.L.R. (3d) 122.

Source: Nikkei National Museum, 2018-16-2-11-8-18
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On the basis of those authorities, I take the rules applicable to an action such as this to be:

(1) Money paid under a mistake of fact, but not a mistake of law, may be recovered.

(2) Where money was paid under a mistake of law, if the plaintiff was not in pari delicto with the defendant, recovery may be had if the mistake was as to a statute intended specifically to protect the class of persons of whom the plaintiff is a member, and if the money was paid under an illegal contract.

(3) Money paid under compulsion or duress and in the absence of lawful authority to require payment may be recovered.

(4) Whatever the basis for seeking recovery, it will be granted only if it would be unjust or against conscience to allow the defendant to keep the money.

Applying those principles to the facts of this case, I conclude firstly that the plaintiffs cannot succeed on mistake. Any mistake of the parties was as to the validity of the statute under which the tax was imposed. That is similar to the mistake in *Nepean* which was one as to the validity of a resolution. It was a mistake of law and thus not a basis for recovery.

Secondly, I conclude that the in pari delicto exception has no application. The principal authority for the existence of that exception is *Kiriri Cotton Co. v. Dewani*, [1960] A.C. 192, [1960] 2 W.L.R. 127, [1960] 1 All E.R. 177 (P.C.). In holding that case to have no application to the facts of *Nepean*, Estey J. said at p. 394:

> The parties here did not "agree" to do something prohibited by the Act. The respondent submitted a claim for payment of charges for power supplied, which were not authorized by the Act under which the parties were operating and the appellant, in all innocence, paid the account so rendered. The *"in pari delicto"* test and its terminology seem most inappropriate and utterly unconnected to the realities of the transaction.

Here, the province collected a tax which was authorized by the Constitution but was collected under a statute which was not authorized. As in *Nepean*, the in pari delicto test and its terminology seem most inappropriate and utterly unconnected to the realities of the transaction.

The major ground upon which the plaintiffs rest their case is, I think, that of compulsion. Clearly, there was no duress or compulsion comparable to that exerted in the *Amax* and *CIGOL* cases but the

plaintiffs rely upon "practical compulsion" as defined in such cases as *Eadie v. Brantford*, [1967] S.C.R. 573, 63 D.L.R. (2d) 561 [Ont.]. Hinkson J.A. has set out the facts relied upon in support of that contention. I adopt his outline of the facts and express no disagreement with his view that Air Canada did not pay the tax as a result of a practical compulsion. At best, the plaintiffs have a very weak case on practical compulsion but, for the sake of argument, I will assume that they can get over that hurdle. They then meet a hurdle which in my view they cannot get over. As in *Severson*, supra, where the payment was found to have been made under practical compulsion, recovery should be denied because, in the circumstances, it would not be unjust to permit the defendant to keep the money.

The cause of action relied on by the plaintiffs has its foundation in the law of restitution or unjust enrichment. It is now well established in Canada that the plaintiff in an action for money had and received must establish, apart from all else, that it would be unjust or against conscience that the defendant be allowed to keep the money. The matter was considered by the Supreme Court of Canada in *Storthoaks v. Mobil Oil Can. Ltd.*, [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, 55 D.L.R. (3d) 1, 5 N.R. 23 [Sask.]. Martland J., who gave judgment for the court, discussed the two lines of authorities which had developed. After expressing some reservations whether the test of "unjust or against conscience" was the most appropriate, he accepted that earlier decisions of the Supreme Court of Canada had established that rule.

Assuming that the plaintiffs can establish payment under compulsion, the question remains whether it would be unjust to allow the province of British Columbia to retain the money. In my view, it would not. I return to what I consider to be the essential fact in the case. The tax imposed upon and collected from these plaintiffs was a tax clearly within the competence of the province. I know of no reason why the province, having discovered the defect in the statute, could not have validly imposed a retroactive tax and have deemed the payments made under the defective statute to have been made in payment of the retroactive tax. In 1981 it went some way in that direction. It enacted s. 25 of the Gasoline Tax Act, which is set out in full in the reasons of Hinkson J.A.; but, instead of simply deeming the money already collected to have been paid under that "new" tax, which is conceded otherwise to be a valid exercise of legislative power, it deemed in s. 25(5) that the money was "confiscated by the government without compensation". That language, if it could be linked to the preceding four subsections, and had the province relied

on it, might have the effect which I suggest could have been validly achieved by simply deeming the money to have been paid under the new retroactive tax. By providing no verbal link to that which goes before, and by resorting to the unnecessarily inflammatory language of "confiscation without compensation", the section creates a vivid appearance of "colourability". That may, and in my view probably is, merely an appearance. But that issue is not properly before us. The province, concerned that subs. (5) would run afoul of the rule in *Amax*, chose not to rely upon it. So it came before the court in this action relying upon the first four subsections and asserting that the fifth should be "severed" and ignored. Without relying upon subs. (5), the province established no link between the new retroactive tax and the money paid under the old ultra vires statute. The trial judge left open the question whether that link could have been provided by a plea of set-off. I agree that, on the basis the matter is put before the court, that question should be left open.

I will add that I think it is clear that the legislative intent was to link subs. (5) to the preceding four subsections. I agree with Hinkson J.A. that the fifth subsection cannot be severed but I do not agree that there it needs to be severed to preserve the constitutional validity of the new tax. That is because I am not persuaded that subs. (5) is constitutionally invalid. In substance, it appears to me to be a provision for collecting the tax validly imposed by the first four subsections and therefore does not offend the *Amax* rule. I would, however, be reluctant to decide the case on that basis because it was neither pleaded nor argued. The province did not concede the invalidity of subs. (5) but it shyly took the position that it would not rely upon it lest it be found invalid. This unwonted diffidence has effectively left the court without the benefit of proper argument on the question of the validity of subs. (5).

I therefore leave this question on the basis that I do not see why subs. (5) is ultra vires the province but it is unnecessary to reach a final conclusion.

In the view I take of the matter, the legislative manoeuvres in 1981 are irrelevant. The question is whether the plaintiffs have made out a case for recovery. Without regard to the 1981 amendments, I conclude that they have not. The 1981 amendments have succeeded in thoroughly confusing the issue but, in the end, are unnecessary to maintain the case of the province.

The plaintiffs, in submitting that it would be unjust to allow the province to retain the money, base their submissions primarily on the

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course of conduct of the legislature from 1928 to 1976. Hinkson J.A. has referred at length to the legislative history. During all of that time, the province was apparently aware of the defect in its legislation, enacted a statute which would have remedied that defect, but did not proclaim it. The record discloses no reason for that curious course of conduct. It may be lost in the mists of time. It is a course which may be thought not to reflect well on those who had charge of the affairs of the province in this area during that half century. But again it is the substance which counts. The substance is that the province got no benefit, and the taxpayer suffered no detriment, not authorized by the Constitution.

Counsel for C.P. Air says that the province, by maintaining a valid statute and not proclaiming it, provided itself with a "parachute" which it did not use until it "got caught". He describes that as deliberately acting in a "covert manner". That language is designed to create an appearance of similarity between this legislative performance and Saskatchewan's reliance in *Amax* on s. 5(7). I see no similarity. Section 5(7), if applied to the *Amax* action, had the effect of depriving the plaintiffs of a decision on the merits of their claim for recovery. That was done under the guise of relying upon Crown immunity. That is what was referred to as "covert".

If the plaintiffs' accusations against the province are stripped of rhetorical flourishes, they amount to saying that the province equipped itself in 1928 with a properly worded statute but decided to wait for an attack to be made on the improperly worded one before proclaiming the new one. I accept that as the most probable explanation of the course of conduct. When regard is had to the difficulties inherent in establishing a direct tax, and to the sometimes baffling and tortuous trail created by the decisions on the subject, this rather dithery course is perhaps excusable. In 1928, or even in 1958, it may not have been as clear as it now is that the scheme of the Gasoline Tax Act 1928 would be held valid. The validity of the new Fuel-oil Tax Act was not finally established until the decision of the Privy Council in *A.G.B.C. v. Kingcome Navigation Co.*, [1934] A.C. 45, [1933] 3 W.W.R. 353, [1934] 1 D.L.R. 31. In any event, that created a tax on consumption which may well have been impractical as a means of taxing gasoline as distinct from fuel oil. Whatever the reasoning, the province, perhaps reassured by the absence of attack on the statute, decided to let that particular sleeping dog lie. That was sloppy legislative housekeeping but not a basis for requiring the province to repay the taxes collected in that way. Whatever rude language one chooses to apply to this 48-year performance by British Columbia, the

fact remains that it gained the province no benefit to which it was not constitutionally entitled and deprived the taxpayers of no right or benefit to which they were entitled under the Constitution. The tax was a proper one.

It is of some interest to note that Air Canada which, of the three airlines, paid the largest amounts under the Gasoline Tax Act over the longest period, apparently did so until September 1975, more than halfway through the period for which it claims recovery, in the belief that it was making the payments voluntarily. That belief was based on an interpretation of federal legislation which is now conceded to have been an erroneous one. What is of interest is that, in its letter of 14th July 1975 when the increasing rates of tax led it for the first time to lodge a protest with British Columbia, albeit on an erroneous ground, it said that it had paid voluntarily "so that B.C. could derive its fair share of revenue".

It is sometimes said that actions of this kind are designed to prevent the person who got money under mistake or compulsion from being unjustly enriched or obtaining a windfall. I can conceive of no sensible basis for suggesting that, if the province retains this money, it will get a windfall. I agree with Mr. Arvay that, if these plaintiffs hold their judgment, they will in a real sense have achieved one. From every point of view, I conclude that justice and conscience dictate that the plaintiff's action for recovery be dismissed.

That is the order I would make. I would allow the cross-appeal accordingly.

Appeal and cross-appeal dismissed.

Source: Nikkei National Museum, 2018-16-2-11-8-20
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NATIONAL ASSOCIATION OF JAPANESE CANADIANS

National Executive Office: 735 Ash Street, Winnipeg, Manitoba R3N 0R5

June 16, 1988

TO: The Strategy Committee
Art Miki, Roger Obata, Audrey Kobayashi, Bryce Kambara, Roy Inouye, Roy Miki

and legal advisors
Shin Imai, Maryka Omatsu, Ann Sunahara, Don Rosenbloom

FROM: Cassandra Kobayashi, 3245 West 12th Ave., Vancouver, B.C. V6K 2R8
(604) 731-8455 home, 731-0311 work or messages

RE: Redress Claim - Opinion on Limitations from Davis & Co.

This memo will introduce the legal research concerning possible court action, and request your feedback.

As explained at the Ottawa Council Meeting in April, the Vancouver law firm, Davis & Company, has been working on the qustion of whether a possible court action to support our claim for Redress would be statute barred. As you will see in the enclosed letter dated June 3, 1988, the firm has come up with four possible causes of action, or types of claims, which would not be subject to the statutory limitation periods. For most types of claims, the limitation periods have run out, which means that it is too late to bring an action for such things as wrongful imprisonment, or conversion (wrongful taking of another's property).

I will explain the four causes of action dealt with in their letter:

(a) **Seek a declaration that certain Orders-in-Council were not constitutionally valid**

Davis & Company are involved in a case which is before the Supreme Court of Canada which involves the issue of whether a constitutional challenge can be statute barred. In that action, they are also seeking repayment of the money paid under the law which they allege is unconstitutional.

In 1942, the Canadian constitution was The British North American Act, which divided power between the federal and provincial governments. For example, the federal government had jurisdiction over air travel and defense, and the provincial government had jurisdiction over property and liquor sales. If the federal government acted outside its constitutional jurisdiction, then the

Source: Nikkei National Museum, 2018-16-2-11-9-1
www.nikkeimuseum.org

Orders-in-Council it passed were without legal effect, and it may be possible to ask that the damage be reversed insofar as that is possible. It is possible to argue that some of the Orders in Council pertaining to "property and civil rights" which are under provincial not federal jurisdiction were outside the powers of the Cabinet.

(b) **Seek a declaration that certain Orders-in-Council were arbitrary, done in bad faith, or were outside the jurisdiction of the Governor-in-Council**

The government has always argued that perhaps their actions were discriminatory, but they were "legal". If we succeded in showing the Orders-in-Council were arbitrary (without a valid reason), done in bad faith (for the wrong reasons) or without jurisdiction (outside the power given to the Cabinet), then the Orders-in-Council will be found to be without legal effect.

Challenges of this type are known as judicial review which is a part of administrative law. In our lives, administrative bodies which are subject to fair procedural rules are ubiquitous - various licensing bodies and the worker's compensation system for example.

(c) **Seek a declaration as to personal status**

Declarations as to personal status usually concern a child's legitimacy, or a person's marital status or citizenship, and are not statute barred.

This application would seek not only a ruling as to the citizenship of certain Japanese Canadians, but also the "incidents" attached to such status, such as the right to move freely and the right to acquire and hold property. This issue arises from the Orders-in-Council which deemed Japanese Canadians to be enemy aliens.

(d) **Bring an action for fraudulent breach of trust**

Fraudulent breach of trust is an action against a "trustee" who fails to carry out the terms of the trust, for example, by disposing of the trust property in an improper manner, or taking some benefit for himself in the form of commissions.

In order to overcome the limitations problem, the following would have to be shown:

1. A constructive trust existed (as opposed to an explicit trust such as one created by a Will or trust

Source: Nikkei National Museum, 2018-16-2-11-9-2
www.nikkeimuseum.org

fund). The Custodian of Enemy Property is a likely candidate.

2. The Ontario Limitations Act applies (Ontario law appears to be more favourable than B.C. law on this point);

3. The breach of trust arose in Ontario for the purposes of bringing the action.

Davis & Company have not yet established that these three conditions are satisfied, but are reasonably confident that this is an avenue worth exploring. If successful, such a cause of action could result in a large monetary settlement.

Davis & Company has also advised that we could argue that limitations should not apply where new information is being unearthed which creates new causes of action.

General Comments

At this time, Davis & Company has given an opinion only on the issue of overcoming the limitation periods. Their opinion does not consider the substantive issues, or whether we would succeed on the merits.

However, their work on overcoming the limitation periods is significant because the biggest hurdle against bringing any action has been the limitation periods.

The above causes of action are not following a routine pattern established by precedent, so it is difficult to predict with certainty, the outcome of any aspect of the case. These are ground-breaking cases and would be making new law. However, they are confident that we would not be thrown out on the limitations issue.

When a writ is issued, we would have to state the nature of our claim, and the relief we are seeking. Before the substantive issue is heard, many interlocutory or preliminary matters are often raised by the defendants, such as whether the case is before the right court, whether the right parties have been named in the suit, and whether the limitation period has run out. These interlocutory motions are heard in a separate hearing, and can be appealed by the losing party, and further appealed all the way to the Supreme Court of Canada. Bob Banno thinks the limitations question could go to the Supreme Court of Canada and take 3 years to be resolved. The whole action might take 5 or 6 years to be decided.

Source: Nikkei National Museum, 2018-16-2-11-9-3
www.nikkeimuseum.org

Fees

In informal discussions, Davis & Company has indicated that they might be prepared to proceed on a semi-contingency basis, meaning that we pay all disbursements (e.g. photocopying, courier, long distance telephone, special research or accounting fees) and half their hourly fees as we go along. If we ultimately win a monetary settlement or settle with the government out-of-court, we would then pay a percentage of the win on a sliding scale to cover the other half of their fees, plus a bonus for their risk and the interest on the late fees. Bob Banno has said that a case of this magnitude would not likely not cost more than $200,000 a year in fees, or $1 million over 5 years (in today's dollars), of which we would have to pay half during the conduct of the action. He also indicated that we will have some ability to control the costs.

Although $500,000 sounds like a lot of money, broken down into yearly amounts, I believe it is manageable. There may be people who have been reluctant to support a political settlement but would donate to a legal fund. As well, the specific nature of the project makes it easier to fundraise. If there are an estimated 12,000 Japanese Canadians who were directly affected by the injustices in the 1940's, they alone could finance this action at a cost of $50 per person ($50 x 12,000 = $600,000), or $10 per year.

Strategy

While the action was occurring, we would reap lots of free publicity and educational material. Even if we seek only declarations without a monetary claim, the court's findings would be a point of honour in showing that Japanese Canadians were truly innocent victims of government wrongdoing.

Bob has stressed that the major benefit in bringing this action will be to better our bargaining position with the government. We would not be ruling out a political settlement. As Ron Doering said to us, their $12 million offer could be substantially increased if they were paying us out to avoid a costly legal suit.

Time frame and next steps

Although 45 years have passed, we cannot be too complacent about letting more time pass. There is some concern about the number of years since the Archives have been open for inspection, and we should consider issuing a writ within the next 6 months.

Source: Nikkei National Museum, 2018-16-2-11-9-4
www.nikkeimuseum.org

Along with fundraising, the NAJC would have to find suitable plaintiffs for this action, probably in a representative capacity. Davis & Company would assist with a list of criteria.

Feedback

Before the NAJC Council members are presented with these research findings and asked to make a decision on further action, I sugggest the Strategy Committee should endorse a plan of action concerning the following points:

1. Are we interested in continuing research towards commencing an action?

2. Are we happy with Davis & Company having conduct of the action?

3. Is the proposed fee agreement acceptable?

4. Do you have any comments on their research findings?

Please call me or write by July 5th. Looking forward to hearing from you.

Cassandra

Source: Nikkei National Museum, 2018-16-2-11-9-5
www.nikkeimuseum.org

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FILE NO. 50739-37599/#52
REPLY TO Robert T. Banno

June 3, 1988

National Association of Japanese
Canadians
c/o Mr. Roy Miki
2995 West 15th Avenue
Vancouver, B.C.
V6K 3A2

Attention: Mr. R. Miki and Ms. C. Kobayashi

Dear Sirs:

Re: Redress Claim - Limitations

We have been asked to consider whether there are causes of action not bound by limitations legislation available to Japanese Canadians interned or whose property was seized and sold during World War II or who were deported after the war.

For the purpose of this letter, we have limited ourselves to the question of what, if any, causes of action survive the expiry of the more than 45 year period from 1942 to date. Clearly, most causes of action would not survive such a lengthy period. For example, a simple action for conversion as against the Custodian of Enemy Property would likely be statute barred. So too would an action for false imprisonment as against Her Majesty the Queen in Right of Canada. In limiting our research to causes of action which may survive the 45 year time period, we have not considered:

(a) the substantive merits of the causes of action;

(b) the method by which any such cause of action could best be advanced; or

(c) who the parties to such a cause of action should be.

In our opinion, there are a number of potential causes of action available which are not precluded by

Source: Nikkei National Museum, 2018-16-2-11-10-1
www.nikkeimuseum.org

limitations legislation. The following causes of action would, in our view, likely survive the imposition of provincial and federal limitations legislation:

(a) Challenges to the constitutional validity of relevant Orders-in-Council

It is our opinion that one cannot by legislative or executive act seek to prevent a constitutional challenge. Consequently, an attempt by the Federal Government, for example, to pass legislation establishing that a constitutional challenge cannot be brought would likely be invalid. The more difficult question is whether laws of general application, such as limitations legislation, can validly have the effect of preventing a constitutional challenge. That is, is the question of constitutional validity of such significance that its resolution ought to be paramount to or to supercede laws of general application?

Although the foregoing issue has not yet been addressed directly by our Supreme Court of Canada, it is likely to be addressed more fully by that Court within the next month. Relevant lower Court authorities do, however, seem to support the proposition that a constitutional challenge cannot be precluded or preempted by a law of general application.

It is our view that if the relevant facts could be established, you could endeavor to assert that provisions of the War Measures Act R.S.C. 1927, c. 206 or certain Orders-in-Council passed pursuant to the Act were constitutionally invalid.

(b) Challenges to the relevant Orders in Council on administrative grounds

Traditional issues of administrative law raise such questions as whether given governmental action was arbitrary, in bad faith, or lacked an adequate jurisdictional basis. In this context, our view is that you could endeavor to establish or seek a court declaration that certain Orders-in-Council were, in fact, arbitrary, passed in bad faith, or without adequate jurisdictional basis. Our opinion is that an application in the nature of a judicial review for such declarations would not be precluded by limitations legislation.

(c) Declarations as to personal status

Our view is that the seeking of a declaration as to personal status, such as legitimacy, marital status or

Source: Nikkei National Museum, 2018-16-2-11-10-2
www.nikkeimuseum.org

citizenship would not be statute-barred. We note that pursuant to certain Orders-in-Council, Canadians of Japanese descent were treated as if they were aliens. In British Columbia declarations as to personal status are free from the application of limitations legislation.

The more difficult question is whether in seeking a declaration as to personal status one could concurrently seek a declaration as to the incidents which would normally attach to such status. That is, by asserting that an individual is a citizen does one, impliedly and of necessity, concurrently determine that that individual has all the incidents normally attached to citizenship?

In this instance, however, our view is that a declaration as to personal status, as well as the incidents attached to such status, if properly framed, could be brought in a manner which would be free from the application of limitations legislation.

(d) Claims In Trust

In some instances and under the limitations legislation of some provinces, claims for fraudulent breach of trust are exempt from limitations legislation. In this instance, you could attempt to establish that assets of Japanese Canadians held by the Custodian of Enemy Property were held on constructive trust and that subsequent Orders-in-Council and the conduct by the Custodian of Enemy Property in selling the property on unfavorable terms constituted breaches of trust.

In British Columbia, fraudulent breaches of trust are not wholly exempt from limitations legislation. Our present understanding (though we are not qualified to give opinions on Ontario law) is that the Ontario Limitations Act exempts such conduct from the application of limitation legislation.

We do not presently have sufficient facts to ascertain whether it can be established that such breaches of trust took place in Ontario and therefore whether the Ontario Limitations Act is applicable. If you could establish that the breach of trust took place in Ontario, it would appear that the breach of trust action would be free from the application of limitations legislation.

Source: Nikkei National Museum, 2018-16-2-11-10-3
www.nikkeimuseum.org

In addition to the foregoing specific causes of action, we suggest you endeavor to frame your action in a manner which makes it clear that considerable relevant information has come to your attention only during the course of the past few years. This is particularly the case with respect to materials that were in government archives and have only recently been disclosed to the public. It is possible that some of the information may raise causes of action in respect of which limitations period may not start to run until you became aware of the information.

Similarly, you should endeavor to frame an action in a manner that it is understood that you require further information to pursue your action. You could by virtue of such pleadings seek to persuade a Court not to deal with limitations legislation on a preliminary basis but rather to allow you to pursue your action on the merits initially and to reserve on questions on limitations until you are able to advance relevant arguments and the courts are in possession of relevant material.

We are attaching with this letter a copy of a memorandum prepared by our Mr. Voith which substantiates many of the opinions contained in this letter. Some of the opinions contained in Mr. Voith's memorandum are founded upon further memoranda dealing with more specific issues. If you wish we can provide you with copies of these additional materials.

Should you have any questions arising from this letter or from Mr. Voith's memorandum, please do not hesitate to contact us. We look forward to hearing from you at your convenience.

Yours truly,

DAVIS & COMPANY

Per:

RTB/PGV/dw

Source: Nikkei National Museum, 2018-16-2-11-10-4
www.nikkeimuseum.org

M E M O R A N D U M

May 31, 1988

POSSIBLE ACTION FOR REDRESS AND LIMITATIONS LEGISLATION

We have been asked to provide an opinion dealing with the significance of limitations legislation in the context of an action being considered by Japanese Canadians or by the National Association of Japanese Canadians on their behalf. More specifically, limitations legislation will preclude reliance upon many of the remedies that would normally be available to the N.A.J.C. This memorandum focuses on the causes of action that remain available and free from the application of any such limitations legislation. The memorandum does not consider the substantive merits of the individual causes of action themselves.

The relevant facts are as follows:

Section 3 of the War Measures Act, R.S.C. 1927 c.206 is relevant and provides:

> (1) "The Governor and 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; 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

Source: Nikkei National Museum, 2018-16-2-11-11-1
www.nikkeimuseum.org

within the classes of subjects hereinafter enumerated, that is to say:

(b) arrest, detention, exclusion and deportation;

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

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

Pursuant to the provisions of the War Measures Act, a series of Orders in Council were passed. Most were passed in the period January-March, 1942. The relevant Orders in Council include:

(a) P.C. 365, January 27, 1942 - authorizing the evacuation (internment) of Japanese nationals;

(b) P.C. 1486, February 24, 1942 - authorizing the evacuation (internment) of Japanese nationals;

(c) P.C. 1665, March 11, 1942 - vesting the control and management of the property of Japanese nationals in the Custodian;

(d) P.C. 2483, March 27, 1942 - vested property of Japanese nationals in the Custodian and provided the Custodian with power to administer such property;

(e) P.C. 469, January 19, 1943 - provided the Custodian with power to "liquidate, sell or otherwise dispose of...property";

(f) P.C. 7355, December 15, 1945 - provided for the deportation of Japanese nationals.

I have obtained the full text of each of these Orders in Council. Other Orders in Council and Regulations

Source: Nikkei National Museum, 2018-16-2-11-11-2
www.nikkeimuseum.org

which have been gathered are useful in understanding the chronology of relevant legislation. These Orders in Council and Regulations frequently refer to the Defence of Canada Regulations (Consolidation) (1941) and the Regulations Respecting Trading with the Enemy (1939) (Consolidation) and I have obtained copies of both of these materials.

Under the authority of these various Regulations and Orders in Council, persons of the Japanese race were interned, had their property seized and sold and were deported.

The forms of loss suffered by the Japanese are considered in a report by Price Waterhouse dated May 7, 1986, a copy of which is in our files.

Relevant limitations legislation includes the following:

(i) Federal Court Act, Section 38(1):

> "(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions enforced in any province between subject and subject apply to any proceedings in the court in respect of any cause of action arising in such province, ..."
>
> (2) Except as expressly provided in any other Act, the laws relating to prescription and the limitation of actions referred to in subsection (1) apply to any proceedings brought by or against the Crown."

(ii) Crown Proceedings Act, R.S.C. 1970:

(a) Section 19(1):

Source: Nikkei National Museum, 2018-16-2-11-11-3
www.nikkeimuseum.org

"Unless otherwise provided in this Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings against the Crown under this Act in respect of any cause of action arising in such province, and proceedings against the Crown under this Act in respect of a cause of action otherwise than in a province shall be taken within and not after six years after the cause of action arose."

(b) Section 24(1):

"No proceedings shall be taken against the Crown under this Act in respect of any act, omission, transaction, matter or thing that occurred or existed before the 14th day of May, 1953." (underlining added)

(iii) Limitations Act, R.S.B.C. 1979 c.8:

(a) Section 3(3):

"A person is not governed by a limitation period and may at any time bring an action

(i) for a declaration as to personal status;"

(b) Section 3(4):

"Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose."

(c) Section 8(1):

"Subject to Section 3(3) but notwithstanding a confirmation made under Section 5, or a postponement or a suspension of the running of time under Section 6, 7 or 11(2) no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose ..."

(iv) Certain provisions of the Ontario Limitations Act, R.S.O. 1980, are relevant to certain arguments which follow. The Act, however, contains no comprehensive provisions of the sort outlined above.

Source: Nikkei National Museum, 2018-16-2-11-11-4
www.nikkeimuseum.org

I have considered a number of specific grounds upon which an argument advanced by the Crown and based on limitations legislation might be addressed. Those grounds are as follows:

(1) Our seeking a declaration that the Orders in Council listed above are ultra vires (in the constitutional sense) and our arguing that limitations legislation cannot be used to prevent a constitutional inquiry;

(2) Our seeking a declaration that the Orders in Council in question are ultra vires (in the administrative sense) and our asserting that no limitations period applies to such an action;

(3) Our seeking a declaration as to personal status in relation to the "deemed" alien status imposed by given Orders in Council;

(4) Our alleging fraudulent/equitable breaches of trust by Her Majesty and the Custodian of Enemy Property;

1. Can limitations legislation bar a constitutional inquiry?

There are no authorities which deal with this issue. There are, however, a number of cases which are of assistance. In the case of Air Canada v. Attorney General of British Columbia (1986) 8 B.C.L.R. (2d) 273 (S.C.C.), the Petitioner commenced an action seeking a declaration that the Gasoline Tax Act did not apply to it or was ultra vires and for an accounting of money paid under that Act. Pursuant to the Crown Proceeding Act, it also issued a petition of right with respect to certain monies that had been paid by it. On the advice of the Attorney General, the Executive Council advised the Lieutenant Governor to deny

Source: Nikkei National Museum, 2018-16-2-11-11-5
www.nikkeimuseum.org

the fiat. The Petitioner then brought an application under the Judicial Review Act for an Order compelling the Attorney General to consider the Petition and to advise the Lieutenant Governor to consider the fiat.

Two decisions were considered by the Court at length and are particularly relevant:

> B.C. Power Corp. v. B.B.C. Electric Co. [1962] S.C.R. 462;
>
> Amax Potash Ltd. v. Saskatchewan [1977] 2 S.C.R. 576

The Amax decision dealt with a provincial statute that sought to prevent the recovery of taxes paid under protest and pursuant to an unconstitutional statute.

> In the Amax case Dickson J. said at p. 592:
>
> "The principle governing this appeal can be shortly and simply expressed in these terms: If a statute is found to be ultra vires the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to the invalid law must equally be invalid because it relates to the same subject matter of that which was involved in the prior legislation. If a state cannot take by unconstitutional means, it cannot retain by unconstitutional means."

In the Air Canada case La Forest, J., speaking for the Court, said at page 278:

> "In my view, if a statute cannot permit the retention of monies obtained under an

Source: Nikkei National Museum, 2018-16-2-11-11-6
www.nikkeimuseum.org

> unconstitutional statute that result cannot be achieved under purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with the constitutional imperatives".

It should be noted, however, that the Court said at page 281:

> "Finally, counsel for the Respondent argued that a Judgment along these lines would preclude the provinces relying not only on Crown immunity, but also on limitation periods, retroactive remedial legislation and mutual mistake of law to retain monies collected under ultra vires legislation. While I do not wish to enter into these issues at any length, I do not think this conclusion necessarily follows. There is a difference between an executive act directly interfering with a recourse to the courts for the recovery of monies under an allegedly unconstitutional statute and relying on general principles of law like limitation periods which are aimed at different purposes, in that case, barring stale claims. The significance of this distinction is best left to be raised in the principal action when the matter, which was simply touched upon in this court, can be examined in depth."

Two issues arise:

(i) Can the Crown rely on laws of general application to prevent an inquiry into the constitutionality of a statute?

(ii) Could the Orders in Council in question be challenged on constitutional grounds?

Source: Nikkei National Museum, 2018-16-2-11-11-7
www.nikkeimuseum.org

The first of these issues, that of the applicability of general principles of law in the context of constitutional inquiries was considered by the British Columbia Court of Appeal in the case of Air Canada v. Attorney General of British Columbia (1986) 4 B.C.L.R. (2d) 356. In this case the Crown sought to argue that monies paid under ultra vires legislation had been paid under a mistake of law and that the parties were in pari delicto.

The Court of Appeal dealt extensively with both the case of Kiriri Cotton Co. v. Dewani [1960] A.C. 192 where the House of Lords reviewed principles of the mistake of law and its requisite elements and the case of Nepean Hydro Electric Commission v. Ontario Hydro [1982] 1 S.C.R. 347 where Estey J. dealt at length with the Kiriri case.

The Plaintiffs pointed out, however, that the Nepean case was not a constitutional case and that the court was not there "concerned with the division of powers under the constitution."

Three separate judgments were rendered.

Hinkson J.A. said at page 371:

> "In a federal state the Crown cannot engage in an illegal exercise of power by way of taxation and then call in aid either legislation

Source: Nikkei National Museum, 2018-16-2-11-11-8
www.nikkeimuseum.org

enacted by it or common law rights asserted by it to retain the proceeds of such taxation. As Dickson J. indicated, 'in each case, the concern is with the preservation of the Constitution which is paramount'. I understand that passage to mean that other rights asserted by the legislature which has exercised that illegal power must yield to that paramount concern; and I conclude that the Crown is not entitled to retain such monies either on the basis of the legislation it enacted to do so or on the basis of common law principles."

Lambert J.A. said at page 380:

"The first argument is a constitutional one. It is that even if the Nepean case could be considered to extend common law principles of mistake, compulsion and unjust enrichment to money paid under a wholly ultra vires statute, constitutional principles would require that the money paid under the ultra vires statute must be recoverable, not withstanding those common law principles, otherwise the constitution would be flouted in the result. In short, there is a constitutional exception to the Nepean case with respect to money paid under a taxing statute which is beyond the legislative competence of the legislation which was enacted under section 92 of the Constitution Act.

The second argument applies to the common law principles, with the same result. If money is paid as taxes under a wholly ultra vires statute that money should be considered to have been paid under the irresistible compulsion of state power, whether the statute was thought by either the state or the taxpayer to be ultra vires and whether the taxpayer protests or not, or complained about the compulsion or not. I think, in the relevant sense of "compulsion", under common law principles, all taxes are paid under compulsion.

I also consider it would be unjust and against conscience for the Crown to retain monies paid as taxes under an ultra vires statute. In this case, the fact that the Crown is retaining the money paid by other taxpayers

Source: Nikkei National Museum, 2018-16-2-11-11-9
www.nikkeimuseum.org

does not make it just to retain it against the air lines."

Esson J.A. applied conventional "mistake of law" principles and concluded that the Plaintiffs could not succeed on that basis. Esson J.A. continued with an analysis of restitutionary principles and determined that "it would not be unjust to permit the Defendant to keep the money".

The Air Canada case has been appealed to the Supreme Court of Canada and that appeal is expected to be heard in mid-June of this year. If Air Canada is successful, a principle which precludes the application of common law principles to prevent constitutional challenges ought to emerge. That principle ought also to extend to the recovery of monies paid or lost under unconstitutional legislation as well as recovery for harm occasioned by unconstitutional legislation. If this result ensues then the broader concern raised by Laforest J. in the earlier Air Canada case, dealing with the interplay between laws of general application and constitutional challenges, will have been directly addressed.

2. Could the Orders in Council in question be challenged on conventional constitutional principles?

Some authorities appear to indicate that subordinate legislation, not generally enacted by

Source: Nikkei National Museum, 2018-16-2-11-11-10
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Parliament, cannot be challenged on constitutional grounds; E.A. Driedger, Subordinate Legislation, (1960) 38 Can. Bar Rev. 1.

The principle is, however, not rigorously applied and there exists numerous authorities, including Central Canada Potash Co. Ltd. v. Attorney General for Saskatchewan [1975] 5 W.W.R. 193 and Burns Food Ltd. v. A.G. Manitoba [1973] 10 D.L.R. (3d) 731 (S.C.C.), where Orders in Council and regulations have been challenged on the basis of conventional constitutional arguments.

Whether a constitutional challenge, in the traditional sense, can be maintained may be contingent upon the language or authority of the statute under which subordinate instrument is created.

For example, in the Central Canada Potash case, Section 10(3) of the Mineral Resources Act provided "every regulation and order made under this section shall be deemed to be part of this Act".

By way of comparison, Section 3(2) of the War Measures Act provides: " all orders and regulations made under this section shall have the force of law ..."

Source: Nikkei National Museum, 2018-16-2-11-11-11
www.nikkeimuseum.org

In the case of Rex v. Singers [1941] S.C.R. 111, the Court considered the status of various Orders in Council passed under the War Measures Act. Taschereau J. said at page 15:

> "I cannot come to the conclusion that in the present instance the violation of the Order in Council is tantamount to the violation of the War Measures Act. An Order in Council is passed by the Executive Council, an Act of Parliament is enacted by the House of Commons and by the Senate of Canada. Both are entirely different and unless there is a provision in the law stating that the Orders in Council shall be considered as forming part of the law itself, or that any offence against the regulations shall be a violation of the Act, it cannot be said that the violation of the Order in Council is a violation of the Act of Parliament."

The case of Texada Mines Ltd. v. A.G. B.C. [1960] S.C.R. 713 makes reference to similar concerns under a different statute.

On the other hand, in the Japanese Reference [1947] A.C. 87 case, the Judicial Committee of the Privy Council appeared to approximate regulations under the War Measures Act with Acts of Parliament. The Statute of Westminster, 1931, provided that no law "made by the Parliament of a Dominion" should be void on the ground that it was repugnant to the law of England and that the Colonial Laws Validity Act should not apply "to any law made...by the Parliament of the Dominion".

Source: Nikkei National Museum, 2018-16-2-11-11-12
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It was argued that the Statute of Westminster applied only to acts of Parliaments and not to regulations and therefore, the Colonial Laws Validity Act was still applicable. The Judicial Committee, however, held that the regulations in question were laws made "by the Parliament of a Dominion" within the meaning of the Statute of Westminster. Lord Wright said at page 107:

> "The legislative activity of Parliament is still present at the time the Orders are made and these Orders are 'law'. In their Lordship's opinion, their law is made by the Parliament at the time of their promulgation."

There also exist numerous cases where the constitutionality of subordinate legislation has been expressly challenged and no question about the subordinate nature of such legislation has been raised.

The following cases deal with various Orders in Council whose constitutionality has been challenged:

Kirkbride v. Her Majesty the Queen in Right of the Province of British Columbia (unreported) November 19, 1987 (S.C.C.)

Deiorio v. Warden of the Common Jail of the City of Montreal [1978] 1 S.C.R. 152

Faber v. the Queen [1976] 2 S.C.R. 9

Attorney General of Quebec and Keable v. Attorney General of Canada [1979] 1 S.C.R. 218

Source: Nikkei National Museum, 2018-16-2-11-11-13
www.nikkeimuseum.org

Again, in each of these cases no reference was made to the fact that the subject matter of the constitutional challenge was subordinate legislation.

I would also make reference to Section 32(1) of the Charter. That section governs the applicability of the Charter:

(a) "To the Parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territories and Northwest Territories; and

(b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

This provision has not been interpreted so as to be limited to Acts of Parliament and has been extended to by-laws, Orders in Council, regulations, and other forms of governmental activity.

Having regard to the foregoing, and particularly the numerous examples of cases where Orders in Council have been challenged on constitutional grounds, I believe that the Orders in Council in question could properly be subject to a constitutional challenge.

3. <u>Could the legality of the Orders in Council in question be challenged on administrative grounds</u>?

There exists a variety of bases upon which the Orders in Council in question could be challenged on

Source: Nikkei National Museum, 2018-16-2-11-11-14
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administrative grounds. These would include, inter alia, the arbitrary nature of the Orders in Council, whether they were ultra vires their governing legislation, and whether the Orders in Council were the subject of bad faith.

I believe that if we sought a declaration to the effect that the Orders in Council lacked an adequate jurisdictional basis or were arbitrary, we would be able to circumvent difficulties imposed by limitations legislation.

Section 17 of the Federal Court Act provides the Trial Division with "original jurisdiction in all cases where relief is claimed against the Crown".

Section 18 of the Federal Court Act provides the Trial Division with exclusive jurisdiction:

> (b) "To hear and determine the application or the proceeding for relief and the nature of relief contemplated by paragraph (a) including any proceeding brought against the Attorney General of Canada, to obtain relief against a Federal Board, Commissioner or Tribunal."

Paragraph (a) of Section 18 includes declaratory relief.

Section 18 has been extended to relief claimed against bodies other than Federal Boards, Commissions or Tribunals and has been extended to relief being claimed in relation to the conduct of ministers.

Source: Nikkei National Museum, 2018-16-2-11-11-15
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One could arguably seek declaratory relief under either Section 17 or Section 18 of the Federal Court Act. Neither presents problems in relation to questions of limitations legislation.

There is no limitation period applicable to Section 18 of the Federal Court Act. Cavanagh, Guide to Judicial Review, notes at page 119:

> "The Act prescribed no limitation period for bringing an application before the Trial Division under Section 18. However, the Court in its discretion may deny relief where there has been undue delay in commencing proceedings."

The author continues and refers to the case of Landreville v. R. (No. 2) (1977) 75 D.L.R. (3d) 380 where the Court did not find a delay of six years compelling as no party was prejudiced by that delay.

Having regard to the fact that considerable evidence has only become available to the Plaintiffs in this action in the last 5 to 10 years, we would, I believe, be able to address concerns relating to "undue delay" on the part of the Plaintiff.

The applicability of limitations legislation under Section 17 of the Federal Court Act is not as clear. You

Source: Nikkei National Museum, 2018-16-2-11-11-16
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will recall that Section 38 of the Act makes applicable the legislation of the province where "the cause of action" arose. Various interpretation acts define the word "action" and "cause of action" in different ways. The federal Interpretation Act does not provide any assistance. Similarly, the word has been subject to different definitions in sources such as Jowitt's, Dictionary of English Law, and Black's, Law Dictionary. It is not clear from these various authorities whether an application for relief in the nature of judicial review would constitute a "cause of action". It does not matter.

If such relief does not constitute a "cause of action", then Section 38 would not be applicable.

If an action seeking declaratory relief constitutes a "cause of action" then, I believe, that cause of action would have arisen in Ontario. In this instance, each of the Orders in Council and regulations in question were reviewed and promulgated in Ontario. The Minister of Justice was located in Ontario, the various discussions which underlay the issuance of the Orders in Council took place in Ontario and none of the activity relevant to the promulgation of the Orders in Council themselves took place outside of Ontario -- so far as I know.

Source: Nikkei National Museum, 2018-16-2-11-11-17
www.nikkeimuseum.org

If an action or application for relief in the nature of judicial review does constitute a "cause of action", then reference would have to be made to both the Ontario Limitations Act and the Ontario Judicial Review Procedure Act, R.S.O. 1980, c.224. Neither those pieces of legislation prescribes any limitation period for bringing an application for judicial review.

With reference to the Ontario Judicial Review Procedure Act, Cavanagh (supra.) says at page 120:

> "(The Act)... does not prescribe any limitation period for bringing an application."

Similarly, with reference to the Ontario Limitations Act, the Ontario Law Reform Commission states at page 20:

> "There are a variety of other actions to which the Act does not apply. These include:
>
> (7) where judicial review is undertaken by bringing...declaratory judgment..."

Based on the foregoing, I believe that those portions of an action which sought relief in the nature of a judicial review, including a declaration that given Orders in Council were ultra vires, would be immune from limitations legislation.

Source: Nikkei National Museum, 2018-16-2-11-11-18
www.nikkeimuseum.org

4. Would an action for a properly worded declaration pertaining to "personal status" be immune from the applicability of limitations legislation?

The Limitations Act R.S.B.C. 1979 does not apply in instances where a person seeks "a declaration as to personal status"; Section 3(3)(i).

A number of other pieces of legislation and regulations are directly relevant.

Section 5 of the Naturalization Act R.S.C. 1927 c. 138 provides:

> "A person to whom a certificate of naturalization is granted by the Minister shall, subject to the provisions of this Act, be entitled to all political and other rights, powers and privileges, be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and as from the date of his naturalization have to all intents and purposes the status of a natural-born British subject."

Section 3 of the Act establishes which persons are deemed to be "natural-born British subjects" and includes in that group:

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

(b) any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfills any of the following conditions, that is to say, if either:

(i) his father was born within His Majesty's alliance; or

Source: Nikkei National Museum, 2018-16-2-11-11-19
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(ii) his father was a person to whom a certificate of naturalization had been granted..."

Many of the Japanese who were interned during World War II or were otherwise subject to the Orders in Council in question were either "natural-born British subjects" or holders of certificates of naturalization.

The following regulations had the effect of taking from "persons of the Japanese race" rights which they would otherwise have had by virtue of their status as British subjects:

(a) The Defence of Canada Regulations (Consolidation) 1941, allegedly passed under the authority of the War Measures Act, contained a number of provisions directly relevant to "enemy aliens". Those words, in turn, were defined as "a person who, not being a British subject, possesses the nationality of a state at war with Her Majesty".

(b) Regulation 26(a) and 26(b) made certain other Regulations applicable to persons of the Japanese race:

"26(a)
The provisions of Regulation 24,25 and 26 of these Regulations shall apply mutatis mutandis to all persons
(c) of the Japanese race other than citizens of the United States; who are not British subjects..."

"26(b)
Provisions of Regulations 24, 25 and 26 of these Regulations shall apply mutatis mutandis

Source: Nikkei National Museum, 2018-16-2-11-11-20
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> to all persons who have become naturalized British subjects since the 1st day of September, 1922, who
>
> (d) are of the Japanese race."

The words "person of the Japanese race" were defined as "including a person not wholly of the Japanese race if his mother or father is wholly of the Japanese race and if the Registrar General of the enemy aliens, by notice in writing, requires him to register as an enemy alien".

(c) By virtue of Order in Council PC 1665, it was determined:

> "12(1)
> As a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race resident in such area ... shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy 1939;...
>
> (2)
> Subject as hereinafter provided, and for the purposes of the control and management of such property, rights and interest by the Custodian, the Regulations respecting Trading with the Enemy, 1939, shall apply mutatis mutandis to the same extent as if such property, rights and interest belonged to an enemy within the meaning of the said Regulations."

Thus, persons of the Japanese race, without actually being stripped or deprived of their nationality as contemplated by the Naturalization Act, 1927, were deemed

Source: Nikkei National Museum, 2018-16-2-11-11-21
www.nikkeimuseum.org

for the purposes of subordinate legislation to be "enemy aliens". More specifically, Regulations and Orders in Council dealing exclusively with enemy aliens were deemed to apply mutatis mutandis to persons of the Japanese race. By virtue of such subordinate legislation members of the Japanese race, though also British subjects or naturalized, lost the rights of such subjects.

By way of example, Regulation 25 of the Defence of Canada Regulations required the formal registration of "enemy aliens" and contemplated their internment in given instances.

By way of further example, Regulation 39(e) provided:

> "(1) No person of the Japanese race and no Japanese company shall, except as hereinafter provided, have the capacity, after the 24th day of February, 1942, during the continuation of the state of war now existing, to acquire or hold land or growing crops in Canada
>
> (2) No conveyance made or executed after the 24th day of February, 1942 shall be effective to convey to or for the benefit of a person of the Japanese race or of a Japanese company any lands or growing crops in Canada."

For the purpose of this regulation, persons of the Japanese race were defined as "a person wholly of the Japanese race".

Source: Nikkei National Museum, 2018-16-2-11-11-22
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I have only been able to locate one decision pertaining to Section 3(3)(i) of the Limitations Act. In the case of Rankin v. Irving (1983) 47 B.C.L.R. 242 at p. 247, Bouck J. dealt with the intended ambit of Section 3(3)(i):

> "Taking all of the above into account, it seems apparent the words of the Statute should not be strained when the result is to deprive an honest trustee such as the defendant of its benefit. Suggesting this suit merely involves an order for declaration as to personal status so that the Plaintiff may establish her position as a beneficiary of an alleged constructive trust is an indirect method of trying to obtain relief against a blameless trustee in the position of the defendant when he is otherwise protected from action because of the passage of time.
>
> Also, Section 3(3)(i) is not intended to apply on these facts. Rather, it is meant to assist persons who for one reason or another desire to establish their position as married, divorced, or some such similar capacity that has to do with the claimant's relationship to the community and some third person. This interpretation is not meant to be exhaustive."

The foregoing analysis, if upheld by higher courts, clearly raises some problems. It prevents us, for example, from seeking a declaration that given Orders in Council impacting on the status of members of the Japanese race, who were also British subjects, were improperly passed. The focus of such a declaration would only indirectly deal with the "claimant's relationship to the community and some third person". Instead it would be an attempt to use S.3(3)(i) as a tool to challenge administrative conduct in an instance

Source: Nikkei National Museum, 2018-16-2-11-11-23
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where limitations legislation would otherwise preclude such a challenge.

On the other hand, a declaration that given (identified) members of the Japanese race "remained naturalized and British subjects throughout the period 1941-1945" might be inadequate for our purposes. The Attorney General might well concede the validity of the declaration being sought. That is, none of the Orders in Council or Regulations expressly deprived members of the Japanese race of their status as British subjects. Instead these various regulations and orders in council had the effect of depriving "British subjects" of the incidents of such status.

The Naturalization Act, 1927, confirmed that a British subject or naturalized Canadian had all the rights and obligations of a natural-born British subject. These rights would have included, for example, the right to move freely and the right to acquire property. Both of these rights were denied members of the Japanese race who may, nevertheless, have been British subjects.

The issue is whether in seeking a declaration as to status one is of necessity and by implication, confirming and concurrently dealing with the natural incidents of such status. Alternatively, if we seek a declaration confirming

Source: Nikkei National Museum, 2018-16-2-11-11-24
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not only the continued status (nationality) of members of the Japanese race, but also expressly confirming the continued existence of the natural incidents which attach to such status, do we go beyond the intended ambit of Section 3(3)(i)?

The language of this latter form of declaration might provide, by way of example:

> "For a declaration that the plaintiff/petitioner remained a British subject throughout the period 1941-1945 and was entitled to all the natural incidents of such status during that period including ..."

In my opinion, the mere declaration that one "is a British subject" of necessity imports given attributes of status. If one is deprived of the right to vote, hold property, move freely, and be gainfully employed, how can it be said he remains a citizen?

A number of authorities support the foregoing conclusion.

In the case of Re MacDonald (1964) 44 D.L.R. (2nd) 208 (S.C.C.) the Court dealt with the questions of rights which a child born out of wedlock would enjoy. At page 215 the Court said:

> "In my opinion the title of 'legitimacy' or 'illegitimacy' would attach to the status of an individual in any jurisdiction reflects the capacity or lack of capacity which the law of

Source: Nikkei National Museum, 2018-16-2-11-11-25
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> that jurisdiction recognizes in the case of the individual concerned. Just as 'legitimate' when used in relation to a child is only a symbol employed to designate the legal rights and obligations which flow from being born in wedlock, so the word 'illegitimate' is used to donate the limitations of capacity which attach to being born out of wedlock, and the word 'legitimation' is descriptive of the legal effects incident to being relieved of those limitations."

In the case of Hill v. Hill [1929] 1 D.L.R. 423 the Court dealt with the legality of provincial legislation affecting questions of status arising from marriage. The Court said at page 425:

> "...Murray's, New English Dictionary, defines status, at page 866-7 as:
>
> > 'the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations; condition and respect, example of liberty or servitude, marriage or celibacy, infancy or majority'
>
> Since the marriage status, with the exception of solemnization of marriage, is allocated to the Federal Parliament, then I submit that if the incapacity of the spouses to sue each other at common law is properly said to be a qualification or material element of the status of marriage, then however much it may be a matter of civil right, it has been placed exclusively within the federal legislative field."

In the case of City of Halifax v. Lyall [1922] 65 D.L.R. 305 the Court said at page 312, quoting from earlier authority:

Source: Nikkei National Museum, 2018-16-2-11-11-26
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"Status is defined...as follows:

'The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community.'"

The Australian Courts have considered the interplay between status and the rights attached to status in a number of cases. Section 35 of their Judiciary Act, 1903 allowed an appeal to be brought without leave from any judgment of the Supreme Court of a State which "affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency". In the case of Ford v. Ford [1947] 73 C.L.R. 524 (H.C.A.) at page 529, Latham C.J. said:

"A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person, a bankrupt as distinct from other persons generally, or all persons who have a particular status. The mere fact that an alien is an alien means that he is subject to certain disabilities and disqualifications in law. A husband because he is a husband owes special duties to his wife which he owes to no other person and cannot owe, merely as a matter of law, to any other person. A bankrupt simply because he is a bankrupt, cannot deal with his property in the same manner as other persons. These consequences flow as a matter of law from the fact of membership of a particular class of persons.

If the effect of a judgment is to place a person in or to remove a person from such a class the judgment affects the status of that

Source: Nikkei National Museum, 2018-16-2-11-11-27
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person. Thus a decree of divorce, a judicial declaration that a person is an alien, and an order of sequestration in the bankruptcy jurisdiction are all judgments which affect status.

But a variation effected by a judgment of the rights and obligations of a person having a particular status does not necessarily affect the status of that person. Thus an order setting aside or varying a provision for alimony for a married woman or a divorced woman or a judicially separated woman is not an order affecting her status. The conviction of an alien for refusing to register under a law applying to aliens and therefore involving a determination that it followed from the fact that he was an alien that he was bound to register would not affect his status as an alien. A declaration that he was not an alien but was a naturalized British subject would affect his status.

The distinction between the status itself and the incidents of status as possibly varying from time to time as well is illustrated by the case of In Re Adam. In that case a person who was resident in Mauritius claimed that he was a citizen of Mauritius and was not liable to be treated as an alien. He claimed that an order made by the Governor requiring him to depart from the Island was invalid.

It was held in the Privy Council...that the status of Adam must be determined by the laws of England, but that the laws of the Colony must govern what rights and liabilities were attached to the status when ascertained. It was held that he was an alien and the Privy Council then proceeded to determine what were his rights as an alien. The distinction is clearly drawn between the status of an alien and the particular rights which an alien as such may be entitled to enjoy, or the liabilities to which he may be subject."

Dixon J. in the same case said:

"What concerns us is not a juristic analysis but the meaning of the Statute which employs the expression and employs it for the purpose of defining the sort of decree from which an appeal as of right should lay. Under distinct

Source: Nikkei National Museum, 2018-16-2-11-11-28
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> names or legal designations our law knows a number of special conditions or relationships which, independently of their will, give the persons occupying these positions distinct congeries or bundles of rights and liabilities not belonging to the ordinary unmarried man or woman of full capacity and legitimate birth, and each of these is recognized as a status. The condition or relationship forming the status bears a legal name to distinguish the particular situation of those who occupy it from the general rights and duties attached to the citizen as such".

His Lordship continued at page 539 and said:

> "The truth is that the words "affecting status" are so vague as to be susceptible of almost any extension of meaning and, therefore, of application. It might be said that anything that produces the least consequence upon the rights or liabilities of any of them which arise from a status "affect" that status. But the meaning of the words in Section 35(1) is clearly more definite and restricted. It could hardly have been intended that, whenever a Supreme Court reviewed a decision between husband and wife enforcing, refusing to enforce or varying as by separation order any of the rights or obligations arising from marriage, an appeal here should lay as of right.
>
> The word 'affect' was not intended to cover consequential or incidental effects produced by orders based upon marriage, alienage or bankruptcy. It refers to something affecting the existence or validity of the status, to a judicial order where the status is or may be established or denied, continued or ended, confirmed or prejudiced."

Having regard to the foregoing it is apparent that we must establish that the Orders in Council in question did not simply have some consequential or incidental effect on the status of the Canadians of Japanese ancestry. Instead

Source: Nikkei National Museum, 2018-16-2-11-11-29
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the Orders in Council went to the very existence or validity of that status and by virtue of their nature had the effect of denying, ending or prejudicing the status of these people.

It is apparent from each of the foregoing authorities that the word "status" may encompass, of necessity, the incidents or the "bundle of rights" which attach to that status.

Thus, when one seeks a declaration as to the citizenship/nationality of an individual one is, by implication, confirming that that individual enjoyed, or was entitled to enjoy certain rights. If one seeks confirmation or clarification of the rights attached to a certain status one is still only clarifying whether the person enjoyed the status "citizen" in the legal sense of the word or in some restricted or modified sense. We could, therefore, seek a declaration confirming the continued right to enjoy certain rights (and specify those rights) as an integral part of a "declaration as to personal status". By seeking to confirm what those rights are, we would not be exceeding the intended ambit of Section 3(3)(i) of the Limitations Act.

Source: Nikkei National Museum, 2018-16-2-11-11-30
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5. Can a cause of action framed in trust be advanced so as to circumvent the applicability of limitations legislation?

As noted earlier, Order in Council PC 1665 determined that "all property situated in any protected area of British Columbia belonging to any person of the Japanese race ... shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy, 1939".

PC 2483 established "that the Custodian ... shall have full power to administer such property for the benefit of all interested persons, and shall release such property upon being satisfied that the interest of the aforesaid will not be prejudiced thereby."

PC 469 stated that "the Custodian has been vested with the power and responsibility of controlling and managing any property or persons of the Japanese race evacuated from the protective areas, such power and responsibility shall be deemed to include and to have included from the date of vesting of such property in the Custodian, the power to liquidate, sell or otherwise dispose of such property."

Source: Nikkei National Museum, 2018-16-2-11-11-31
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The following provisions of the consolidated Regulations respecting Trading with the Enemy (1939) are also relevant:

(a) Regulation 1:

"Enemies shall include:

(iv) any person who is declared by the Governor in Council to be an enemy."

(b) Regulation 6:

"The Secretary of State is hereby appointed to receive, hold, preserve and deal with such property, as may be paid to or vested in him in pursuance of these Regulations and is hereafter referred to as the 'Custodian'."

6(2):

"Any power or duty conferred or imposed by or under these Regulations upon the Secretary of State and/or Custodian may be delegated by him to such person or persons as he thinks proper."

(c) Regulation 21(1):

"All property in Canada belonging to enemies at or subsequent to the commencement of the present war, and whether or not such property has been disclosed to the Custodian as required by these Regulations, is hereby vested in and subject to the control of the Custodian."

21(2):

"This Regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies, including the power of dealing with such property in such manner, as he may in his sole discretion decide."

(d) Regulation 22(1):

"No enemy whose property is vested in the Custodian under these Regulations shall have any rights or remedies against any person in respect of any such property after such vesting has taken place."

Source: Nikkei National Museum, 2018-16-2-11-11-32
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22(2):

"No enemy shall have any rights or remedies against any person in respect of any matter whatsoever other than the rights and remedies referred to in paragraph (1) hereof."

(e) Regulation 43(1):

"The Custodian shall establish an office or offices for the administration of these Regulations, and such other matters as may be delegated to him, and there shall be attached to the said office such officers, clerks and advisers as the Custodian may select, and there shall be paid to such officers, clerks and advisers such remuneration as the Custodian may determine."

43(2):

"The Custodian's office shall be deemed to be a Department of the Government of Canada and the Custodian the head of such Department, for the purposes of the Canada Evidence Act."

Though not immediately relevant in the context of the present issue, it is significant to note that the Regulations authorized the Custodian to retain out of the proceeds of all property vested in him or liquidated by him monies to pay expenses incurred in the administration of the Regulations themselves.

In order to advance this argument, the following conditions have to be satisfied:

(a) A constructive trust can be established;

(b) Section 43(2) of the Ontario Limitations Act extends to constructive trustees (British Columbia

Source: Nikkei National Museum, 2018-16-2-11-11-33
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limitations legislation is more stringent in relation to claims brought in trust);

(c) The cause of action (fraudulent breach of constructive trust), for the purposes of Section 38 of the Federal Court Act, arose in Ontario.

The substantive question of whether a constructive trust can be established is not addressed in this memorandum.

Section 43 of the Ontario Limitations Act, R.S.O. c.240 provides:

> 43(1) "In this section 'trustee' includes an executor, an administrator, a trustee whose trust arises by construction or implication of law as well as an express trustee, and a joint trustee."
>
> (2) "In an action against a trustee or person claiming through him, except where the claim is founded upon a fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously applied by the trustee and converted to his use, the following paragraphs apply:
>
> (The language of the sub-paragraphs which follow is not particularly relevant.)
>
> 44(2) "Subject to Section 43, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations."

Source: Nikkei National Museum, 2018-16-2-11-11-34
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The language of Section 43 appears to apply to express trustees and constructive trustees in like manner. Notwithstanding the apparently explicit language of the provision, there appears to be considerable dispute about whether Section 43(2), in so far as it pertains to fraud by a trustee, applies equally to both constructive and express trustees. The issue is dealt with at length by both the Ontario Law Reform Commission; Limitation of Actions, and Waters, Law of Trusts in Canada, at pages 1017-1021. This latter citation has, in turn, been referred to and relied upon extensively in the case law.

Constructive trustees appear to have been equated to express trustees, for the purposes of Section 43(2), in only those instances where "a trust arose before the occurrence of the transaction impeached (but not) where it arose only by reason of the transaction." Taylor v. Davies [1920] A.C. 636 at 653 (a decision of the Privy Council on appeal from Ontario).

The Taylor case has been cited with approval in:

(a) Clarkson v. Davies [1923] A.C. 100;

(b) Gordon v. Ottawa (1953) 4 D.L.R. 542 (Ont. H.C.);

(c) C.N. Realties v. Albert (1958) 14 D.L.R. (2d) 20 (Alta C.A.);

(d) Veid v. Canada Permanent Trust 54 W.W.R. 543 (Sask. Q.B.)

Source: Nikkei National Museum, 2018-16-2-11-11-35
www.nikkeimuseum.org

In practical terms, I understand the distinction to mean that if a constructive trust was already in existence as at the time that given the impugned conduct took place, the constructive trustee will, for the purposes of the Limitations Act, be treated as though he were an express trustee. In the context of the present factual framework, it might be asserted that it was PC 1665 (which vested property in the Custodian) which established the constructive trust. PC 469, allowing the Custodian to liquidate property, would be the subsequent impugned conduct or transaction upon which we can focus. Similarly, actual conduct by the Custodian in disposing of property in an improper manner or in taking commissions for himself might be the subsequently impugned conduct.

If we can establish, and I believe that we can, that we fall within the ambit of Section 43(2) of the Ontario Limitations Act, the question becomes whether we can establish that the cause of action, for the purposes of Section 38(1) of the Federal Court Act, arose in the province of Ontario. That is, did the breaches of trust which we allege arise in Ontario?

The following connecting factors are significant:

(1) The Custodian (Secretary of State) was based in Ontario.

Source: Nikkei National Museum, 2018-16-2-11-11-36
www.nikkeimuseum.org

(2) The Orders in Council providing authority to the Custodian and "vesting custody and control" in the Custodian emanated from Ontario.

(3) The head office of the Custodian was located in Ontario.

(4) The Custodian provided the directions to his agent, in Vancouver, from Ontario.

(5) The bulk of moveable and immoveable property was located in British Columbia.

(6) The beneficiaries of the trust were generally located in British Columbia.

(7) The preponderance of the day to day administration of the trust, effected by the Custodian's agent, took place in British Columbia.

There is a great deal of law dealing with the "proper law of the trust", as it relates to questions of administration, validity and interpretation. Further subdivisions and principles have been established depending on whether the trust property itself is moveable or immoveable in nature. All of this authority appears to be dealing exclusively with express trusts. We are not, in

Source: Nikkei National Museum, 2018-16-2-11-11-37
www.nikkeimuseum.org

this case, dealing with an express trust. Instead, we will have to allege that a constructive trust was established.

Dicey and Morris, The Conflict of Laws, 11th edition, (1987) states:

> "There seems to be no English or Commonwealth authority on the conflict of laws rules relating to construtive trusts. If constructive trusts are regarded, as it seems best, as within the subject of restitution, Rule 203 will apply to indicate the proper law of the obligation represented by the constructive trust."

Having regard, for example, to the case of Pettkus v. Becker [1980] 2 S.C.R. 834, the inter-relationship between constructive trusts and unjust enrichment proposed by the authors appears to be appropriate.

Rule 203 of Dicey and Morris establishes:

"(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.

(2) The proper law of the obligation is determined as follows:

(a) If the obligation arises in connection with a contract, its proper law is the proper law of the contract;

(b) If it arises in connection with a transaction concerning an immoveable (land), its proper law is the law of the country where the moveable is situated (lex situs);

(c) If it arises in any other circumstance, its proper law is the law of the country where the enrichment occurs."

Source: Nikkei National Museum, 2018-16-2-11-11-38
www.nikkeimuseum.org

I do not know whether the Japanese were required to enter into any contract with the Custodian at the time that they vested their property with him.

It is clear that some of the property vested in the Custodian would have been land located in British Columbia. Therefore I believe we will have to establish and focus on the fraud/equitable fraud on the part of Her Majesty as trustee which arose in permitting the Custodian to alienate property that had been vested with him. That is we would have to deal with the Orders in Council and conduct of the Custodian as they relate to "property" in the generic sense without focussing on the treatment of specific property.

The submission would be made as follows:

(a) A constructive trust was established when property was taken from persons of the Japanese race and vested in the Custodian as agent for the Government of Canada.

(b) The Government of Canada/Custodian acted in a fraudulent manner in authorizing itself to alienate or dispose of property already in its control.

(c) The Government of Canada/Custodian took part in further improper conduct or breaches of trust in relation to the manner in which it disposed of trust property.

Source: Nikkei National Museum, 2018-16-2-11-11-39
www.nikkeimuseum.org

At least arguably, the preponderance of the relevant connecting factors, with some connection to the first form of breach, arise in Ontario. Thus, the relevant or proper law would be the law of Ontario. In terms of the second form of breach, relating to the actual administration of property, I do not see how we can assert that the proper law, for all property, is the law of Ontario.

With respect to paragraph 2(c) of Rule 203, any form of benefit which accrued to the Government of Canada can be said to have accrued to Ontario. Such benefits would include, inter alia:

(i) Commissions charged by the Custodian in dealing with property; and

(ii) Administrative charges imposed by the Custodian for dealing with property.

To some extent the foregoing unjust enrichment analysis, particularly as it relates to the place where the enrichment occurred, is inappropriate. The focus of the case being advanced by the Japanese-Canadians does not deal with the enrichment of the Canadian government. Instead it has as its focus the impropriety of the manner in which trust property was dealt with (its alienation) and the specific losses/dissipation in the value of such property. There was not necessarily any concomitant benefit to the government.

Source: Nikkei National Museum, 2018-16-2-11-11-40
www.nikkeimuseum.org

Furthermore, the rules advanced by Dicey, pertaining to conflict of laws and unjust enrichment, do not reflect fixed principles. McLeod, The Conflict of Laws, (1983), states at page 571:

> "Rule 172: The right to restitutionary relief in respect of an unjust enrichment is determined in accordance with the proper law of the obligation."

At page 572 the author states:

> "Restitutionary causes of action encompass court actions, contractual actions and proprietary action. To simply apply the corresponding contract, tort or property choice of law rules is to ignore the independence of restitutionary causes of action. On the other hand, to ignore completely the development of such areas is to ignore the legacy of history. It is submitted, therefore, that although the connecting factor may be stated to be the proper law of the obligation, the formulation of the proper law of the obligation in any individual restitutionary cause of action must take into account the contractual, tortious or proprietary basis for the restitutionary cause of relief."

After elaborating upon this principle the author concedes:

> "It must be admitted that there is no Canadian authority in support of the broad propositions put forward here. On the other hand it is clear that there is no authority directly opposing the propositions. Logically, it is proper to treat restitution as an independent legal issue and given current trends the proper law approach is the obvious approach at the choice of law stage."

For these reasons, it may still be appropriate to rely upon or advance conflict of laws characterization

Source: Nikkei National Museum, 2018-16-2-11-11-41
www.nikkeimuseum.org

factors such as "validity" and "administration" commonly used in the context of express trusts.

Canadian law makes clear that, for the purposes of conflicts of law, a distinction is to be drawn between the validity of trust and the administration of a trust; Jewish National Fund View World Trust Co. [1965] S.C.R. 784. It ought to be noted that English courts, most recently in the case of Clearing v. Chellaram [1985] C.H. 409 have rejected the distinction between a "validity", "interpretation" and questions of "administration". The Court there held that the proper law governed all aspects of the trust.

In Canada the distinction remains significant. Waters, at page 1124 states:

> "Administration is a term which both embraces all those issues that are exclusively concerned with the management or administration of trust affairs, and also acts as a connecting factor."

And at page 1125:

> "...administration covers such issues as who may appoint, and be appointed as, a new trustee, the powers and duties of trustees, trustees investments, the distinction between income and capital, liability of trustees for breach of trust and their rights of indemnity and contribution.."

Waters also notes at page 1124:

> "There is, however, a fairly general agreement that it is situated (the law of the place of

Source: Nikkei National Museum, 2018-16-2-11-11-42
www.nikkeimuseum.org

> administration) where the trustees reside and are administering the trust. For the majority of cases this formula will be satisfactory ..."

While the foregoing proposition could be helpful to us, it must be regarded with some caution. Castel, Canadian Conflict of Laws, 2nd Edition, (1986) notes at page 483:

> "In Canada, the conflict of laws rules applicable to questions of administration are not altogether clear. The few decisions that have been reported are not all in favour of the law of the place of administration which generally is where the trustees reside or carry on the business of administration."

A number of cases are footnoted by the author which highlight some of the confusion inherent in the law and the inconsistent manner in which courts have applied the relevant principles.

I do not believe there exists sufficient authority or authority of sufficient consistency or that we have an adequate factual framework to fully consider this particular issue.

Peter G. Voith

Source: Nikkei National Museum, 2018-16-2-11-11-43
www.nikkeimuseum.org

June 16, 1988

TO: The Strategy Committee
Art Miki, Roger Obata, Audrey Kobayashi, Bryce Kambara, Roy Inouye, Roy Miki

and legal advisors
Shin Imai, Maryka Omatsu, Ann Sunahara, Don Rosenbloom

FROM: Cassandra Kobayashi, 3245 West 12th Ave.,
Vancouver, B.C. V6K 2R8
(604) 731-8455 home, 731-0311 work or messages

RE: Redress Claim - Opinion on Limitations from Davis & Co.

This memo will introduce the legal research concerning possible court action, and request your feedback.

As explained at the Ottawa Council Meeting in April, the Vancouver law firm, Davis & Company, has been working on the qustion of whether a possible court action to support our claim for Redress would be statute barred. As you will see in the enclosed letter dated June 3, 1988, the firm has come up with four possible causes of action, or types of claims, which would not be subject to the statutory limitation periods. For most types of claims, the limitation periods have run out, which means that it is too late to bring an action for such things as wrongful imprisonment, or conversion (wrongful taking of another's property).

I will explain the four causes of action dealt with in their letter:

(a) **Seek a declaration that certain Orders-in-Council were not constitutionally valid**

Davis & Company are involved in a case which is before the Supreme Court of Canada which involves the issue of whether a constitutional challenge can be statute barred. In that action, they are also seeking repayment of the money paid under the law which they allege is unconstitutional.

In 1942, the Canadian constitution was The British North American Act, which divided power between the federal and provincial governments. For example, the federal government had jurisdiction over air travel and defense, and the provincial government had jurisdiction over property and liquor sales. If the federal government acted outside its constitutional jurisdiction, then the

Source: Nikkei National Museum, 2018-16-2-11-12-1
www.nikkeimuseum.org

Orders-in-Council it passed were without legal effect, and it may be possible to ask that the damage be reversed insofar as that is possible. It is possible to argue that some of the Orders in Council pertaining to "property and civil rights" which are under provincial not federal jurisdiction were outside the powers of the Cabinet.

(b) **Seek a declaration that certain Orders-in-Council were arbitrary, done in bad faith, or were outside the jurisdiction of the Governor-in-Council**

The government has always argued that perhaps their actions were discriminatory, but they were "legal". If we succeded in showing the Orders-in-Council were arbitrary (without a valid reason), done in bad faith (for the wrong reasons) or without jurisdiction (outside the power given to the Cabinet), then the Orders-in-Council will be found to be without legal effect.

Challenges of this type are known as judicial review which is a part of administrative law. In our lives, administrative bodies which are subject to fair procedural rules are ubiquitous - various licensing bodies and the worker's compensation system for example.

(c) **Seek a declaration as to personal status**

Declarations as to personal status usually concern a child's legitimacy, or a person's marital status or citizenship, and are not statute barred.

This application would seek not only a ruling as to the citizenship of certain Japanese Canadians, but also the "incidents" attached to such status, such as the right to move freely and the right to acquire and hold property. This issue arises from the Orders-in-Council which deemed Japanese Canadians to be enemy aliens.

(d) **Bring an action for fraudulent breach of trust**

Fraudulent breach of trust is an action against a "trustee" who fails to carry out the terms of the trust, for example, by disposing of the trust property in an improper manner, or taking some benefit for himself in the form of commissions.

In order to overcome the limitations problem, the following would have to be shown:

1. A constructive trust existed (as opposed to an explicit trust such as one created by a Will or trust

Source: Nikkei National Museum, 2018-16-2-11-12-2
www.nikkeimuseum.org

fund). The Custodian of Enemy Property is a likely candidate.

2. The Ontario Limitations Act applies (Ontario law appears to be more favourable than B.C. law on this point);

3. The breach of trust arose in Ontario for the purposes of bringing the action.

Davis & Company have not yet established that these three conditions are satisfied, but are reasonably confident that this is an avenue worth exploring. If successful, such a cause of action could result in a large monetary settlement.

Davis & Company has also advised that we could argue that limitations should not apply where new information is being unearthed which creates new causes of action.

General Comments

At this time, Davis & Company has given an opinion only on the issue of overcoming the limitation periods. Their opinion does not consider the substantive issues, or whether we would succeed on the merits.

However, their work on overcoming the limitation periods is significant because the biggest hurdle against bringing any action has been the limitation periods.

The above causes of action are not following a routine pattern established by precedent, so it is difficult to predict with certainty, the outcome of any aspect of the case. These are ground-breaking cases and would be making new law. However, they are confident that we would not be thrown out on the limitations issue.

When a writ is issued, we would have to state the nature of our claim, and the relief we are seeking. Before the substantive issue is heard, many interlocutory or preliminary matters are often raised by the defendants, such as whether the case is before the right court, whether the right parties have been named in the suit, and whether the limitation period has run out. These interlocutory motions are heard in a separate hearing, and can be appealed by the losing party, and further appealed all the way to the Supreme Court of Canada. Bob Banno thinks the limitations question could go to the Supreme Court of Canada and take 3 years to be resolved. The whole action might take 5 or 6 years to be decided.

Source: Nikkei National Museum, 2018-16-2-11-12-3
www.nikkeimuseum.org

Fees

In informal discussions, Davis & Company has indicated that they might be prepared to proceed on a semi-contingency basis, meaning that we pay all disbursements (e.g. photocopying, courier, long distance telephone, special research or accounting fees) and half their hourly fees as we go along. If we ultimately win a monetary settlement or settle with the government out-of-court, we would then pay a percentage of the win on a sliding scale to cover the other half of their fees, plus a bonus for their risk and the interest on the late fees. Bob Banno has said that a case of this magnitude would not likely not cost more than $200,000 a year in fees, or $1 million over 5 years (in today's dollars), of which we would have to pay half during the conduct of the action. He also indicated that we will have some ability to control the costs.

Although $500,000 sounds like a lot of money, broken down into yearly amounts, I believe it is manageable. There may be people who have been reluctant to support a political settlement but would donate to a legal fund. As well, the specific nature of the project makes it easier to fundraise. If there are an estimated 12,000 Japanese Canadians who were directly affected by the injustices in the 1940's, they alone could finance this action at a cost of $50 per person ($50 x 12,000 = $600,000), or $10 per year.

Strategy

While the action was occurring, we would reap lots of free publicity and educational material. Even if we seek only declarations without a monetary claim, the court's findings would be a point of honour in showing that Japanese Canadians were truly innocent victims of government wrongdoing.

Bob has stressed that the major benefit in bringing this action will be to better our bargaining position with the government. We would not be ruling out a political settlement. As Ron Doering said to us, their $12 million offer could be substantially increased if they were paying us out to avoid a costly legal suit.

Time frame and next steps

Although 45 years have passed, we cannot be too complacent about letting more time pass. There is some concern about the number of years since the Archives have been open for inspection, and we should consider issuing a writ within the next 6 months.

Source: Nikkei National Museum, 2018-16-2-11-12-4
www.nikkeimuseum.org

Along with fundraising, the NAJC would have to find suitable plaintiffs for this action, probably in a representative capacity. Davis & Company would assist with a list of criteria.

Feedback

Before the NAJC Council members are presented with these research findings and asked to make a decision on further action, I sugggest the Strategy Committee should endorse a plan of action concerning the following points:

1. Are we interested in continuing research towards commencing an action?

2. Are we happy with Davis & Company having conduct of the action?

3. Is the proposed fee agreement acceptable?

4. Do you have any comments on their research findings?

Please call me or write by July 5th. Looking forward to hearing from you.

Cassandra

Source: Nikkei National Museum, 2018-16-2-11-12-5
www.nikkeimuseum.org

DAVIS & COMPANY

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COPY

FILE NO. 50739-37599/#93
REPLY TO Robert T. Banno

June 2, 1988

National Association of Japanese
Canadians
c/o Mr. Roy Miki
2995 West 15th Avenue
Vancouver, B.C.
V6K 3A2

Attention: Mr. R. Miki and Ms. C. Kobayashi

Dear Sirs:

Re: Redress Claim - Limitations

We have been asked to consider whether there are causes of action not bound by limitations legislation available to Japanese Canadians interned or whose property was seized and sold during World War II or who were deported after the war.

For the purpose of this letter, we have limited ourselves to the question of what, if any, causes of action survive the expiry of the more than 45 year period from 1942 to date. Clearly, most causes of action would not survive such a lengthy period. For example, a simple action for conversion as against the Custodian of Enemy Property would likely be statute barred. So too would an action for false imprisonment as against Her Majesty the Queen in Right of Canada. We have not, for example, considered:

(a) the substantive merits of the causes of action;

(b) the method by which any such cause of action could best be advanced; or

(c) who the specific parties to such a cause of action should be.

In our opinion, there are a number of potential causes of action available which are not precluded by

Source: Nikkei National Museum, 2018-16-2-11-13-1
www.nikkeimuseum.org

limitations legislation. The following causes of action would, in our view, likely survive the imposition of provincial and federal limitations legislation:

(a) Challenges to the constitutional validity of relevant Orders-in-Council

It is our opinion that one cannot by legislative or executive act seek to prevent a constitutional challenge. Consequently, an attempt by the Federal Government, for example, to pass legislation establishing that a constitutional challenge cannot be brought would likely be invalid. The more difficult question is whether laws of general application, such as limitations legislation, can validly have the effect of preventing a constitutional challenge. That is, is the question of constitutional validity of such significance that its resolution ought to be paramount to or supercede laws of general application?

Although the foregoing issue has not yet been addressed directly by our Supreme Court of Canada, it is likely to be addressed more fully by that Court within the next month. Relevant lower Court authorities do, however, seem to support the proposition that a constitutional challenge cannot be precluded or preempted by a law of general application.

It is our view that if the relevant facts could be established, you could endeavor to assert that provisions of the War Measures Act R.S.C. 1927, c. 206 or certain Orders-in-Council passed pursuant to the Act were constitutionally invalid.

(b) Challenges to the relevant Orders in Council on administrative grounds

Traditional issues of administrative law raise such questions as whether given governmental action was arbitrary, in bad faith, or lacked an adequate jurisdictional basis. In this context, our view is that you could endeavor to establish or seek a court declaration that certain Orders-in-Council were, in fact, arbitrary, passed in bad faith, or without adequate jurisdictional basis. Our opinion is that an application in the nature of a judicial review for such declarations would not be precluded by limitations legislation.

Source: Nikkei National Museum, 2018-16-2-11-13-2
www.nikkeimuseum.org

(c) Declarations as to personal status

Our view is that the seeking of a declaration as to personal status, such as legitimacy, marital status or citizenship would not be statute-barred. We note that pursuant to certain Orders-in-Council Canadians of Japanese descent were treated as if they were aliens. In British Columbia declarations as to personal status are free from the application of limitations legislation.

The more difficult question is whether in seeking a declaration as to personal status one could concurrently seek a declaration as to the incidents which would normally attach to such status. That is, by asserting that an individual is a citizen does one, impliedly and of necessity, concurrently determine that that individual has all the incidents normally attached to citizenship?

In this instance, however, our view is that a declaration as to personal status, as well as the incidents attached to such status, if properly framed, could be brought in a manner which would be free from the application of limitations legislation.

(d) Claims In Trust

In some instances and under the limitations legislation of some provinces, claims for fraudulent breach of trust are exempt from limitations legislation. In this instance, you could attempt to establish that assets of Japanese Canadians held by the Custodian of Enemy Property were held on constructive trust and that subsequent Orders-in-Council and the conduct by the Custodian of Enemy Property in alienating the property and in selling it on unfavorable terms for its Japanese Canadian owners constituted breaches of trust.

In British Columbia, fraudulent breaches of trust are not wholly exempt from limitations legislation. Our present understanding (though we are not qualified to give opinions on Ontario law) is that the Ontario Limitations Act can exempt such conduct from the application of limitation legislation.

We do not presently have sufficient facts to ascertain whether it can be established that such breaches of trust took place in Ontario and therefore whether the

Source: Nikkei National Museum, 2018-16-2-11-13-3
www.nikkeimuseum.org

Ontario Limitations Act is applicable. If you could establish that the breach of trust took place in Ontario, it would appear that the breach of trust action be free from the application of limitations legislation.

In addition to the foregoing specific causes of action, we suggest you endeavor to frame your action in a manner which makes it clear that considerable relevant information has come to your attention only during the course of the past few years. This is particularly the case with respect to materials that were in government archives and have only recently been disclosed to the public. It is possible that some of the information may raise causes of action in respect of which limitations period may not start to run until you become aware of the information.

Similarly you should endeavor to frame an action in a manner that it is understood that you require further information to pursue your action. You could by virtue of such pleadings seek to persuade a Court not to deal with limitations legislation on a preliminary basis but rather to allow you to pursue your action on the merits initially and to reserve on questions on limitations until you are able to advance relevant arguments and the courts are in possession of relevant material.

We are attaching with this letter a copy of a memorandum prepared by our Mr. Voith which substantiates many of the opinions contained in this letter. Some of the opinions contained in Mr. Voith's memorandum are founded upon further memoranda dealing with more specific issues. If you wish we can provide you with copies of these additional materials.

Should you have any questions arising from this letter or from Mr. Voith's memorandum, please do not hesitate to contact us. We look forward to hearing from you at your convenience.

Yours truly,

DAVIS & COMPANY

Per:

RTB/PGV/dw

Source: Nikkei National Museum, 2018-16-2-11-13-4
www.nikkeimuseum.org

Ms. Anne Sunahara

With the Compliments of . . .

Peter G. Voith

DAVIS & COMPANY
BARRISTERS and SOLICITORS
2800 Park Place, 666 Burrard Street, Vancouver, Canada V6C 2Z7
Telephone 687-9444

D U M

May 31, 1988

LIMITATIONS LEGISLATION

provide an opinion dealing

ations legislation in the

context of an action being considered by Japanese Canadians or by the National Association of Japanese Canadians on their behalf. More specifically, limitations legislation will preclude reliance upon many of the remedies that would normally be available to the N.A.J.C. This memorandum focuses on the causes of action that remain available and free from the application of any such limitations legislation. The memorandum does not consider the substantive merits of the individual causes of action themselves.

The relevant facts are as follows:

Section 3 of the War Measures Act, R.S.C. 1927 c.206 is relevant and provides:

> (1) "The Governor and 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; 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

Source: Nikkei National Museum, 2018-16-2-11-13-5
www.nikkeimuseum.org

M E M O R A N D U M

May 31, 1988

POSSIBLE ACTION FOR REDRESS AND LIMITATIONS LEGISLATION

We have been asked to provide an opinion dealing with the significance of limitations legislation in the context of an action being considered by Japanese Canadians or by the National Association of Japanese Canadians on their behalf. More specifically, limitations legislation will preclude reliance upon many of the remedies that would normally be available to the N.A.J.C. This memorandum focuses on the causes of action that remain available and free from the application of any such limitations legislation. The memorandum does not consider the substantive merits of the individual causes of action themselves.

The relevant facts are as follows:

Section 3 of the War Measures Act, R.S.C. 1927 c.206 is relevant and provides:

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Source: Nikkei National Museum, 2018-16-2-11-13-5-copy
www.nikkeimuseum.org

within the classes of subjects hereinafter enumerated, that is to say:

(b) arrest, detention, exclusion and deportation;

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

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

Pursuant to the provisions of the War Measures Act, a series of Orders in Council were passed. Most were passed in the period January-March, 1942. The relevant Orders in Council include:

(a) P.C. 365, January 27, 1942 - authorizing the evacuation (internment) of Japanese nationals;

(b) P.C. 1486, February 24, 1942 - authorizing the evacuation (internment) of Japanese nationals;

(c) P.C. 1665, March 11, 1942 - vesting the control and management of the property of Japanese nationals in the Custodian;

(d) P.C. 2483, March 27, 1942 - vested property of Japanese nationals in the Custodian and provided the Custodian with power to administer such property;

(e) P.C. 469, January 19, 1943 - provided the Custodian with power to "liquidate, sell or otherwise dispose of...property";

(f) P.C. 7355, December 15, 1945 - provided for the deportation of Japanese nationals.

I have obtained the full text of each of these Orders in Council. Other Orders in Council and Regulations

Source: Nikkei National Museum, 2018-16-2-11-13-6
www.nikkeimuseum.org

which have been gathered are useful in understanding the chronology of relevant legislation. These Orders in Council and Regulations frequently refer to the Defence of Canada Regulations (Consolidation) (1941) and the Regulations Respecting Trading with the Enemy (1939) (Consolidation) and I have obtained copies of both of these materials.

Under the authority of these various Regulations and Orders in Council, persons of the Japanese race were interned, had their property seized and sold and were deported.

The forms of loss suffered by the Japanese are considered in a report by Price Waterhouse dated May 7, 1986, a copy of which is in our files.

Relevant limitations legislation includes the following:

(i) Federal Court Act, Section 38(1):

> "(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions enforced in any province between subject and subject apply to any proceedings in the court in respect of any cause of action arising in such province, ..."
>
> (2) Except as expressly provided in any other Act, the laws relating to prescription and the limitation of actions referred to in subsection (1) apply to any proceedings brought by or against the Crown."

(ii) Crown Proceedings Act, R.S.C. 1970:

(a) Section 19(1):

Source: Nikkei National Museum, 2018-16-2-11-13-7
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"Unless otherwise provided in this Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings against the Crown under this Act in respect of any cause of action arising in such province, and proceedings against the Crown under this Act in respect of a cause of action otherwise than in a province shall be taken within and not after six years after the cause of action arose."

(b) Section 24(1):

"No proceedings shall be taken against the Crown under this Act in respect of any act, omission, transaction, matter or thing that occurred or existed before the 14th day of May, 1953." (underlining added)

(iii) Limitations Act, R.S.B.C. 1979 c.8:

(a) Section 3(3):

"A person is not governed by a limitation period and may at any time bring an action

(i) for a declaration as to personal status;"

(b) Section 3(4):

"Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose."

(c) Section 8(1):

"Subject to Section 3(3) but notwithstanding a confirmation made under Section 5, or a postponement or a suspension of the running of time under Section 6, 7 or 11(2) no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose ..."

(iv) Certain provisions of the Ontario Limitations Act, R.S.O. 1980, are relevant to certain arguments which follow. The Act, however, contains no comprehensive provisions of the sort outlined above.

Source: Nikkei National Museum, 2018-16-2-11-13-8
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I have considered a number of specific grounds upon which an argument advanced by the Crown and based on limitations legislation might be addressed. Those grounds are as follows:

(1) Our seeking a declaration that the Orders in Council listed above are ultra vires (in the constitutional sense) and our arguing that limitations legislation cannot be used to prevent a constitutional inquiry;

(2) Our seeking a declaration that the Orders in Council in question are ultra vires (in the administrative sense) and our asserting that no limitations period applies to such an action;

(3) Our seeking a declaration as to personal status in relation to the "deemed" alien status imposed by given Orders in Council;

(4) Our alleging fraudulent/equitable breaches of trust by Her Majesty and the Custodian of Enemy Property;

1. Can limitations legislation bar a constitutional inquiry?

There are no authorities which deal with this issue. There are, however, a number of cases which are of assistance. In the case of Air Canada v. Attorney General of British Columbia (1986) 8 B.C.L.R. (2d) 273 (S.C.C.), the Petitioner commenced an action seeking a declaration that the Gasoline Tax Act did not apply to it or was ultra vires and for an accounting of money paid under that Act. Pursuant to the Crown Proceeding Act, it also issued a petition of right with respect to certain monies that had been paid by it. On the advice of the Attorney General, the Executive Council advised the Lieutenant Governor to deny

Source: Nikkei National Museum, 2018-16-2-11-13-9
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the fiat. The Petitioner then brought an application under the Judicial Review Act for an Order compelling the Attorney General to consider the Petition and to advise the Lieutenant Governor to consider the fiat.

Two decisions were considered by the Court at length and are particularly relevant:

> B.C. Power Corp. v. B.B.C. Electric Co. [1962] S.C.R. 462;
>
> Amax Potash Ltd. v. Saskatchewan [1977] 2 S.C.R. 576

The Amax decision dealt with a provincial statute that sought to prevent the recovery of taxes paid under protest and pursuant to an unconstitutional statute.

In the Amax case Dickson J. said at p. 592:

> "The principle governing this appeal can be shortly and simply expressed in these terms: If a statute is found to be ultra vires the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to the invalid law must equally be invalid because it relates to the same subject matter of that which was involved in the prior legislation. If a state cannot take by unconstitutional means, it cannot retain by unconstitutional means."

In the Air Canada case La Forest, J., speaking for the Court, said at page 278:

> "In my view, if a statute cannot permit the retention of monies obtained under an

Source: Nikkei National Museum, 2018-16-2-11-13-10
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> unconstitutional statute that result cannot be achieved under purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with the constitutional imperatives".

It should be noted, however, that the Court said at page 281:

> "Finally, counsel for the Respondent argued that a Judgment along these lines would preclude the provinces relying not only on Crown immunity, but also on limitation periods, retroactive remedial legislation and mutual mistake of law to retain monies collected under ultra vires legislation. While I do not wish to enter into these issues at any length, I do not think this conclusion necessarily follows. There is a difference between an executive act directly interfering with a recourse to the courts for the recovery of monies under an allegedly unconstitutional statute and relying on general principles of law like limitation periods which are aimed at different purposes, in that case, barring stale claims. The significance of this distinction is best left to be raised in the principal action when the matter, which was simply touched upon in this court, can be examined in depth."

Two issues arise:

(i) Can the Crown rely on laws of general application to prevent an inquiry into the constitutionality of a statute?

(ii) Could the Orders in Council in question be challenged on constitutional grounds?

Source: Nikkei National Museum, 2018-16-2-11-13-11
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The first of these issues, that of the applicability of general principles of law in the context of constitutional inquiries was considered by the British Columbia Court of Appeal in the case of Air Canada v. Attorney General of British Columbia (1986) 4 B.C.L.R. (2d) 356. In this case the Crown sought to argue that monies paid under ultra vires legislation had been paid under a mistake of law and that the parties were in pari delicto.

The Court of Appeal dealt extensively with both the case of Kiriri Cotton Co. v. Dewani [1960] A.C. 192 where the House of Lords reviewed principles of the mistake of law and its requisite elements and the case of Nepean Hydro Electric Commission v. Ontario Hydro [1982] 1 S.C.R. 347 where Estey J. dealt at length with the Kiriri case.

The Plaintiffs pointed out, however, that the Nepean case was not a constitutional case and that the court was not there "concerned with the division of powers under the constitution."

Three separate judgments were rendered.

Hinkson J.A. said at page 371:

> "In a federal state the Crown cannot engage in an illegal exercise of power by way of taxation and then call in aid either legislation

Source: Nikkei National Museum, 2018-16-2-11-13-12
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enacted by it or common law rights asserted by it to retain the proceeds of such taxation. As Dickson J. indicated, 'in each case, the concern is with the preservation of the Constitution which is paramount'. I understand that passage to mean that other rights asserted by the legislature which has exercised that illegal power must yield to that paramount concern; and I conclude that the Crown is not entitled to retain such monies either on the basis of the legislation it enacted to do so or on the basis of common law principles."

Lambert J.A. said at page 380:

"The first argument is a constitutional one. It is that even if the Nepean case could be considered to extend common law principles of mistake, compulsion and unjust enrichment to money paid under a wholly ultra vires statute, constitutional principles would require that the money paid under the ultra vires statute must be recoverable, not withstanding those common law principles, otherwise the constitution would be flouted in the result. In short, there is a constitutional exception to the Nepean case with respect to money paid under a taxing statute which is beyond the legislative competence of the legislation which was enacted under section 92 of the Constitution Act. (1867)

The second argument applies to the common law principles, with the same result. If money is paid as taxes under a wholly ultra vires statute that money should be considered to have been paid under the irresistible compulsion of state power, whether the statute was thought by either the state or the taxpayer to be ultra vires and whether the taxpayer protests or not, or complained about the compulsion or not. I think, in the relevant sense of "compulsion", under common law principles, all taxes are paid under compulsion.

I also consider it would be unjust and against conscience for the Crown to retain monies paid as taxes under an ultra vires statute. In this case, the fact that the Crown is retaining the money paid by other taxpayers

Source: Nikkei National Museum, 2018-16-2-11-13-13
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does not make it just to retain it against the air lines."

Esson J.A. applied conventional "mistake of law" principles and concluded that the Plaintiffs could not succeed on that basis. Esson J.A. continued with an analysis of restitutionary principles and determined that "it would not be unjust to permit the Defendant to keep the money".

The Air Canada case has been appealed to the Supreme Court of Canada and that appeal is expected to be heard in mid-June of this year. If Air Canada is successful, a principle which precludes the application of common law principles to prevent constitutional challenges ought to emerge. That principle ought also to extend to the recovery of monies paid or lost under unconstitutional legislation as well as recovery for harm occasioned by unconstitutional legislation. If this result ensues then the broader concern raised by Laforest J. in the earlier Air Canada case, dealing with the interplay between laws of general application and constitutional challenges, will have been directly addressed.

2. Could the Orders in Council in question be challenged on conventional constitutional principles?

Some authorities appear to indicate that subordinate legislation, not generally enacted by

Source: Nikkei National Museum, 2018-16-2-11-13-14
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NB: this is NOT Neary "subordinate leg"

Parliament, cannot be challenged on constitutional grounds; E.A. Driedger, Subordinate Legislation, (1960) 38 Can. Bar Rev. 1.

The principle is, however, not rigorously applied and there exists numerous authorities, including Central Canada Potash Co. Ltd. v. Attorney General for Saskatchewan [1975] 5 W.W.R. 193 and Burns Food Ltd. v. A.G. Manitoba [1973] 10 D.L.R. (3d) 731 (S.C.C.), where Orders in Council and regulations have been challenged on the basis of conventional constitutional arguments.

Whether a constitutional challenge, in the traditional sense, can be maintained may be contingent upon the language or authority of the statute under which subordinate instrument is created.

For example, in the Central Canada Potash case, Section 10(3) of the Mineral Resources Act provided "every regulation and order made under this section shall be deemed to be part of this Act".

By way of comparison, Section 3(2) of the War Measures Act provides: " all orders and regulations made under this section shall have the force of law ..."

Source: Nikkei National Museum, 2018-16-2-11-13-15
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In the case of Rex v. Singers [1941] S.C.R. 111, the Court considered the status of various Orders in Council passed under the War Measures Act. Taschereau J. said at page 15:

> "I cannot come to the conclusion that in the present instance the violation of the Order in Council is tantamount to the violation of the War Measures Act. An Order in Council is passed by the Executive Council, an Act of Parliament is enacted by the House of Commons and by the Senate of Canada. Both are entirely different and unless there is a provision in the law stating that the Orders in Council shall be considered as forming part of the law itself, or that any offence against the regulations shall be a violation of the Act, it cannot be said that the violation of the Order in Council is a violation of the Act of Parliament."

The case of Texada Mines Ltd. v. A.G. B.C. [1960] S.C.R. 713 makes reference to similar concerns under a different statute.

On the other hand, in the Japanese Reference [1947] A.C. 87 case, the Judicial Committee of the Privy Council appeared to approximate regulations under the War Measures Act with Acts of Parliament. The Statute of Westminster, 1931, provided that no law "made by the Parliament of a Dominion" should be void on the ground that it was repugnant to the law of England and that the Colonial Laws Validity Act should not apply "to any law made...by the Parliament of the Dominion".

Source: Nikkei National Museum, 2018-16-2-11-13-16
www.nikkeimuseum.org

It was argued that the Statute of Westminster applied only to acts of Parliaments and not to regulations and therefore, the Colonial Laws Validity Act was still applicable. The Judicial Committee, however, held that the regulations in question were laws made "by the Parliament of a Dominion" within the meaning of the Statute of Westminster. Lord Wright said at page 107:

> "The legislative activity of Parliament is still present at the time the Orders are made and these Orders are 'law'. In their Lordship's opinion, their law is made by the Parliament at the time of their promulgation."

There also exist numerous cases where the constitutionality of subordinate legislation has been expressly challenged and no question about the subordinate nature of such legislation has been raised.

The following cases deal with various Orders in Council whose constitutionality has been challenged:

Kirkbride v. Her Majesty the Queen in Right of the Province of British Columbia (unreported) November 19, 1987 (S.C.C.)

Deiorio v. Warden of the Common Jail of the City of Montreal [1978] 1 S.C.R. 152

Faber v. the Queen [1976] 2 S.C.R. 9

Attorney General of Quebec and Keable v. Attorney General of Canada [1979] 1 S.C.R. 218

Source: Nikkei National Museum, 2018-16-2-11-13-17
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Again, in each of these cases no reference was made to the fact that the subject matter of the constitutional challenge was subordinate legislation.

I would also make reference to Section 32(1) of the Charter. That section governs the applicability of the Charter:

(a) "To the Parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territories and Northwest Territories; and

(b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

This provision has not been interpreted so as to be limited to Acts of Parliament and has been extended to by-laws, Orders in Council, regulations, and other forms of governmental activity.

Having regard to the foregoing, and particularly the numerous examples of cases where Orders in Council have been challenged on constitutional grounds, I believe that the Orders in Council in question could properly be subject to a constitutional challenge.

3. Could the legality of the Orders in Council in question be challenged on administrative grounds?

There exists a variety of bases upon which the Orders in Council in question could be challenged on

Source: Nikkei National Museum, 2018-16-2-11-13-18
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administrative grounds. These would include, inter alia, the arbitrary nature of the Orders in Council, whether they were ultra vires their governing legislation, and whether the Orders in Council were the subject of bad faith.

I believe that if we sought a declaration to the effect that the Orders in Council lacked an adequate jurisdictional basis or were arbitrary, we would be able to circumvent difficulties imposed by limitations legislation.

Section 17 of the Federal Court Act provides the Trial Division with "original jurisdiction in all cases where relief is claimed against the Crown".

Section 18 of the Federal Court Act provides the Trial Division with exclusive jurisdiction:

> (b) "To hear and determine the application or the proceeding for relief and the nature of relief contemplated by paragraph (a) including any proceeding brought against the Attorney General of Canada, to obtain relief against a Federal Board, Commissioner or Tribunal."

Paragraph (a) of Section 18 includes declaratory relief.

Section 18 has been extended to relief claimed against bodies other than Federal Boards, Commissions or Tribunals and has been extended to relief being claimed in relation to the conduct of ministers.

Source: Nikkei National Museum, 2018-16-2-11-13-19
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One could arguably seek declaratory relief under either Section 17 or Section 18 of the Federal Court Act. Neither presents problems in relation to questions of limitations legislation.

There is no limitation period applicable to Section 18 of the Federal Court Act. Cavanagh, Guide to Judicial Review, notes at page 119:

> "The Act prescribed no limitation period for bringing an application before the Trial Division under Section 18. However, the Court in its discretion may deny relief where there has been undue delay in commencing proceedings."

The author continues and refers to the case of Landreville v. R. (No. 2) (1977) 75 D.L.R. (3d) 380 where the Court did not find a delay of six years compelling as no party was prejudiced by that delay.

Having regard to the fact that considerable evidence has only become available to the Plaintiffs in this action in the last 5 to 10 years, we would, I believe, be able to address concerns relating to "undue delay" on the part of the Plaintiff.

The applicability of limitations legislation under Section 17 of the Federal Court Act is not as clear. You

Source: Nikkei National Museum, 2018-16-2-11-13-20
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will recall that Section 38 of the Act makes applicable the legislation of the province where "the cause of action" arose. Various interpretation acts define the word "action" and "cause of action" in different ways. The federal Interpretation Act does not provide any assistance. Similarly, the word has been subject to different definitions in sources such as Jowitt's, Dictionary of English Law, and Black's, Law Dictionary. It is not clear from these various authorities whether an application for relief in the nature of judicial review would constitute a "cause of action". It does not matter.

If such relief does not constitute a "cause of action", then Section 38 would not be applicable.

If an action seeking declaratory relief constitutes a "cause of action" then, I believe, that cause of action would have arisen in Ontario. In this instance, each of the Orders in Council and regulations in question were reviewed and promulgated in Ontario. The Minister of Justice was located in Ontario, the various discussions which underlay the issuance of the Orders in Council took place in Ontario and none of the activity relevant to the promulgation of the Orders in Council themselves took place outside of Ontario -- so far as I know.

↳ postwin Bloody

Source: Nikkei National Museum, 2018-16-2-11-13-21
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If an action or application for relief in the nature of judicial review does constitute a "cause of action", then reference would have to be made to both the Ontario Limitations Act and the Ontario Judicial Review Procedure Act, R.S.O. 1980, c.224. Neither those pieces of legislation prescribes any limitation period for bringing an application for judicial review.

With reference to the Ontario Judicial Review Procedure Act, Cavanagh (supra.) says at page 120:

> "(The Act)... does not prescribe any limitation period for bringing an application."

Similarly, with reference to the Ontario Limitations Act, the Ontario Law Reform Commission states at page 20:

> "There are a variety of other actions to which the Act does not apply. These include:
>
> (7) where judicial review is undertaken by bringing...declaratory judgment..."

Based on the foregoing, I believe that those portions of an action which sought relief in the nature of a judicial review, including a declaration that given Orders in Council were ultra vires, would be immune from limitations legislation.

Source: Nikkei National Museum, 2018-16-2-11-13-22
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4. Would an action for a properly worded declaration pertaining to "personal status" be immune from the applicability of limitations legislation?

The Limitations Act R.S.B.C. 1979 does not apply in instances where a person seeks "a declaration as to personal status"; Section 3(3)(i).

A number of other pieces of legislation and regulations are directly relevant.

Section 5 of the Naturalization Act R.S.C. 1927 c. 138 provides:

> "A person to whom a certificate of naturalization is granted by the Minister shall, subject to the provisions of this Act, be entitled to all political and other rights, powers and privileges, be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and as from the date of his naturalization have to all intents and purposes the status of a natural-born British subject."

Section 3 of the Act establishes which persons are deemed to be "natural-born British subjects" and includes in that group:

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

(b) any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfills any of the following conditions, that is to say, if either:

(i) his father was born within His Majesty's alliance; or

Source: Nikkei National Museum, 2018-16-2-11-13-23
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(ii) his father was a person to whom a certificate of naturalization had been granted..."

Many of the Japanese who were interned during World War II or were otherwise subject to the Orders in Council in question were either "natural-born British subjects" or holders of certificates of naturalization.

The following regulations had the effect of taking from "persons of the Japanese race" rights which they would otherwise have had by virtue of their status as British subjects:

(a) The Defence of Canada Regulations (Consolidation) 1941, allegedly passed under the authority of the War Measures Act, contained a number of provisions directly relevant to "enemy aliens". Those words, in turn, were defined as "a person who, not being a British subject, possesses the nationality of a state at war with Her Majesty".

(b) Regulation 26(a) and 26(b) made certain other Regulations applicable to persons of the Japanese race:

"26(a)
The provisions of Regulation 24,25 and 26 of these Regulations shall apply mutatis mutandis to all persons
(c) of the Japanese race other than citizens of the United States; who are not British subjects..."

"26(b)
Provisions of Regulations 24, 25 and 26 of these Regulations shall apply mutatis mutandis

Source: Nikkei National Museum, 2018-16-2-11-13-24
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to all persons who have become naturalized British subjects since the 1st day of September, 1922, who

(d) are of the Japanese race."

The words "person of the Japanese race" were defined as "including a person not wholly of the Japanese race if his mother or father is wholly of the Japanese race and if the Registrar General of the enemy aliens, by notice in writing, requires him to register as an enemy alien".

(c) By virtue of Order in Council PC 1665, it was determined:

"12(1)
As a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race resident in such area ... shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy 1939;...

(2)
Subject as hereinafter provided, and for the purposes of the control and management of such property, rights and interest by the Custodian, the Regulations respecting Trading with the Enemy, 1939, shall apply mutatis mutandis to the same extent as if such property, rights and interest belonged to an enemy within the meaning of the said Regulations."

Thus, persons of the Japanese race, without actually being stripped or deprived of their nationality as contemplated by the Naturalization Act, 1927, were deemed

Source: Nikkei National Museum, 2018-16-2-11-13-25
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for the purposes of subordinate legislation to be "enemy aliens". More specifically, Regulations and Orders in Council dealing exclusively with enemy aliens were deemed to apply mutatis mutandis to persons of the Japanese race. By virtue of such subordinate legislation members of the Japanese race, though also British subjects or naturalized, lost the rights of such subjects.

By way of example, Regulation 25 of the Defence of Canada Regulations required the formal registration of "enemy aliens" and contemplated their internment in given instances.

By way of further example, Regulation 39(e) provided:

> "(1) No person of the Japanese race and no Japanese company shall, except as hereinafter provided, have the capacity, after the 24th day of February, 1942, during the continuation of the state of war now existing, to acquire or hold land or growing crops in Canada
>
> (2) No conveyance made or executed after the 24th day of February, 1942 shall be effective to convey to or for the benefit of a person of the Japanese race or of a Japanese company any lands or growing crops in Canada."

For the purpose of this regulation, persons of the Japanese race were defined as "a person wholly of the Japanese race".

Source: Nikkei National Museum, 2018-16-2-11-13-26
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I have only been able to locate one decision pertaining to Section 3(3)(i) of the Limitations Act. In the case of Rankin v. Irving (1983) 47 B.C.L.R. 242 at p. 247, Bouck J. dealt with the intended ambit of Section 3(3)(i):

> "Taking all of the above into account, it seems apparent the words of the Statute should not be strained when the result is to deprive an honest trustee such as the defendant of its benefit. Suggesting this suit merely involves an order for declaration as to personal status so that the Plaintiff may establish her position as a beneficiary of an alleged constructive trust is an indirect method of trying to obtain relief against a blameless trustee in the position of the defendant when he is otherwise protected from action because of the passage of time.
>
> Also, Section 3(3)(i) is not intended to apply on these facts. Rather, it is meant to assist persons who for one reason or another desire to establish their position as married, divorced, or some such similar capacity that has to do with the claimant's relationship to the community and some third person. This interpretation is not meant to be exhaustive."

The foregoing analysis, if upheld by higher courts, clearly raises some problems. It prevents us, for example, from seeking a declaration that given Orders in Council impacting on the status of members of the Japanese race, who were also British subjects, were improperly passed. The focus of such a declaration would only indirectly deal with the "claimant's relationship to the community and some third person". Instead it would be an attempt to use S.3(3)(i) as a tool to challenge administrative conduct in an instance

Source: Nikkei National Museum, 2018-16-2-11-13-27
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where limitations legislation would otherwise preclude such a challenge.

On the other hand, a declaration that given (identified) members of the Japanese race "remained naturalized and British subjects throughout the period 1941-1945" might be inadequate for our purposes. The Attorney General might well concede the validity of the declaration being sought. That is, none of the Orders in Council or Regulations expressly deprived members of the Japanese race of their status as British subjects. Instead these various regulations and orders in council had the effect of depriving "British subjects" of the incidents of such status.

The Naturalization Act, 1927, confirmed that a British subject or naturalized Canadian had all the rights and obligations of a natural-born British subject. These rights would have included, for example, the right to move freely and the right to acquire property. Both of these rights were denied members of the Japanese race who may, nevertheless, have been British subjects.

The issue is whether in seeking a declaration as to status one is of necessity and by implication, confirming and concurrently dealing with the natural incidents of such status. Alternatively, if we seek a declaration confirming

Source: Nikkei National Museum, 2018-16-2-11-13-28
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not only the continued status (nationality) of members of the Japanese race, but also expressly confirming the continued existence of the natural incidents which attach to such status, do we go beyond the intended ambit of Section 3(3)(i)?

The language of this latter form of declaration might provide, by way of example:

> "For a declaration that the plaintiff/petitioner remained a British subject throughout the period 1941-1945 and was entitled to all the natural incidents of such status during that period including ..."

In my opinion, the mere declaration that one "is a British subject" of necessity imports given attributes of status. If one is deprived of the right to vote, hold property, move freely, and be gainfully employed, how can it be said he remains a citizen?

A number of authorities support the foregoing conclusion.

In the case of Re MacDonald (1964) 44 D.L.R. (2nd) 208 (S.C.C.) the Court dealt with the questions of rights which a child born out of wedlock would enjoy. At page 215 the Court said:

> "In my opinion the title of 'legitimacy' or 'illegitimacy' would attach to the status of an individual in any jurisdiction reflects the capacity or lack of capacity which the law of

Source: Nikkei National Museum, 2018-16-2-11-13-29
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> that jurisdiction recognizes in the case of the individual concerned. Just as 'legitimate' when used in relation to a child is only a symbol employed to designate the legal rights and obligations which flow from being born in wedlock, so the word 'illegitimate' is used to donate the limitations of capacity which attach to being born out of wedlock, and the word 'legitimation' is descriptive of the legal effects incident to being relieved of those limitations."

In the case of Hill v. Hill [1929] 1 D.L.R. 423 the Court dealt with the legality of provincial legislation affecting questions of status arising from marriage. The Court said at page 425:

> "...Murray's, New English Dictionary, defines status, at page 866-7 as:
>
> > 'the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations; condition and respect, example of liberty or servitude, marriage or celibacy, infancy or majority'
>
> Since the marriage status, with the exception of solemnization of marriage, is allocated to the Federal Parliament, then I submit that if the incapacity of the spouses to sue each other at common law is properly said to be a qualification or material element of the status of marriage, then however much it may be a matter of civil right, it has been placed exclusively within the federal legislative field."

In the case of City of Halifax v. Lyall [1922] 65 D.L.R. 305 the Court said at page 312, quoting from earlier authority:

Source: Nikkei National Museum, 2018-16-2-11-13-30
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"Status is defined...as follows:

'The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community.'"

The Australian Courts have considered the interplay between status and the rights attached to status in a number of cases. Section 35 of their Judiciary Act, 1903 allowed an appeal to be brought without leave from any judgment of the Supreme Court of a State which "affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency". In the case of Ford v. Ford [1947] 73 C.L.R. 524 (H.C.A.) at page 529, Latham C.J. said:

"A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person, a bankrupt as distinct from other persons generally, or all persons who have a particular status. The mere fact that an alien is an alien means that he is subject to certain disabilities and disqualifications in law. A husband because he is a husband owes special duties to his wife which he owes to no other person and cannot owe, merely as a matter of law, to any other person. A bankrupt simply because he is a bankrupt, cannot deal with his property in the same manner as other persons. These consequences flow as a matter of law from the fact of membership of a particular class of persons.

If the effect of a judgment is to place a person in or to remove a person from such a class the judgment affects the status of that

Source: Nikkei National Museum, 2018-16-2-11-13-31
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person. Thus a decree of divorce, a judicial declaration that a person is an alien, and an order of sequestration in the bankruptcy jurisdiction are all judgments which affect status.

But a variation effected by a judgment of the rights and obligations of a person having a particular status does not necessarily affect the status of that person. Thus an order setting aside or varying a provision for alimony for a married woman or a divorced woman or a judicially separated woman is not an order affecting her status. The conviction of an alien for refusing to register under a law applying to aliens and therefore involving a determination that it followed from the fact that he was an alien that he was bound to register would not affect his status as an alien. A declaration that he was not an alien but was a naturalized British subject would affect his status.

The distinction between the status itself and the incidents of status as possibly varying from time to time as well is illustrated by the case of In Re Adam. In that case a person who was resident in Mauritius claimed that he was a citizen of Mauritius and was not liable to be treated as an alien. He claimed that an order made by the Governor requiring him to depart from the Island was invalid.

It was held in the Privy Council...that the status of Adam must be determined by the laws of England, but that the laws of the Colony must govern what rights and liabilities were attached to the status when ascertained. It was held that he was an alien and the Privy Council then proceeded to determine what were his rights as an alien. The distinction is clearly drawn between the status of an alien and the particular rights which an alien as such may be entitled to enjoy, or the liabilities to which he may be subject."

Dixon J. in the same case said:

"What concerns us is not a juristic analysis but the meaning of the Statute which employs the expression and employs it for the purpose of defining the sort of decree from which an appeal as of right should lay. Under distinct

Source: Nikkei National Museum, 2018-16-2-11-13-32
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names or legal designations our law knows a number of special conditions or relationships which, independently of their will, give the persons occupying these positions distinct congeries or bundles of rights and liabilities not belonging to the ordinary unmarried man or woman of full capacity and legitimate birth, and each of these is recognized as a status. The condition or relationship forming the status bears a legal name to distinguish the particular situation of those who occupy it from the general rights and duties attached to the citizen as such".

His Lordship continued at page 539 and said:

"The truth is that the words "affecting status" are so vague as to be susceptible of almost any extension of meaning and, therefore, of application. It might be said that anything that produces the least consequence upon the rights or liabilities of any of them which arise from a status "affect" that status. But the meaning of the words in Section 35(1) is clearly more definite and restricted. It could hardly have been intended that, whenever a Supreme Court reviewed a decision between husband and wife enforcing, refusing to enforce or varying as by separation order any of the rights or obligations arising from marriage, an appeal here should lay as of right.

The word 'affect' was not intended to cover consequential or incidental effects produced by orders based upon marriage, alienage or bankruptcy. It refers to something affecting the existence or validity of the status, to a judicial order where the status is or may be established or denied, continued or ended, confirmed or prejudiced."

Having regard to the foregoing it is apparent that we must establish that the Orders in Council in question did not simply have some consequential or incidental effect on the status of the Canadians of Japanese ancestry. Instead

Source: Nikkei National Museum, 2018-16-2-11-13-33
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the Orders in Council went to the very existence or validity of that status and by virtue of their nature had the effect of denying, ending or prejudicing the status of these people.

It is apparent from each of the foregoing authorities that the word "status" may encompass, of necessity, the incidents or the "bundle of rights" which attach to that status.

Thus, when one seeks a declaration as to the citizenship/nationality of an individual one is, by implication, confirming that that individual enjoyed, or was entitled to enjoy certain rights. If one seeks confirmation or clarification of the rights attached to a certain status one is still only clarifying whether the person enjoyed the status "citizen" in the legal sense of the word or in some restricted or modified sense. We could, therefore, seek a declaration confirming the continued right to enjoy certain rights (and specify those rights) as an integral part of a "declaration as to personal status". By seeking to confirm what those rights are, we would not be exceeding the intended ambit of Section 3(3)(i) of the Limitations Act.

Source: Nikkei National Museum, 2018-16-2-11-13-34
www.nikkeimuseum.org

5. Can a cause of action framed in trust be advanced so as to circumvent the applicability of limitations legislation?

As noted earlier, Order in Council PC 1665 determined that "all property situated in any protected area of British Columbia belonging to any person of the Japanese race ... shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy, 1939".

PC 2483 established "that the Custodian ... shall have full power to administer such property for the benefit of all interested persons, and shall release such property upon being satisfied that the interest of the aforesaid will not be prejudiced thereby."

PC 469 stated that "the Custodian has been vested with the power and responsibility of controlling and managing any property or persons of the Japanese race evacuated from the protective areas, such power and responsibility shall be deemed to include and to have included from the date of vesting of such property in the Custodian, the power to liquidate, sell or otherwise dispose of such property."

Source: Nikkei National Museum, 2018-16-2-11-13-35
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The following provisions of the consolidated Regulations respecting Trading with the Enemy (1939) are also relevant:

(a) Regulation 1:

"Enemies shall include:

(iv) any person who is declared by the Governor in Council to be an enemy."

(b) Regulation 6:

"The Secretary of State is hereby appointed to receive, hold, preserve and deal with such property, as may be paid to or vested in him in pursuance of these Regulations and is hereafter referred to as the 'Custodian'."

6(2):

"Any power or duty conferred or imposed by or under these Regulations upon the Secretary of State and/or Custodian may be delegated by him to such person or persons as he thinks proper."

(c) Regulation 21(1):

"All property in Canada belonging to enemies at or subsequent to the commencement of the present war, and whether or not such property has been disclosed to the Custodian as required by these Regulations, is hereby vested in and subject to the control of the Custodian."

21(2):

"This Regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies, including the power of dealing with such property in such manner, as he may in his sole discretion decide."

(d) Regulation 22(1):

"No enemy whose property is vested in the Custodian under these Regulations shall have any rights or remedies against any person in respect of any such property after such vesting has taken place."

Source: Nikkei National Museum, 2018-16-2-11-13-36
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22(2):

"No enemy shall have any rights or remedies against any person in respect of any matter whatsoever other than the rights and remedies referred to in paragraph (1) hereof."

(e) Regulation 43(1):

"The Custodian shall establish an office or offices for the administration of these Regulations, and such other matters as may be delegated to him, and there shall be attached to the said office such officers, clerks and advisers as the Custodian may select, and there shall be paid to such officers, clerks and advisers such remuneration as the Custodian may determine."

43(2):

"The Custodian's office shall be deemed to be a Department of the Government of Canada and the Custodian the head of such Department, for the purposes of the Canada Evidence Act."

Though not immediately relevant in the context of the present issue, it is significant to note that the Regulations authorized the Custodian to retain out of the proceeds of all property vested in him or liquidated by him monies to pay expenses incurred in the administration of the Regulations themselves.

In order to advance this argument, the following conditions have to be satisfied:

(a) A constructive trust can be established;

(b) Section 43(2) of the Ontario Limitations Act extends to constructive trustees (British Columbia

Source: Nikkei National Museum, 2018-16-2-11-13-37
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limitations legislation is more stringent in relation to claims brought in trust);

(c) The cause of action (fraudulent breach of constructive trust), for the purposes of Section 38 of the Federal Court Act, arose in Ontario.

The substantive question of whether a constructive trust can be established is not addressed in this memorandum.

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Section 43 of the Ontario Limitations Act, R.S.O. c.240 provides:

> 43(1) "In this section 'trustee' includes an executor, an administrator, a trustee whose trust arises by construction or implication of law as well as an express trustee, and a joint trustee."
>
> (2) "In an action against a trustee or person claiming through him, except where the claim is founded upon a fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously applied by the trustee and converted to his use, the following paragraphs apply:
>
> (The language of the sub-paragraphs which follow is not particularly relevant.)
>
> 44(2) "Subject to Section 43, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations."

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Source: Nikkei National Museum, 2018-16-2-11-13-38
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The language of Section 43 appears to apply to express trustees and constructive trustees in like manner. Notwithstanding the apparently explicit language of the provision, there appears to be considerable dispute about whether Section 43(2), in so far as it pertains to fraud by a trustee, applies equally to both constructive and express trustees. The issue is dealt with at length by both the Ontario Law Reform Commission; Limitation of Actions, and Waters, Law of Trusts in Canada, at pages 1017-1021. This latter citation has, in turn, been referred to and relied upon extensively in the case law.

Constructive trustees appear to have been equated to express trustees, for the purposes of Section 43(2), in only those instances where "a trust arose before the occurrence of the transaction impeached (but not) where it arose only by reason of the transaction." Taylor v. Davies [1920] A.C. 636 at 653 (a decision of the Privy Council on appeal from Ontario).

The Taylor case has been cited with approval in:

(a) Clarkson v. Davies [1923] A.C. 100;

(b) Gordon v. Ottawa (1953) 4 D.L.R. 542 (Ont. H.C.);

(c) C.N. Realties v. Albert (1958) 14 D.L.R. (2d) 20 (Alta C.A.);

(d) Veid v. Canada Permanent Trust 54 W.W.R. 543 (Sask. Q.B.)

Source: Nikkei National Museum, 2018-16-2-11-13-39
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In practical terms, I understand the distinction to mean that if a constructive trust was already in existence as at the time that given the impugned conduct took place, the constructive trustee will, for the purposes of the Limitations Act, be treated as though he were an express trustee. In the context of the present factual framework, it might be asserted that it was PC 1665 (which vested property in the Custodian) which established the constructive trust. PC 469, allowing the Custodian to liquidate property, would be the subsequent impugned conduct or transaction upon which we can focus. Similarly, actual conduct by the Custodian in disposing of property in an improper manner or in taking commissions for himself might be the subsequently impugned conduct.

If we can establish, and I believe that we can, that we fall within the ambit of Section 43(2) of the Ontario Limitations Act, the question becomes whether we can establish that the cause of action, for the purposes of Section 38(1) of the Federal Court Act, arose in the province of Ontario. That is, did the breaches of trust which we allege arise in Ontario?

The following connecting factors are significant:

(1) The Custodian (Secretary of State) was based in Ontario.

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(2) The Orders in Council providing authority to the Custodian and "vesting custody and control" in the Custodian emanated from Ontario.

(3) The head office of the Custodian was located in Ontario.

(4) The Custodian provided the directions to his agent, in Vancouver, from Ontario.

(5) The bulk of moveable and immoveable property was located in British Columbia.

(6) The beneficiaries of the trust were generally located in British Columbia.

(7) The preponderance of the day to day administration of the trust, effected by the Custodian's agent, took place in British Columbia.

There is a great deal of law dealing with the "proper law of the trust", as it relates to questions of administration, validity and interpretation. Further subdivisions and principles have been established depending on whether the trust property itself is moveable or immoveable in nature. All of this authority appears to be dealing exclusively with express trusts. We are not, in

Source: Nikkei National Museum, 2018-16-2-11-13-41
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this case, dealing with an express trust. Instead, we will have to allege that a constructive trust was established.

Dicey and Morris, The Conflict of Laws, 11th edition, (1987) states:

> "There seems to be no English or Commonwealth authority on the conflict of laws rules relating to constructive trusts. If constructive trusts are regarded, as it seems best, as within the subject of restitution, Rule 203 will apply to indicate the proper law of the obligation represented by the constructive trust."

Having regard, for example, to the case of Pettkus v. Becker [1980] 2 S.C.R. 834, the inter-relationship between constructive trusts and unjust enrichment proposed by the authors appears to be appropriate.

Rule 203 of Dicey and Morris establishes:

"(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.

(2) The proper law of the obligation is determined as follows:

(a) If the obligation arises in connection with a contract, its proper law is the proper law of the contract;

(b) If it arises in connection with a transaction concerning an immoveable (land), its proper law is the law of the country where the immoveable is situated (lex situs);

(c) If it arises in any other circumstance, its proper law is the law of the country where the enrichment occurs."

Source: Nikkei National Museum, 2018-16-2-11-13-42
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I do not know whether the Japanese were required to enter into any contract with the Custodian at the time that they vested their property with him.

It is clear that some of the property vested in the Custodian would have been land located in British Columbia. Therefore I believe we will have to establish and focus on the fraud/equitable fraud on the part of Her Majesty as trustee which arose in permitting the Custodian to alienate property that had been vested with him. That is we would have to deal with the Orders in Council and conduct of the Custodian as they relate to "property" in the generic sense without focussing on the treatment of specific property.

The submission would be made as follows:

(a) A constructive trust was established when property was taken from persons of the Japanese race and vested in the Custodian as agent for the Government of Canada.

(b) The Government of Canada/Custodian acted in a fraudulent manner in authorizing itself to alienate or dispose of property already in its control.

(c) The Government of Canada/Custodian took part in further improper conduct or breaches of trust in relation to the manner in which it disposed of trust property.

Source: Nikkei National Museum, 2018-16-2-11-13-43
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At least arguably, the preponderance of the relevant connecting factors, with some connection to the first form of breach, arise in Ontario. Thus, the relevant or proper law would be the law of Ontario. In terms of the second form of breach, relating to the actual administration of property, I do not see how we can assert that the proper law, for all property, is the law of Ontario.

With respect to paragraph 2(c) of Rule 203, any form of benefit which accrued to the Government of Canada can be said to have accrued to Ontario. Such benefits would include, inter alia:

(i) Commissions charged by the Custodian in dealing with property; and

(ii) Administrative charges imposed by the Custodian for dealing with property.

(4) Land for Vets Collateral benefit

(iii) reimbursement of welfare expenses incurred to date by the pty donor.

To some extent the foregoing unjust enrichment analysis, particularly as it relates to the place where the enrichment occurred, is inappropriate. The focus of the case being advanced by the Japanese-Canadians does not deal with the enrichment of the Canadian government. Instead it has as its focus the impropriety of the manner in which trust property was dealt with (its alienation) and the specific losses/dissipation in the value of such property. There was not necessarily any concomitant benefit to the government.

Source: Nikkei National Museum, 2018-16-2-11-13-44
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Furthermore, the rules advanced by Dicey, pertaining to conflict of laws and unjust enrichment, do not reflect fixed principles. McLeod, The Conflict of Laws, (1983), states at page 571:

> "Rule 172: The right to restitutionary relief in respect of an unjust enrichment is determined in accordance with the proper law of the obligation."

At page 572 the author states:

> "Restitutionary causes of action encompass court actions, contractual actions and proprietary action. To simply apply the corresponding contract, tort or property choice of law rules is to ignore the independence of restitutionary causes of action. On the other hand, to ignore completely the development of such areas is to ignore the legacy of history. It is submitted, therefore, that although the connecting factor may be stated to be the proper law of the obligation, the formulation of the proper law of the obligation in any individual restitutionary cause of action must take into account the contractual, tortious or proprietary basis for the restitutionary cause of relief."

tort where any part of tort to take place in the jurisdiction

After elaborating upon this principle the author concedes:

> "It must be admitted that there is no Canadian authority in support of the broad propositions put forward here. On the other hand it is clear that there is no authority directly opposing the propositions. Logically, it is proper to treat restitution as an independent legal issue and given current trends the proper law approach is the obvious approach at the choice of law stage."

For these reasons, it may still be appropriate to rely upon or advance conflict of laws characterization

Source: Nikkei National Museum, 2018-16-2-11-13-45
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factors such as "validity" and "administration" commonly used in the context of express trusts.

Canadian law makes clear that, for the purposes of conflicts of law, a distinction is to be drawn between the validity of trust and the administration of a trust; Jewish National Fund View World Trust Co. [1965] S.C.R. 784. It ought to be noted that English courts, most recently in the case of Clearing v. Chellaram [1985] ~~C.H.~~ Ch. 409 have rejected the distinction between a "validity", "interpretation" and questions of "administration". The Court there held that the proper law governed all aspects of the trust.

In Canada the distinction remains significant. Waters, at page 1124 states:

> "Administration is a term which both embraces all those issues that are exclusively concerned with the management or administration of trust affairs, and also acts as a connecting factor."

And at page 1125:

> "...administration covers such issues as who may appoint, and be appointed as, a new trustee, the powers and duties of trustees, trustees investments, the distinction between income and capital, liability of trustees for breach of trust and their rights of indemnity and contribution.."

Waters also notes at page 1124:

> "There is, however, a fairly general agreement that it is situated (the law of the place of

Source: Nikkei National Museum, 2018-16-2-11-13-46
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> administration) where the trustees reside and are administering the trust. For the majority of cases this formula will be satisfactory ..."

While the foregoing proposition could be helpful to us, it must be regarded with some caution. Castel, Canadian Conflict of Laws, 2nd Edition, (1986) notes at page 483:

> "In Canada, the conflict of laws rules applicable to questions of administration are not altogether clear. The few decisions that have been reported are not all in favour of the law of the place of administration which generally is where the trustees reside or carry on the business of administration."

A number of cases are footnoted by the author which highlight some of the confusion inherent in the law and the inconsistent manner in which courts have applied the relevant principles.

I do not believe there exists sufficient authority or authority of sufficient consistency or that we have an adequate factual framework to fully consider this particular issue.

Peter G. Voith

Source: Nikkei National Museum, 2018-16-2-11-13-47
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