Nakashima v. Canada

Between:
Eikichi Nakashima, Suppliant; and
His Majesty the King, Respondent.
And between:
Tadao Wakabayashi, Suppliant; and
His Majesty the King, Respondent.
And between:
Jitaro Tanaka and Takejiro Tanaka, Suppliants; and
His Majesty the King, Respondent.

[1947] Ex.C.R. 486

4 D.L.R. 487

Exchequer Court of Canada

Thorson P.

1944: May 29, 30 / 1947: August 28..

J.A. MacLennan, for the suppliants.
F.P. Varcoe K.C. and D.W. Mundell, for the respondent.

THORSON P. now (August 28, 1947) delivered the following judgment:

1 THORSON P.:-- In each of these proceedings it was ordered that the following question of law be set down for hearing and disposed of before the trial, namely,

> Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the respondent for any of the relief sought by the suppliant in the said Petition.

2 The suppliants are all persons of Japanese origin who resided and owned property in Vancouver, British Columbia, prior to their compulsory evacuation therefrom in [page488] 1942. The first suppliant is a British subject by naturalization, the second a British subject by birth, and, the suppliants in the third petition are Japanese nationals. The questions of law were heard together, the circumstances being such that the answer in any one case will be equally applicable in the others.

3 It will be desirable to set out the sequence of events before dealing with the contentions made on the suppliants' behalf. By Order in Council P.C. 365, dated January 16, 1942, the Defence of

Canada Regulations (Consolidation) 1941 were amended by substituting a new Regulation 4 for the one previously in force by which the Minister of National Defence with the concurrence of the Minister of Justice was empowered, "if it appears necessary or expedient so to do in the public interest and for the efficient prosecution of the war", to make an order declaring a protected area and to make certain orders with respect to such area including that of requiring "all or any enemy aliens to leave such protected area." By an Order, dated January 29, 1942, made pursuant to this authority, the portion of British Columbia lying west of the Cascade Mountains (more particularly described in the Order) was declared to be a protected area. By Order in Council P.C. 1486, dated February 24, 1942, the power of requiring persons to leave a protected area was extended to include persons who were not alien enemies and the Minister of Justice was given power "to require any or all persons to leave such protected area". And on February 26, 1942, the Minister made what may be called the Japanese evacuation order which provided, inter alia, that "every person of the Japanese race shall leave the protected area aforesaid forthwith." This applied to persons of Japanese origin regardless of whether they were Japanese nationals or British subjects either by birth or naturalization. The suppliants were all residing within the protected area and subject to the evacuation order. The next relevant order was Order in Council P.C. 1665, dated March 4, 1942, by which the British Columbia Security Commission was established and charged with the duty of planning, supervising and directing the evacuation. We are concerned only [page489] with section 12 of this Order under the heading "Custody of Japanese Property", which provides as follows:

Custody of Japanese Property

> 12. (1) As a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race resident in such area, (excepting fishing vessels subject to Order in Council P.C. 288 of the 13th January, 1942, and deposits of money, shares of stock, debentures, bonds or other securities), delivered up to any person by the owner pursuant to the Order of the Minister of Justice dated February 26, 1942, or which is turned over to the Custodian by the owner, or which the owner, on being evacuated is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy, 1939; provided, however, that no commission shall be charged by the Custodian in respect of such control and management.
>
> (2) Subject as hereinafter provided, and for the purposes of the control and management of such property, rights and interest by the Custodian, the Regulations respecting Trading with the Enemy, 1939, shall apply mutatis mutandis to the same extent as if such property, rights and interests belonged to any enemy within the meaning of the said Regulations.
>
> (3) The property, rights and interests so vested in and subject to the control and management of the Custodian, or the proceeds thereof, shall be dealt with in such manner as the Governor in Council may direct.

Then by Order in Council P.C. 2483, dated March 27, this provision was rescinded and the following substituted:

> 12. (1) Subject as hereinafter in this Regulation provided, as a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race (excepting fishing vessels subject to Order in Council P.C. 288 of January 13, 1942, and deposits of money, shares of stock, debentures, bonds or other securities) delivered up to any person by the owner pursuant to an order of the Minister of Justice, or which is turned over to the Custodian by or on behalf of the owner, or which the owner, on being evacuated from the protected area, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations Respecting Trading with the Enemy (1939); provided, however, that no commission shall be charged by the Custodian in respect of such control and management.
>
> (2) The Custodian may, notwithstanding anything contained in this Regulation, order that all or any property whatsoever, situated in any protected area, of British Columbia, belonging to any person of the Japanese race shall, for the purpose of protecting the interests of the owner or any other person, be vested in the Custodian, and the Custodian shall have full power to administer such property for the benefit of all such interested persons, and shall release such property upon being satisfied that the interests aforesaid will not be prejudiced thereby.
>
> (3) For the purposes of the control and management of such property by the Custodian, the Consolidated Regulations Respecting Trading with [page490] the Enemy (1939), shall apply mutatis mutandis to the same extent as if the property belonged to an enemy within the meaning of the said Consolidated Regulations.

In this state of the law the suppliants left the protected area. But before they did so they had in each case signed a document, Form "JP", giving particulars of their property in the protected area, in which the following statement was made:

> I, the undersigned, hereby voluntarily turn over to the Custodian all my property in the protected area as set out above, except fishing vessels, deposits of money, shares of stock, debentures, bonds or other securities, if any.

Then, after the suppliants had left, by Order in Council P.C. 469, dated January 19, 1943, it was provided inter alia:

> Wherever, under Orders in Council under the War Measures Act, chapter 206 of the Revised Statutes of Canada 1927, the Custodian has been vested with the power and responsibility of controlling and managing any property of persons of the Japanese race evacuated from the protected areas, such power and respon-

> sibility shall be deemed to include and to have included from the date of the vesting of such property in the Custodian, the power to liquidate, sell, or otherwise dispose of such property; and for the purpose of such liquidation, sale or other disposition the Consolidated Regulations. Respecting Trading with the Enemy (1939) shall apply mutatis mutandis as if the property belonged to an enemy within the meaning of the said Consolidated Regulations.

The next fact of importance is that on June 19, 1943, the Custodian advertised certain properties for sale by tender, including those of the suppliants. It was this advertisement that led to the launching of the petitions of right.

4 The suppliants object to the sale, liquidation or other disposition of their properties and deny the right of the Custodian to take any such action against their wishes and desires. The petitions set forth a number of contentions and each concludes with a prayer for certain declarations. The contentions are that the suppliants are entitled to rely upon the terms of Orders in Council P.C. 1665 and P.C. 2483 providing that their properties should be and remain in the possession of the Custodian and under his management and control for the protection of the suppliants for the period of their enforced evacuation; that, in the alternative, the Custodian acquired possession of the properties upon trust requiring him to hold them in trust for the protection of the suppliants and under his management and control upon a condition requiring him to return [page491] them to the suppliants when the area ceases to be a protected area; that, in the further alternative, the properties are under the control and management of the Custodian upon trust on a condition requiring him to return them to the suppliants after the end of the war or to retain and hold them for their protection and benefit until otherwise authorized or directed in accordance with any Treaty of Peace between Canada and Japan; that in the further alternative, the Orders in Council P.C. 1665, P.C. 2483 and P.C. 469 are invalid and. unconstitutional and ultra vires, or that if the first is valid and constitutional the others are not. The suppliants seek a number of declarations, namely, that the Custodian is not entitled to sell, liquidate or otherwise dispose of the properties against their wishes; that the Orders in Council referred to, or one or more of them are or is invalid, unconstitutional and ultra vires or, in the alternative, do not authorize or empower the Custodian to sell, liquidate or otherwise dispose of the properties without their consent; and that the Custodian is a trustee of the properties for them as set out in the petitions. Then there is a request for a mandamus compelling the Custodian to carry out the terms of his trust and an injunction to restrain him from selling, liquidating or otherwise disposing of the properties. Essentially, the purpose of the petitions is to prevent the Custodian from selling the properties: the essence of the claim is that he has no valid power to do so.

5 The proceedings are by way of petition of right against the Crown as though the properties were in the possession of the Crown and on the assumption that, although they are vested in the Custodian, he holds them as the servant or agent of the Crown.

6 The first objection taken is that any relief sought is in respect of the Custodian; that the Custodian is not a servant or agent of the Crown but an independent person in respect of whose acts a petition of right against the Crown does not lie; and that no cause of action against the Crown is shown.

7 The cases lay down a number of tests to be applied in determining whether a body is a servant or agent of the Crown or is independent of it. In Fox v. Government [page492] of Newfoundland[1] it was held by the Judicial Committee of the Privy Council that certain balances in the books of a bank to the credit of the various boards of education in Newfoundland were not debts or claims due

to the Crown or to the Government or revenues of Newfoundland. At page 672, Sir Richard Couch said:

> The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it - a power which is independent of the Government.

The determining test in this case was the possession of a discretionary power independent of the Government. The above statement was approved by the Judicial Committee in the leading case of Metropolitan Meat Industry Board v. Sheedy[2]. In that case the Meat Industry Act, 1915, of New South Wales provided for the maintenance and control of slaughter houses, cattle sale yards, and meat markets in Sydney and the adjoining district, and established the Board to administer the Act. The members of the Board were to be appointed by the Governor, who had power to veto certain of its actions. The Board had wide powers, which it exercised at its discretion; any power of interference which a Minister of the Crown possessed was not such as to make the acts of administration his acts. Money received by the Board for tolls and fees to be levied by it was not paid into the general funds of the State, but to its own fund, out of which the expenses of carrying the Act into effect were to be met. The question for determination was whether an amount due to the Board by a company which had gone into liquidation was a debt due to the Crown and as such entitled to priority over the claims of other unsecured creditors. It was held that the Board was not acting as a servant of the Crown and the amount owing to it was not a debt due to the Crown. At page 905, Viscount Haldane said:

> They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without [page493] consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund.

Undoubtedly, the governing factor in deciding that the Board was not a servant of the Crown but an independent body was that, although it was subject to governmental control in several respects, it had wide powers which were to be exercised at its own discretion and without consulting any direct representative of the Crown. Another indication of its independence was that it had control over its own revenues and their expenditure. An important Canadian case on the subject. is the judgment of the Supreme Court of Canada in City of Halifax v. Halifax Harbour Commissioners[3]. There the question was whether the Halifax Harbour Commissioners who occupied the Crown property of Halifax Harbour were assessable for business tax as an "occupier" within Section 357 (1) of the

Halifax City Charter (1931). Duff C.J., speaking for the Court, carefully scrutinized the nature of the powers and duties of the Commissioners, and summarized the controls and supervision to which they were subject. He pointed out that in the exercise of all their powers the Commissioners were subject to the control of the Crown and concluded that they were performing Government services and were occupying the property in question in and for the services of the Crown and were, therefore, not assessable for business tax. The Commissioners had none of the free discretionary powers that are necessary to independence, as laid down in Metropolitan Meat Industry Board v. Sheedy (supra), and the case was, therefore, readily distinguishable from it. In coming to its decision the Court applied a number of tests in addition to those already referred to. For example, it inquired into such questions as the ownership of the occupied property, namely, whether it belonged to the Crown or the occupant, and the nature of the functions of the occupant, that is, whether they were those ordinarily performed in the course of government. Then reference may also be made to the recent judgment of the Judicial Committee of the Privy Council in Montreal v. Montreal Locomotive Works[4], in which Lord Wright [page494] stresses the difficulty which is inherent in deciding whether a person is a servant or not, and points out that the presence or absence of control by itself is not always conclusive and suggests other tests as well, which are not applicable in the present case. Vide also the judgment of the Supreme Court of Canada in Regina Industries Ltd. v. Regina[5].

8 This leads to an examination of the position of the Custodian under the Consolidated Regulations respecting Trading with the Enemy (1939), as enacted by Order in Council P.C. 3959, dated August 21, 1940, as amended by Order in Council P.C. 5353, dated October 3, 1940, hereinafter called the Consolidated Regulations. By Section 6 the Secretary of State is appointed as the Custodian to receive, hold, preserve and deal with such property, as may be paid to or vested in him under the regulations. In my opinion, nothing turns on the fact that a Minister of the Crown is appointed as Custodian, for anyone else might just as validly have been appointed. By section 21 all enemy property in Canada vests in the Custodian and is subject to his control. The Consolidated Regulations give him very wide discretionary powers over such property; for example, by section 21 (2) he may deal with the interest of the enemy in it as he may in his sole discretion decide; under section 23 he may have it transferred into his own name; by section 38 he may, where he considers it advisable to do so, liquidate it; or by section 39, at his discretion, relinquish it; or by section 40 dispose of it either publicly or privately, as he in his discretion shall think proper; the property held by him is by section 49 rendered free from attachment or execution and by section 50 he is made not liable for any charge against it. These references are sufficient to show the great width of the Custodian's discretionary powers and his freedom from governmental control in dealing with the property vested in him. In the matter of litigation, by section 27 provision is made for proceedings by and against the Custodian under certain conditions and under section 36 he may take action to recover money payable to him under the regulations. It is to be noted that the right of action is that of the Custodian, not that of the Crown; [page495] indeed, he may himself have to take proceedings as Custodian against the Crown as has happened in this Court. Then under the regulations the Custodian is given very wide administrative powers involving the free exercise of discretion. By section 43 (1) he shall establish an office or offices for the administration of the regulations and is empowered to select officers, clerks and advisers and to pay them such remuneration as he may determine. This is a most unusual power and indicative of the independent character of the Custodian's office. This is not in the least diminished by the special provision for a special purpose in section 43 (2) that the Custodian's office shall be deemed to be a Department of Government of Canada and the Custodian the head of such Department, for the purposes of the Canada Evidence Act. Furthermore, the Custodian is given full control over his own funds. By section 42 he may deposit moneys paid to or received

by him in any bank. They are not paid in to the Consolidated Revenue. By section 44 (1) he is empowered to make certain charges against released property and by section 44 (2) he may retain out of the proceeds of all property vested in him sufficient moneys to pay the expenses incurred in the administration of the regulations. He is not dependent at all for the administration of the regulations on any appropriations by Parliament. These references to the regulations sufficiently show the independence with which the law has endowed the Custodian. It is true that he is subject to control by the Governor in Council, but such control is not executive but of a legislative nature of the same kind as that which Parliament itself might exercise, which is a very different thing from the control which the Crown, meaning thereby His Majesty acting on advice in his executive capacity, exercises over its servants. If the Custodian is not the servant or agent of the Crown, it must follow that a petition of right cannot lie against it in respect of his acts and it was so held by this Court in Ritcher v. The King[6]. There Angers J. expressed the opinion that the Custodian did not hold enemy property as an agent or servant of the Crown and that no petition of right could lie against the Crown in respect of any claim asserted in respect [page496] of his actions. I am of a similar opinion in the present case. It seems clear to me, in view of the wide discretionary powers of the Custodian over the property vested in him, his freedom from governmental control in the management of his office and the appointment and remuneration of members of his staff and his complete control over his funds and their expenditure, that it was intended by the Consolidated Regulations that the Custodian should not be a servant or agent of the Crown but an independent person. It was important and proper that this should be so in order that the properties vested in him should be held by him neither for the former owners nor for the Crown but independently in a state of suspense until their final disposition should be determined pursuant to appropriate legislative enactment in the light of the turn of events on the conclusion of the emergency that made their vesting necessary or advisable. That being so, it follows that the course taken by the suppliants in lodging petitions of right against the Crown in respect of an intended sale of the suppliants' properties by the Custodian was erroneous, and that since no cause of action against the Crown is shown the answer to the question of law herein must be in the negative. If the suppliants have any cause of action it could only be against the Custodian; as to which, the Court expresses no opinion in the absence of the Custodian, who is not a party to these proceedings.

9 Counsel for the suppliants sought to save himself from this conclusion by arguing that the Custodian was not in the same position with regard to Japanese evacuee property as with regard to alien enemy property. His contention was that the suppliants were not alien enemies within the meaning of the Consolidated Regulations, which is true, and that they do not apply in the present case except only for limited purposes, since under Order in Council P.C. 1665 of March 4, 1942, and Order in Council P.C. 2483 of March 27, 1942, Japanese evacuee property is vested in the Custodian "as a protective measure only" and made subject only "to the control and management of the Custodian" and that at the time of the vesting the Custodian had no right of sale. In my opinion, even if this were conceded, it would not alter the character of the [page497] Custodian's powers and duties. His discretionary powers might be more limited in scope than in the case of alien enemy property, but the difference would be one of degree rather than of kind. He would still have very wide free discretionary powers in the field of control and management. And, if Order in Council P.C. 469 of January 19, 1943, is valid, there would be no difference at all in the scope of the Custodian's discretionary powers as between alien, enemy property on the one hand and Japanese evacuee property on the other.

10 Counsel for the suppliants also took the position that, even if the Custodian were not a servant or agent of the Crown, the filing of a petition of right would, nevertheless, be the correct procedure for the relief sought on the ground that although the properties were vested in the Custodian, he derived his title to them from the Crown, and he relied upon a number of cases in support of his view including Attorney General for Ontario v. McLean Gold Mines[7]. There two mining claims in Ontario granted by the Crown were forfeited, under the Mining Tax Act, for default in the payment of taxes, and were granted to another person. Assignees of the original grantee brought an action against the Attorney General, the Minister of Mines, and registered owners under the new grant, alleging defects in the forfeiture proceedings, and claiming a declaration that they were the true owners, a declaration that the forfeiture certificates were void and an order that they should be substituted as owners in the register of titles. It was held that as the plaintiffs' claim impugned the title accruing to the Crown on the forfeiture it could not be made by action, but only by petition of right. In my opinion, this judgment has no applicability in the present case, since the title to the suppliants' property was never in the Crown and the Custodian's title could not, therefore, have been derived from it. To contend that because the suppliants' properties were vested in the Custodian by an Order in Council, passed under the War Measures Act, he derived his title to them from the Crown shows a misconception of the nature of the source of the Custodian's title. It did not come from the Crown pursuant to an executive act of the Crown. Both the divesting from the former Japanese owners and [page498] the vesting in the Custodian were pursuant to an Order in Council passed by the Governor in Council as a legislative enactment under the legislative power devolved upon him by Parliament and having the same force as if it had been enacted by Parliament itself. The source of the Custodian's title is legislative, not executive. It was not a case at all of the title having first been in the Crown and then, transferred to the Custodian. It was never in the Crown, and the Custodian did not derive any title from it.

11 Under the circumstances, since the Custodian is not the servant or agent of the Crown and no cause of action against the Crown appears I must hold that the proceedings by way of petition of right were erroneously taken. In my opinion, this ends the matter and is a sufficient reason for answering the question of law in the negative.

12 I was urged, however, by counsel for the suppliants to deal with his attack on the validity of the Orders in Council on the ground that it could be made only by way of petition of right. I do not agree with this or with the other grounds advanced for dealing, with the question. But since it is of great importance and has some bearing, as already suggested, on whether there is any difference in kind between the powers of the Custodian in the present case and those which he possesses as Custodian of alien enemy property, I shall deal with the question, although with considerable doubt as to whether it can properly be raised in these proceedings.

13 Counsel for the suppliants confined his attack on the validity of the Orders in Council to the extent to which they purport to authorize the Custodian to liquidate, sell or otherwise dispose of the properties of Japanese evacuees vested in him. The argument ran as follows. It was conceded that the order for the evacuation of persons of Japanese origin from the protected area was valid as a war measure, whether such persons were Japanese nationals or British subjects. It was also conceded that Orders in Council P.C. 1665 and P.C. 2483 were valid in so far as they vested the properties in the Custodian for his control and management; since the Japanese on their evacuation had to leave their properties, it was said to be the duty and responsibility of the Government to look after them, [page499] so that the vesting of them in the Custodian for control and management for the protection of the former owners was necessarily incidental and ancillary to the evacuation and, as such, a

valid war measure. But this was the limit of counsel's concessions. While the terms of Order in Council P.C. 469, cited above, were the main object of counsel's attack he made it clear that if they were to be regarded as merely declaratory and the power of control and management conferred by Orders in Council P.C. 1665 and P.C. 2483 construed as including the power of sale, then his attack extended also to these Orders in Council to the extent that they purported to confer such power. It was the authorization of the power of liquidation, sale or other disposition of the properties that was objected to as being beyond the powers of the Governor in Council even under the War Measures Act. It was admitted that the power of control and management might conceivably include the right to sell the properties if such sale was necessary to protect them or the former owners, but not otherwise, and there could be no such necessity in the present case where, as alleged in the petitions, the properties are rented and the rentals are sufficient to maintain them in good standing and condition. Counsel urged that there was a vital difference between the right to authorize control and management and the right to authorize sale; the former was intra vires, the latter was not. The validity of the Orders in Council vesting the properties of the evacuated Japanese in the Custodian for his control and management could be justified, so counsel argued, only on the basis that such vesting was for the protection of the former Japanese owners and was ancillary to their evacuation, but that no such justification was possible for an Order in Council authorizing the sale of properties already in the custody of the Custodian and subject to his control and management. The argument went on that only that which was ancillary to the evacuation was intra vires and that, while control and management of the properties was ancillary, sale of them was not. Counsel urged vigorously that Orders in Council under the War Measures Act must be for war objects; that the authorizing of the sale of the properties had nothing to do with the evacuation, or the attainment [page500] of the objects of the war or national security, was not a war measure at all and, therefore, not within the competence of the Governor in Council; that the Court had the right to question the validity of Orders in Council under the War Measures Act; and that it ought to intervene in an obvious case such as this and declare that the Order in Council authorizing the liquidation, sale or other disposition of the properties in question was not a war measure at all, but an unwarranted invasion of property and civil rights and, consequently, ultra vires.

14 With the propriety of the action of the Custodian in advertising the suppliants' properties for sale the Court can have no concern in these proceedings. The sole question is whether he had the right to do so and that in turn depends on whether the Order in Council authorizing the power of sale is within the competence of the Governor in Council. Order in Council P.C. 469 of January 19, 1943, was expressly declared to be made under the authority of the War Measures Act, R.S.C. 1927, chap. 206, and contained a number of recitals including the following:

> That the evacuation of persons of the Japanese race from the protected areas has now been substantially completed and it is necessary to provide facilities for liquidation of property in appropriate cases.

Although the Order in Council was passed under the authority of the War Measures Act and the Governor in Council has declared that it is a necessary measure, the Court is invited by counsel for the suppliants to declare that it is not a war measure and is, therefore, not validly enacted. Whether the Court can assert an opinion contrary to that declared by the Governor in Council is the matter to be determined. The question has, I think, been completely answered by the authorities.

15 The War Measures Act, first enacted in 1914, Statutes of Canada, 1914, 2nd Session, chap. 2, was not repealed after the end of the first world war, and was carried into the 1927 Revision with only minor changes made by the Commissioners and some rearrangement of its sections. The first portion of section 3, previously section 6, provides as follows:

> 3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by [page501] reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada;

The validity of the War Measures Act itself depends on whether it falls within the jurisdiction of the Canadian Parliament under the opening words of section 91 of the British North America Act, which empowers it to make laws for the peace, order and good government of Canada. It was considered intra vires by the Supreme Court of Canada in Re George Edwin Gray[8], and its validity was settled by the Judicial Committee of the Privy Council in Fort Frances Pulp and Power Co. v. Manitoba Free Press[9]. It was not challenged in the present case.

16 Under the circumstances, the question whether Order in Council 469 is intra vires the Governor in Council is really a question of construction of the War Measures Act and an ascertainment of whether its requirements have been complied with. If the answer to this question is in the affirmative, 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. That was the conclusion of the Supreme Court of Canada in Reference re Chemicals Regulations and Administrative Orders[10] in which, although the primary question was as to the power of the Governor in Council to delegate authority to subordinate agencies, the nature and extent of the powers of the Governor in Council under the War Measures Act were also dealt with. The Court 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 itself. Duff C.J., at page 9, said:

> The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the War Measures Act may have the effect of an Act of Parliament.

And Rinfret J., as he then was, at page 17, expressed the same view:

> The powers conferred upon the Governor in Council by the War Measures Act constitute a law making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by [page502] reasons of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself (Lord Selborne in The Queen v. Burah [1878] 3 App. Cas. 889. Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law making power.

The conditions of a valid enactment under the War Measures Act prescribed by the Act itself are two; first, there must be in existence a real or apprehended war, invasion or insurrection; and secondly, the Governor in Council must by reason of such real or apprehended war, invasion or insurrection deem the enactment necessary or advisable for the security, defence, peace, order and welfare of Canada. It is to be noted that the objects specified are not confined to the prosecution of the war. Once the conditions prescribed by the Act have been complied with it is not open to the Court to question the validity of an Order in Council under the War Measures Act on the ground that the enactment was not in fact necessary or advisable for the objects specified. At, page 12, Duff C. J. put the proposition in these terms:

> The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above, (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country - the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor in Council (not the courts) deems necessary or advisable.

And, as Rinfret J. said, at page 19:

> For a court to review the enactment would be to assume the role of legislator.

The matter is, I think, conclusively settled by the Reference re Persons of Japanese Race[11]. There Rinfret C. J., speaking also for Kerwin and Taschereau JJ. and referring [page503] to the Orders in Council that were the subject of the reference, said, at page 277:

> The Governor in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any Court to canvass the considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth.

And, at page 285, Rand J. made it clear that it was not for the courts to substitute their view of any such necessity or advisability for that of the Governor in Council. And when the matter came before the Judicial Committee of the Privy Council[12], Lord Wright, at page 586, said:

> It is not pertinent to the judiciary to consider the wisdom or propriety of the particular policy which is embodied in the emergency legislation. Determina-

> tion of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers.

The same thought was forcefully expressed by the English Court of Appeal in R. v. Comptroller of Patents[13]. In that case His Majesty in Council was given power by the Emergency Powers (Defence) Act, 1939, to make such orders as appeared to him necessary or expedient for securing public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community, and under this power a regulation was passed enabling the Comptroller of Patents to suspend the trade mark rights of British subjects operating enemy owned patents. The regulation was objected to on the grounds that it was outside the war purposes to which the power conferred by the Emergency Powers (Defence) Act, 1939, was confined. The contention was thus very similar to that put forward for the suppliants in the present case. It did not prevail. Scott L. J. said, at page 681:

> the effect of the words "as appears to him to be necessary or expedient" is, in my opinion, to give to His Majesty in Council, as the authority for passing the delegated legislation, a complete discretion entrusted to him by Parliament to decide what regulations are necessary for the purposes named in the subsection. If so, it is not open to His Majesty's Courts to investigate the question as to whether or not it was in fact necessary or expedient for the purposes named to make the regulations which were made.

And Clauson L. J., at page 683, put it very clearly:

> the criterion whether or not His Majesty had power to make a particular regulation is not whether that regulation is necessary or expedient for the purpose named, but whether it appears to His Majesty to be necessary or expedient for the purposes named to make the particular regulation.

[page504]

And then said, at page 684:

> If my view as to the construction of the Act and the effect of it is correct, it is quite clear that it is wholly irrelevant to discuss before this court whether the regulation was in fact necessary or expedient for securing the public safety and so forth. It is a wholly irrelevant matter and with that we have nothing to do. His Majesty has formed the view that it was necessary or expedient. So far as this court is concerned, in my judgment, there is an end to the matter.

17 In the present case, the two conditions of jurisdiction prescribed by the War Measures Act have both been satisfied. It is, therefore, not open to the Court to question the validity of the Order in Council empowering the Custodian to sell the properties vested in him on the ground that such sale was not necessary for the purposes mentioned in the War Measures Act. Parliament has left the decision as to the necessity or advisability of such an order for the security, defence, peace, order

and welfare of Canada, not to the Court, but to the Governor in Council, and once the Governor in Council has made his decision that the order is necessary or advisable for any of the purposes mentioned that is the end of the matter. The Court has no right to substitute its opinion of what is necessary or advisable for that of the Governor in Council or to question the validity of an order so made. The only authority that can validly challenge the exercise by the Governor in Council of the legislative powers entrusted to him is Parliament itself. If Parliament considers that he has acted erroneously the corrective power is in its hands - it does not lie with the Courts.

18 It was, therefore, within the power of the Governor in Council to pass Order in Council P.C. 469 of January 19, 1943, embodying the terms against which the suppliants protest and they were validly enacted. The Custodian has, therefore, the lawful right to liquidate, sell, or otherwise dispose of the property vested in him, including the properties of the suppliants.

19 Only a brief reference need be made to another argument advanced on behalf of the suppliants. It was contended that they had handed their properties over to the Custodian voluntarily on the strength of the first two Orders in [page505] Council under which they were to be vested in him as a protective measure only for his control and management; that this fact constituted a contract with the Crown under which rights had accrued to the suppliants that the Crown would hold the properties for them pursuant to the Orders in Council: and that it was not competent for the Governor in Council to authorize the Custodian to sell the properties since this would affect accrued rights and would amount to a breach of contract. Apart altogether from my view that counsel for the suppliants has taken too narrow a view of the words "as a protective measure only" in the Order in Council I find no merit in law in his argument based on contract and accrued rights. In my view, there was no contract, express or implied, between the suppliants and either the Crown or the Custodian by reason of the signing of the "JP" forms. The properties became vested in the Custodian not by any contract but pursuant to the Orders in Council and would have vested in the Custodian whether the suppliants had signed the forms referred to or not. Moreover, I repeat, the vesting was the result of a legislative enactment, not of an executive act. The Crown never held the properties and no rights against the Crown had ever accrued to the suppliants in respect of them.

20 Since the suppliants' whole case depends on the assumption that the Custodian is the servant or agent of the Crown and has no right to sell the suppliants' properties and such assumption is unsound their case falls to the ground. It is, therefore, unnecessary in these proceedings to deal with a number of matters referred to in the pleadings and raised in argument such as whether the Crown or the Custodian is a trustee of the properties in question and, if so, for whom and subject to what conditions, or whether declaratory orders of the kind sought for can or should be given. If, as I have held, the Custodian does not hold the properties of the suppliants as the servant or agent of the Crown, such questions cannot arise as against the Crown, and so far as the Custodian is concerned they cannot be dealt with in these proceedings since he is not a party to them.

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21 In the result the answer to the question of law submitted to the Court is - No. That being so, there is no object in proceeding to the trial of the petitions and the judgment of the Court must be that the suppliants are not entitled to any of the relief sought by them in their petitions of right. In each case, the respondent is entitled to costs.

Judgment accordingly.

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187] Henderson J.A. dissenting, directed that Q. 1 be answered: Yes; Q. 2: No; and in view of these answers the other questions were not answered.

The decision to commute and pay the succession duties was made for the benefit of the estate as a whole. That could have been accomplished without the agreement dated November 14, 1940, but would have reduced the income available for the payment of the annuities. This agreement was made to avoid that result. The material does not disclose what portion, if any, of the $14,185.02 was used to make up the annuities of $10,000 and $75,000, but as a consequence of what was stated at the hearing, it should be assumed that at least some part thereof was so used in certain years.

It is clear that in November, 1940, when this agreement was entered into, the provisions embodied in the subsequent amendments to the *Income War Tax Act* were not present to the minds of the parties as they prepared and executed the agreement. There are, however, certain provisions indicative of the intention of the parties that are helpful in the solution of the present issue.

In para. 2 above quoted it is stated that the trustees "shall annually charge the capital assets . . . and shall annually add to the net income of the Estate . . . and shall treat the same as part of the said income to be distributed". The adoption of this language discloses that the parties intended to avoid the possibility of this capital sum being treated as income for any purpose except that specifically provided for. While so treated it does not lose its identity in the books of the trustees, which disclose both its source and disposition, as in the somewhat similar case of *Syme* v. *Com'r of Taxes*, [1914] A.C. 1013.

Between the annuitants, Mrs. Kirkpatrick and the widow, The Hon. Mrs. Wood, there is no priority. If the executors as they were empowered had commuted and paid the succession duties, any consequent reduction in the annuities of these parties would have been apportioned ratably. The agreement of November 14, 1940, was made to avoid such a possibility. The principle of apportionment just referred to has long been recognized and is based upon considerations of equity and fairness between the parties: *Miller* v. *Huddlestone* (1851), 3 Mac. & G. 513, 42 E.R. 358. It would seem fair and reasonable that the same principle should apply where a deficiency is by agreement (without any provision for distribution thereof) made up from capital and therefore that the required amount should

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be distributed ratably between the parties. Therefore, in any year all or that portion of the $14,185.02 which is used to make up any deficiency in these annuities should be treated as paid ratably to the two above-mentioned annuitants, and any balance thereof divided equally between Gordon Ferrie and John Ferrie. It follows that the annuitants will benefit under the exemption to the extent that they respectively receive a portion of the $14,185.02.

The questions should therefore be answered as: Q. 1: No; Q. 2: Yes; Q. 3: Yes; Q. 4: In view if the foregoing need not be answered.

The appeal should be allowed and the order of the Judge of first instance restored. The parties are entitled to their costs throughout from the estate and those of the trustees as between solicitor and client.

Appeal allowed.

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Exchequer Court of Canada, Thorson P. August 28, 1947.

Crown III A, II B—War IV—Custodian not servant of Crown—Impropriety of petition of right in respect of Japanese evacuee property—Title derived by Custodian from legislation not through Crown—

The Custodian of Enemy Property is an independent person and not a servant or agent of the Crown, and hence a petition of right against the Crown does not lie in respect of acts of the Custodian. The *Consolidated Trading with the Enemy Regulations* gave him wide discretionary powers in respect of the property vested in him, gave him complete control over funds and their expenditure and left him free from governmental control in the management of his office. Nothing turns on the fact that a Minister of the Crown was appointed Custodian.

The Custodian is as much an independent person in relation to Japanese evacuee property (under P.C. 1665 of March 4, 1942 and P.C. 2483 of March 27, 1942) as he is in relation to alien enemy property even though his discretionary powers may be more limited in scope in respect of the former than in respect of the latter.

There is no substance to the contention that a petition of right is proper in respect of the Custodian's dealing with Japanese evacuee property because he derived title thereto from the Crown. Title was derived directly from Orders in Council having the effect of statute and was never in the Crown.

Cases Judicially Noted: *Fox* v. *Govt. of Newfoundland*, [1898] A.C. 667; *Metropolitan Meat Industry Bd.* v. *Sheedy*, [1927] A.C. 899; *Halifax* v. *Halifax Harbour Com'rs*, [1935], 1 D.L.R. 657, S.C.R. 215;

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Montreal v. Montreal Locomotive Wks., [1947] 1 D.L.R. 161, [1946] 3 W.W.R. 748; *Ritcher v. The King*, [1943], 3 D.L.R. 540, Ex. C.R. 64, apld; *A.-G. Ont. v. McLean Gold Mines*, [1926], 4 D.L.R. 213, 3 W.W.R. 193, [1927] A.C. 185, 59 O.L.R. 415*n*, distd.

War IV—Order in Council empowering liquidation of Japanese evacuee property—Validity under War Measures Act (Can.)—

Order in Council P.C. 469 of January 19, 1943, passed under the *War Measures Act*, R.S.C. 1927, c. 206, and empowering the Custodian to liquidate property of Japanese evacuees is *intra vires*. It satisfied the two conditions of a valid enactment under the *War Measures Act*, *viz.*, there was in existence a real or apprehended war, and the Governor in Council by reason thereof deemed the Order in Council necessary or advisable for the security, etc., of Canada. Hence, no tenable objection can be made to the Order in Council on the ground that liquidation of the property was not necessary for the purposes set out in the *War Measures Act* or on the ground that liquidation was not ancillary to the principal object of evacuation of Japanese persons.

Cases Judicially Noted: *Re Gray*, 42 D.L.R. 1, 57 S.C.R. 150, [1918] 3 W.W.R. 111; *Reference re Regulations (Chemicals) under War Measures Act*, [1943], 1 D.L.R. 248, S.C.R. 1, 79 Can. C.C. 1; *Reference re Deportation of Japanese*, [1947], 1 D.L.R. 577, A.C. 87, folld.

Statutes Considered: P.C. 469 ([1943] 1 C.W.O.R. 224); P.C. 1665 (75 Can. Gaz. 3628); P.C. 2483 (Proclamations & Orders in Council, vol. 6, p. 252); *War Measures Act*, R.S.C. 1927, c. 206.

PETITIONS OF RIGHT against the Crown in respect of dealings by the Custodian with Japanese evacuee property.

J. A. MacLennan, for suppliants.

F. P. Varcoe, K.C. and *D. W. Mundell*, for respondents.

THORSON P.:—In each of these proceedings it was ordered that the following question of law be set down for hearing and disposed of before the trial, namely: "Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the respondent for any of the relief sought by the suppliant in the said Petition."

The suppliants are all persons of Japanese origin who resided and owned property in Vancouver, British Columbia, prior to their compulsory evacuation therefrom in 1942. The first suppliant is a British subject by naturalization, the second a British subject by birth, and the suppliants in the third petition are Japanese nationals. The questions of law were heard together, the circumstances being such that the answer in any one case will be equally applicable in the others.

It will be desirable to set out the sequence of events before dealing with the contentions made on the suppliants' behalf. By P.C. 365 [75 Can. Gaz. 2945], dated January 16, 1942, the *Defence of Canada Regulations (Cons.)* 1941 were amended by

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substituting a new Reg. 4 for the one previously in force by which the Minister of National Defence with the concurrence of the Minister of Justice was empowered, "if it appears necessary or expedient so to do in the public interest and for the efficient prosecution of the war", to make an order declaring a protected area and to make certain orders with respect to such area including that of requiring "all or any enemy aliens to leave such protected area [4(2) (*a*)]." By an order, dated January 29, 1942, made pursuant to this authority, the portion of British Columbia lying west of the Cascade Mountains (more particularly described in the Order) was declared to be a protected area. By P.C. 1486 [75 Can. Gaz. 3475], dated February 24, 1942, the power of requiring persons to leave a protected area was extended to include persons who were not alien enemies and the Minister of Justice was given power "to require any or all persons to leave such protected area". And on February 26, 1942, the Minister made what may be called the Japanese evacuation order which provided, *inter alia*, that "every person of the Japanese race shall leave the protected area aforesaid forthwith". This applied to persons of Japanese origin regardless of whether they were Japanese nationals or British subjects either by birth or naturalization. The suppliants were all residing within the protected area and subject to the evacuation order. The next relevant Order was P.C. 1665 [75 Can. Gaz. 3628], dated March 4, 1942, by which the British Columbia Security Commission was established and charged with the duty of planning, supervising and directing the evacuation. We are concerned only with s. 12 of this Order under the heading "Custody of Japanese Property", which provides as follows:

"Custody of Japanese Property

"12 (1) As a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race resident in such area (excepting fishing vessels subject to Order in Council P.C. 288 of the 13th of January, 1942, and deposits of money, shares of stock, debentures, bonds or other securities), delivered up to any person by the owner pursuant to the Order of the Minister of Justice dated February 26, 1942, or which is turned over to the Custodian by the owner, or which the owner, on being evacuated, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy,

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1939; provided, however, that no commission shall be charged by the Custodian in respect of such control and management.

"(2) Subject as hereinafter provided, and for the purposes of the control and management of such property, rights and interest by the Custodian, the Regulations respecting Trading with the Enemy, 1939, shall apply *mutatis mutandis* to the same extent as if such property, rights and interests belonged to any enemy within the meaning of the said Regulations.

"(3) The property, rights and interests so vested in and subject to the control and management of the Custodian, or the proceeds thereof, shall be dealt with in such manner as the Governor in Council may direct."

Then by P.C. 2483 [Proclamations & Orders in Council, vol. 6, p. 252] dated March 27, 1942, this provision was rescinded and the following substituted: "12 (1) Subject as hereinafter in this Regulation provided, as a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race (excepting fishing vessels subject to Order in Council P.C. 288 of January 13, 1942, and deposits of money, shares of stock, debentures, bonds or other securities) delivered up to any person by the owner pursuant to an order of the Minister of Justice, or which is turned over to the Custodian by or on behalf of the owner, or which the owner, on being evacuated from the protected area, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations Respecting Trading with the Enemy, (1939); provided, however, that no commission shall be charged by the Custodian in respect of such control and management.

"(2) The Custodian may, notwithstanding anything contained in this Regulation, order that all or any property whatsoever, situated in any protected area of British Columbia, belonging to any person of the Japanese race shall, for the purpose of protecting the interests of the owner or any other person, be vested in the Custodian, and the Custodian shall have full power to administer such property for the benefit of all such interested persons, and shall release such property upon being satisfied that the interests aforesaid will not be prejudiced thereby.

"(3) For the purposes of the control and management of such property by the Custodian, the Consolidated Regulations Respecting Trading with the Enemy, (1939), shall apply mutatis mutandis to the same extent as if the property belonged to an enemy within the meaning of the said Consolidated Regulations."

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In this state of the law the suppliants left the protected area. But before they did so they had in each case signed a document, Form "JP", giving particulars of their property in the protected area, in which the following statement was made: "I, the undersigned, hereby voluntarily turn over to the Custodian all my property in the protected area as set out above, except fishing vessels, deposits of money, shares of stock, debentures, bonds or other securities, if any."

Then, after the suppliants had left, by P.C. 469 [[1943] 1 C.W.O.R. 224], dated January 19, 1943, it was provided *inter alia*: "Wherever, under Orders in Council under the War Measures Act, Chapter 206 of the Revised Statutes of Canada 1927, the Custodian has been vested with the power and responsibility of controlling and managing any property of persons of the Japanese race evacuated from the protected areas, such power and responsibility shall be deemed to include and to have included from the date of the vesting of such property in the Custodian, the power to liquidate, sell, or otherwise dispose of such property; and for the purpose of such liquidation, sale or other disposition the Consolidated Regulations Respecting Trading with the Enemy (1939) shall apply mutatis mutandis as if the property belonged to an enemy within the meaning of the said Consolidated Regulations."

The next fact of importance is that on June 19, 1943, the Custodian advertised certain properties for sale by tender, including those of the suppliants. It was this advertisement that led to the launching of the petitions of right.

The suppliants object to the sale, liquidation or other disposition of their properties and deny the right of the Custodian to take any such action against their wishes and desires. The petitions set forth a number of contentions and each concludes with a prayer for certain declarations. The contentions are that the suppliants are entitled to rely upon the terms of P.C. 1665 and P.C. 2483 providing that their properties should be and remain in the possession of the Custodian and under his management and control for the protection of the suppliants for the period of their enforced evacuation; that, in the alternative, the Custodian acquired possession of the properties upon trust requiring him to hold them in trust for the protection of the suppliants and under his management and control upon a condition requiring him to return them to the suppliants when the area ceases to be a protected area; that,

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in the further alternative, the properties are under the control and management of the Custodian upon trust on a condition requiring him to return them to the suppliants after the end of the war or to retain and hold them for their protection and benefit until otherwise authorized or directed in accordance with any Treaty of Peace between Canada and Japan; that, in the further alternative, the Orders in Council P.C. 1665, 2483 and 469 are invalid and unconstitutional and *ultra vires*, or that if the first is valid and constitutional the others are not. The suppliants seek a number of declarations, namely, that the Custodian is not entitled to sell, liquidate or otherwise dispose of the properties against their wishes; that the Orders in Council referred to, or one or more of them are or is invalid, unconstitutional and *ultra vires* or, in the alternative, do not authorize or empower the Custodian to sell, liquidate or otherwise dispose of the properties without their consent; and that the Custodian is a trustee of the properties for them as set out in the petitions. Then there is a request for a mandamus compelling the Custodian to carry out the terms of his trust and an injunction to restrain him from selling, liquidating or otherwise disposing of the properties. Essentially, the purpose of the petitions is to prevent the Custodian from selling the properties: the essence of the claim is that he has no valid power to do so.

The proceedings are by way of petition of right against the Crown as though the properties were in the possession of the Crown and on the assumption that although they are vested in the Custodian he holds them as the servant or agent of the Crown.

The first objection taken is that any relief sought is in respect of the Custodian, that the Custodian is not a servant or agent of the Crown but an independent person in respect of whose acts a petition of right against the Crown does not lie; and that no cause of action against the Crown is shown.

The cases lay down a number of tests to be applied in determining whether a body is a servant or agent of the Crown or is independent of it. In *Fox* v. *Govt. of Newfoundland*, [1898] A.C. 667, it was held by the Judicial Committee of the Privy Council that certain balances in the books of a bank to the credit of the various boards of education in Newfoundland were not debts or claims due to the Crown or to the Government or revenues of Newfoundland. At p. 672, Sir Richard Couch said: "The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government."

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The determining test in this case was the possession of a discretionary power independent of the Government. The above statement was approved by the Judicial Committee in the leading case of *Metropolitan Meat Industry Bd.* v. *Sheedy*, [1927] A.C. 899. In that case the *Meat Industry Act*, 1915, of New South Wales provided for the maintenance and control of slaughter-houses, cattle sale yards, and meat markets in Sydney and the adjoining district, and established the Board to administer the Act. The members of the Board were to be appointed by the Governor, who had power to veto certain of its actions. The Board had wide powers, which it exercised at its discretion; any power of interference which a Minister of the Crown possessed was not such as to make the acts of administration his acts. Money received by the Board for tolls and fees to be levied by it was not paid into the general funds of the State, but to its own fund, out of which the expenses of carrying the Act into effect were to be met. The question for determination was whether an amount due to the Board by a company which had gone into liquidation was a debt due to the Crown and as such entitled to priority over the claims of other unsecured creditors. It was held that the Board was not acting as a servant of the Crown and the amount owing to it was not a debt due to the Crown. At p. 905, Viscount Haldane said: "They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguised from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund."

Undoubtedly, the governing factor in deciding that the

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Board was not a servant of the Crown but an independent body was that, although it was subject to governmental control in several respects, it had wide powers which were to be exercised at its own discretion and without consulting any direct representative of the Crown. Another indication of its independence was that it had control over its own revenues and their expenditure. An important Canadian case on the subject is the judgment of the Supreme Court of Canada in *Halifax* v. *Halifax Harbour Com'rs*, [1935], 1 D.L.R. 657, S.C.R. 215. There the question was whether the Halifax Harbour Commissioners who occupied the Crown property of Halifax Harbour were assessable for business tax as an "occupier" within s. 357(1) of the *Halifax City Charter* (1931). Sir Lyman P. Duff C.J.C., speaking for the Court, carefully scrutinized the nature of the powers and duties of the Commissioners, and summarized the controls and supervision to which they were subject. He pointed out that in the exercise of all their powers the Commissioners were subject to the control of the Crown and concluded that they were performing Government services and were occupying the property in question in and for the services of the Crown and were, therefore, not assessable for business tax. The Commissioners had none of the free discretionary powers that are necessary to independence, as laid down in *Metropolitan Meat Industry Bd.* v. *Sheedy*, *supra*, and the case was, therefore, readily distinguishable from it. In coming to its decision the Court applied a number of tests in addition to those already referred to. For example, it inquired into such questions as the ownership of the occupied property, namely, whether it belonged to the Crown or the occupant, and the nature of the functions of the occupant, that is, whether they were those ordinarily performed in the course of government. Then reference may also be made to the recent judgment of the Judicial Committee of the Privy Council in *Montreal* v. *Montreal Locomotive Wks.*, [1947] 1 D.L.R. 161 in which Lord Wright stresses the difficulty which is inherent in deciding whether a person is a servant or not, and points out that the presence or absence of control by itself is not always conclusive and suggests other tests as well, which are not applicable in the present case. *Vide* also the judgment of the Supreme Court of Canada in *Regina Industries Ltd.* v. *Regina*, [1947], 3 D.L.R. 81, S.C.R. 345. This leads to an examination of the position of the Custodian under the *Consolidated Regulations respecting Trading with the Enemy (1939)*, as enacted by P.C. 3959 [74 Can. Gaz. 757], dated August 21, 1940, as amended by P.C.

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5353 [Proclamations & Orders in Council, vol. 3, p. 110] dated October 3, 1940, hereinafter called the *Consolidated Regulations*. By s. 6 the Secretary of State is appointed as the Custodian to receive, hold, preserve and deal with such property, as may be paid to or vested in him under the Regulations. In my opinion, nothing turns on the fact that a Minister of the Crown is appointed as Custodian, for anyone else might just as validly have been appointed. By s. 21 all enemy property in Canada vests in the Custodian and is subject to his control. The *Consolidated Regulations* give him very wide discretionary powers over such property; for example, by s. 21(2) he may deal with the interest of the enemy in it as he may in his sole discretion decide; under s. 23(2) he may have it transferred into his own name; by s. 38 he may, where he considers it advisable to do so, liquidate it; or by s. 39, at his discretion, relinquish it; or by s. 40 dispose of it either publicly or privately, as he in his discretion shall think proper; the property held by him is by s. 49 rendered free from attachment or execution and by s. 50 he is made not liable for any charge against it. These references are sufficient to show the great width of the Custodian's discretionary powers and his freedom from governmental control in dealing with the property vested in him. In the matter of litigation, by s. 27 provision is made for proceedings by and against the Custodian under certain conditions and under s. 36 he may take action to recover money payable to him under the Regulations. It is to be noted that the right of action is that of the Custodian, not that of the Crown; indeed, he may himself have to take proceedings as Custodian against the Crown as has happened in this Court. Then under the Regulations the Custodian is given very wide administrative powers involving the free exercise of discretion. By s. 43(1) he shall establish an office or offices for the administration of the Regulations and is empowered to select officers, clerks and advisers and to pay them such remuneration as he may determine. This is a most unusual power and indicative of the independent character of the Custodian's office. This is not in the least diminished by the special provision for a special purpose in s. 43(2) that the Custodian's office shall be deemed to be a Department of Government of Canada and the Custodian the head of such Department, for the purposes of the *Canada Evidence Act*, R.S.C. 1927, c. 59. Furthermore, the Custodian is given full control over his own funds. By s. 42 he may deposit moneys paid to or received by him in any bank. They are not paid in to the Consolidated Revenue. By s. 44(1) he

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is empowered to make certain charges against released property and by s. 44(2) he may retain out of the proceeds of all property vested in him sufficient moneys to pay the expenses incurred in the administration of the Regulations. He is not dependent at all for the administration of the Regulations on any appropriations by Parliament. These references to the Regulations sufficiently show the independence with which the law has endowed the Custodian. It is true that he is subject to control by the Governor in Council but such control is not executive but of a legislative nature of the same kind as that which Parliament itself might exercise, which is a very different thing from the control which the Crown, meaning thereby His Majesty acting on advice in his executive capacity, exercises over its servants. If the Custodian is not the servant or agent of the Crown it must follow that a petition of right cannot lie against it in respect of his acts and it was so held by this Court in *Ritcher* v. *The King*, [1943], 3 D.L.R. 540, Ex. C.R. 64. There Angers J. expressed the opinion that the Custodian did not hold enemy property as an agent or servant of the Crown and that no petition of right could lie against the Crown in respect of any claim asserted in respect of his actions. I am of a similar opinion in the present case. It seems clear to me, in view of the wide discretionary powers of the Custodian over the property vested in him, his freedom from governmental control in the management of his office and the appointment and remuneration of members of his staff, and his complete control over his funds and their expenditure, that it was intended by the *Consolidated Regulations* that the Custodian should not be a servant or agent of the Crown but an independent person. It was important and proper that this should be so in order that the properties vested in him should be held by him neither for the former owners nor for the Crown but independently in a state of suspense until their final disposition should be determined pursuant to appropriate legislative enactment in the light of the turn of events on the conclusion of the emergency that made their vesting necessary or advisable. That being so, it follows that the course taken by the suppliants in lodging petitions of right against the Crown in respect of an intended sale of the suppliants' properties by the Custodian was erroneous, and that since no cause of action against the Crown is shown the answer to the question of law herein must be in the negative. If the suppliants have any cause of action it could only be against the Custodian; as to which, the Court expresses no opinion in the absence of the Custodian, who is not a party to these proceedings.

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Counsel for the suppliants sought to save himself from this conclusion by arguing that the Custodian was not in the same position with regard to Japanese evacuee property as with regard to alien enemy property. His contention was that the suppliants were not alien enemies within the meaning of the *Consolidated Regulations*, which is true, and that they do not apply in the present case except only for limited purposes, since under P.C. 1665 and P.C. 2483, Japanese evacuee property is vested in the Custodian "as a protective measure only" and made subject only "to the control and management of the Custodian" and that at the time of the vesting the Custodian had no right of sale. In my opinion, even if this were conceded, it would not alter the character of the Custodian's powers and duties. His discretionary powers might be more limited in scope than in the case of alien enemy property, but the difference would be one of degree rather than of kind. He would still have very wide free discretionary powers in the field of control and management. And, if P.C. 469 is valid, there would be no difference at all in the scope of the Custodian's discretionary powers as between alien enemy property on the one hand and Japanese evacuee property on the other.

Counsel for the suppliants also took the position that, even if the Custodian were not a servant or agent of the Crown, the filing of a petition of right would, nevertheless, be the correct procedure for the relief sought on the ground that although the properties were vested in the Custodian he derived his title to them from the Crown, and he relied upon a number of cases in support of his view including *A.-G. Ont.* v. *McLean Gold Mines Ltd.*, [1926] 4 D.L.R. 213, [1927] A.C. 185, 59 O.L.R. 415*n*. There two mining claims in Ontario granted by the Crown were forfeited, under the *Mining Tax Act*, for default in the payment of taxes, and were granted to another person. Assignees of the original grantee brought an action against the Attorney-General, the Minister of Mines, and registered owners under the new grant, alleging defects in the forfeiture proceedings, and claiming a declaration that they were the true owners, a declaration that the forfeiture certificates were void and an order that they should be substituted as owners in the register of titles. It was held that as the plaintiff's claim impugned the title accruing to the Crown on the forfeiture it could not be made by action, but only by petition of right. In my opinion, this judgment has no applicability in the present case, since the title to the suppliants' property was never in the Crown and the Custodian's title could not, therefore, have been derived

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from it. To contend that because the suppliants' properties were vested in the Custodian by an Order in Council, passed under the *War Measures Act*, R.S.C. 1927, c. 206, he derived his title to them from the Crown shows a misconception of the nature of the source of the Custodian's title. It did not come from the Crown pursuant to an executive act of the Crown. Both the divesting from the former Japanese owners and the vesting in the Custodian were pursuant to an Order in Council passed by the Governor in Council as a legislative enactment under the legislative power devolved upon him by Parliament and having the same force as if it had been enacted by Parliament itself. The source of the Custodian's title is legislative, not executive. It was not a case at all of the title having first been in the Crown and then transferred to the Custodian. It was never in the Crown, and the Custodian did not derive any title from it.

Under the circumstances, since the Custodian is not the servant or agent of the Crown and no cause of action against the Crown appears I must hold that the proceedings by way of petition of right were erroneously taken. In my opinion, this ends the matter and is a sufficient reason for answering the question of law in the negative.

I was urged, however, by counsel for the suppliants to deal with his attack on the validity of the Orders in Council on the ground that it could be made only by way of petition of right. I do not agree with this or with the other grounds advanced for dealing with the question. But since it is of great importance and has some bearing, as already suggested, on whether there is any difference in kind between the powers of the Custodian in the present case and those which he possesses as Custodian of alien enemy property, I shall deal with the question, although with considerable doubt as to whether it can properly be raised in these proceedings.

Counsel for the suppliants confined his attack on the validity of the Orders in Council to the extent to which they purport to authorize the Custodian to liquidate, sell or otherwise dispose of the properties of Japanese evacuees vested in him. The argument ran as follows: It was conceded that the Order for the evacuation of persons of Japanese origin from the protected area was valid as a war measure, whether such persons were Japanese nationals or British subjects. It was also conceded that P.C. 1665 and P.C. 2483 were valid in so far as they vested the properties in the Custodian for his control and management; since the Japanese on their evacuation had to leave their properties, it was said to be the duty and responsibility of the Government to look after them, so that the vesting of them in the Custodian for control and management for the protection of the former owners was necessarily incidental and ancillary to the evacuation and, as such, a valid war measure. But this was the limit of counsel's concessions. While the terms of P.C. 469, cited above, were the main object of counsel's attack he made it clear that if they were to be regarded as merely declaratory and the power of control and management conferred by P.C. 1665 and P.C. 2483 construed as including the power of sale, then his attack extended also to these Orders in Council to the extent that they purported to confer such power. It was the authorization of the power of liquidation, sale or other disposition of the properties that was objected to as being beyond the powers of the Governor in Council even under the *War Measures Act*. It was admitted that the power of control and management might conceivably include the right to sell the properties if such sale was necessary to protect them or the former owners, but not otherwise, and there could be no such necessity in the present case where, as alleged in the petitions, the properties are rented and the rentals are sufficient to maintain them in good standing and condition. Counsel urged that there was a vital difference between the right to authorize control and management and the right to authorize sale; the former was *intra vires*, the latter was not. The validity of the Orders in Council vesting the properties of the evacuated Japanese in the Custodian for his control and management could be justified, so counsel argued, only on the basis that such vesting was for the protection of the former Japanese owners and was ancillary to their evacuation, but that no such justification was possible for an Order in Council authorizing the sale of properties already in the custody of the Custodian and subject to his control and management. The argument went on that only that which was ancillary to the evacuation was *intra vires* and that, while control and management of the properties was ancillary, sale of them was not. Counsel urged vigorously that Orders in Council under the *War Measures Act* must be for war objects; that the authorizing of the sale of the properties had nothing to do with the evacuation, or the attainment of the objects of the war or national security, was not a war measure at all and, therefore, not within the competence of the Governor in Council; that the Court had the right to question the validity of Orders in Council under the *War Measures Act;* and that it ought to intervene

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in an obvious case such as this and declare that the Order in Council authorizing the liquidation, sale or other disposition of the properties in question was not a war measure at all, but an unwarranted invasion of property and civil rights and, consequently, *ultra vires*.

With the propriety of the action of the Custodian in advertising the suppliants' properties for sale the Court can have no concern in these proceedings. The sole question is whether he had the right to do so and that in turn depends on whether the Order authorizing the power of sale is within the competence of the Governor in Council. Order in Council P.C. 469 was expressly declared to be made under the authority of the *War Measures Act*, and contained a number of recitals including the following: "That the evacuation of persons of the Japanese race from the protected areas has now been substantially completed and that it is necessary to provide facilities for liquidation of property in appropriate cases."

Although the Order in Council was passed under the authority of the *War Measures Act* and the Governor in Council has declared that it is a necessary measure, the Court is invited by counsel for the suppliants to declare that it is not a war measure and is, therefore, not validly enacted. Whether the Court can assert an opinion contrary to that declared by the Governor in Council is the matter to be determined. The question has, I think, been completely answered by the authorities.

The *War Measures Act*, first enacted in 1914, 1914 (Can. 2nd Sess.), c. 2, was not repealed after the end of the first world war, and was carried into the 1927 revision with only minor changes made by the Commissioners and some rearrangement of its sections. The first portion of s. 3, previously s. 6, provides as follows: "3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada."

The validity of the *War Measures Act* itself depends on whether it falls within the jurisdiction of the Canadian Parliament under the opening words of s. 91 of the *B.N.A. Act*, which empowers it to make laws for the peace, order and good government of Canada. It was considered *intra vires* by the Supreme Court of Canada in *Re Gray* (1918), 42 D.L.R. 1, 57 S.C.R. 150, and its validity was settled by the Judicial Committee of the Privy Council in *Fort Frances P. & P. Co.* v. *Man. Free Press Co.*, [1923], 3 D.L.R. 629, A.C. 695, 25 O.W.N. 60. It was not challenged in the present case.

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Under the circumstances, the question whether P.C. 469 is *intra vires* the Governor in Council is really a question of construction of the *War Measures Act* and an ascertainment of whether its requirements have been complied with. If the answer to this question is in the affirmative 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. That was the conclusion of the Supreme Court of Canada in *Reference re Regulations (Chemicals) Under War Measures Act*, [1943], 1 D.L.R. 248, S.C.R. 1, 79 Can. C.C. 1, in which, although the primary question was as to the power of the Governor in Council to delegate authority to subordinate agencies, the nature and extent of the powers of the Governor in Council under the *War Measures Act* were also dealt with. The Court 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 itself. Sir Lyman P. Duff C.J.C. at p. 253 D.L.R., p. 9 S.C.R., p. 7 Can. C.C. said: "The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the *War Measures Act* may have the effect of an Act of Parliament."

And Rinfret, J., as he then was, at p. 260 D.L.R., pp. 17-8 S.C.R., p. 15 Can. C.C., expressed the same view: "The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council in vested with plenary powers of legislation as large and of the same nature as those of Parliament itself (Lord Selborne in *The Queen* v. *Burah* (1878), 3 App. Cas. 889). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power."

The conditions of a valid enactment under the *War Measures Act* prescribed by the Act itself are two; first, there must be in existence a real or apprehended war, invasion or insurrection; and secondly, the Governor in Council must by reason of such real or apprehended war, invasion or insurrection deem

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the enactment necessary or advisable for the security, defence, peace, order and welfare of Canada. It is to be noted that the objects specified are not confined to the prosecution of the war. Once the conditions prescribed by the Act have been complied with it is not open to the Court to question the validity of an Order in Council under the *War Measures Act* on the ground that the enactment was not in fact necessary or advisable for the objects specified. At pp. 255-6 D.L.R., p. 12 S.C.R., pp. 9-10 Can. C.C., Sir Lyman P. Duff C.J.C. put the proposition in these terms: "The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above, (and the specific provisions enumerated), when Regulations have been passed by the Governor-General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any Court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor-General in Council (not the Courts) deems necessary or advisable."

And, as Rinfret J. said at p. 262 D.L.R., p. 19 S.C.R., p. 17 Can. C.C.: "For a Court to review the enactment would be to assume the role of legislator."

The matter is, I think, conclusively settled by *Reference re Deportation of Japanese*, [1946], 3 D.L.R. 321, S.C.R. 248. There Rinfret C.J.C., speaking also for Kerwin and Taschereau JJ. and referring to the Orders in Council that were the subject of the reference, said at p. 339 D.L.R., p. 277 S.C.R.: "The Governor in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any Court to canvass these considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth."

And at pp. 346-7 D.L.R., p. 285 S.C.R. Rand J. made it clear that it was not for the Courts to substitute their view of any such necessity or advisability for that of the Governor in Council. And when the matter came before the Judicial Committee of the Privy Council, [1947], 1 D.L.R. 577 at p. 586, A.C. 87, Lord Wright said: "It is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers."

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The same thought was forcefully expressed by the English Court of Appeal in *R.* v. *Comptroller-General of Patents*, [1941] 2 All E.R. 677. In that case His Majesty in Council was given power by the *Emergency Powers (Defence) Act*, 1939, to make such orders as appeared to him necessary or expedient for securing public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community, and under this power a Regulation was passed enabling the Comptroller of Patents to suspend the trade-mark rights of British subjects operating enemy-owned patents. The Regulation was objected to on the grounds that it was outside the war purposes to which the power conferred by the *Emergency Powers (Defence) Act*, 1939, was confined. The contention was thus very similar to that put forward for the suppliants in the present case. It did not prevail. Scott L.J. said at p. 681: "The effect of the words 'as appear to him to be necessary or expedient' is, in my opinion, to give to His Majesty in Council, as the authority for passing the delegated legislation, a complete discretion entrusted to him by Parliament to decide what regulations are necessary for the purposes named in the subsection. If so, it is not open to His Majesty's courts to investigate the question as to whether or not it was in fact necessary or expedient for the purposes named to make the regulations which were made."

And Clauson L.J., at pp. 683-4, put it very clearly: "The criterion whether or not His Majesty had power to make a particular regulation is not whether that regulation is necessary or expedient for the purpose named, but whether it appears to His Majesty to be necessary or expedient for the purposes named to make the particular regulation."

And then said at p. 684: "If my view as to the construction of the Act and the effect of it is correct, it is quite clear that it is wholly irrelevant to discuss before this court whether the regulation was in fact necessary or expedient for securing the public safety and so forth. It is a wholly irrelevant matter,

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and with that we have nothing to do. His Majesty has formed the view that it was necessary or expedient. So far as this court is concerned, in my judgment, there is an end of the matter."

In the present case, the two conditions of jurisdiction prescribed by the *War Measures Act* have both been satisfied. It is, therefore, not open to the Court to question the validity of the Order in Council empowering the Custodian to sell the properties vested in him on the ground that such sale was not necessary for the purposes mentioned in the *War Measures Act*. Parliament has left the decision as to the necessity or advisability of such an Order for the security, defence, peace, order and welfare of Canada, not to the Court, but to the Governor in Council, and once the Governor in Council has made his decision that the Order is necessary or advisable for any of the purposes mentioned that is the end of the matter. The Court has no right to substitute its opinion of what is necessary or advisable for that of the Governor in Council or to question the validity of an Order so made. The only authority that can validly challenge the exercise by the Governor in Council of the legislative powers entrusted to him is Parliament itself. If Parliament considers that he has acted erroneously the corrective power is in its hands—it does not lie with the Courts.

It was, therefore, within the power of the Governor in Council to pass P.C. 469 embodying the terms against which the suppliants protest and they were validly enacted. The Custodian has, therefore, the lawful right to liquidate, sell, or otherwise dispose of the property vested in him, including the properties of the suppliants.

Only a brief reference need be made to another argument advanced on behalf of the suppliants. It was contended that they had handed their properties over to the Custodian voluntarily on the strength of the first two Orders in Council under which they were to be vested in him as a protective measure only for his control and management; that this fact constituted a contract with the Crown under which rights had accrued to the suppliants that the Crown would hold the properties for them pursuant to the Orders in Council: and that it was not competent for the Governor in Council to authorize the Custodian to sell the properties since this would affect accrued rights and would amount to a breach of contract. Apart altogether from my view that counsel for the suppliants has taken too narrow a view of the words "as a protective measure only" in the Order in Council I find no merit in law in his argument

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based on contract and accrued rights. In my view, there was no contract, express or implied, between the suppliants and either the Crown or the Custodian by reason of the signing of the "JP" Forms. The properties became vested in the Custodian not by any contract but pursuant to the Orders in Council and would have vested in the Custodian whether the suppliants had signed the forms referred to or not. Moreover, I repeat, the vesting was the result of a legislative enactment, not of an executive act. The Crown never held the properties and no rights against the Crown had ever accrued to the suppliants in respect of them.

Since the suppliants' whole case depends on the assumption that the Custodian is the servant or agent of the Crown and has no right to sell the suppliants' properties and such assumption is unsound their case falls to the ground. It is, therefore, unnecessary in these proceedings to deal with a number of matters referred to in the pleadings and raised in argument such as whether the Crown or the Custodian is a trustee of the properties in question and, if so, for whom and subject to what conditions, or whether declaratory orders of the kind sought for can or should be given. If, as I have held, the Custodian does not hold the properties of the suppliants as the servant or agent of the Crown, such questions cannot arise as against the Crown and so far as the Custodian is concerned they cannot be dealt with in these proceedings since he is not a party to them.

In the result the answer to the question of law submitted to the Court is—No. That being so, there is no object in proceeding to the trial of the petitions and the judgment of the Court must be that the suppliants are not entitled to any of the relief sought by them in their petitions of right. In each case, the respondent is entitled to costs.

Petitions dismissed.

C.N.R. v. CANADA STEAMSHIP LINES LTD.

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Ontario High Court, Schroeder J. June 30, 1947.

Negligence I B, II A—Fires—Operation of defective gasoline lift-truck in room containing inflammable substances—Whether failure to provide adequate fire protection is contributory negligence—Volenti non fit injuria—Accidental Fires Act (Ont.)—

A fire does not "accidentally begin" within the exempting provisions of the *Accidental Fires Act*, R.S.O. 1937, c. 161, where it is the result of negligence. The term "accidental" is not used in