EMERGENCY POWER:
THE REAL ENEMY WITHIN

Americans complain that Canadians have too much respect for authority and too little respect for individual rights. Unfortunately, they are correct.

For proof we need look no further than the Mulroney government's new Emergencies Act. This is the law they say is to replace the War Measures Act, which they acknowledge is a travesty: Globe and Mail, December 10, 1987, p. A17. In fact the proposed Emergencies Act is only a recasting of the War Measures Act in different words. It contains every flaw found in the WarMeasures Act, and more.

Like the War Measures Act the new Act transfers to the federal Cabinet some or all of the powers of Parliament for periods varying from 21 to 360 days depending on the type of "national emergency". Nowhere does the Act define a "national emergency". Rather, like the War Measures Act, it is left to the subjective political judgement of the federal Cabinet: Section 4(1).

At first glance the new Act appears to be full of safeguards. It has nice titles like "Compensation" and "Parliamentary Supervision". Parliament must approve both the declaration of an emergency and the continuation of the Cabinet's emergency powers beyond the time limits for each type of emergency. Unlike the War Measures Act Parliament can also revoke Orders-in-Council made by the Cabinet under its emergency powers. The Defence Minister, Perrin Beatty, is already on record as stating that "the new legislation will give Parliament far greater powers to rein in a government that wants to impose emergency measures.": CP(Ottawa), November 17, 1987.

Unfortunately it is all a smokescreen. The safeguards are totally inadequate. They do not work because they are not practical. Parliament gets only one chance to stop a bad Order-in-Council and is hampered in its efforts by time contraints that make impossible a meaningful review of Cabinet actions.

The history of how Japanese Canadians were abused under the War Measures Act during the Second World War proves these alleged safeguards will not work. Each of the Orders stripping Japanese Canadians of their rights and freedoms was placed before Parliament, although Parliament under the War Measures Act had no power to revoke them. On each occasion the Minister responsible provided Parliament with a plausible reason for the order, or an assurance that the order was intended for a specific, benign purpose. In each case the reason given Parliament turned out to be not quite accurate, and on occasion a bald lie.

Source: Nikkei National Museum, 2018-16-4-6-1-1
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Take for example of the Order-in-Council that stripped Japanese Canadians of all they owned. When it was placed before Parliament in January of 1943 the impression was given that the order would cause only a few minor administrative changes in the handling of Japanese Canadian property, changes that would protect Japanese Canadians from predatory buyers and permit the sale of rapidly depreciating properties which the owners wished to sell. The real purpose only became clear two months later when the government made it clear that it intended to sell not only all real property owned by Japanese Canadians, but also their personal possessions: A.G. Sunahara, The Politics of Racism, 1981: Lorimer at 101 -106.

It was the same story with the Orders-in-Council under which the government tried to deport 10,000 Japanese Canadians in 1946. Parliament had refused in November 1945 to give the Cabinet the power to deport Canadians in the law that was to replace the War Measures Act in January 1946. The Cabinet passed the deportation orders in December 1945 in defiance of Parliament, and then told Parliament that those being deported had requested to be sent to Japan. It was not until three months later, after massive protests by civil rights groups, that the majority of Members of Parliament understood the alleged requests for deportation had been coerced: See Sunahara, supra, at 118 - 124, 127 - 128, 136 - 140.

Under the new Act Parliament would be equally powerless. To amend or revoke an order under the new Act Parliament has only 20 days in which to identify that the order is flawed, collect evidence of a contrary purpose for the order, organize a motion by 30 M.P.'s or 15 Senators, and, with only three hours allowed for debate, convince a majority of Parliamentarians that changes must be made or the order revoked. Once this 20 days is passed, or a motion to revoke has failed, nothing can be done.

Parliament cannot even stop a bad order when it confirms the continuation of the Cabinet's emergency powers. The draft Act limits the duration of each type of emergency. But, while Parliament must confirm each extention of emergency power, debate on the confirming motion is limited to the question of whether there is, in fact, an emergency. The Orders-in-Council that automatically continue upon confirmation of an emergency are not open for review.

Consider again the Japanese Canadian example. If the new Act had existed in 1941, Parliament would have been asked every 360 days while the war continued and every 120 or 60 days thereafter, to confirm the continued existance of an emergency. Since a state of war existed until September 2, 1945, and the "emergency" of postwar adjustment continued thereafter, undoubtedly Parliament would have continued the

Source: Nikkei National Museum, 2018-16-4-6-1-2
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Cabinet's emergency powers and with them, automatically, the orders abusing Japanese Canadians. Parliament will remain as emasculated under the Emergencies Act as it was under the War Measures Act.

The Charter of Rights and Freedoms does not help at all. The preamble of the new Act refers to the Charter, but in substance says only that the Cabinet must remember that there are some Charter rights that cannot be abridged, even in time of national emergency. It must be remembered that the Charter permits Parliament to pass legisation that offends the fundamental freedoms and legal and equality rights in the Charter if that legislation is passed in accordance with section 33 of the Charter: Section 38(1). Under the new Act in a war emergency all the powers of Parliament, including its Charter powers, pass to the Cabinet. It is entirely possible, therefore, that in time of war, the Cabinet could pass orders doing to others what was done to Japanese Canadians by simply excluding the victims' Charter rights. The courts could do nothing, because there would be no Charter rights for the courts to protect.

In fact, under the new Act the Cabinet could treat a minority worse than the King Cabinet treated Japanese Canadians, and neither Parliament nor the Canadian public would ever know anything about it. This draconian possibility arises from the fact that the Emergencies Act, unlike the War Measures Act, permits secret Orders-in-Council.

The new Act tries to temper the oppressive implications of secret orders with a Parliamentary Review Committee. It requires that secret orders be referred to that Committee within 15 days, or, if the Committee does not exist, within 5 days after it is established: Section 59(2). The Committee then has 30 days to review and to amend or revoke the secret orders: Section 60(4).

The safeguard fails badly because of several flaws in the scheme for Parliamentary review. Firstly, the Parliamentary Review Committee does not have to be in existence during the tenure of a secret order. The new Act uses the permissive "may" when referring to the establishment of the Review Committee, not the mandatory "shall":Section 60(1). The Emergencies Act also allows the referral of a secret order to the Review Committee to be delayed until 5 days after the Review Committee is established: Section 59(2). There is nothing to prevent a Cabinet from delaying the appointment of the Review Committee until after the purpose of the secret orders has been accomplished.

Source: Nikkei National Museum, 2018-16-4-6-1-3
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The victims of such orders would have no recourse. the courts are specifically excluded from reviewing the actions of the government under the Emergencies Act. Those who carry out the government's orders, even immoral orders, are protected against prosecution: Section 45(1). The Cabinet is further protected by the secrecy oath required of the Review Committee: Section 60(2). Neither Parliament nor the Canadian people would ever learn of the secret orders or the deeds done under them.

The Emergencies Act set up a perfect scenario for covert operations of dubious morality. For instance, there would be nothing to stop the Cabinet from ordering the execution without trial of named individuals or members of some group by simply inserting in the order a properly drafted clause depriving them of their right to life and the right not to be deprived of life without a public trial. Since secret orders take effect before they are approved by the Parliamentary Review Committee, the victims could be dead before the Committee ever sees the orders. Bound by their secrecy oath (which would no doubt be reinforced by heavy penalties), the Committee members could not even tell Parliament of the summary executions ordered by the Cabinet.

The example need not be so extreme. Secret orders that transfer government funds to Swiss bank accounts in order to finance covert "Irangate" type operations are but one possibility. The potential abuse of this power is limited only by the imagination of the Cabinet wielding it.

Another flaw in the safeguards is that the Parliamentary Review Committee also has only one chance to strike a secret order and it has only 30 days in which to do it. Unless a Minister responsible for an order is so stupid as to tell the Parliamentary Review Committee the real reason for a bad order, how is the Review Committee to find out the truth in a mere thirty days in order to stop such orders? Once the 30 days is up, no matter what the Committee subsequently discovers, it can do nothing. It cannot even report to Parliament.

These same complaints can be made again and again about this Act. All the safeguards in the new Act are rendered impractical by: (a) unrealistic time constraints; (b) a single opportunity to strike bad orders or regulations; (c) closure on Parliamentary debate over the amendment or revocation of an order or regulation; (d) the absence of any ability to investigate the need for, or the use of, any order or regulation; (e) the absence of liability for abuses or mismanagement; and, (f) no review of how the Cabinet exercises its emergency powers.

Independent review of the use of emergency powers has long been advocated by those concerned with civil liberties:

Source: Nikkei National Museum, 2018-16-4-6-1-4
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See Canadian Civil Liberties Association, Emergency Powers and the War Measures Act: Submission to the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, October 3, 1979. Yet it is completely ignored and expressly excluded from the draft Emergencies Act. The only review permitted is an internal review by the Minister who may ,not must, be delegated with the responsibility of compensating persons who apply for compensation: Section 46(1). Like the review of the sale of Japanese Canadian property by the King government after the Second World War, the Minister will look at the administration of an order, not the propriety of the order itself: See Sunahara at 151 - 160. Moreover whether compensation is paid, to whom, and how much is entirely within the jurisdiction of the Cabinet that made the bad orders in the first place: Section 47. There is an appeal to a Federal Court Judge, but his powers are limited to confirming the Minister's decision, referring the matter back to the Minister, or raising the compensation to the maximum amount specified in regulations made by the Cabinet: Section 50. The "Compensation" sections are obviously intended to minimize scrutiny of Cabinet conduct after the fact. They are not intended to achieve justice for the victims of bad orders.

The Emergencies Act is worse than the War Measures Act. It is a regressive step in Canadian civil liberties. It does not accomplish the government's stated objective of replacing the War Measures Act with legislation that would prevent a recurrence of what happened to Japanese Canadians during the Second World War.

The Emergencies Act proves Canadians have learned nothing from their history. It hands our politicians even stronger tools of oppression than they have had in the past. It ignores the historical fact, proved by the treatment of Japanese Canadians, that our politicians have acted improperly in the past. It perpetuates our naive belief that our leaders will always be benign father figures to whom we must defer.

At a time when other nations are cutting back the emergency powers of their governments and protecting the rights of their citizens, we are expanding our executive powers and leaving our citizens devoid of protection. If the Emergencies Act is passed into law, and if we, like Germany in 1933, elect ourselves a leader who does not hesitate to use immoral means to achieve political ends, we will have only ourselves to blame for the resulting abuses of power.



Source: Nikkei National Museum, 2018-16-4-6-1-5
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The Role of the Wartime Elections Act in the Formation of the Union Government

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The Wartime Elections Act has been termed "the most remarkable franchise act ever passed in Canada and very possibly in the democratic world,[1]" because it disenfranchised more than it enfranchised. While giving the vote to the female relatives of soldiers serving overseas, it withdrew it from conscientious objectors, groups exempted from military service by Orders in Council, and

> every British subject naturalized after March 31, 1902 born in an enemy alien country or whose mother tongue was that of an enemy country except those who had volunteered and had been accepted for Military Service.[2]

This third group included most of the almost 400,000 persons of German descent and the 130,000 persons of Austro-Hungarian descent in Canada.[3]

The reaction to this Bill was extreme. Its supporters praised it as an imperative war measure; its opponents damned it as nothing more than a partisan scheme to win an election.[4] Among those opponents were Liberal Members of Parliament who had been recently working to establish a national, non-partisan, coalition government. Within a month of the passage of the bill, however, the vast majority of these opponents joined the Unionist government. This paper proposes to examine the role of the Wartime Elections Act in the formation of the Union government in order to determine the reasons behind this apparent inconsistency in the behaviour of coalitionist Liberals in 1917.

To accomplish this task this paper is organized in three sections. The first section examines the behaviour and attitudes of coalitionist Liberals before the introduction of the Wartime Elections Act. The purpose of this examination is to determine the causes of the split which had developed within the Liberal party prior to the introduction of the Wartime Elections Act. The second section discusses the Wartime Election Act itself in order to establish both

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its possible effect on Liberal support and the reaction of coalitionist Liberals to it. The last section traces the subsequent formation of the Union government and speculates on why conscriptionist Liberals, in view of their opposition to the Wartime Elections Act, chose to join the Union government.

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By 1917, the third year of the war and the sixth year of Borden's government, a wartime election seemed inevitable. As the year progressed opposition to the Military Service Act and the results of provincial elections in Alberta and Saskatchewan dimmed Conservative prospects for success.

Both the Alberta and Saskatchewan provincial elections had been overwhelming Liberal victories, thanks almost entirely to the ethnic vote. In a letter to Borden following the Alberta election, the Alberta Conservative leader offered the opinion that:

> The Swedes voted solidly against me and so did the other foreigners.... Unless steps are taken to disenfranchise all the enemy alien born they will have the balance of power to defeat most of our candidates in the Province.[5]

The overwhelming Liberal vistory in the Saskatchewan provincial election was attributed in part to the Conservative pro-Conscription stance.[6] The rejection of Conscription by the non-Anglo-Canadian population, combined with the absence of 30,000 voters serving with the Canadian Expeditionary Force, left the Conservatives with quite bleak prospects in that province.[7]

In Manitoba the 'immigrant' vote had been traditionally Conservative; indeed it had been instrumental in sustaining the incumbent Conservatives in power in the 1914 provincial election. The provincial Conservatives' subsequent change in stance from pro-alien in 1914 to anti-alien by 1917

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and their overwhelming defeat in the 1916 provincial election made Conservative prospects within that province very bleak. Changing racial sentiments within Manitoba and subsequent actions of the Norris government in response to those changes, however, held the promise of a solution to Borden's dilemma.

In the decade before the First World War the nature of the society and culture which was to emerge from the mixing of diverse peoples in western Canada had been a matter of great public concern.[9] The question was whether Canada should become a melting pot of cultures or whether she should retain an essentially British culture through the assimilation of the other cultures to an Anglo-Canadian standard. While there were supporters in the West for the melting pot concept, most Anglo-Canadians appeared to assume that cultural assimilation would and should follow the exposure of these other cultures to the free enterprise system and to British democratic institutions.[10] The acceptance of British ideals and institutions in the place of those of the immigrants' mother culture was seen as both fundamental to the definition of 'Canadian' and necessary for Canadian unity.

By 1916 this definition had become further refined in the minds of many by the acceptance of national service as a criterion of being 'Canadian.' Unwillingness to identify with, and participate in, this essentially Anglo-Canadian cause came to be regarded as disloyalty and tantamount to treason.[11] In the name of national security, it was felt necessary to force those defined as enemy aliens or those who insisted on alternate definitions of Canadian citizenship - even a French-Canadian definition - into the cultural pattern of the Anglo-Canadian majority.[12]

In the early months of 1916 the attention of the Manitoban Anglo-Canadian assimilationists became focused on the issue of bilingual schools. Inquiries

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in late 1915 by the Manitoba Free Press and by the Department of Education into bilingual schools had revealed that such schools perpetuated the alien tongue without teaching adequate English.[13] This evidence that bilingual schools were failing to fulfill their primary aim of teaching English to immigrant children convinced many Anglo-Canadians, including leading Manitoba Liberals, that the system had to be reformed "if the province of Manitoba was not to be transformed into middle Europe on a small scale."[14] Accordingly, early in 1916 the Liberal government of Manitoba abolished all bilingual schools including French Canadian schools.

This action coincided with growing agitation by French Canadians in Ontario against the recent, but less radical, changes in the Ontario School system.[15] Because any question concerning bilingual schools was of concern to Quebec it was only a matter of time before the problem erupted into federal politics. Accordingly, in May 1916 Ernest La Pointe, with Laurier's consent, introduced a resolution critical of Ontario's educational reforms.[16]

This resolution came at a time when low enlistment from the province of Quebec was generating suspicions about French Canadian loyalty among Anglo-Canadians and consequently generated dissent within the Liberal Party. The resolution was perceived by Liberals in Manitoba and Ontario as an attempt by Quebec (and hence by Bourassa) to interfere in the affairs of their provinces. More importantly Laurier's support of it was seen as evidence that he too had fallen under the spell of Bourassa.[17] As a consequence when the roll call on the Resolution was taken, eleven Western Liberals and one Ontario Liberal voted against it. With the La Pointe resolution the ties of some western Liberals to Laurier began to weaken.

While some Anglo-Canadian Liberals were beginning to question Laurier's leadership they did not view Borden as an alternative at this point. Government blundering in the war effort and suspicions of corruption within the

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Cabinet made supporting the current Conservative government impossible. The Manitoba Free Press articulated this attitude in December 1916 as follows:

> We have had during the war a mean-spirited, selfish, far from competent, patronage-dispensing Government, made up in large part of inveterate and embittered partisans whose first thought is for themselves and their positions and the jobs and patronage they can deliver to their supporters....
>
> The Liberal opposition has retaliated, as was inevitable, with the consequence that we have not a united people intent upon the greatest task that ever fell to our nation, but a country distracted by partisan strife, drifting surely and steadily into a General Election campaign which will still further divide the people into warring factions.[19]

The editor of the Free Press, John W. Dafoe, felt however that there was a solution to this problem - the creation of a non-partisan, national, coalition government dedicated to winning the war. Drawing an analogy with the crisis of Confederation, he argued that "if Brown and Macdonald could sink their differences - personal and political - to bring about Confederation, Sir Wilfrid, Sir Robert... might be able to loyally combine for a far greater purpose."[20]

Dafoe was not alone in this sentiment. The Ottawa Free Press, a Liberal paper, had urged as early as July 10, 1915 "that the formation of a Dominion Coalition Government, under Sir Robert Borden, if it is so desired, would be the truly patriotic thing for Canada's leading statesmen to bring about - patriotic for the Empire and patriotic for Canada."[21] The Toronto Star urged on January 4, 1917, that: "There should be no party in office at this time. The Prime Minister should not have a political party on his back. The country should have a non-partisan War Administration. If Sir Robert Borden brought that about it would be the end of his troubles and the beginning of his usefulness."[22]

Borden personally favoured the idea of coalition but left the subject for some crisis which would make political union imperative and therefore

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possible.[23] By May of 1917 he had found that crisis in the dwindling flow of reinforcements for the Canadian Expeditionary Force in Europe. Accordingly on May 29, 1917, he proposed to Laurier the formation of a coalition government with equal representation for both parties in the Cabinet, with himself remaining as Prime Minister and based on the enforcement of conscription.[24] Negotiations continued until June sixth when it was announced that because of Laurier's opposition to the introduction of conscription without a national referendum a National Government could not be formed.[25]

Laurier's opposition to conscription was not shared by Anglo-Canadian Liberals. N. W. Rowell, the Ontario Liberal leader had come out publicly in favour of conscription in mid-May 1916.[26] The Manitoba Free Press supported the issue from its announcement in May[27], and its editor, John Dafoe began to urge western conscriptionist Liberals to form a coalition with Borden's Conservatives without Laurier and the Quebec Members.[28] As a result, the Western Liberal Convention in Winnipeg in August 1917 became a struggle between conscriptionist Liberals and Laurier Liberals for the control of the Liberal party in the west. While the Convention upheld Laurier's leadership and passed a win-the-war resolution which carefully avoided the issue of conscription, the identification of Laurier with Bourassa and a growing conviction in the necessity of conscription had split the Liberal Party in the West and negotiations for coalition continued between leading conscriptionist Liberals and Borden.

The obstacle inhibiting these negotiations was the issue of who should lead the coalition. The Liberals involved felt that it should not be led by a prominent Conservative like Borden while the Conservatives would not accept a Liberal leader.[29] On August 23, 1917 the prominent Western Liberal leaders, J. Calder, T. A. Crerar, A. B. Hudson and A. L. Sifton wired Borden that:

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> they favoured a National Government and the formation of a War Council of six, of which Robert Borden should be one, but they thought a change of leadership essential and suggested four gentlemen, of whom Sir George E. Foster was first named and added, these gentlemen would, under another leader, be willing to serve, together with strong Eastern colleagues.[30]

Such a compromise was, however, unacceptable to the Conservative caucus and the project appeared to die.

With the possibility of coalition apparently dead and the possibility of defeat in the West through the votes of non-Anglo-Canadians looming over the Conservatives, demands for the disenfranchisement of Canadians of enemy alien background increased among both eastern and western Conservatives. Responding to these demands the Borden government introduced a bill designed to "shift the franchise from the doubtful British or anti-British of the male sex and to extend it at the same time to our patriotic women"[31] - the Wartime Elections Act.

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The Wartime Elections Act represented a double loss to the Liberals. By limiting the female franchise to the nearest female relatives of soldiers serving in Europe, it deprived them of their share of the votes of the newly enfranchised women of Canada's five westernmost provinces.[32] By disenfranchising all British subjects of enemy alien origin naturalized after 1902, it deprived the Liberals, especially western Liberals, of the 'immigrant' vote which was traditionally cast in their favour. Damning the Bill as nothing more than a partisan scheme to win the election the Liberals reunited to oppose it.

The Liberals attacked the Wartime Elections Act as unfair and unconstitutional. In introducing the Bill Arthur Meighan had stressed that"the franchise of peace time is founded on peace service and the franchise of war on war service."[33]

Source: Nikkei National Museum, 2018-16-4-6-2-7
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Seizing this point the Liberals argued that by restricting the female franchise to the relatives of soldiers in Europe the bill unfairly denied it to other female war workers. If the government wished to grant the franchise to women, Laurier contended, the best course would be to grant it to all women and not to just a few.[34] The Bill was also unfair to enemy aliens sympathetic to the Allied cause since the apparent lack of war service among these groups resulted from Government policy not a lack of loyalty. To assume that the Czech, Slovak, Lithuanian, Polish and German-speaking Swiss and Russian immigrants were hostile to the Allied cause, Laurier argued, was contrary to evidence of their loyalty.[35] The Bill was unconstitutional because it denied a fundamental right to vote to naturalized citizens. By doing so it set a dangerous precedent and made a mockery of the rights conferred by naturalization.

The Liberal attacks were beaten down by arguments led by Meighan, Borden and R. B. Bennett. Since large numbers of the men serving overseas would be unable to vote, Meighan argued, the franchise should be extended to their female relatives who "more likely represent in sentiment and in purpose the voice and will of those who are fighting."[36] However, he continued, the vote should not be extended to all women since "a very substantial portion of the women of this country who are now British subjects have become British subjects by the naturalization of a parent or by marriage."[37] The disenfranchisement of voters of enemy origin was necessary since it was not fair that those who are unacceptable for military service should have the power to determine the vigour or direction of the war by their votes:

> Inasmuch as war service should be on the basis of war franchise, and inasmuch as from the commencement of this war, not only in Canada but in Great Britain, it has been found undesirable and unwise to accept those citizens of the class I have described, for the highest service of the war, it does not seem unreasonable that they should not exercise, during the war, that control of our destinies which is vested in the franchise.[38]

Since the large number of comparatively recent immigrants of enemy alien

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origin could not be expected to divorce themselves from national sympathies acquired in their former homelands,[39] it was impractical, Prime Minister Borden argued, to send such recent immigrants into the trenches to fight their own flesh and blood. Since they could not fulfil this duty, they ought not to decide the progress of the war through their votes.[40] The Wartime Elections Act was not unconstitutional, Bennett contended, since the franchise and citizenship were not synonymous. "Franchise is granted by a legislative body. It is a privilege conferred by legislation upon a class in a community which is named by that legislature."[41] Any group could, therefore, be legally disenfranchised by Parliament. Finally Meighan pointed out that since only 30,000 enemy aliens would be disenfranchised while up to 500,000 women would be enfranchised the Act was "the widest measure of enfranchisement proportionate to population ever passed by a British community since the first Reform Bill."[42]

Prominent among those who opposed the bill were the Liberals who had broken with their party to support conscription. To these men the Wartime Elections Act was nothing less than a betrayal. Charged W. A. Buchanan, the Liberal Member for Medicine Hat:

> The attitude the Government is taking at this time is most unfair, and it is a slap in the face to every Western Liberal Member who supported this Government on conscription.
>
> We left our party and we took the position we did for the national advantage, because we looked upon the measure as a war measure. This Government is adopting the present measure not as a war measure, but for the advantage of the party they represent.[43]

Declaring the bill "unjust, unBritish, autocratic and damnable to the very last degree,"[44] D. B. Neely, Liberal Member for Humbolt, declared that its introduction "has negated the sincerity of the efforts of the Prime Minister to secure what he calls union or national government."[45] J. G. Turriff, the Liberal Member for Assiniboia, and an ardent conscriptionist, lamented that the failure to form a national government had produced such a bill. The bill, he

Source: Nikkei National Museum, 2018-16-4-6-2-9
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continued, must have been introduced "more for winning the war than for any advantage to the Conservative party, because if my Hon. friends on the other side of the House think the Bill will help them win elections for many years to come in the West, they are labouring under a delusion.... This Bill may help elect a win-the-war government, but I am not so sure of that, and for what little advantage there may be in it I do not think it was worthwhile."[46]

In view of these sentiments it is not surprising that only three Liberals supported the Wartime Elections Act when it came to a vote on September 14, 1917. On October 12, 1917, the Union Government, a coalition of conscriptionist Liberals and Conservatives came into being. By the end of the month fifteen of the twenty-seven Liberals who had supported conscription, including twelve who had opposed the Wartime Elections Act, were running for re-election as Unionist Candidates. The next section of this paper will attempt to determine why these Liberals chose this course of action.

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The Wartime Elections Act placed conscriptionist Liberals in a bind. If they ran for election as conscriptionist Liberals against both Conservative and Laurier Liberal candidates the pro-conscription vote might split resulting in the election of the anti-conscription Laurier Liberals. Alternatively the traditional Liberal vote might split resulting in an even greater Conservative majority - a more realistic possibility in view of the elimination of the 'immigrant' vote by the Wartime Elections Act.[47]

Neither of these alternatives was acceptable to the conscriptionist Liberals. The Wartime Elections Act had not healed the chism within the Liberal Party. Conscriptionist Liberals had opposed the Wartime Elections Act in addition to, but not necessarily with, the Laurier Liberals. The antipathy conceived

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in the La Pointe Resolution and expanded by differing priorities with respect to the war still remained. The election of an anti-conscriptionist, Quebec dominated, Laurier led government, in the opinion of these men, would hinder the all important war effort. Similarly, the re-election of a Conservative government tainted with scandal to continue prosecuting the war as it had in the past was an anathema to these men.

There were two possible solutions to this dilemma. Either they could come to terms with Borden who now held the stronger bargaining position and form a non-partisan government under his leadership or they could seek to replace Laurier with an English speaking leader acceptable to conscriptionist Liberal voters.

Early in October conscriptionist Liberals led by F. B. Carvell approached Sir Wilfrid to ask him to resign in favour of an English speaking conscriptionist Liberal. Sir Wilfrid answered that he would do so if it were the wish of the Party.[48] Liberal response to the announcement of Sir Wilfrid's possible resignation, however, soon demonstrated that the conscriptionist view of his leadership was a minority view.[49] With the possibility of the realignment of the Liberal leadership gone, the conscriptionist Liberal leadership began again to negotiate with Borden - only this time, because of the Wartime Elections Act, the Prime Minister was in the stronger position. The Wartime Elections Act, then, did alter the course by which Union government was accomplished; it merely altered the terms of that union to those of Sir Robert Borden.

Source: Nikkei National Museum, 2018-16-4-6-2-11
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LIBERALS WHO SUPPORTED CONSCRIPTION AND THEIR SUBSEQUENT INVOLVEMENT IN THE 1917 GENERAL ELECTION

Member	Constituency	1917 Affiliation
Buchanan, W. A.	Medicene Hat, Alba.	Liberal Unionist
Carvell, F. B.	Carleton, N.B.	"
*Champagne, A.	Battleford, Sask.	Did Not Run
Charlton, W.A.	Norfolk, Ont.	Liberal Unionist
Clark, M.	Red Deer, Alta.	"
Cruise, R.	Dauphin, Man.	"
Douglas, J.M.	Strathcona, Alta.	"
Graham, G.	Renfrew South, Ont.	Did Not Run (Defeated)
*Guthrie, H.	Wellington S., Ont.	Liberal Unionist
Knowles, W. E.	Moose Jaw, Sask.	Did Not Run
MacLean, A. K.	Halifax, N.S.	Liberal Unionist
MacNutt, T.	Saltscoat, Sask.	"
McCoig, A.B.	Kent, Ontario.	Opposition
McCraney, G. E.	Saskatoon Sask.	Did Not Run
*McLean, H.H.	Queens & Sunbury, N.B.	Liberal Unionist (Royal, N.B.)
McMillan, J.A.	Glengarry, Ont.	Did Not Run
Nesbitt, E.W.	Oxford, Ont.,	Liberal Unionist
Neely, D. B.	Humbolt, Sask.	Did Not Run
Pardee, F.F.	Lambton, Ont.	Liberal Unionist
Ross, D. C.	Middlesex, Ont.	Opposition
Thomson, L.	Qu'Appelle, Sask.	Liberal Unionist
Turriff, J. G.	Assiniboia, Sask.	Liberal Unionist
White, W. H.	Victoria, Alta.	Opposition

The following Liberals were not recorded as voting in the Debates but are listed as supporting Conscription in Life and Letters of Sir Wilfrid Laurier, Volume II, p. 517.

German, U.M.	Welland, Ont.	Opposition (defeated)
Loggie, W.S.	Northumberland, N.B.	Liberal Unionist
Sinclair, J. H.	Guysborough & Antigonish	Opposition
Truax, R. E.	Bruce South, Ont.	Opposition

Liberal Unionists:	14 (15)	Numbers in the brackets include those mentioned in the Life and Letters of Sir Wilfrid Laurier
Opposition:	3 (6)	
Did Not Run:	6 (6)	

* also voted in favour of the Wartime Elections Act.

Source: Nikkei National Museum, 2018-16-4-6-2-12
www.nikkeimuseum.org

Footnotes

1 N. Ward, quoted in J. A. Boudreau, "Western Canada's Enemy Aliens in World War One," Alberta Historical Review, Vol. 12, No. I, (Winter 1964) p. 7.

2 D. H. Avery, "Canadian Immigration Policy and the Alien Question, 1895-1919: The Anglo-Canadian Perspective", (unpublished Ph.D. thesis, U.W.O., 1973), p. 404.

3 Ibid., p. 374.

4 J. C. Hopkins, (ed), The Canadian Annual Review, 1917, Toronto: The Canadian Annual Review Ltd., p. 331.

5 Avery, op. cit., p. 405

6 Boudreau, op. cit., p. 7-8.

7 Avery, op. cit., p. 406.

8 W. L. Morton, Manitoba: A History, Toronto: University of Toronto Press, 1967, p. 337.

9 R. C. Brown and R. Cook, Canada: 1896-1921: A Nation Transformed, Toronto: McClelland and Stewart, 1971, p. 71.

10 Avery, op. cit., p. 404.

11 Ibid., p. 373.

12 Ibid., p. 373.

13 Morton, op. cit., p. 351.

14 R. Cook, The Politics of John W. Dafoe and the Free Press, Toronto: University of Toronto Press, 1963, p. 70.

15 Ibid., p. 69.

16 Ibid., p. 70.

17 Ibid., p. 72.

18 Ibid., p. 71.

19 Ibid., p. 73.

20 Ibid., p. 74

21 Hopkins, op. cit., p. 557

22 Ibid., p. 558.

23 Ibid., p. 557

24 O. D. Skelton, The Life and Letters of Sir Wilfrid Laurier, Volume II, Toronto: Oxford University Press, 1921, p. 512.

25 Ibid., p. 513

26 Hopkins, op. cit., p. 559.

27 Cook, op. cit., p. 75.

28 Ibid., p. 77

29 Hopkins, op. cit., p. 577

30 Ibid., p. 580.

31 Avery, op. cit., p. 404.

32 Hopkins, op. cit., p. 333.

33 Avery, op. cit., p. 409.

34 Hopkins, op. cit., p. 333.

35 Skelton, op. cit., p. 529.

36 Hopkins, op. cit., p. 332.

37 Ibid., p. 332.

38 Ibid., p. 332.

39 R. L. Borden, Robert Laird Borden: His Memoirs , Toronto: MacMillan Co. Ltd., 1938. p. 709.

40 Ibid., p. 711-12

Source: Nikkei National Museum, 2018-16-4-6-2-13
www.nikkeimuseum.org

41 Canada, Parliament, House of Commons Debates (1917) VI, p. 5616.
42 Ibid., p. 5583.
43 Ibid., p. 5581.
44 Ibid., p. 5824.
45 Ibid., p. 5823.
46 Ibid., p. 5836-7.
47 R. Graham, Arthur Meighan: A Biography, Toronto: Clark Irwin Co. Ltd., 1968, p. 170.
48 Skelton, op. cit., p. 530.
49 Ibid., p. 531.

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Source: Nikkei National Museum, 2018-16-4-6-2-14
www.nikkeimuseum.org

Mrs. Arimahara: A-

This is an interesting paper and brings out a number of valuable points. I think some of the material on p. 2-7 tends to be dealt with in too much detail getting a bit away from the topic. This ~~a~~ is a large section of your 11 p. paper. The part from p 7-11 is very good. I think you might have commented more fully perhaps on the individuals and constituencies listed in your appendix. It was brought out in the discussion for example that some of the liberals most opposed to the Act were not from (over)

Source: Nikkei National Museum, 2018-16-4-6-2-15a
www.nikkeimuseum.org

communities where the ethnic vote is of special importance.

However in general this is quite a good paper — as I would have expected.

D D Kerr

2018.16.4.6.2-15

Source: Nikkei National Museum, 2018-16-4-6-2-15b
www.nikkeimuseum.org

THE WAR MEASURES ACT: CAN ITS USE BE CONTROLLED?

The Japanese Canadian Case

In times of real or apprehended war, invasion or insurrection Canada is governed by the executive under the powers of the War Measures Act[1]. By that Act, a hastily conceived, broadly drafted instrument passed virtually without debate[2], Parliament surrenders its prerogative to the Executive for an indefinite period of time. The War Measures Act is unique among emergency legislation in that it contains none of the traditional safeguards[3]. Nor does it permit Parliament to annul orders in council passed by the executive under its powers[4]. Parliament can debate the proclamation of the emergency and by a majority of both the House of Commons and the Senate revoke it, but only during the ten days following the date on which the proclamation declaring the emergency to exist is laid before Parliament[5]. After that ten day period Parliament can only control the actions

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[1] R.S. ch. W-2.

[2] Only one Member of Parliament responded to the government's request for comment. Oliver Pugsley, an opposition Liberal, objected to a clause which prohibited examination by the courts of the facts in any order or regulation made under the Act. That clause was subsequently withdrawn. See D.E. Smith, "Emergency Government in Canada", (1969) 50 **C.H.R.** 429 at 431-432 and J.A. Carrothers, "The Great War and Canada's Enemy Alien Policy", 4 **Queen's L.J.** 43 at 55-56.

[3] (i) that the emergency be declared according to a constitutional form by persons who will **not** administer the emergency power, and (ii) that the duration of the administration of emergency power must be strictly limited. M.P. O'Boyle, "Emergency Situations and the Protection of Human Rights", (1977) 28 **N.I.L.Q.** 160.

[4] In the latter aspect it stands in stark contrast to the British legislation, the Emergency Powers (Defence) (No. 2) Act, 1940, 3 and 4 Geo 6, c. 45 (U.K.), which was not only subject to annual renewal by Parliament but required that each order in council be laid before it as soon as possible and that such orders could be annulled by either House within 28 days.

[5] War Measures Act, supra, s. 6.

Source: Nikkei National Museum, 2018-16-4-6-3-1
www.nikkeimuseum.org

of the executive under the Was Measures Act by criticism and by the extreme measures of bringing down the government by invoking censure or a vote of want of confidence. The probability of that extreme measure being taken in time of emergency is in the words of Canada's foremost expert on Parliamentary procedure, Senator Eugene A. Forsey, "extremely unlikely[6]." In times of emergency, therefore, the Canadian executive governs restrained only by the personal moral standards and sense of justice of its members, the influence of the media, pressure groups and public opinion, the vigilance of the Parliamentary opposition, and the residual power of the ballot box[7].

While a presumption exists that the executive will not abuse its emergency powers[8], recent evidence suggests that presumption is no longer valid. Using the government's own documents this paper contends that the treatment meted out to Japanese Canadians in the Second World War constituted an abuse of its powers under the War Measures Act by the government of the day. The paper demonstrates that the political ambitions and personal prejudices of a minority of the executive motivated the implementation of repressive polices against a defenceless ethnic minority. Given this abuse and the absence of safeguards noted above, the paper then explores the past and possible roles of the

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[6] Interview with the author, March 6, 1983.
[7] O'Boyle, supra, 165.
[8] **Reference as to the Validity of the Regulations in Relation to Chemicals** [1943] S.C.R. 1 at 19-20.

Source: Nikkei National Museum, 2018-16-4-6-3-2
www.nikkeimuseum.org

courts in protecting individual and collective liberties in situations such as that faced by Japanese Canadians in World War II. To accomplish the latter objective the paper reviews and hypothetically relitigates the legal issues arising from the orders in council affecting Japanese Canadians. This paper is offered as a hypothetical test of whether the laws of Canada are truly capable of protecting the rights and freedoms of Canadians. It is also offered in the hope that neither the extreme circumstances chronicled herein, nor anything remotely like them, will recur in Canada.

I THE FACTS

Between 1941 and 1949 over 20,000 Canadian residents of Japanese ancestry, 76% of whom were Canadian citizens, were uprooted from their homes in British Columbia, confined in detention camps, stripped of their real and personal property, and forced to disperse across Canada or be shipped to a starving Japan. Although opposed by those among the military and the police who were responsible for Canada's national security[9], those policies were implemented by orders in council under the War Measures Act ostensibly for reasons of national security. While over thirty orders in council pursuant to the War Measures

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[9] A.G. Sunahara, **The Politics of Racism: The Uprooting of Japanese Canadians in World War II**, 1981: Lorimer, 31-33. For full documentation of the facts in this essay the reader is referred to this reference.

Source: Nikkei National Museum, 2018-16-4-6-3-3
www.nikkeimuseum.org

Act affected Japanese Canadians[10]2 this analysis is concerned only with the most important three: P.C. 1486, February 24, 1942 which authorized the uprooting and detention of Japanese Canadians; P.C. 469, January 19, 1943 which authorized the sale of Japanese owned property; and P.C. 7355, December 15, 1945 empowering the deportation of 10,000 Japanese Canadians. It is not within the scope of this paper to trace the evolution of even these three orders in council in detail. That has been done elsewhere[11]. Rather this analysis presents only sufficient background to set the scene and the main evidence now available that supports or contradicts the "national security" and "emergency" justifications of the government of the day.

(a) The Background

The policies affecting Japanese Canadians can be viewed as an extension of the government's policies with respect to enemy aliens in both World Wars. In World War I enemy alien policy, like most policies of the government of Robert Borden, was characterized by restraint. While over 80,000 enemy aliens were registered with the police, the Borden government resisted demands for their mass internment. Rather only unemployed[12] or

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[10] See **Senate Committee Proceedings** (1950) pp. 277-279 for a list of these orders.

[11] Sunahara, supra.

[12] Unemployment among enemy aliens became such a problem during the economic depression of 1913 to 1916 that the Borden government initiated an internment policy in part to prevent starvation among enemy aliens. The plight of unemployed enemy aliens was aggravated by the abrogation of their legal rights

Source: Nikkei National Museum, 2018-16-4-6-3-4
www.nikkeimuseum.org

trouble-making aliens were interned prior to 1916. After 1916 conflicts between the manpower demands of the war industries and the intolerance of the public produced a seesaw policy in which some internees would be released to satisfy the demands of employers followed by the internment of a similar number to satisfy public prejudice stimulated by the propaganda of new and politically powerful veterans groups[13]. The Borden government's quiet but firm resistance to the demands of the Great War Veterans' Association for the internment of all enemy aliens only served to reinforce the general impression that an executive operating under the War Measures Act would interfere with individual liberty only where absolutely necessary.

One of the risks of emergency power, however, is that those who administer it come to view its use as acceptable, and even normal, and apply emergency powers to meet a marginal situation instead of less efficient and less drastic alternatives[14]. In the Second World War the Cabinet of William Lyon Mackenzie King was not as reluctant as the Borden Cabinet had been to use its powers to the fullest. Many of those expanded powers were necessary to meet the demands of a war very different from that faced by Borden. This growing use of

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which left them without recourse to the courts. See Carruthers, supra, at 69-75, 85-89.

[13] Ibid, 104-105.

[14] O'Boyle, supra, 164.

Source: Nikkei National Museum, 2018-16-4-6-3-5
www.nikkeimuseum.org

emergency power bothered some members of the Cabinet[15]. For others it was an opportunity to get things done without having to answer for them. Into this latter group fell the principal architect of Japanese Canadian policy, Capt. the Hon. Ian Alistair Mackenzie, K.C., Member of Parliament for Vancouver Centre and Minister of Pensions and Health. To Mackenzie, the political strategist behind the Liberal Party's traditionally anti-Asian election campaigns in British Columbia, the war and the War Measures Act afforded a carte blanche to implement "Dam the Japs" policies he boasted would win the Liberal every seat in British Columbia[16]. His attitude is best shown by his reply in 1942 to a fellow Minister who queried the legality of stripping Japanese Canadians of their property. Mackenzie wrote: [W]e should not be deterred by any representations by Japanese. Any action we take under the War Measures Act cannot be challenged in the courts"[17]. Mackenzie's attitudes were important because as the Cabinet's "expert" on Asians, a purely secondary matter in a busy Cabinet that believed the government should follow the status quo in racial matters[18], Mackenzie virtually dictated

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[15] Notably C.G. Power, J.L. Ilsley, and T.A. Crerar. See R. Cook, "Canadian Freedom in Wartime" in W.H. Heick and R. Graham (eds), **His Own Man: Essays in Honour of Arthur Reginald Marsden Lower**, 1974: McGill - Queens, p. 45 and Sunahara, supra, 108-109, 149.

[16] **Macleans**, April 15, 1946, pp. 65-66.

[17] I.A. Mackenzie to N.A. McLarty, June 5, 1942, Ian Mackenzie Papers, Vol. 25, P.A.C.

[18] Humphrey Mitchell, Minister of Labour, as quoted in **Nisei Affairs**, August 28, 1945.

Source: Nikkei National Museum, 2018-16-4-6-3-6
www.nikkeimuseum.org

Japanese Canadian policy.

A second risk in the exercise of emergency powers is that the public comes to view restrictions on civil liberties as justifiable. So long as the vast majority of the public is not directly and adversely affected by their exercise, and in the absence of contradicting evidence, the public will presume that the implemented measures were both necessary and valid[19]. The restraint of the King government in its enemy alien policies in 1939 and 1940 reinforced that image. The male leadership of German and Italian fascist organizations had been interned along with some communists, whose detention is open to question. But the government had resisted public pressure in the spring of 1940 for the internment of massive numbers of German and Italian Canadians. As the experience of the First World War had shown public hysteria[20] soon receded. The public was left with the impression that the government had the situation under control and would only act where valid grounds existed. That impression was so strong that two weeks before the Pearl Harbor attack, the editor of a Japanese Canadian newspaper confidently assured his readers that in the event of war between Japan and Canada

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[19] This phenomenon was common in Germany in the period before the Nazi concentration camps became overt death camps. See Bruno Bettleheim, **The Informed Heart**, 1960: Free Press, pp. 164-165.

[20] Hysteria at that time was fanned by the revelation of the role of German undercover agents and "quislings" in the occupation of the Low Countries and of Norway lending force to allegations of fifth column activities among German and Italian Canadians.

Source: Nikkei National Museum, 2018-16-4-6-3-7
www.nikkeimuseum.org

"inflamed public opinion will probably be far more serious and more injurious than official government policy[21]."

The public, particularly in British Columbia, was also desensitized by historical discrimination against Asians. Asians had been the scapegoats of organized labour and politicians for seventy years. With the growing power of Imperial Japan and the economic success of Japanese immigrants in Canada, the Japanese became the main candidates for discriminatory regulations[22]. In the dying days of white supremacy the fact that they were non-white and relatively successful as a group made it easy to portray them as a social and economic threat. Japanese Canadians were supposed to be inferior but had proved themselves equal, if not superior, in the workforce. Disliked and socially isolated, the fact that they were different made them suspicious; the fact that they were racially the same as an enemy made it easy to convert suspicion into fear, a fear that stifled any uneasiness about government policies affecting Japanese Canadians.

A third difficulty with the exercise of emergency powers is the indirect way in which such powers increase the influence of politically powerful interest groups by silencing their opposition. At a time of censorship and possible

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[21] **The New Canadian**, November 21, 1941.

[22] For example in the 1920's and 1930's the federal government tried to drive Japanese Canadians from the fishing industry by denying licences, cutback Japanese immigration to a maximum of 150 persons annually, and refused to enfranchise Canadian-born Japanese.

Source: Nikkei National Museum, 2018-16-4-6-3-8
www.nikkeimuseum.org

imprisonment for "sedition", however defined, it takes a brave man to oppose the proposals of powerful groups, especially groups like political or veterans associations which have traditionally clothed themselves with the mantle of public protectors[23]. Opposition is all the more difficult when the traditional moderating bodies, the official Opposition and the churches, remain silent. When the powerful interest groups are also anti-Asian and the potential victims are disenfranchised and hence politically impotent Asians, the victims are quickly isolated and open to attack.

In Canada in 1941 Japanese Canadians were in a extremely difficult position. They faced a Cabinet willing to use its war powers to their fullest, a public desensitized by the reasonableness of past policy and by laws which traditionally discriminated against Asians, and politically powerful anti-Asian interest groups willing and able to agitate for repressive measures.

(b) P.C. 1486: Removal and Detention

Order in Council P.C. 1486 did not contain the word "Japanese". Rather that order was directed at "any or all persons ordinarily or actually resident" within any area of

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[23] For instance critical remarks about the finding of a Royal Commission into the tragedy of the Canadian Forces at Hong Kong was sufficient for charges of "making statements prejudicial to the war effort" to be laid against Ontario's Conservative leader, Lt. Col. George Drew. See Cook, supra, 42.

Source: Nikkei National Museum, 2018-16-4-6-3-9
www.nikkeimuseum.org

Canada defined as a "protected area" by the Minister of Justice. It empowered that Minister to control everyone's movement, employment, residence, freedom of association and communication, and their right to possess any specified article. It also authorized the Minister to order any and all persons to leave the area in question and to detain them "in any place and under such conditions as he may from time to time direct[24]." While the order in council was broad enough to affect every resident of Canada, the ministerial order made under it on February 26, 1942 was directed only at "persons of the Japanese race". The government's rationale for the order was "national security". The removal of Japanese Canadians, Prime Minister King told the House of Commons, was necessary to safeguard the defences of the Pacific Coast[25]. Later the government would claim that Japanese Canadians had been uprooted only to protect them from the hysterical public of British Columbia[26]. The fact that the rationale changed over time makes pertinent an examination of the evidence on which the decision was taken.

In favour of its national security argument the government has cited public opinion on the Pacific Coast and the possibility of riots resulting therefrom. The picture painted is of a British Columbian public seething with hatred and hysteria

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[24] **Canada Gazette** February 27, 1942.
[25] Canada, House of Commons, **Debates**, February 25, 1942, p. 180.
[26] See P.C. 7357, December 15, 1945.

Source: Nikkei National Museum, 2018-16-4-6-3-10
www.nikkeimuseum.org

demanding the removal of Japanese Canadians from their midst. The truth of that picture is undermined by the government's own files. When Ian Mackenzie told the Cabinet on the 24th of February, the day of the decision, that he was "being besieged with telegrams and letters" demanding the removal of Japanese Canadians, his files contained only 18 anti-Japanese resolutions and 9 letters received in the twelve weeks since the Pearl Harbor attack[27]. Even if Mackenzie's files are not complete, Prime Minister King's external affairs files[28] contain only 100 letters and resolutions received in that period, not all of them negative, and only 40 of which were received in February 1942[29]. Importantly the bulk of these letters and resolutions came from interlocking veterans and political organizations located in the small communities around Victoria, B.C., the same organizations that had agitated unsuccessfully for the internment of Germans and Italians in 1940. Letters and resolutions from B.C. mainland, where 75 percent of Japanese Canadians resided, are conspicuous by their absence. In contrast the post decision file[30] contains letters and resolutions from Fraser Valley farmers asking the government to parole their Japanese neighbours in their care. The government's own files, plus other

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[27] Ian Mackenzie Papers, Vol. 25 P.A.C.
[28] King also held the portfolio of Minister of External Affairs.
[29] Department of External Affairs Archives, file 773-b-1-40, parts 1 and 2.
[30] Ibid, part 3.

Source: Nikkei National Museum, 2018-16-4-6-3-11
www.nikkeimuseum.org

disinterested assessments[31] suggest that before the Cabinet confirmed the rumours that Japanese Canadians were traitors by ordering their uprooting, the demands for the removal of Japanese Canadians were coming from certain small, politically powerful groups. There is no denying that the people of B.C. were concerned, but support for the hysteria argument in the period **before** the decision to uproot is not as strong as has been alleged.

The potential for riots was real. The R.C.M.P. had closely monitored anti-Japanese sentiment since Japan had formally joined the Axis powers in 1940. The security experts had concluded, however, that the greatest danger to public order lay in the activities of west coast racists who were seeking to build a power base on an anti-Japanese platform. In 1940 the R.C.M.P. officer responsible for west coast security, Asst. Comdr. F.J. Mead had reported that

> No fear of sabotage need be expected from the Japanese in Canada. I feel this is a broad statement, at the same time I know it to be true... The greatest danger lies in the provocative and at times like these, downright dangerous agitation of [certain named politicians][32].

The R.C.M.P. had responded to the threat with informal arrangements with the press about the publicity to be given to

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[31] See Sunahara, supra, p. 34.
[32] F.J. Mead, Asst. Comdr., to S.T. Wood, Comdr. R.C.M.P., August 21, 1940, RG 24, vol. 2730, file HQS-5199x, P.A.C.

Source: Nikkei National Museum, 2018-16-4-6-3-12
www.nikkeimuseum.org

the activities and allegations of such men. For the most part the media exercised remarkable restraint, especially when compared to the vitriolic lies being pumped out in the same period by the anti-Asian Hearst press in the United States[33]. To Canada's security experts the way to defuse the possibility for civil disorder was to take action against those inciting the riot, not their potential victims[34].

Apart from a statement in support of Japanese Canadian loyalty on the day after the Pearl Harbor attack, no attempt was made by the Cabinet or any B.C. politician[35], to defuse the anti-Japanese fears that could produce a riot. Quite the contrary, by shutting down the Japanese Canadian fishing industry[36], where all fishermen were Canadians, registering all Japanese Canadians like enemy aliens, ordering the removal of adult male aliens for reasons of national security[37], and publicly demanding the removal of all Japanese Canadians, the Cabinet and politicians only aggravated the fears and insecurities of British Colombians. Silence in politics is agreement and confirmation.

In Ottawa there were sharp divisions between the

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[33] For the American situation see Roger Daniels, **Concentration Camps U.S.A.**, 1971: Holt, Rinehart and Wilson.
[34] H.L. Keenleyside, Assistant Under-Secretary of State for External Affairs, to Lt. Gen. Maurice A. Pope, Vice Chief of General Staff, January 3, 1942, with Pope's agreement, file 773-B-40, DEA.
[35] Except the single C.C.F. politician, Angus MacInnis.
[36] P.C. 288, January 13, 1942.
[37] P.C. 365, January 16, 1942.

Source: Nikkei National Museum, 2018-16-4-6-3-13
www.nikkeimuseum.org

professionals and the politicians over the "Japanese question". The military, the R.C.M.P. and senior civil servants from the Department of External Affairs were of the opinion that Japanese Canadians were loyal and that measures already in force for the internal defence of the Pacific Coast were adequate. External Affairs was also afraid that further repression against Japanese Canadians might make matters worse for Canadians captured at Hong Kong or trapped in Japan[38]. To B.C. politicians the loyalty of Japanese Canadians was immaterial. The possibility of riots, however caused, and the "heaven sent opportunity to rid themselves of the Japanese **economic** menace for ever more[39]" were all that mattered.

The opinion of the professionals may never have reached the Cabinet as a whole. The Cabinet's principal avenue of information was Ian Mackenzie. Even in his report of a January conference on the issue of Japanese Canadians Mackenzie omitted the opinion of the professionals. Instead he played up the possibility of riots while moderating, in vocabulary if not in

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[38] Conference on Japanese Problems, **Minutes**, p. 6, Dept. of External Affairs file 773-B-40C.

[39] Maurice A. Pope, **Soldiers and Politicians**, 1962: University of Toronto Press, p. 177. Pope's emphasis. The "economic menace" comment arises from the fact that for seventy years B.C. politicians had blamed the province's economic woes on non-whites whose lower wages were portrayed as undermining white living standards. The same politicians, however, were unwilling to pass legislation requiring equal pay for equal work.

Source: Nikkei National Museum, 2018-16-4-6-3-14
www.nikkeimuseum.org

content, the more blatant demands of the B.C. politicians[40]. In place of the views of the R.C.M.P. and Ottawa's senior military officers Mackenzie substituted the views of the senior officer on the west coast, Maj. Gen. R.O. Alexander. Alexander, following private discussions with B.C. politicians, proposed three weeks after Pearl Harbor that adult male Japanese Canadians be interned to prevent riots he thought might follow scheduled anti-Japanese demonstrations, a proposal rejected by his superiors[41]. In subsequent Cabinet discussions MacKenzie, ignoring the counsel of the R.C.M.P. and of External Affairs, continually pushed the argument that all Japanese Canadians, both citizens and aliens, were disloyal[42].

Mackenzie was helped by Prime Minister King. In 1942 King was highly suspicious of the military who wanted conscription to meet Canada's overseas commitments. Aware that conscription could destroy the Liberal party in Quebec, King wanted to avoid conscription at all costs. The need for home defence was King's main argument against conscription, and

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[40] Conference on the Japanese Problem in B.C., **report**, Ian Mackenzie papers, vol. 32, file x-81, P.A.C.
[41] Ibid and n. 34. For the complete proposal see Maj. Gen. R.O. Alexander to Chief of General staff, December 30, 1941, file 322.009(D358), Department of National Defence. Alexander was removed from his command within three weeks of the order uprooting Japanese Canadians.
[42] See Sunahara, supra, 41. While making these charges Mackenzie was trying to organize a Civilian Service Corps for Japanese Canadian males, a corps he presumed they would join to prove their loyalty.

Source: Nikkei National Museum, 2018-16-4-6-3-15
www.nikkeimuseum.org

instability on the Pacific coast only helped that argument[43]. Where the advice of the military conflicted with King's political needs, that advice would be ignored.

Mackenzie was also helped by the Americans. On February 19th President Roosevelt signed Executive Order 9066 permitting any designated military commander to exclude any and all persons from any designated area under his command. On the 20th the Secretary of War, Henry L. Stimson gave those powers to General John L. DeWitt of the Western Defense command setting in motion the uprooting by American military of 110,000 Japanese Americans. News of the American action reached Ottawa on February 22nd the same day that Mackenzie obtained the agreement of Cabinet to enlist all male Japanese Canadians in a Civilian Service Corps. Upon learning of the American plans to include women, children and aged, the Cabinet readily assented to P.C. 1486.

Canada's senior military officers made one final protest. On February 26th they refused to carry out the uprooting of Japanese Canadians[44]. In the eyes of the military the matter was a political problem, not a national security problem. As a consequence the task fell to the equally reluctant Royal Canadian Mounted Police and to a civilian agency, the

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[43] W.L.M. King Diary, February 20, 1942.
[44] Canada, War Cabinet Committee, **Minutes**, February 26, 1942, RG/16, vol. 8, P.A.C.

Source: Nikkei National Museum, 2018-16-4-6-3-16
www.nikkeimuseum.org

British Columbia Security Commission, who between March and November 1942 supervised the removal of 20,881 men, women and children from their homes on the Pacific coast to detention camps in the mountains of British Columbia.

(c) P.C. 469: Dispossession

The process of stripping Japanese Canadians of their property by means of P.C. 469 began only seven weeks after P.C. 1486 authorized their uprooting. Realizing that Japanese farms in the Frazer Valley were ideal for postwar veteran resettlement[45], Mackenzie immediately took steps to acquire them thereby effecting two political coups: appealing for veteran's votes with good, cheap farms, and giving early proof to his pledge of April 4, 1942 that as long as he remained in public office Japanese Canadians would never return to the Pacific coast[46]. His plans went smoothly. Since the Veterans Land Act under which he intended to buy the farms was not yet law, he arranged for the sale of Japanese-owned farms to be frozen[47], had them surveyed by Soldier Settlement Board appraisers using

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[45] Ian Mackenzie to T.A. Crerar, Minister of Mines and Resources, April 14, 1942, Ian MacKenzie Papers, MG27IIIB5, Vol. 25, 70-25-3, P.A.C.

[46] Vancouver **Province**, April 4, 1942.

[47] P.C. 5523, June 29, 1942. That order required that sale of Japanese farms be approved by the Director of the Soldier Settlement Board ostensibly to protect Japanese Canadians from exploitation. Approval was seldom given by that official who in August became the Director of the Veteran's Land Act Administration and purchaser of the farms on behalf of the government.

Source: Nikkei National Museum, 2018-16-4-6-3-17
www.nikkeimuseum.org

criteria which minimized their apparent value[48], and took on the task of persuading the Secretary of State, Norman A. McLarty, to amend the powers of the Custodian of Enemy Property to permit the sale of Japanese property[49]. Mackenzie was assisted by Humphrey Mitchell, the Minister of Labour, who supported the sale of Japanese Canadian property as a means of raising money on which Japanese Canadians could live while confined unemployed in government detention camps, and from which the inmates could repay the relief they had already accepted to support themselves while so confined. Making Japanese Canadians pay for their own incarceration would minimize the government's expenses and avoid charges by the Conservative opposition that the government was "pampering" Japanese Canadians[50].

P.C. 469 of January 19, 1943 makes no mention of any of these reasons. Rather that order states that the Custodian's powers were being amended to enable him to handle the continuing sale of Japanese Canadian fishing vessels[51], and to assume the former duties of the Soldier Settlement Board with respect to the

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[48] Sunahara, supra, p. 103.

[49] Japanese property had been vested in The Custodian of Enemy Property "as a protective measure only" at the time of the uprooting. P.C. 1665, March 4, 1942, s. 12.

[50] Cabinet Committee on Japanese Questions, **Minutes**, January 11, 1943, Ian Mackenzie Papers, Vol. 24, P.A.C. This policy reduced government expenses on Japanese Canadians to $700. per year per family of 5. The U.S. government spent $10,000 per year per family of five.

[51] The sale of the fishing fleet had formerly been handled by the Japanese Fishing Vessel Disposal Committee set up under P.CV. 288, January 13, 1942.

Source: Nikkei National Museum, 2018-16-4-6-3-18
www.nikkeimuseum.org

frozen farms[52]. The assumption of these duties, the order continues, made it "necessary to provide facilities for liquidation of property in appropriate cases." Accordingly, the powers of the Custodian were deemed to have included from the date of the vesting of Japanese property "the power to liquidate, sell or otherwise dispose of such property" and that for the purpose of such sales the Consolidated Regulations Respecting Trading With the Enemy would apply "mutatis mutandis as if the property belonged to an enemy[53]."

In fact the words "appropriate cases" meant "every case". Over the next four years, while the courts reserved judgement on the legality of the order[54], the Custodian disposed of an estimated $11.5 million of Japanese Canadian property for $5,373,317.64[55].

These figures represented all Japanese Canadian property, real and personal, within 100 miles of the Pacific Coast.

(d) P.C. 7355: Deportation

The circumstances surrounding P.C. 7355[56], of

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[52] See note 47.
[53] P.C. 469, January 19, 1943, s. 2.
[54] **Nakashima et al** v. **The King** [1947] Ex. C.R. 486.
[55] Estimated by the Office of the Custodian of Enemy Property. G.W. MacPherson to Dr. E.H. Coleman, January 19, 1943, RG117, Vol. T95, P.A.C. Cash realization from as of March 31, 1947 from Memorandum to Cabinet, Ian Mackenzie Papers, Vol. 79, P.A.C.
[56] P.C. 7355 was the cornerstone of a trilogy of orders in council intended to (i) effect the deportation of 10,000 Japanese Canadians (P.C. 7355), (ii) to strip naturalized Japanese

Source: Nikkei National Museum, 2018-16-4-6-3-19
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December 15, 1945, authorizing the deportation of 10,000 Japanese Canadians, illustrate the real powerlessness of Parliament when the War Measures Act is administered by an executive determined to get its way. The first and more draconian version of this order had been produced on September 2, 1945 by a Special Cabinet Committee[57] dominated by Ian Mackenzie and Humphrey Mitchell. Their intention was to have that committee rubber-stamp the order and its companions, to rush them through Cabinet and deport the affected Japanese Canadians before the War Measures Act was replaced four months later by the National Emergency Transitional Powers Act of 1945 (N.E.P.T.A.)[58]. The purpose of N.E.P.T.A., about to be put before Parliament, was to continue certain emergency powers, in particular economic controls, to facilitate the transition of the Canadian economy from strict wartime controls to normal peacetime conditions. However, opposition from within the committee, plus a delay in the necessary approval of the Supreme Allied Commander in Occupied Japan for the shipment of civilians to that starving country, frustrated their plans.

The manner in which the government overcame this

Canadians so deported of their Canadian status (P.C. 7356), and (iii) to set up a Loyalty Commission to determine which additional Japanese Canadians the Minister of Labour should recommend for deportation (P.C. 7357).

[57] On Repatriation and Relocation. See Sunahara, supra, p. 124 for composition of this committee.

[58] S.C. 9 & 10 George 6, c. 25.

Source: Nikkei National Museum, 2018-16-4-6-3-20
www.nikkeimuseum.org

frustration illustrates its acumen and the arrogance with which it viewed its emergency powers. First the Cabinet attempted to expand its powers under N.E.P.T.A. by inserting a clause in the draft bill that gave the Governor in Council exclusive power over "entry into Canada, exclusion and deportation, and revocation of nationality[59]". The ensuing uproar in Parliament, assisted by the fact that the deportation of citizens had been declared a war crime by the United Nations, forced the Justice Minister, Louis St. Laurent, to withdraw the offending section, s. 3(g) pledging as he did so to consult Parliament on any future deportation legislation[60].

Unfortunately in its relief over the removal of section 3(g) and bolstered by St. Laurent's pledge, the Commons failed to appreciate the significance of N.E.P.T.A.'s section 4. Section 4 authorized the Governor in Council to order the continuation in full force under the authority of N.E.P.T.A. of all orders in council existing on December 31, 1945. Orders passed under the War Measures Act and continued under the authority of N.E.P.T.A. could not be annulled by Parliament under section 2(3) as orders passed pursuant to N.E.P.T.A. could be. To defy Parliament with impunity the Cabinet simply waited until N.E.P.T.A. was passed by Parliament before it created P.C. 7355 in the dying days of the War Measures Act.

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[59] Bill 15, October 5, 1945, s. 3(g).
[60] **Debates**, December 6, 1945.

Source: Nikkei National Museum, 2018-16-4-6-3-21
www.nikkeimuseum.org

P.C. 7417[61] continuing all existing orders rendered Parliament impotent. Despite the subsequent conclusion of the Chief Justice of Canada that "Parliament has not effaced itself, and has full power to amend or repeal the **War Measures Act** or to make ineffective any Order in Council passed in pursuance of its provisions[62]", there was only one mechanism by which Parliament could "make ineffective" an order it had explicitly rejected: it could bring down the government. In December of 1945, however, the probable success of a vote of want of confidence was minimal. Not only did the recently re-elected government have a majority which could be depended upon to support the government, but the conservative Members from British Columbia, who where as traditionally anti-Asian as their Liberal counterparts, were not about to see themselves accused of precipitating an election through supporting the rights of Japanese Canadians. Those who wished to stop the deportation of Japanese Canadians could look only to a public opinion or to a legal solution to the problem.

P.C. 7355 states as the reason for its existence that certain Japanese Canadians have made "a written request or statement of desire to be repatriated or sent to Japan" and hence that it was deemed desirable to deport them. The order creates

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[61] December 28, 1945.

[62] **Reference as to the Validity of Orders in Council of the 15th Day of December 1945, in Relation to Persons of the Japanese Race** [1946] S.C.R. 248, Rinfret C.J. at 264. (Hereafter **Reference re Japanese Canadians**)

Source: Nikkei National Museum, 2018-16-4-6-3-22
www.nikkeimuseum.org

four classes of deportees: (i) Japanese nationals who had either requested to be repatriated or were still interned at the end of the war, (ii) naturalized Japanese Canadians who failed to withdraw their requests before the surrender of Japan on September 1, 1945, (iii) Canadian-born Japanese who did not revoke their "repatriation" [sic][63] requests before the Minister made the order for their deportation, and (iv) the wives and minor children of the above males regardless of whether they had requested to be sent to Japan. The order gave the impression later presumed by the courts[64], that the government was merely trying to facilitate the journey of Japan to those who had voluntarily requested to be sent there. The government's own records show how erroneous that impression is.

The "written request or statement of desire" referred to above was, in most cases, a document signed in April or May 1945 under stressful and compromising circumstances. At that time the plans of the federal government were disrupted when the United States Supreme Court ruled that the detention of loyal Japanese Americans was unconstitutional and that they must be allowed to return to their homes on the Pacific Coast[65]. Unwilling to extend the same right to Japanese Canadians, the government forced Japanese Canadians to choose between immediate

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[63] The "patria" of Canadian-born Japanese is Canada.
[64] See Estey J. in **Reference re Japanese Canadians**, supra, at 318, 320.
[65] **Ex Parte Mitsue Endo** (1944) 323 U.S. 283.

Source: Nikkei National Museum, 2018-16-4-6-3-23
www.nikkeimuseum.org

dispersal east of the Rocky Mountain or deportation to Japan at some future date. Those who chose Japan would be deemed disloyal and deportable.

The survey was deliberately slanted to encourage the confused, poverty-stricken and demoralized inmates of the government's detention camps to choose Japan. The inmates were told that those who chose Japan could retain their jobs in B.C., or if unemployed, could receive a relief allowance without any further depletion of their capital in the hands of the Custodian of Enemy Property[66]. They could continue to reside in the shacks they had improved at their own expense, and, if they had no capital left because of supporting themselves in the camps, they would be guaranteed a resettlement allowance of $200 and free transportation to Japan. In contrast, those who chose Canada were to lose their jobs and be immediately shipped to the rotting tenements of the Kaslo detention camp, where they would remain until sent to a job east of the Rocky Mountains. The suitability of that job was to be determined by the government, and there was no guarantee that the job would last for more than a few weeks. There was also no guarantee that the move eastward would be permanent. Japanese Canadians were told that the government was offering "such generous terms... to those who come to the

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[66] Normally Japanese Canadians with capital from the sale of their property in the hands of the Custodian could not receive relief until that capital was depleted.

Source: Nikkei National Museum, 2018-16-4-6-3-24
www.nikkeimuseum.org

conclusion that conditions might be too difficult for them in Canada and the opportunity might be better in Japan[67]", because only Saskatchewan's C.C.F. government had expressed a willingness to accept Japanese Canadians.

The survey was attended by confusion, fear and turmoil. The government's records show that the inmates were told that signing for "repatriation" was not an indication of disloyalty and that they could revoke at a later date. The records also show that the government knew of the factors vitiating voluntary choice but rationalized that the survey "was fair in terms of what is politically feasible at the moment[68]. To keep their jobs, to hide from a hostile world, in despair and confusion, under pressure from family and neighbours, 6,884 Japanese Canadians over the age of 16 signed the "repatriation" forms. If they and their 3,500 dependents were deported while the rest were scattered east of the Rocky Mountains, Ian Mackenzie would accomplish his objective of ridding B.C. of Japanese Canadians.

In the end P.C. 7355 was never used. Upheld by the courts[69] it was defeated by the people of Canada. The court cases were fought only to buy time to mount an anti-deportation

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[67] R.G. Robertson to W.L.M. King, April 23, 1945, W.L.M. King papers, Vol 36, C249590, P.A.C.
[68] Norman Robertson to W.L.M. King, February 21, 1945, W.L.M. King Papers, Vol. 361, C249584, P.A.C.
[69] **Reference re Japanese Canadians**, supra, and **Cooperative Committee on Japanese Canadians et al. v. Attorney General of Canada et al.** [1947] 1 D.L.R. 577 (P.C.).

Source: Nikkei National Museum, 2018-16-4-6-3-25
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campaign. The churches, civil liberties groups, and the press, no longer fettered by censorship, were finally able to tell the Canadian people what was being done to Japanese Canadians. In the greatest outburst of public opinion in the long career of Prime Minister King, ordinary people all across Canada, including British Columbia, told their government to stop abusing Japanese Canadians. P.C. 7355 was revoked, under protest from Ian Mackenzie and Louis St. Laurent, on January 27, 1947, although the civil rights of Japanese Canadians continued to be restricted until April, 1949.

II ABUSE OF POWER?

The evidence above raises an important question: Did the above decision conform with the five principles of the doctrine of necessity that alone justifies the use of emergency powers? That is, did the orders affecting Japanese Canadians arise from an extreme danger to the safety of the state? Were the actions taken the only remedies available? Were they proportional to the threat? Were they temporary in character and limited to the duration of the threat? Was the usual authority unable to act[70]? Should the answers to the above questions be negative, it must then be considered whether nonconformity with these principles amounts to evidence of abuse of power as in the

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[70] O'Boyle, supra, 161, n. 6.

Source: Nikkei National Museum, 2018-16-4-6-3-26
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Roncarelli v. Duplessis model[71], that is, evidence of a Cabinet "acting with the improper intent and for an alien purpose; ... arbitrarily and illegally attempting to divest a citizen of an incident of his civil status[72]."

The above orders in council arguably violate all five principles of the concept of necessity. Only the first principle raises any difficulty, because of the fact that the war itself was a threat to the safety of the state. While the courts have ruled that only the Governor in Council can determine what is necessary once an emergency has been proclaimed[73], it is submitted that where the orders are not general war regulations applicable to the entire population but discriminatory orders against a specific group of people, the group they are directed toward must be a threat to the safety of the state before those orders can be necessary.

The question then arises as to whether the Cabinet that created the orders was cognizant of Japanese Canadian loyalty. At the time the Cabinet passed P.C. 1486, uprooting Japanese Canadians, Ian Mackenzie, the Fisheries Minister J.E. Michaud, and Minister of National Service J.T. Thorson definitely knew, since they had attended the conference in January at which the

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[71] [1959] S.C.R. 121.
[72] Ibid, Rand J a 141.
[73] **Reference Re Japanese Canadians** supra, 277. For a more complete discussion of this issue see pp. 30-31 infra.

Source: Nikkei National Museum, 2018-16-4-6-3-27
www.nikkeimuseum.org

R.C.M.P. and military gave their assessments[74]276

. None however was likely to speak out in Cabinet in support of Japanese Canadians. Michaud had long followed Mackenzie's lead in discriminating against Asians and, although he had occasional twinges of conscience, he was content to leave the responsibility to Mackenzie[75]. Thorson was not a tolerant man. He would later distinguish himself as the Justice who procrastinated for three years thereby stifling the legal objections of Japanese Canadians to the sale of their property while his former Cabinet colleagues sold off that property[76], and as the taxpayer who could not tolerate French as an official language[77].

There were at least four other Cabinet Ministers who must have known of the opposition of the military and the R.C.M.P.: Prime Minister King in his role as Minister of External Affairs, Louis St. Laurent, the Minister of Justice, Humphrey Mitchell, the Minister of Labour, and J.L. Ralston, the Minister of National Defence. As discussed above, King in 1942 was unlikely to side with the military in what he perceived as a political matter. Moreover his diary clearly shows that his attitude toward the Japanese as a race was negative[78]. St.

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[74] Conference on the Japanese Problem in B.C., **Report** supra.
[75] Sunahara, supra. p. 18.
[76] **Nakashima et al. v. The King** [1947] Ex. C.R. 486, See p. 38 infra.
[77] **Thorson v. A.G. Canada et al.** [1975] 1 S.C.R. 138.
[78] For example there is his comment on the bombing of Hiroshima: "it is fortunate that the use of the bomb should have been upon the Japanese rather than upon the white races of Europe."

Source: Nikkei National Museum, 2018-16-4-6-3-28
www.nikkeimuseum.org

Laurent was similarly very prejudiced against Japanese Canadians. As Prime Minister King noted in his diary, St. Laurent wanted to deport Japanese Canadians because they "would increase in population and demands would be made later when Japan was a settled country to have the Japanese in Canada given the same rights as the white population[79]." Mitchell, likewise, would later distinguish himself as an ally of Ian Mackenzie in stripping Japanese Canadians of their property and in the attempt to deport them. Mitchell who thought nothing of calling Japanese Canadians "yellow bastards" in polite company[80], would hardly have raised any point in their favour.

J.L. Ralston, however, might very well have emphatically informed the Cabinet of the military evaluation **if** he had been present. There is no record as to whether he was at the meeting at which Mackenzie first gave his report but it is very likely that he was absent from the Cabinet on the morning of February 24, 1942 when the decision to uproot and detain Japanese Canadians was taken. That assessment is based on the fact that Ralston made a major speech to a secret sitting[81] of Parliament on the afternoon of the 24th, a speech and question period which no doubt involved an extensive briefing session that morning.

W.L.M. King Diary, August 6, 1945.
[79] King diary, January 27, 1947.
[80] Sunahara, 140.
[81] A special sitting at which Parliament was brought up to date on the course of the war and which for security reasons was not recorded in Hansard.

Source: Nikkei National Museum, 2018-16-4-6-3-29
www.nikkeimuseum.org

Not only do Ralston's notes for that speech indicate that he informed parliament of the impossibility of a west coast invasion and of the adequacy of home defence[82], but his support two days later for the refusal of the military to carry out the uprooting, indicate that either he was present and overruled by the majority or he was not present to contradict Mackenzie when P.C. 1486 was passed. If in fact the former happened, then the Cabinet as a whole must have known of the loyalty of Japanese Canadians. Even if the latter is true, the fact that at least 7 of the 19 Cabinet Ministers, including the Prime Minister, definitely knew and should have reported the fact to the Cabinet as a whole, raises the inference that at that time the Cabinet ought to have known that Japanese Canadians were no threat to the safety of the state.

The passage of time only strengthens the inference. At the time Japanese Canadians were stripped of their property they were under the strict control of the authorities. Neither they nor their property was a threat to the safety of the state. By the time they were ordered deported, their innocence and loyalty was a matter of public record. Prime Minister King had himself acknowledged it in the House of Commons. "It is a fact", he stated in August 1944, "that no person of the Japanese race born in Canada has ever been charged with any act of sabotage or

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[82] J.L. Ralston Papers, MGIIIB11, P.A.C. See Sunahara, 43.

Source: Nikkei National Museum, 2018-16-4-6-3-30
www.nikkeimuseum.org

disloyalty during the years of the war[83]." At the time that both these orders were passed, the Cabinet as a whole knew Japanese Canadians were not threat to anyone.

The second difficulty with the first principle of the concept of necessity arises from Mackenzie's predictions of inevitable civil disorder if Japanese Canadians were not removed. If this was in fact the real reason behind P.C. 1946, then in order for that order to satisfy the first principle of the concept of necessity, the Cabinet must have believed that the possible victims of civil disorder were a threat to the safety of the state. Normally it is the instigators of riots who commit the criminal act, not their victims. Yet throughout the government's documents the statement recurs that "by reason of their concentration along the Pacific coast of Canada[84]" it was necessary to uproot, detain, dispossess and deport Japanese Canadians. The implication is that those measures were undertaken for the welfare of Japanese Canadians. While that sounds laudable, one Justice of Canada has ruled that actions undertaken for the welfare of individuals or families are not actions which fall within the purpose of the War Measures Act[85]. The United States Supreme Court has also rejected protective custody as a grounds for detaining loyal citizens[86]. It is

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[83] **Debates** August 4, 1944, p. 6062.
[84] See P.C. 7357, December 15, 1945, preamble.
[85] **Reference Re Japanese**, supra, 292, Rand J.
[86] **Ex Parte Mitsue Endo**, supra, 302. See p. 37 infra.

Source: Nikkei National Museum, 2018-16-4-6-3-31
www.nikkeimuseum.org

submitted that the possibility that Japanese Canadians might be victims of civil disorder is not a sufficient or reasonable ground to believe they could have been a threat to the safety of the state.

A third difficulty arises from the governments' claims, with respect to P.C. 7355, that the "repatriation" requests upon which deportation would be based manifest sympathy with or support of Japan. Yet the government's own records show that while a minority sympathized with Japan, most signed the requests for reasons totally unconnected with the issue of loyalty or under pressures very similar to those which led an American court to rule denaturalization requests by Japanese Americans were invalid on the grounds that they were not made through the exercise of free, intelligent choice[87]. The evidence in the government's own files raises the question of whether the sympathies of a few are a sufficient and reasonable grounds to conclude that the entire group is a threat to the safety of a state, especially after the emergency has passed. The best answer to that question was given by the government itself when, possessed of the legal power to deport the entire group, it chose not to do so because public protest had made it politically unwise.

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[87] **Acheson v. Murakami** (1949) 176 F. (2d) 953. See Sunahara, supra, 121-123 for evidence of the reasons for signing "repatriation" requests.

Source: Nikkei National Museum, 2018-16-4-6-3-32
www.nikkeimuseum.org

The orders in council also violate the other four principles. The actions taken under these orders were not the only remedies. Rather the Cabinet's emergency powers were used instead of, and against the counsel of, the normal authorities. Indeed the remedies chosen were grossly disproportionate to the only possibility of being the victim of a riot. Even if the uprooting of Japanese Canadians could be partially justified under the heading of protective custody, what justification can possibly exist for imprisoning, impoverishing, attempting to deport and denying the civil liberties of the protected party for a period of seven years? The latter fact amply demonstrates the violation of the fourth principle that the actions taken should be limited to the duration of the threat. Finally, the violation of the requirement that the usual authority be incapacitated is demonstrated by the fact that the usual police authorities were functioning normally and the Criminal Code was still in effect to handle the instigators of riots.

There was no national security element in the wartime experience of Japanese Canadians. The entire exercise was the product of political traditions and political opportunism. Anti-Asian policitians exploited their extraordinary emergency powers to arbitrarily deprive Canadians of their civil, indeed their human, rights. But arbitrarily depriving a group of persons of their civil or human rights is not by itself an abuse of power. That deprivation must also be illegal. In the seminal Canadian

Source: Nikkei National Museum, 2018-16-4-6-3-33
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case on abuse of power, **Roncarelli v. Duplessis**[88], Rand J. defined abuse of power as an act done in bad faith; that is, with an improper motive and for a purpose alien to the very statute under which the act is purported to be done. "Without express language", he noted, "no legislature can be taken to have contemplated an unlimited arbitrary power exercisable for any purpose[89]. Whether the politically motivate orders in council through which the King government deprived Canadians of their fundamental civil liberties were an abuse of power, therefore, depends on whether Parliament, when it created the War Measures Act, delegated to the Cabinet an unfettered power to arbitrarily deprive a class of persons of their civil rights.

The powers of the Governor in Council, (in fact the Cabinet) are defined in section 3 of the War Measures Act. Section 3 authorizes the Governor in Council to make " 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 defense, peace, order and welfare of Canada". Among the powers specifically enumerated are detention, exclusion, deportation and disposition of property. While the Was Measures Act has been interpreted to leave the Governor in Council the determination of the necessity or advisability of

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[88] [1959] S.C.R. 121.
[89] Ibid, Rand J. at 140-141.

Source: Nikkei National Museum, 2018-16-4-6-3-34
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such orders[90], on Supreme Court Justice, albeit in a partial dissent, has concluded that Parliament must have contemplated "as a fundamental assumption underlying the statute, the delegation of legislative power of a strictly legal character only" and to have restricted the orders of the Governor in Council to those "in which full juridical quality would inhere[91]". In the absence of an express provision to the contrary, therefore, the powers of the Governor in Council under the War Measures Act are limited to those exercised in good faith for the defense, peace, order and good government of Canada Arbitrarily depriving a citizen of his civil liberties for political purposes enhanced by racial bigotry can arguably never be classified as an order created in good faith. If the orders in council abusing Japanese Canadians are not in law a wanton abuse of power, it would be hard to imagine a situation that would be. If those orders were the product of an abuse of power, then 20,881 Japanese Canadians were falsely imprisoned in 1942 and remained so for seven years.

III LITIGATION

The orders in council abusing Japanese Canadians demonstrate the dangers of the absence of safeguards in emergency legislation. The impunity with which the executive during the Second World War was able to effect a political objective under

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[90] **Reference Re japanese Canadians**, supra, at 277.
[91] Ibid, Rand J. at 290.

Source: Nikkei National Museum, 2018-16-4-6-3-35
www.nikkeimuseum.org

the smoke screen of national security, even against the will of Parliament, clearly demonstrates that when the War Measures Act is in force the rights of all Canadians are dictated by the Cabinet. Parliament can do almost nothing to control the Cabinet. The only real avenue of the protest is the courts. This paper, therefore, now considers how the courts responded to the petitions of Japanese Canadians and how they could have responded both then and now.

(a) P.C. 1486: Removal and Detention

(i) Circa 1942

The ministerial order uprooting and detaining Japanese Canadians was never questioned in a court of law. The reasons for this omission include dissention and disorder in the Japanese Canadian community, the prompt internment of those who objected whether alien or Canadian-born, fear of public reprisals should Japanese Canadians be perceived as refusing to cooperate, and the general feeling among those advising Japanese Canadians that the actions of the government were legal[92]. However, by using cases contemporary with the ministerial order, cases that addressed similar issues, it is possible to assess with some accuracy the probable outcome had Japanese Canadians litigated their removal and detention.

The most useful contemporary cases are the decisions of

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[92] Sunahara, 51-76.

Source: Nikkei National Museum, 2018-16-4-6-3-36
www.nikkeimuseum.org

the House of Lords in **Liversidge v. Anderson**[93] and **Greene v. Secretary of State for Home Affairs**[94] and of the Supreme Court of Canada in the **Reference as to the Validity of the Regulations in Relation to Chemicals** (hereafter the **Chemicals Reference**)[95]. Both the **Liversidge** and **Greene** cases examined the nature of and limits to the authority of the Home Secretary to order the detention of individuals in the absence of criminal charges. In **Liversidge** the plaintiff was setting a declaration that his detention under an order of the Home Secretary was unlawful and was also seeking particulars of the grounds for that detention, while Greene was seeking release from detention through an action by way of habeus corpus[96]. Rendering their decisions in both cases at the same time, the majority of Law Lords, construing the language of Reg. 18 of the British Defense (General) Regulations, 1939, held that the test for whether the Home Secretary had the grounds to detain an individual was subjective; that is, was within the discretion of the Home Secretary and accordingly that it was not open to a court of law to review those grounds. The

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[93] [1942] A.C. 206.
[94] [1942] A.C. 284.
[95] [1943] S.C.R. 1.
[96] The importance of the **Greene** case for Canada is diminished by the fact that Defense of Canada Regulation 21 had effectively suspended habeus corpus by deeming persons detained under orders in council pursuant to the War Measures Act to be in legal custody. Neither Great Britain nor the United States suspended habeus corpus during World War II. See Herbert Marx, "The Emergency power and Civil Liberties in Canada", 16 McGill L.J. 39 at 81.

Source: Nikkei National Museum, 2018-16-4-6-3-37
www.nikkeimuseum.org

majority further held that the detention order itself was prime facie proof that the Home Secretary had acted lawfully and was a defense to both a demand for particulars and a habeus corpus action. The court could only intervene, they stated, where the detainee had discharged the burden of establishing that the detention order was invalid on its face.

The majority position on the issue of individual liberty was best stated by Lord Wright in **Liversidge.**

> All the courts today, and not least this house, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether the common law or statute. It is, in Burke's words, a regulated freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulations ... is alleged to limit or curtail the liberty of a subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given[97].

Finding that the Home Secretary's powers under Reg. 18 included the powers of detention where the control of individuals was required in the national interest, Lord Wright concluded,

> [T]he duty to act in the national interest ... is a higher duty than the duty to regard the liberty of the subject. I cannot see any ground for holding that the performance of that duty is to be subject to the decision of a judge[98].

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[97] **Liversidge v. Anderson**, supra, 260-261.
[98] Ibid, 265-266.

Source: Nikkei National Museum, 2018-16-4-6-3-38
www.nikkeimuseum.org

Lord Atkin dissented. "In this country, amid the clash of arms," he asserted,

> the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law[99].

The appellant's right to particulars, Lord Atkin stated, was based on the principle that every imprisonment, except imprisonment ordered by a judge following a trial, "is prime facie unlawful and that it is for a person directing imprisonment to justify his act[100]." The result of the majority view, he commented, was that the only implied condition to the authority of the Home Secretary was that he act in good faith. "If he does that - and who could dispute it or disputing it prove the opposite? - the Minister has been given complete discretion whether he should detain a subject or not[101]."

The court, Lord Atkin contended, had ample scope for independent inquiry into the criteria on which the Home Secretary based his belief. Using the criterion of "hostile origin", a ground for detention listed in Reg. 18, Lord Atkin asked,

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[99] Ibid, 244.
[100] Ibid, 245.
[101] Ibid, 226.

Source: Nikkei National Museum, 2018-16-4-6-3-39
www.nikkeimuseum.org

> If a man or woman of hostile origin made the case that he or she had been a loyal subject for thirty or forty years, was a supporter of the country's war effort, and had never taken any part in hostile activity, would it not be open to the courts to consider whether by reason of hostile origin it was necessary to control him or her? Could the Home Secretary support a mere order to detain all persons of hostile origin regardless of age, sex or antecedents[102]?

Lord Atkin's questions almost perfectly describe the situation facing Japanese Canadians in 1942. Not only were 60% of the 20,881 persons uprooted and detained in 1942 Canadian-born but over half of the remainder were naturalized British subjects. The immigrant generation of Japanese Canadians had resided in Canada for an average period of greater than thirty years[103]. In addition, not only was there no evidence of hostile activities on the part of any Japanese in Canada, but Japanese Canadians as individuals and as a group had made vigorous efforts to demonstrate loyalty to Canada through Victory Bond drives and requests to be allowed to enlist in the armed forces, a privilege denied all Asians in B.C. because enlistment meant enfranchisement.

Lord Atkin implies that it was indeed open to the courts to consider the necessity of detaining persons solely on the characteristic of their "hostile origin". It is trite law

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[102] Ibid, 243.

[103] Most Japanese immigrated to Canada before World War I. Since 1928 immigration from Japan had been limited to less than 150 persons per year. See Sunahara, 1 - 21.

Source: Nikkei National Museum, 2018-16-4-6-3-40
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that no discretion is unlimited. While the Home Secretary - or in the Japanese Canadian case, the Minister of Justice - had a broad discretion, that discretion must be exercised judiciously and reasonably, not frivolously and capriciously. Lord Atkin's view was later unanimously accepted by the House of Lords in **Padfield v. Minister of Agriculture, Fisheries and Food**[104], where the Law Lords held that "a statutory discretion conferred on a Minister to act as he thought fit was not wholly unfettered but had to be used to promote the policy and objects of the Act[105]."

Lord Atkin's views are also in accord with the 1931 Privy Council decision in **Eshugbayi Eleko v. Officer Administering the Government of Nigeria**[106]. In that case involving a deportation order, the Privy Council held that the courts could examine whether any conditions precedent to the making of an order in fact existed. The **Eleko** case, when considered along with the **Liversidge** case, has recently been interpreted as determining the principle that

> where an executive decision is taken which depends for its validity on the existence of certain facts the mere proof that the order was made does not preclude the courts from

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[104] [1968] A.C. 997.
[105] R.F.V. Heuston, "**Liversidge v. Anderson** in Retrospect", 86 The Law Quarterly Rev. 33 at 68.
[106] [1931] A.C. 662. Lord Wright in **Liversidge** makes an attempt to distinguish **Eleko** on the ground that **Eleko** involved an "ordinary administrative ordinance" while **Liversidge** was concerned with "an emergency power created to meet the necessities of the war and limited in its operation to the period of the war". **Liversidge v. Anderson**, supra, 273.

Source: Nikkei National Museum, 2018-16-4-6-3-41
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> investigating and resolving a factual dispute upon which the very right to make the order depends[107].

By that reasoning it would be open to the court to consider whether ethnicity was a sufficient criterion by which to determine a potential for subversion since the alleged purpose of the removal and detention of Japanese Canadians was for reasons of national security.

If the Canadian courts had had the opportunity to consider the detention of Japanese Canadians, and had chosen to follow the lead of Lord Atkin in **Liversidge** and the Privy Council in **Eleko**, Japanese Canadians might have been spared seven years of abuse. Lord Atkin's views and the **Eleko** decision might have been used to permit the court to examine the question of whether the ethnicity of Japanese Canadians was a sufficient criterion for detaining 20,881 otherwise loyal men, women and children, especially when German and Italian Canadians were not being similarly detained. Lord Atkin's views and the **Eleko** decision also suggest that the onus would be upon the Minister of Justice to prove that being Japanese was sufficient to threaten national security. The issue would then be reduced to an evidentiary question that could be satisfied, if ethnicity was a sufficient criterion, by testimony, in camera if necessary, of the proper security officials and the introduction of the appropriate

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[107] **Kelly v. Faulkner and Others** [1973] N.I.L.R. 31 (Q.B.) at 41.

Source: Nikkei National Museum, 2018-16-4-6-3-42
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military appreciations[108]. As the government's own documents show, however, those responsible for Canada's security opposed the removal and detention of Japanese Canadians and that the Chiefs of Staff Appreciation of February 19, 1942, seven days before the ministerial order uprooting Japanese Canadians, had characterized an invasion of Canada's west coast as "not ... a practical operation of war[109]."

A determined and unscrupulous government could still have frustrated the courts. Evidence contrary to the government's position could have been suppressed as it was in the United States[110]. The Minister could also claim privilege; that is, that national security reasons prevent the Minister from explaining to the court why ethnicity is a sufficient criterion. Finally the defendant Minister could ensure, as in the American case, that only those who supported his views were available to

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[108] In camera testimony was rejected in **Liversidge** by one Law Lord on the grounds that the petitioner would hear it and, if a traitor, would not keep silent after the trial. It is submitted that this position contains two flaws: it presumes the petitioner is guilty before trial; and it presumes that the court will not find grounds to support the Minister's belief that the detainee is disloyal, i.e., that even though the accused is a traitor he will be acquitted.

[109] J.L. Ralston Papers, MG27IIIB11, Vol. 37, PAC. See Sunahara, 43 for the complete quote.

[110] Documents obtained recently under the Freedom of Information Act demonstrate that the anti-subversion reason given by the Officer Commanding the Western Defense Command, General John L. DeWitt, for the removal of Japanese Americans was fabricated and evidence of Japanese American loyalty was suppressed. San Francisco **Chronicle**, January 19, 1983. See also p. 35 infra.

Source: Nikkei National Museum, 2018-16-4-6-3-43
www.nikkeimuseum.org

testify.

A review of the sufficiency of ethnicity as a grounds for detention would also serve another very important purpose: publicity. The publicity element in a case can often contribute as much to the preservation of justice as the decision of the court. Indeed the consideration of an issue by the court can sometimes achieve justice even where the court is forced to rule against a deserving plaintiff. Such was the case in the attempt to deport Japanese Canadians to be discussed later.

Any real hope that the Canadian Courts might follow the enlightened lead of Lord Atkin, however, is quickly shattered by the view of the Supreme Court of Canada in the **Chemicals Reference**[111]. That case concerned the ability of the Governor in Council to delegate his legislative and administrative powers under the War Measures Act and the ability of the Courts to canvass the considerations which led him to deem advisable the regulations so created or actions undertaken. The case is relevant to this analysis in both its aspects since the powers granted the Minister of Justice under P.C. 1486 were delegated powers and because, if the court found they could not review the sufficiency of ethnicity as a grounds for employing the powers of P.C. 1486, any case disputing the detention of Japanese Canadians would have publicity value only.

In the **Chemicals Reference** the Supreme Court of Canada

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[111] [1943] S.C.R. 1.

Source: Nikkei National Museum, 2018-16-4-6-3-44
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found that the Governor in Council had the authority to delegate his powers under the War Measures Act and that the ability of the court to review the considerations behind either the delegating order in council, or the orders or regulations made under it, was very limited. The War Measures Act by its express terms, the Court concluded, contained only two preconditions: (i) that a state of war exist; and (ii) that in the opinion of the Governor in Council the order in question was necessary[112]. Apart from these conditions, Duff C.J. stated,

> the validity of any Order or Regulation ... is affected by a twofold condition: that it would be enacted as a statute by Parliament, in the execution of its emergency powers or otherwise; and, further more, that Parliament is not precluded by the British North America Act or by any other lawful enactment concerning the legislative powers, from committing the subject matter of it to the Executive Government for legislative action[113].

Since the order in question in that case satisfied the above twofold conditions, Duff C.J. could not agree that any court was competent to canvass the considerations which led the Governor in Council to make the order[114]. Where the delegated powers are "employed in good faith and for the purposes for which they are given," he concluded, the court will not interfere[115].

It is unclear in the latter statement whether Duff C.J.

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[112] Ibid, 11.
[113] Ibid, at 10.
[114] Ibid, 12.
[115] Ibid, 13.

Source: Nikkei National Museum, 2018-16-4-6-3-45
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intended "in good faith" and "for the purposes for which they are given" to be conjunctive or disjunctive; that is whether they are synonymous or represent two different ways in which the delegated powers may be misemployed. Three years later the Privy Council apparently regarded the exercise of power for an unauthorized purpose as a reason by itself to invalidate an order under the War Measures Act[116]. The distinction is important because, as Lord Atkin observed, who could dispute that a member of the executive or a delegatee acted in bad faith "or disputing it could prove the opposite"[117]? Not only would it be necessary to overcome the evidentiary problems suggested above[118] but also the presumption on the part of the Courts that statutory powers will not be abused. Rinfret J. reiterated this idea in the **Chemicals Reference**. "In discussing these questions," he stated, "it should not be assumed that the powers granted will be abused. We are warned by the Privy Council, in many of its judgements on Canadian Constitutional Law, against such a line of discussion"[119]. An allegation that the powers were being used for purposes other than that for which they were given might better overcome the judicial reluctance to finding bad faith and the overtones of malfeasance inherent in allegations of bad faith. The court might be ready to find error where it would be

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[116] **Cooperative Committee on Japanese Canadians**, supra, 591.
[117] **Liversidge v. Anderson**, supra, 226.
[118] See page 25.
[119] **Chemicals Reference**, supra, 19-20.

Source: Nikkei National Museum, 2018-16-4-6-3-46
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reluctant to find abuse. In the Japanese Canadian situation allegations that the Minister of Justice had exceeded the objects of his delegated powers under P.C. 1486 might be more palatable to a court reluctant to undermine they emergency powers of a wartime government than would allegations of bad faith or abuse of power.

That the Supreme Court of Canada was determined to support the emergency powers of the government of the day is very evident in the **Chemicals Reference**. Rinfret J. perhaps best demonstrates this determination in his adoption of Viscount Maugham's statement in **Liversidge** that the proper approach to the construction of an emergency order or regulation is that "which will carry into effect the plain intention of those responsible for the order in council rather than one which will defeat that intention"[120]. Rinfret J. also concluded that the court need not concern itself with the potential for abuse inherent in emergency powers because possible abuses would be prevented by "the safety valve of our constitutional system of government" which he felt remained intact[121]. "Parliament", he states, "retains its powers intact and can, whenever it pleases take the matter directly into its own hands"[122].

Rinfred J.'s last conclusion raises a very serious

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[120] **Liversidge v. Anderson** supra, at 268 as quoted in the **Chemicals Reference**, supra at 24.
[121] Ibid, 26.
[122] Ibid, 20.

Source: Nikkei National Museum, 2018-16-4-6-3-47
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question: should the courts be using a fine point of law which in 1918 kept alive a badly drafted piece of legislation to justify the abdication of their traditional role as guardians of individual liberty? In **Re Gray**[123] the Supreme Court of Canada examined whether Parliament had abdicated its powers when it passed the War Measures Act and held that it had not done so because the executive receiving Parliament's powers was "dependent upon Parliament for the continuance of its official existence"[124]. As **Re Gray** acknowledged, the theoretical ability of Parliament to destroy the executive is the only "safety valve" in the War Measures Act. In reaching this fine point of technical law the court did not concern itself with the practical aspects of that power: with the fact that the executive are also members of Parliament, with party discipline and self-interest, and with the improbability that, even assuming party discipline could be broken, Parliament would destroy a government in a time of crisis over any issue except one so fundamental that the choice lay between destroying the executive and massive public anger. It takes only a rudimentary knowledge of history to understand that the tolerance of the general public for the abuse of others in the name of national security is uncomfortably very great. To presume, therefore, that the remote possibility that a government might be destroyed for the misexercise of its

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[123] (1919) 57 S.C.R. 150.
[124] Ibid, 171.

Source: Nikkei National Museum, 2018-16-4-6-3-48
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emergency powers to detain individuals is the least naive. It is submitted that the reliance of the court upon the largely theoretical ability of Parliament to control the executive is misplaced. Indeed the minimal control of Parliament over an executive in wartime should increase the onus on the courts to fulfill their role as a protector of individual and collective liberty.

In addition to the reliance on **Re Gray**, the Supreme Court of Canada also rests its faith in parliament upon the statements by the Law Lords in British cases[125]. The use of British cases in this manner ignores fundamental differences between Canada and British emergency legislation. In **Liversidge**, one of the cases so used, the Law Lords took pains to emphasize that the Home Secretary's powers were limited in a number of ways: the legislation was expressly limited in duration; the Home Secretary had to report to Parliament monthly; and he was assisted by an advisory committee that reviewed each case. Most importantly, in direct contrast to the Canadian legislation, the British Parliament could annul orders in council passed under their emergency legislation[126]. In Britain, unlike Canada, Parliament had retained real not illusory control over the executive.

The stand of the courts in the **Chemicals Reference**,

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[125] **Chemicals Reference**, 25-27, Davis J.
[126] **Liversidge** 222, 223, 252, 255.

Source: Nikkei National Museum, 2018-16-4-6-3-49
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however, does not leave Japanese Canadians totally without hope. A slender ray of hope may be found in the fact that the Supreme Court in the **Chemicals Reference** did not consider the comments in the **Liversidge** and **Greene** cases to the effect that the presumption that the order was legal was prime facie only; that is rebuttable. As Viscount Maugham noted in **Greene**, it is for the prisoner to prove the facts necessary to controvert an order or warrant which appears valid on its face. He agreed also with opinion of 19th century Justices that if the warrant "declares the grounds of adjudication," the courts in many cases would examine into its validity[127]. Lord Maughan's statements have been subsequently interpreted as meaning that evidence of not only bad faith but that "the state of mind of the Minister which induced the order depended upon the application of incompetent standards or the admission of irrelevant considerations" could rob an order of efficacy[128]. The question arises, therefore, whether the ministerial order uprooting and detaining "all persons of Japanese racial origin" was an administrative order that can be challenged as being based on an irrelevant consideration, ethnicity. It might be argued that the only relevant consideration for orders under P.C. 1486 was the suspect loyalty of the individuals affected. It might also be argued that while evidence existed which indicated that individuals or even groups

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[127] **Greene v. Secretary of State for Home Affairs**, supra. 295.
[128] **Kelly v. Faulkner**, supra, 41.

Source: Nikkei National Museum, 2018-16-4-6-3-50
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within the minority sympathized with Japan, evidence that might justify the detention of those individuals, there existed no evidence to justify the detention of an entire population on the basis of its ethnicity alone, especially since German and Italian Canadians were not also being similarly detained.

The fact, however, remains that wartime courts were unlikely to adopt any view but that of the majority in **Liversidge v. Anderson.** Moreover, the success of any possible alternative argument would very much depend upon the Japanese Canadians being able to prove their loyalty and the absence of relevant grounds for their removal as a group. The difficulties of that task are self-evident. It is very probable, therefore, that any attempt to question the removal and detention of Japanese Canadians in 1942 would have had publicity value only. Whether such publicity would have moved Canadians to protest in 1942 as they did in 1946 is open to question.

(ii) Today

To speculate on how the courts today would resolve a legal protest by Japanese Canadians of their removal and detention requires consideration of both the common law and the Canadian Charter of Rights and Freedoms[129]. The possibilities arising from the common law are best demonstrated by the case of **Kelly v. Faulkner**, arising from the ongoing crisis in Northern

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[129] In the Constitution Act, 1982, Public Statutes, 29 & 30 Elizabeth II, c. 11 (U.K.).

Source: Nikkei National Museum, 2018-16-4-6-3-51
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Ireland, and by the **Reference Re: The Anti-Inflation Act**[130]. As noted previously, the court in **Kelly** found that the mere proof of a detention order under Northern Ireland's emergency legislation[131] was not sufficient to preclude a court from investigating and resolving a factual dispute upon which the right to make that order depended. The case also stated the principle that not only bad faith but the application of incompetent standards or irrelevant considerations could rob such orders of efficacy[132]. The latter statement implies that a court may consider not only the facts upon which an order depends but also whether irrelevant considerations entered into the decision to issue the order. That interpretation would enable counsel for persons detained today, as Japanese Canadians were in 1942, to argue that ethnicity was an irrelevant consideration since ethnicity alone is not an indication of potential for subversion.

The **Anti-Inflation Reference**, however, raises some very real problems. In that case seven of the nine Justices of the Supreme Court of Canada adopted statements by Lord Wright in **Cooperative Committee On Japanese Canadians v. A.G. Canada**[133] that

> ...very clear evidence that an emergency has not arisen, or no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling

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[130] (1976) 68 D.L.R. (3d) 452.
[131] Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (12 & 13 Geo 5, c. 5).
[132] **Kelly v. Faulkner**, supra, 41.
[133] [1947] 1 DLR 577.

Source: Nikkei National Museum, 2018-16-4-6-3-52
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> the decision of the Parliament of the Dominion that exceptional measures were required or were still required[134].

This adoption raises the question as to which emergency must be disproved: the real or apprehended war; invasion or insurrection that precipitate the invocation of the War Measures Act; or the circumstances of the alleged emergency that has precipitated the contested legislation? In the **Cooperative Committee on Japanese Canadians** case the Privy Council implied that the fact that the executive had not yet declared the precipitating war or insurrection to have ended was sufficient in the absence of very clear evidence to the contrary to justify the order[135].

The stance of the Privy Council is disturbing because by that reasoning any order in council, no matter how tenuously linked to the emergency that precipitated the proclamation of the War Measures Act, could be justified by the fact of that proclamation. For example, an order in council could be passed requiring that the north, south, east and west faces of all buildings be painted certain different colours on the grounds that the measure would aid pilots in navigation. It would be far more logical and sensible that the validity of such an order in council should depend upon a real or apprehended emergency in navigation. It is submitted that Parliament could not have intended that the existence of a proclaimed emergency should be

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[134] Ibid, 585-586.
[135] Ibid.

Source: Nikkei National Museum, 2018-16-4-6-3-53
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sufficient grounds for every order in council no matter how frivolous or draconian. Surely Parliament did not intend, for instance, that the proclamation of the War Measures Act in 1970, generated by the F.L.Q. crisis in Quebec, should legitimate the arrest of drug addicts in Vancouver if the Cabinet had passed an order in council to that effect? It is far more logical that Parliament intended that the court should consider whether the orders in council passed under the War Measures Act are in fact emergency legislation in the sense of legislation to cope with an emergency, not legislation passed under emergency powers for a purpose unconnected or tenuously connected with the war, invasion or insurrection that happens to exist.

The **Anti-Inflation Act Reference** also raises problems in the standard it sets for determining whether an emergency exists. For three Justices[136] the failure of those opposed to the legislation to disprove the existence of the alleged emergency was sufficient to establish the validity of that emergency[137]. More importantly for Laskin CJ., writing for himself and three others[138], it was only necessary that there be a "rational basis for the governmental and legislative judgement exercise in the enactment" of emergency legislation[139]. Does this conclusion mean that even where a Japanese Canadian could prove, in the words of

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[136] Ritchie, Martland and Pigeon JJ.
[137] **Anti-Inflation Act Reference**, supra, 509.
[138] Judson, Spence, and Dickson JJ.
[139] **Anti-Inflation Act Reference**, 487.

Source: Nikkei National Museum, 2018-16-4-6-3-54
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Lord Atkin, "that he or she had been a loyal subject for thirty or forty years, was a supporter of the country's war effort, and had never taken part in any hostile activity"[140], his or her detention would be justified if the government could offer a rational basis for the detention order? If so, what would constitute a "rational basis": a public speech by the Minister? The preamble to the legislation[141]? Statements by officials that the presence of unascertained potentially disloyal persons within a group necessitated the detention of the entire group regardless of age, sex, health or record of loyalty[142]?

If the rational basis standard used in the **Anti-Inflation Act Reference** were applied to all emergencies, whether peacetime or wartime, it would further limit the already self-limited ability of the courts to aid in maintaining even rudimentary civil liberties in time of crisis. In the pre-**Anti-Inflation Act Reference** cases the court had largely limited itself in time of crisis to the role of declaring "that an

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[140] **Liversidge v. Anderson**, supra, 243.

[141] This was sufficient in the **Reference Re Japanese Canadians** supra, 264 and in the **Anti-Inflation Act Reference**. See Edward P. Belobaba, "Disputed" Emergencies "and the Scope of Judicial Review: Yet Another Implication of the Anti-Inflation Act Reference", (1977) Osgood Hall L.J. 406 at 410.

[142] Similar statements by American military were sufficient to allow the United States Supreme Court to support Executive Order 9066 uprooting and detaining 110,000 Japanese Americans. See **Hirabayashi v. U.S.** (1943) 320 U.S. 81 at 99. See also page 34 infra. For a summary of the Canadian and American cases see E. Hudon, "The Status of Persons of Japanese Ancestry in the United States and Canada During World War II: A Tragedy in Three Parts" (1977) C de D 61.

Source: Nikkei National Museum, 2018-16-4-6-3-55
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emergency has terminated or that it never actually arose"[143]. Moreover the court has also limited itself when making those declarations to a consideration of only whether the precipitating emergency still exists or had never arisen. Laskin C.J.'s rational basis test appears, therefore, to further narrow judicial options in time of crisis by cutting off the arguments of those opposing emergency legislation by legitimizing the contested legislation as soon as the executive offers a rational basis for it. It would appear, therefore, that while the developments of the common law since the Second World War raise tantalizing hopes for the victims of regulation under the War Measures Act, they also raise formidable obstacles.

Today, however, the victims of regulation under the War Measures Act have an additional legal weapon: The Canadian Charter of Rights and Freedoms. In his pre-Charter article on emergency power and civil liberties in Canada, legal academic Herbet Marx concluded that an entrenched "Bill of Rights" would effectively increase the role of the courts in preserving liberties in times of emergency[144]. His conclusion appears to have been based on the presumption that, like its American counterpart, any entrenched Canadian "Bill of Rights" would afford legal protection at all times. The inclusion in the Canadian Charter of Rights and Freedoms of section 33 by which

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[143] Herbert Marx, supra, 91.
[144] Ibid.

Source: Nikkei National Museum, 2018-16-4-6-3-56
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Parliament or a legislature may pass laws notwithstanding the fundamental freedoms and legal and equality rights in the Charter, casts doubt upon Marx' optimistic conclusion. The usefulness of the Charter of Rights to the victims of regulation under the War Measures Act, therefore, may depend upon the legal effect of a section 33 notwithstanding clause either in the War Measures Act itself or in specific orders in council passed under it.

Considering first the situation in which Parliament chooses not to amend the War Measures Act to include a section 33 notwithstanding clause, the question arises as to whether an executive operating under the War Measures Act could validly include a section 33 notwithstanding clause in an order in council. The answer may be yes. Section 33 provides that "Parliament ... may expressly declare in an Act of Parliament ... that the Act or a provision thereof shall operate notwithstanding" a provision in the fundamental freedom or legal and equality rights section of the Charter. In the **Chemicals Reference** the Supreme Court of Canada stated that the executive under the War Measures Act is vested with "plenary powers of legislation as large and of the same nature as those of Parliament itself" and that orders in council under that Act "may have the effect of an Act of Parliament"[145]. In **Re Gray**, however,

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[145] Supra, 17,9.

Source: Nikkei National Museum, 2018-16-4-6-3-57
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the same court had earlier stated that the War Measures Act made no attempt to substitute the executive for Parliament in the sense of distributing the balance of constitutional authority[146]. The question then arises as to whether the powers delegated by Parliament to the executive under the War Measures Act include Parliament's power under section 33 to nullify the rights guaranteed in the Charter. In the **Chemicals Reference** Duff C.J. concluded that the only limitations on orders deemed necessary by the Governor in Council in time of war were that Parliament could have enacted the order as a statute and that Parliament was not precluded by what is now the Constitution Act from committing the subject matter to the executive[147]. That statement suggests that the executive can indeed assume Parliament's powers under section 33 of the Charter unless the fact that the Charter was passed subsequent to the War Measures Act is held to mean that Parliament, when it passed that Act, could not have intended to delegate its section 33 powers to the executive.

Even if the executive could not exclude the operation of the Charter, victims of regulation under the War Measures Act would not necessarily be protected by the Charter. The rights and freedoms "guaranteed" by the Charter are also limited under section one to "such reasonable limits prescribed by law as can be demonstrably justifiable in a free and democratic society."

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[146] Supra, 170.
[147] Supra, 10.

Source: Nikkei National Museum, 2018-16-4-6-3-58
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As yet the standards by which the courts will test an alleged violation of the charter are unknown. That standard could range from the stringent compelling governmental purpose test which would require the executive to prove that the order was necessary to preserve Canadian society, to the weak scrutiny of the rational basis test where, as in the **Anti-Inflation Act Reference**, it would be sufficient that the executive state that an order was necessary. If the court were to conclude that the rational basis test used to evaluate peacetime economic legislation will also be the standard they will employ in times of "real or apprehended war, invasion or insurrection", then the Charter may afford the victims of regulation under the War Measures Act no more protection than the common law.

If P.C. 1486 were litigated today and if the court adopted the standard used by the United States Supreme Court in 1943, an order in council uprooting and detaining Japanese Canadians would be constitutional if it were enacted as a defense measure "for the avowed purpose of safeguarding the military area in question...from the danger of sabotage and espionage"[148]. In **Kiyoshi Hirabayashi v. United States**[149] the U.S. Supreme Court considered the question of whether the Executive could reasonably have concluded on the evidence adduced before the court that there were unascertainable elements within the Japanese American

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[148] **Kiyoshi Hirabayashi v. United States** 63 S. St. 1375 at 1383.
[149] Supra.

Source: Nikkei National Museum, 2018-16-4-6-3-59
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community with "continued attachment" to Japan and the Japanese institutions. "Whatever views we may entertain regarding the loyalty to this country of citizens of Japanese ancestry," Chief Justice Stone concluded,

> we cannot reject as unfounded the judgement of the military authorities and of Congress that there were disloyal members of that population whose numbers and strength could not be precisely and quickly ascertained. We cannot say that the war making branches of Government did not have ground for believing that in a critical hour such persons could not be readily isolated and separately dealt with[150].

The triple negative in the above statement appears to mean that, in the view of the U.S. Supreme Court, the removal and detention of Japanese Americans was constitutional where the executive alleged it was undertaken for the purpose of isolating unascertainable disloyal elements within that ethnic minority.

Before we conclude on the basis of the **Hirabayashi** case that the Canadian, or even the American, courts would reach the same conclusion today, it is important to note two caveats. First, as was not the case in Canada, the Executive order authorizing the removal and detention of Japanese Americans was ratified by congress[151]. Secondly, documents, including military and F.B.I. reports, recently released under the Freedom of Information Act indicate that at Hirabayashi's trial evidence was

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[150] Ibid, 1385
[151] Ibid, 1381.

Source: Nikkei National Museum, 2018-16-4-6-3-60
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suppressed by the prosecutor, evidence that contradicted allegations by certain military officers that Japanese Americans were in contact with the enemy and that separating the potentially disloyal from the loyal majority of Japanese Americans was impossible[152]. In view of this evidence and the reopening of the **Hirabayashi** case, that case may be shortly no longer good authority.

The **Hirabayashi** case clearly demonstrates the importance of evidence to the victims of regulation under the War Measures Act. The government's own files, in the case of Japanese Canadians, establish that Canadian authorities had already separated out those they considered potentially disloyal and were continuing to monitor the Japanese minority. It would have been relatively difficult for the Canadian authorities to defend a "national security" stance without consciously suppressing the evidence of Canada's senior military and police officers.

The problem of which standard would be used by the court also arises should Parliament chose to amend the War Measures Act to include a section 33 notwithstanding clause. While such a clause would prevent persons in the position of

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[152] See Seattle **Post-Intelligence**, February 1, 1983, A4, and San Francisco **Chronicle**, January 2, 1983, 2. The author has also seen copies of similar documents in the possession of Dr. Peter Irons, Professor of Law, University of California at San Diego and counsel for Gordon Kiyoshi Hirabayashi in his recent petition to overturn his conviction.

Source: Nikkei National Museum, 2018-16-4-6-3-61
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Japanese Canadians in 1942 from claiming the protection of sections 7, 9, 10, and 15[153] of the Charter, they might still be able to claim the protection of section six, the mobility rights section. Section six raises two issues: (i) whether the right to "remain in Canada...and take up residence in any province" means the right to remain in <u>all parts of</u> Canada and to take up residence in <u>all parts of</u> any province, and if so; (ii) whether restrictions on the mobility of Japanese Canadians in 1942 were "demonstrably justifiable in a free and democratic society."

The first issue arises because Japanese Canadians in 1942 were permitted to remain in Canada. They were denied only the right to remain in that portion of Canada within 100 miles of the Pacific Coast, a portion freely available to all other residents of Canada. Similarly they could reside in any province (with the permission of the authorities) although not in all parts of British Columbia. Should the courts rule that the rights guaranteed by section six do not require universal access to all parts of Canada for every citizen and permanent resident, then the Canadian Charter of Rights and Freedoms would provide no protection to Canadians facing a forced removal like that faced by Japanese Canadians in 1942.

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[153] Respectively the right not to be deprived of life, liberty and security of the person, the right not to be arbitrarily detained or imprisoned, the right to have the validity of detention determined by way of <u>habeus corpus</u>, and the right to the equal protection and equal benefit of the law without discrimination.

Source: Nikkei National Museum, 2018-16-4-6-3-62
www.nikkeimuseum.org

Should the courts rule, however, that section six requires universal access to all parts of Canada then the second issue arises: was the denial of the mobility rights of Japanese Canadians in 1942 "demonstrably justifiable in a free and democratic society"? This is essentially the same issue addressed by the U.S. Supreme Court in **Ex Parte Mitsue Endo**[154]. In that case a female American citizen of Japanese ancestry who had been uprooted from Sacramento, California and detained in the Tule Lake Relocation Center petitioned by way of habeus corpus alleging that she was a loyal and law-abiding citizen against whom no charge had been made, and that she was being unlawfully detained against her will in the relocation center. Her loyalty was undisputed. She had already been cleared by the authorities for "relocation" anywhere in the United States outside the prohibited Pacific zone.

The issue before the U.S. Supreme Court was whether her continued detention and denial of access to the Pacific zone was constitutionally justifiable. The justification offered by the authorities was essentially a protective custody justification; that is, that it was necessary to control the movement of Japanese Americans to spare them the hardship and disorder that might arise from their residence in communities that were not prepared to tolerate them. The court firmly rejected that

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[154] (1944) U.S. 283.

Source: Nikkei National Museum, 2018-16-4-6-3-63
www.nikkeimuseum.org

reasoning. "If we assume (as we do)", the court held,

> that the regional evacuation [of Japanese Americans] was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. ... The authority to detain a citizen or to grant him a conditional release ... is exhausted at least when his loyalty is conceded. ... When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized[155].

Loyal citizens, the court concluded, could not be denied access to those parts of the United States available to other loyal citizens. If the Canadian courts today were to use the same standard as the American courts used in the **Endo** case, then disloyalty alone would make the denial of mobility rights demonstrably justifiable in a free and democratic society.

The Charter of Rights, therefore, may be of limited utility to persons in the position of Japanese Canadians in 1942. As the **Hirabayashi** case clearly demonstrates, however, its utility may well be predicated on the quality of evidence adduced by the petitioner. In the case of Japanese Canadians the evidence clearly exists to show that the detention of Japanese Canadians was not a national security measure but an act of political opportunism.

(b) <u>P.C. 469: Dispossession</u>

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[155] Ibid, 302.

Source: Nikkei National Museum, 2018-16-4-6-3-64
www.nikkeimuseum.org

(i) Circa 1943 - 1947

The validity of P.C. 469 authorizing the Custodian of Enemy Property to sell all property owned by Japanese Canadians within 100 miles of the Pacific Coast, was litigated. In July 1943, as soon as it became evident that the policy was to sell everything, three Japanese Canadians - an alien, a naturalized citizen, and a Canadian-born Japanese - filed petitions of right in the Exchequer Court of Canada seeking an mandamus order preventing the Custodian from selling Japanese Canadian property[156]. Although such petitions were usually heard within two months, permission to argue these petitions was not granted until May 1944, ten months after they were filed. At trial the supplicants argued that by the terms of s. 12 of P.C. 1665 of March 4, 1942 and the forms by which they has "voluntarily"[157] signed over their property to the Custodian, the Custodian held their property only for the purpose of protective custody for the duration of their absence from the Pacific Coast. Alternatively, they argued, the Custodian has acquired their property upon trust under the condition that it was to be held in trust and returned when the coastal area had ceased to be a protected area. In the

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[156] **Nakashima et al. v. The King** [1947] Ex. C.R. 486

[157] The voluntariness of signing over their property is open to question. It was illegal to leave property in the care of anyone else. Unless they liquidated their property, Japanese Canadians had no more choice about signing over the administration of their property to the Custodian than the Jews in Germany had about accepting the price "offered" by the Nazis for their property.

Source: Nikkei National Museum, 2018-16-4-6-3-65
www.nikkeimuseum.org

further alternative they argued that some or all of the orders in council governing the property of Japanese Canadians[158] were invalid, unconstitutional and ultra vires[159]. The Crown countered that the petition showed no cause of action against the Crown because the Custodian of Enemy Property is not a servant of the Crown but and independent person in respect of whose acts a petition of right does not lie against the Crown[160].

Following argument on this latter point Mr. Justice Thorson, President of Exchequer Court and former member of the Cabinet[161] that had uprooted and detained Japanese Canadians, reserved his decision on the Crown's argument for three years. While Thorson P. procrastinated the Custodian sold off all real and personal property owned by Japanese Canadians within one hundred miles of the Pacific Coast. In August 1947, two years after the end of the Pacific War, Thorson P. denied the supplicants any relief. On the basis of the Custodian's wide discretionary powers and the fact that he was subject only to the legislative, not the executive, control of the Governor in Council, Thorson P. held that the Custodian was not a servant of the Crown and that no petition of right lay against the Crown

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[158] P.C. 1665, March 4, 1942, P.C. 2483, March 27, 1942 and P.C. 469, January 19, 1943.
[159] supra, 490-491.
[160] Ibid, 491.
[161] Thorson left the Cabinet on October 6, 1942, three months before P.C. 469 but after the policies with respect the Japanese property had been initiated. See page 10 supra.

Source: Nikkei National Museum, 2018-16-4-6-3-66
www.nikkeimuseum.org

with respect to the Custodian's actions under P.C. 469.

Thorson P. did not stop there. In obiter dictum he went on to give his opinion with respect to the validity of P.C. 469 and the merits of the supplicant's argument that the Custodian was in breach of trust. Accepting that counsel for the supplicants had conceded that the order under which Japanese Canadians were removed and detained was a valid war measure and the P.C. 1665 vesting property in the Custodian was also a valid was measure necessarily incidental to that removal, Thorson P. rejected counsel's argument that there was a vital difference between the right to authorize control and management of property and the right to authorize sale. The latter, supplicants' counsel had argued, was not intra vires the Governor in Council as ancillary to the removal and detention of Japanese Canadians. Orders in council under the War Measures Act, they argued, must be for the attainment of war objects or for national security. The sale of Japanese Canadian property, they contended, was not a war measure and, therefore, not within the competence of the Governor in Council[162].

Whether an order in council is intra vires the Governor in Council, Thorson P. stated, depends upon whether the requirements of the War Measures Act have been complied with. "If the answer to this question is in the affirmative," he

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[162] Ibid, 499-500.

Source: Nikkei National Museum, 2018-16-4-6-3-67
www.nikkeimuseum.org

continued,

> then it is clear that the Court has no right to question the decision of the Governor in Council as to the necessity or advisability of the measure. ... The Court [in the **Chemicals Reference**] made it clear that the authority vested in the Governor in Council is legislative in character and of the same nature and subject to the same limitation as that possessed by Parliament[163].

Concluding that the preconditions prescribed by the War Measures Act had been satisfied in this case, Thorson P. stated that the matter had been "conclusively settled" by the Supreme Court of Canada in the **Reference Re Persons of Japanese Race**[164] where four Justices concluded that is was not competent to any court to canvass the considerations which led the Governor in Council to deem the orders necessary or to substitute their views for those of the Governor in Council[165]. Their views, he noted, has been confirmed by the Privy Council which held that it was not pertinent to the judiciary to consider the wisdom or propriety of the particular policy embodied in the emergency legislation[166]. Like Duff C.J. in the **Chemicals Reference** Thorsen P. concluded that only Parliament could validly challenge the exercise of legislative powers by the Governor in Council under the War

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[163] Ibid, 501.
[164] [1946] S.C.R. 248. This reference went on to the Privy Council as **Cooperative Committee on Japanese Canadians et al. v. A. G. Canada et al.** supra.
[165] **Nakashima** supra, 502-503.
[166] Ibid.

Source: Nikkei National Museum, 2018-16-4-6-3-68
www.nikkeimuseum.org

Measures Act and that "the corrective power is in its hands"[167].

Turning to the allegation of breach of trust, Thorson P. concluded that there was no contract to breach. Japanese Canadian property had been vested in the Custodian not by any contract created when they signed the Custodian's forms but by legislative enactment. The properties would have vested in the Custodian, he stated, even if the supplicants had not signed the form. Thorson P. therefore considered it unnecessary to consider whether the Custodian was a trustee of the properties[168].

The **Nakashima** case ultimately rests upon the validity of the order removing and detaining Japanese Canadians. In **Nakashima** that point of law was conceded by counsel for the supplicants. As was shown earlier those orders may not have been valid. If the uprooting and detention of Japanese Canadians was ultra vires the Governor in Council as an abuse of power, then all orders in council ancillary to it were also ultra vires. The Custodian, therefore, had no legal power to sell all Japanese Canadian property.

(iii) Today

Today the **Nakashima** case raises a number of questions, not the least of which is whether the delays involved and the potential bias of the judge constitute a miscarriage of justice. On the question of bias the Supreme Court of Canada has since

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[167] Ibid, 504.
[168] Ibid, 505.

Source: Nikkei National Museum, 2018-16-4-6-3-69
www.nikkeimuseum.org

held that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is grounds for disqualification" and for a new trial[169]. That apprehension must be based on evidence which might reasonably lead one of the litigants to feel he might not receive a fair trail[170]. However, the potential for bias on the part of Thorsen P. from his previous connection to the Cabinet cannot be raised afterward by the litigant if it has not been raised at trial[171]. It is unclear, however, whether that limitation applies to the conduct of a judge after trial. Thorsen P.'s conduct, whether deliberate or only negligent, paralysed legal opposition to the sale of Japanese property leaving the government free to implement its repressive policies. His conduct prevented Japanese Canadians from launching other protests, robbing them of an opportunity to seek justice. A new trial on the basis of Thorsen P.'s apparent bias might well serve, in view of the law and the evidence available today to achieve belated justice for Japanese Canadians.

While the ratio decendendi in Nakashima has been followed elsewhere,[172] Thorsen's opinion that there was no trust has been consider twice and rejected once. In **Iwasaki v. The Queen**[173] a Japanese Canadian attempted to relitigate the issue in

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[169] **Blanchette v. C.I.S. [1973] S.C.R. 833 at 843.**
[170] **R. v. May** (1940) 15 M.P.R. 275 (P.E.I.).
[171] **R. V. Steet** (1895) 2. C.C.C. 433 (Ont. C.A.).
[172] **Laurent v. The Queen** (1976) 66 D.L.R. (3rd) 764.
[173] [1969] 1 Ex C.R. 281.

Source: Nikkei National Museum, 2018-16-4-6-3-70
www.nikkeimuseum.org

a petition alleging that the Custodian as trustee for the supplicant committee a breach of trust when he sold the supplicant's land without any power of sale and that the Crown is liable for the acts of the Custodian by respondent superior. In defense the Crown successfully pleaded that there was no trust and hence no breach of trust and that the supplicant's claim was barred by release. In concluding that there was no trust the trial judge, Sheppard D.J., drew upon Thorsen P.'s analysis of the discretionary powers of the Custodian and concluded that "those powers, and particularly the discretionary powers of the Custodian are inconsistent with any trust"[174].

That conclusion was strongly criticized in **Laurent v. The Queen**[175] in which a Canadian woman married to a Belgium and trapped in Belgium during the Second World War, was seeking compensation for property sold by the Custodian as enemy property for a "ridiculously low price." Commenting on Sheppard D.J.'s conclusion in **Iwasaki**, Addy J. stated:

> Absolute discretionary power to sell and deal with property and to pay expenses incurred can easily be reconciled with the existence of a "trust" (as recognized at common law) relating to the net proceeds from the sale and possibly relating also to the property itself in cases where the Custodian has not disposed of it before the former owner, being a Canadian ... have[sic] ceased to claim his property.

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[174] Ibid, 290.
[175] supra.

Source: Nikkei National Museum, 2018-16-4-6-3-71
www.nikkeimuseum.org

Although compelled to dismiss the **Laurent** petition because the Custodian was not a servant of the Crown, Addy J. went on to comment that he could not understand why **ex gratia** compensation had not been paid on the principle that "burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals"[176]. "This principle", Addy J. continued,

> ... should be applied by the Federal government not only where property is expropriated for war purposes or where compensation is authorized by statute, but also in those cases where it would be fair and reasonable to reimburse the claimant[177].

By that reasoning Japanese Canadians should have been compensated for not only their economic losses but also for the high social and emotional price they paid to satisfy the political ambitions of Ian Mackenzie.

In addition to his questionable finding that there was no breach of trust, Sheppard D.J. in **Iwasaki** also held that the supplicant was barred by reason of the release he signed in 1950[178]. At that time the supplicant was paid a sum in addition to the Custodian's selling price on the recommendation of the Royal Commission that investigated the sale of Japanese property

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[176] Ibid, 767 quoting Moulton L. J. in **Attorney General v. De Keyser's Royal Hotel Ltd** [1920] A.C. 508 (H.L.).
[177] Ibid.
[178] **Iwasaki** supra, 298-299.

Source: Nikkei National Museum, 2018-16-4-6-3-72
www.nikkeimuseum.org

by the Custodian[179]. By that release made under seal to both the Crown and the Custodian the signatory gave up all rights to further claims against either the Custodian or the Crown[180].

The government's own documents raise serious questions about the conscionability of these releases. Those documents show the government knew when it created the Royal Commission that the direct economic losses incurred by Japanese Canadians were far greater than those it empowered the Commission to investigate[181]. Moreover, surveys by Japanese Canadians made available to the government had clearly demonstrated that the indirect losses were at least as great[182]. In addition to knowing when they demanded the releases that signatories had further valid claims for compensation, the government demanded those releases in circumstances which emphasized the continuing inequality between the parties to the release. The monies being paid under those releases were for losses incurred before 1945 which were to be paid in deflated 1951 dollars without interest. Impoverished by the government's policy of making inmates pay for

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[179] Known as the Bird Commission the mandate of this Royal Commission was very limited. For details see Sunahara, supra, 152-159.

[180] One wonders why the releases were to both the Custodian and the Crown if the Crown did not hold itself responsible for the actions of the Custodian.

[181] Cabinet Document JAP 5, F.P. Varcoe, Deputy Minister of Justice, to Dr. E.H. Coleman, Under-Secretary of State, (responsible for the office of the Custodian) B.C.S.C. Papers. RG 36/27 Vol. 34 file 2201 PAC.

[182] See Sunahara 151-153, 174-175.

Source: Nikkei National Museum, 2018-16-4-6-3-73
www.nikkeimuseum.org

their own incarceration, most signatories were dependant upon the monies paid by the Royal Commission to support themselves and to rebuild their lives almost ten years after their detention. Moreover, unless the signatories agreed to the releases, the government would not contribute a promised $50,000 toward the legal expenses incurred by Japanese Canadians in making their claim to the Bird Commission. The releases were intended solely to insulate the government from the further embarrassment of acknowledging that, in the case of the Japanese Canadians, the burden borne allegedly for "the good of the nation" would fall on only the victims of its repressive policies.

While the ratio decedendi of the **Nakashima** case is unquestionably valid, that ratio did not settle the legal status of P.C. 469. The obiter comments on P.C. 469 in that case are predicated on the possibly invalid concession that the removal and detention of Japanese Canadians was intra vires the Governor in Council. Moreover, in reaching his decision that the courts cannot consider the necessity of an alleged emergency measure Thorson P. failed to consider Duff C.J.'s qualifying statement in the **Chemicals Reference** that the court will interfere where the delegated powers are not "employed in good faith and for the purposes for which they are given"[183]. It is submitted that Thorson P. erred in failing to consider this qualifying statement

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[183] Supra, 13.

Source: Nikkei National Museum, 2018-16-4-6-3-74
www.nikkeimuseum.org

and in rejecting as a consequence the supplicants' argument that P.C. 469 was ultra vires because it was not passed for reasons of national security. Japanese Canadians, therefore, were illegally stripped of their property.

(c) P.C. 7355: Deportation

(i) Circa 1946

The attempt to deport Japanese Canadians under P.C. 7355 was not only litigated, it was ruled upon by the highest courts: the Supreme Court of Canada in the **Reference Re Japanese**[184], and the Privy Council in **Cooperative Committee on Japanese Canadians et al. v. A.G. Canada et al**[185]. This time there were no delays as there had been in the **Nakashima** case. The Supreme Court reference was heard on January 24, 1946 only 20 days after counsel for the deportees threatened to initiate habeus corpus proceedings on behalf of each unwilling deportee[186].

Counsel for the deportees[187] advanced three arguments. Firstly, they argued P.C. 7355 was "wholly ultra vires" the

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[184] [1946] S.C.R. 248.
[185] [1947] 1 D.L.R. 577.
[186] Memorandum, F.P. Varcoe, Deputy Minister of Justice to Norman Robertson, Under-Secretary of State for External Affairs, January 4, 1946, Kings Papers, MG26J4, Vol. 283, file 2965, P.A.C.
[187] The Cooperative Committee on Japanese Canadians was a coalition of representatives of over thirty organizations, mostly non-Japanese including the major churches, labour unions, civil liberties and professional organizations, the National Council of Women and the Canadian Jewish Congress. For a complete list see Sunahara, supra, 196, n. 16.

Source: Nikkei National Museum, 2018-16-4-6-3-75
www.nikkeimuseum.org

Governor in Council on five grounds: (i) that the word "deportation" in Section 3 of the War Measures Act meant only "the forcible removal of aliens"; (ii) that the banishment of subjects was prohibited by section 60 of the habeus corpus Act[188]; (iii) that the banishment of nationals on racial grounds was contrary to international law; (iv) that P.C. 7355 was repugnant to the British Nationality and Status of Aliens Act[189] to which the Colonial Laws Validity Act of 1865 applied and hence since Parliament could not pass laws repugnant to Imperial Statutes neither could the Governor in Council; and (v) that the words "Japanese race" within P.C. 7355 were so vague as to make the provision unenforceable[190]. Secondly they argued paragraph 9 of P.C. 7355 which deemed persons held for deportation to be in legal custody deprived a person of his rights to have his detention determined by way of habeus corpus and as such conflicted with section 5 of the War Measures Act which contemplated such proceedings with the consent of the Minister of Justice. Since the War Measures Act was paramount, paragraph 9 was beyond the powers of the Governor in Council. Contending that paragraph 9 was not severable, they argued that defect rendered P.C. 7355 ultra vires. In the alternative counsel argued that the order was ultra vires with respect to the

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[188] 31 Charles II, c. 2.
[189] 4 & 5 Geo 5, c. 17.
[190] **Reference Re Japanese, supra, 266-267.**

Source: Nikkei National Museum, 2018-16-4-6-3-76
www.nikkeimuseum.org

deportation of the Canadian-born and the unwilling dependents of deported males because it failed to show on its face that the Governor in Council had deemed necessary the deportation of those classes of persons.

On February 20, 1946, less than a month after the argument, the Supreme Court handed down a divided decision. While holding unanimously that the deportation of aliens and naturalized citizens was legal, the seven Justices split 5 to 2[191] in favour of the legality of deporting the Canadian-born, and 4 to 3[192] against the legality of deporting the unwilling dependents of male deportees. Moreover, they unanimously held that paragraph 9 had not deprived unwilling deportees of the right to have the validity of their detention prior to deportation determined by way of habeus corpus. The ruling meant that the federal government could legally deport most of the 6400 adults who signed "repatriation" applications but not their 3500 dependents. More importantly, it meant that any unwilling deportee could contest his deportation on the grounds, among others, that his signature was induced by misrepresentation and coercion[193].

Rinfret C.J. writing for himself and two others[194],

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[191] Rand and Kellock J.J. dissenting.
[192] Rand, Kellock, Estey and Hudson J.J. v. Rinfret C.J., Kerwin and Taschereau J.J.
[193] **Reference Re Japanese Canadians** supra, Hudson J. at 282.
[194] Kerwin and Taschereau J.J.

Source: Nikkei National Museum, 2018-16-4-6-3-77
www.nikkeimuseum.org

found P.C. 7355 valid in total. Rejecting the arguments with respect to the vagueness of the words "Japanese race" and the Colonial Laws Validity Act, Rinfret C.J. concentrated on the meaning of "deportation" and on whether the order complied with the preconditions of the War Measures Act. The exact meaning of "deportation" he concluded was "immaterial for either the acts and things mentioned [P.C. 7355] are covered by the word or they are not...[I]f not", he held, "they then come under the general power conferred by the first part" of section 3[195].

On the question of whether the preconditions to an order under the War Measures Act existed, the Chief Justice of Canada went into considerable detail. To determine whether the requisite emergency existed, he drew upon the words of Viscount Haldane in **Fort Frances Pulp and Power Co. v. Manitoba Free Press**[196]. In that case Haldane L.J. held that

> very clear evidence that the crisis had wholly passed away would be required to justify the judiciary ... in overruling the decision of the Government that exceptional measures were still requisite[197].

Not only did Rinfret C.J. find the evidence adduced by the deportee's counsel[198] insufficient to establish that the crisis

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[195] Ibid, 269.
[196] [1923] A.C. 695.
[197] Ibid, 706 as quoted in **Reference Re Japanese Canadians**, supra, 270.
[198] Primarily s. 5 of the National Emergency Transition Powers Act of 1945 which read in part "on or after [January 1, 1946] the war against Germany and Japan shall, for the purposes of the War Measures Act, be deemed to no longer exist".

Source: Nikkei National Museum, 2018-16-4-6-3-78
www.nikkeimuseum.org

had passed away, but he also noted that the absence of actual war conditions in the **Fort Frances** case had not prevented the Privy Council from determining that the orders in council in that case were valid[199].

The fact that the Governor in Council had deemed the order necessary, Rinfret C.J. stated, was clear from the fourth recital in P.C. 7355[200]. That recital, in his opinion, applied not only to the provisions with respect to aliens and naturalized persons but also to those affecting the Canadian-born and dependents of the adult deportees. Assuming that the repatriation requests were voluntary, he stated,

> It must be borne in mind that the Governor in Council was dealing with people who had made requests to be sent to Japan ... Surely ... the Governor in Council might well be justified in considering such people a menace to Canada[201].

Rinfret C.J. seems to be saying that an order in council under the War Measures Act will be valid not only where the Governor in Council expressly states that it is necessary, but also where the court implies that he might have deemed it necessary.

Like Duff C.J. in the **Chemicals Reference**[202] Rinfret C.J. concludes that it is not competent to any court to canvass

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[199] **Reference Re Japanese Canadians** supra, 270-272.
[200] Ibid, 271. The fourth recital reads: "And whereas it is considered necessary by reason of the war, for the security defence, peace, order and welfare of Canada, that provision be made accordingly;"
[201] Ibid, 273.
[202] Supra.

Source: Nikkei National Museum, 2018-16-4-6-3-79
www.nikkeimuseum.org

the considerations which led the Governor in Council to deem the orders advisable. Also like Duff C.J., Rinfret C.J. bases his faith in the Governor in Council in part on the erroneous assumption that the Parliament "has full power ... to make ineffective any Orders in Council passed in pursuant" of the provision of the War measures Act[203]. P.C. 7355 and its companions, Rinfret C.J. concluded, were not ultra vires the Governor in Council either in whole or in part.

The remaining four Justices dissented in part. Kellock J. agreed with the definition of deportation advocated by counsel for the deportees. Using the official communication in which the Government of Canada requested the consent of the Supreme Allied Commander in Japan to the shipment of "deportees and voluntary repatriates": and the fact that in all other Canadian legislation the word deportation referred only to aliens, Kellock J. held that P.C. 7355 was ultra vires with respect to the Canadian-born and the dependents[204]. Estey J. presuming that the requests by the Canadian-born were voluntary, concluded that in the absence of compulsion the order was ultra vires. Accordingly, he held that P.C. 7355 was ultra vires only with respect to the unwilling dependents, a conclusion with which Hudson J. agreed. Rand J. similarly held that the deportation of dependents was ultra vires basing his conclusion on a finding

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[203] **Reference Re Japanese Canadians**, supra, 264.
[204] Ibid, 302-305.

Source: Nikkei National Museum, 2018-16-4-6-3-80
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that their deportation had been ordered for a purpose not within the objects of the War Measures Act, the welfare of families[205]. Rand J. also concluded that the deportation of the Canadian-born was ultra vires since he could find no evidence on the face of the order to establish that the Governor in Council had deemed their deportation necessary, and unlike Rinfret C.J., was unwilling to imply that he had done so. Moreover, Rand held, the deportation of citizens to a foreign country in the absence of a convention with that country was not a juridical act. Parliament, he stated,

> must have intended to restrict the Governor in Council to measures or actions in which full juridical quality would inhere: that power without recognized legal character would be excluded[206].

The Supreme Court ruling was unsatisfactory for all parties. For Japanese Canadians it raised the spectre of family separation. For the government it had generated bad publicity. Deporting males without their unwilling dependents would only fuel growing public anger at the deportation of citizens. In an attempt to clarify the powers of the executive under the War Measures Act, and to buy time to effect a political solution[207] to the "Japanese problem", the government referred the question to the Privy Council.

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[205] Ibid, 292.
[206] Ibid, 290.
[207] The mandatory dispersal of Japanese Canadians east of the Rockies and the shipment of the voluntary repatriates to Japan.

Source: Nikkei National Museum, 2018-16-4-6-3-81
www.nikkeimuseum.org

In the Privy Council there was no division of opinion. Unanimously the Law Lords of the Privy Council held that P.C. 7355 and its companions were not "in any respect ultra vires"[208]. In a ruling termed by the editor of the Dominion Law Reports an "inexplicable relapse into the "emergency" language of the **Fort Frances'** case[209] Lord Wright writing for al the Law Lords, concluded that in a sufficiently great emergency the Canadian Parliament - and by implication its delegate, the executive - had the power to pass any order necessary for national security. Only where those objecting produced very clear evidence that an emergency has not arisen or no longer existed could the judiciary overrule Parliament or its delegate[210]. Neither the Colonial Laws Validity Act nor the extraterritorial operation of the order, he continued, invalidated P.C. 7355. Nor did principles of international law effect its validity. In language that would have been useful to the defence at the Nuremburg trials Lord Wright held that

> The [War Measures] Act is directed to the exercise ... of powers ... at a time when war exists. The accepted rules of international law applicable in time of peace can hardly have been in contemplation and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested[211].

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[208] **Cooperative Committee on Japanese Canadians**, supra, 593.
[209] Ibid, 579.
[210] Ibid, 585-586.
[211] Ibid, 588.

Source: Nikkei National Museum, 2018-16-4-6-3-82
www.nikkeimuseum.org

Lord Wright acknowledged, however, that where the powers under the War Measures Act had been exercised for an unauthorized purpose, the order would be invalid. However, refusing to take into account "the particular circumstances obtaining with the Dominion that led to the orders in question"[212], their Lordships could find "nothing to justify the conclusion that the power had been exercised for an unauthorized purpose"[213]. P.C. 7355, they concluded was ultra vires the Governor in Council under the general power in section 3 of the War Measures Act.

The decision of the Privy Council, the editor of the Dominion Law Reports commented, "reflects a casualness about constitutional powers in Canada that is the more irritating because exhibited by a tribunal, the membership of which, generally speaking, does not have to live with the results of its own pronouncements"[214]. While Japanese Canadians in the end also did not have to live with the results of this pronouncement[215], it set an ongoing and possibly very dangerous precedent. By ignoring Lord Maugham's statements in **Greene** that it is open to the courts to examine the grounds of adjudication where they appear on the face of the order, both the Supreme Court of Canada

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[212] Ibid.
[213] Ibid, 592.
[214] Ibid, 579.
[215] On January 22, 1947 the Cabinet withdrew the deportation orders in council recognizing that opposition with Canada had made the deportation of Japanese Canadians politically unwise. King Diary, January 22, 1947.

Source: Nikkei National Museum, 2018-16-4-6-3-83
www.nikkeimuseum.org

and the Privy Council stripped the judiciary of its traditional role as a protector of individual and collective liberty in time of crisis.

The fetters these decisions placed upon the courts effectively leave the victims of emergency legislation without legal recourse. That fact was dramatically illustrated by the refusal of the Quebec Courts to review the reasons for the invocation of the War Act in 1970[216]. Yet of the 400 persons detained in that incident less than 20 were charged and none was ever convicted. Moreover, ten years later no evidence has been adduced to justify the allegations of an "apprehended insurrection", a curious fact when one considers the political advantages of producing such evidence. The views of the Privy Council in **Cooperative Committee on Japanese Canadians** also formed the basis of the majority judgments in the **Anti-Inflation Act Reference** in which Laskin C.J. enunciated the "rational basis" test for the validity of emergency legislation. The net result of the deportation case, therefore, is the evolution of a legal principle that restrictions on civil liberties under the War Measures Act are legal is the Governor in Council either expressly or impliedly states that they are necessary. In the past the court would not require the executive to prove they are necessary.

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[216] **Gagnon and Vallieres v. The Queen** (1971) 14 C.R.N.S. 321 at 348, (Que. C.A.).

Source: Nikkei National Museum, 2018-16-4-6-3-84
www.nikkeimuseum.org

Has the Charter altered this principle? Would the right to remain in Canada in section six of the Charter halt the deportation of naturalized and Canadian-born Japanese if P.C. 7355 were passed today? Again it is submitted that the answers to those question are predicated on the standard the courts set for deciding what restriction on our rights and freedoms are justifiable under section one of the Charter in times of emergency. If that test is to be something like the "rational basis" test in the **Anti-Inflation Act Reference** or the test enunciated by Rinfred C.J. in the **Reference Re Japanese Canadians** - "the Governor in Council might be justified in considering such people a menace to Canada"[217] - then the Charter may provide only a way to publicize the objections of the victims of regulations under the War Measures Act, not to right them.

The cumulative effect of the orders in council affecting Japanese Canadians is a litany of detention without trial, dispossession without cause, and attempted deportation for political advantage. In the **Nakashima** case and the deportation cases the actions of the government received the approval of the courts who, refusing to look at the circumstances of the order, accepted without question the statements of the Governor in Council that those emergency measures were necessary. Today the government's own records show that those measures were not

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[217] Supra, 273. My emphasis.

Source: Nikkei National Museum, 2018-16-4-6-3-85
www.nikkeimuseum.org

necessary, but represented an ongoing abuse of the powers of the executive under the War Measures Act. In view of that abuse, and of the virtual impossibility of Parliament being able to control the executive when the War Measures Act is in force, it may be time to undertake a serious reconsideration of the War Measures Act and of the role of the judiciary when addressing orders passed under it.

Source: Nikkei National Museum, 2018-16-4-6-3-86
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