EAST INDIANS LOSE APPEAL CASE

Unanimous Decision of Court of Appeal Is Against Would-Be Immigrants—All Actions of Authorities Upheld.

GOVERNMENT HAS POWER TO EXCLUDE

Immigration Law and Orders-in-Council Declared to Be Constitutional — Board of Inquiry's Action Regular.

By unanimous judgment the British Columbia Court of Appeal has dismissed the appeal made on behalf of Mushi Singh, one of the 352 East Indians held on the SS. Komagata Maru in Vancouver Harbor by the immigration authorities, for a writ of habeas corpus. The Court's pronouncement was made at 11 o'clock yesterday morning. Chief Macdonald stated that he had reached the conclusion indicated and proceeded, briefly, to sum up his reasons for having arrived at that conclusion. Mr. Justice Irving, Mr. Justice Martin, Mr. Justice Galliher and Mr. Justice McPhillips declared their concurrence with the Chief Justice in the order named, the former entering more fully into the matter, while the latter made a short statement. He said that the momentous character of the quesion was appreciated; that the terms of the law, in his opinion, inhibited the Courts from interference, that the board had ample evidence to warrant its conclusion as to Munshi Singh's character as a laborer; and that Canada was a nation, complete in itself, with power to pass any law which the Imperial Parliament might pass in this respect, and with power to implement such statutes.

When their lordships took their places the auditorium was crowded. The throng was an illustration of the keen interest taken locally in the struggle of East Indians to obtain admission into Canada. There were a number of countrymen of those who are striving to overcome the determination of the immigration officers to enforce the regulations in attendance. Mr. Robert Cassidy, K.C., who was leading counsel, with Mr. Bird, in the presentation of the case for the would-be immigrants, was absent, as was Mr. Bird. The place of Mr. W. B. H. Ritchie, K.C., who acted for Superintendent Reid, of the Immigration Department, was also vacant, Mr. Ladner appearing, while Mr. H. G. Heisterman, of this city, represented Messrs. Cassidy and Bird.

As the Court of Appeal, without dissension, declared that the Dominion of Canada has the power, under the British North America Act to exclude from the country any class or race, irrespective of whether or not the applicant happens to be a British subject, and that the immigration law and the orders-in-council based on it and under which the immigration officers are holding the new arrivals, are sound, their fate appears to be sealed. It is expected that steps will be taken to deport Gurdit Singh and his countrymen without delay. There is a possibility that Mr. Bird will be instructed to carry the appeal to the Supreme Court, and even as far as the Privy Council, but the solution of the problem of what disposition shall be made of those affected in the interim lies in the hands of those charged with the enforcement of the regulations.

Chief Justice Macdonald

Chief Justice Macdonald's judgment reads as follows:

The appellant, Munshi Singh, who seeks to enter Canada as an immigrant, is a native of India and a British subject. He is one of a large number of immigrants who have come to the port of Vancouver in the Komagata Maru. He was denied permission to land and, after formal proceedings were had before a board of inquiry, he was rejected and an order was made by the board for his deportation. He then applied to a judge for a writ of habeas corpus to test the legality of his detention, and from the refusal of the writ he now appeals to this court.

On the threshold of the case is the question of the constitutionality of the Dominion Act. That the King, with the advice and consent of the Imperial Parliament, had the power to make laws for the exclusion from British possessions of immigrants, whether British subjects or not, has not been questioned, as indeed it would not be doubted. By the terms of the British North America Act the Parliament of Canada is clothed

with sovereign power in matters relating to immigration into any part of the Dominion. No residue of authority except the power of disallowance is left with the Imperial Parliament, and hence subject to the power which has not been exercised with respect to the Immigration Act, Canada's authority to admit immigrants of any or every race or nationality, on any terms she pleases, is complete "authority as plenary and as ample . . . as the Imperial Parliament in the plentitude of its power possesses and could bestow."

The next question is as to whether or not the three orders-in-council under which the immigration authorities have acted in rejecting the appellant, conform to the authority given by the Immigration Act to the Governor-in-Council to make such orders. Section 3 of the act specifies certain prohibited classes, and then provides that other restrictions may be effected by order-in-council, pursuant to sections 37 and 38. So much of section 37 as is relevant to this reads:

"Regulations made by the Governor-in-Council under this act may provide as a condition to permission to land in Canada that immigrants and tourists shall possess in their own right, money to a prescribed minimum amount, which amount may vary according to the race, occupation or destination of such immigrant or tourist, and otherwise according to the circumstances."

In pursuance of this authority, the Governor-in-Council made a regulation, known as P. C. 24, which reads:

"From and after the date hereof, no immigrant of any Asiatic race shall be permitted to land in Canada unless such immigrant possess in his own right, money to the amount of at least $200. Provided that this regulation shall not apply to any person, who is a native or subject of an Asiatic country as to which special statutory regulations inconsistent with this regulation are in force, or with which there is in operation a special treaty, agreement or convention binding the Government of Canada, if the provisions of this regulation be inconsistent with the stipulations of such treaty, agreement or convention."

Much ingenious argument was directed to this section and order, the principal contention being that the order goes beyond the authority given by the section, and discriminates against a particular race. The section is not well drawn, but the manifest intention of its framers was to enable the Governor-in-Council to make regulations which would empower immigration officers to exclude from Canada an immigrant or a tourist not possessed of a specified sum of money, and that in making such regulation he might have regard to the race, occupation and destination of the immigrant or tourist. It contemplates that discrimination with respect to race, which the order-in-council makes, when it subjects the person of Asiatic race to the monetary test. The contention is that because the Asiatic race was singled out and the test not applied to other races, there was an unjust discrimination not authorised by that section. The proviso in P. C. 24, which exempts from the monetary test, natives of Asiatic countries with whom we have treaties or conventions affecting immigration, or whose subjects are admitted under other statutory laws or regulations, was referred to as further supporting this contention, but in my opinion the conditions which made such a proviso necessary are important, as showing that section 37 could not be, and was not intended to have been made, operative without discrimination in favor of such races whose legal status to be admitted to Canada was already fixed by statute or treaty.

The Board of Inquiry acted, also, under another order-in-council, passed on January 7, 1914, and known as P.C. 23, the authority for which is derived from s. c. (a) of section 38 of the Immigration Act. That sub-section enables the Governor-in-Council by proclamation or order to:

"Prohibit the landing in Canada, or at any specified port of entry in Canada, of any immigrant who has come to Canada otherwise than by continuous journey, from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepaid in Canada."

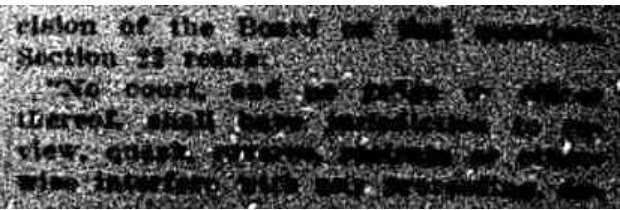
The order-in-council is identical in language with the sub-section, and hence no doubt arises as to its conforming to the act. The fact is conceded that the appellant did not, and could not comply with this regulation. His passage was taken from Hongkong, and though that is a British possession, he cannot, even in a technical sense, be said to be a native citizen of Hongkong, while in the popular sense, in which I am convinced the term "native citizen" is used in section 38, is would be absurd to call him such. The appellant's suggestion is that a British subject, born in one part of the King's possessions is a native citizen of every other part. This, I am confident, was not the meaning attached to the term "native citizen" by Parliament.

Counsel also contended that the powers conferred on the Governor-in-Council under this sub-section could be exercised by him only, and in respect of each immigrant claiming admission. In other words, that the Governor-in-Council should adjudicate upon each and every claim to admission. Such a construction of the section is repugnant to the whole Act and to the language of the section itself.

Then again, sub-section (a) of section 38 authorizes the Governor-in-Council to "prohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry in Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or if immigrants of any specified class, occupation or character."

In pursuance of this authority the Order-in-Council V.C. 897 was passed on the 31st of March, 1914. It provides that, from and after its date and until the 30th September, 1914, the landing at any specified port of entry in British Columbia of any immigrant who is an artisan or a laborer is prohibited. Among the specified ports of entry is the port of Vancouver. It is not contended that this order does not conform to the section. The complaint is that the Board of Inquiry erroneously held that the appellant was a laborer and not a farmer, as he claimed to be.

The onus of proof is by the Act cast upon the immigrant to show that he does not belong to a prohibited class. He failed to convince the Board that he was not a laborer, and one of the questions involved in this appeal is as to whether this Court can review the de-



cision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."

Had the Board of Inquiry acted without jurisdiction or upon orders in council made without authority, or upon a statute which was unconstitutional, no doubt the Court could and would interfere to prevent what in that case would be an illegal detention.

As in my opinion the Immigration Act is not unconstitutional, and the order-in-council P.C. 827, is not ultra vires, and as the Board was legally seized of the subject of the inquiry, I think the Court cannot review a decision upon a question which the Board was authorized to decide. The appellant, if he have just cause of complaint, is not without redress, as an appeal to the Minister of the Interior is given by this Act.

The result is that in my opinion the British North America Act vested in the Parliament of Canada sovereign power over immigration into Canada; that that power includes the right to exclude British subjects, not even excepting those born in the United Kingdom; that each of the orders-in-council in question here was authorized by the Immigration Act; that each one of them would bar the appellant; that the Board of Inquiry acted within its jurisdiction and in accordance with the provisions of the Act; and that its decision, which is not impeached on the ground of fraud, that the appellant is a laborer, is not open to review except by the Minister of the Interior.

It follows that the appeal must be dismissed.

Mr. Justice Irving

Reference first is made by His Lordship to Section 95 of the British North America Act, which was a delegation of legislative and executive powers by the Crown to the Dominion of Canada "in relation to immigration into all or any of the Provinces of Canada." In respect of the matters so delegated to Canada, the Dominion, he said, had an authority as ample as the Imperial Parliament and so had a right to make laws for the exclusion or the expulsion of aliens. He continued: "It seems to me plain beyond all question that Canada has a right also to make laws for the exclusion and expulsion from Canada of British subjects, whether of Asiatic race or of European race, irrespective of whether they come from Calcutta or London. It is with reference to a British subject of Asiatic race, coming from Hong Kong, that we are now dealing, but what has been done by Parliament with reference to any European race."

Mr. Justice Irving, continuing, specifically took up the position of Munshi Singh. He said that the application for habeas corpus should have been supported by an affidavit by the person applying, showing that he was illegally restrained. He adds: 'This omission, I think, shows that the true point for our determination has not been appreciated. Our duty is to determine on this appeal whether the applicant is illegally restrained, and, although we have in that connection to consider the provisions of the Immigration Act—nevertheless, our duty is not to determine whether or not Munshi Singh ought to be admitted. We are not a Court of Appeal from the decision of the Board of Inquiry."

Under any circumstances, however, His Lordship expressed the opinion that the appeal was hopeless. There was a complete chain of authority from the Sovereign, with the assent of the Imperial Parliament, down to the Board

of Inquiry, and the proceedings were on their face regular in every respect.

Mr. Justice Galliher

Mr. Justice Galliher rendered an exceedingly brief judgment, stating at the outset that, in his opinion, the applicant, Munshi Singh, was properly ordered deported under Order-in-Council (P.C. Order 23), which provides that, "From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by a continuous journey, etc." He said that the contention that, because the immigrant in question was a British subject and embarked from Hong Kong he came from the land of which he was a native, was a fallacy. Hong Kong was in the country geographically designated China, and there was no pretence that Munshi Singh was a native or naturalized citizen of China. The word "country" was used in its geographical sense in the Act. His Lordship dismissed the argument that the Immigration Act, in so far as it dealt with British subjects, was ultra vires with references to authorities. He did the same with regard to the point raised as to the jurisdiction of the Board of Inquiry, stating in conclusion that there was nothing in the proceedings before the Board of Inquiry "in the case at bar which gives this court power to review their findings. There is no defect of jurisdiction and no fraud."

Mr. Justice McPhillips

After announcing his decision, which he explained was amplified in writing, Mr. Justice McPhillips said:

"I have looked upon this question as one momentous in character and which is exercising a great deal of public attention. Shortly, my view is that the courts are absolutely inhibited from interfering with the proceedings under the Immigration Act; that the meaning of the statute is so plain and the words are so apt that no other conclusion can be come to. However, should I be wrong in that, I am thoroughly satisfied that no law or rule of evidence has been infringed upon in regard to the board of inquiry's conduct and decision, that there was ample reason for the decision it arrived at, and that there has been no denial of justice. Parliament has power to deal with immigration, and such an act would be passed by any Parliament charged with maintaining peace, order and good government in Canada.

"I am further of the opinion that we can now make the pronouncement that Canada is a nation, complete in herself, part of the British Empire, but that she may enact any law which the Imperial Parliament can pass today. And if the Imperial Parliament would be enabled to pass an act similar to the immigration act, the Parliament of Canada would be, and if it is held that the Imperial Parliament can exclude from Great Britain and Ireland people even who are not British subjects, then the Parliament of Canada may. I am of the opinion that the Imperial Parliament and the Government would be enabled to implement its statutes to that end, and similarly Canada may as fully as would the Imperial Parliament, acting in the best interests of the nation where a national crisis has arisen. Parliament, having to deal with a national crisis and situation, has acted, and the courts have only to see that the law is carried out."

With regard to the point raised as to the civil rights of the East Indians, as British subjects, Mr. Justice Phillips declared that it could not be said, upon the facts, that Munshi Singh was within Canada, not yet being landed. The appellant's domicile unquestionably was India. This being true, he pointed out that Munshi Singh was in the position of being unable to claim any civil rights in British Columbia.

His Lordship did not think that the argument that the East Indians could not properly be termed of Asiatic race as crucial.

He adds: "The Parliament of Canada—the nation's Parliament—may be said to be safe-guarding the people of Canada from an influx, which, it is no chimera to conjure up, might annihilate the nation and change its whole potential complexity, introduce Oriental ways as against European ways, Eastern civilization for Western civilization, and all the dire results that would naturally flow therefrom.

In that our fellow British subjects of the Asiatic race are of different racial instincts to those of the European race—and consistent therewith, their family life, rules of society and laws are of a very different character—in their own interests their proper place of residence is within the confines of their respective countries in the Continent of Asia, not in Canada where their customs are not in vogue and their adhesion to them here only giving rise to disturbances destructive to the wellbeing of society and against the maintenance of peace, order and good government.

In my opinion the Immigration Act and the orders-in-council referred to constitute full and justifiable warrant for the detention of the appellant by the immigration authorities and for his deportation—the deportation order being good and sufficient in law even were the decision of the Board of Inquiry reviewable—and no grounds are made out for the appellant's discharge—but in so holding I am not to be understood as holding that there is any power of review or the right to invoke habeas corpus proceedings to effect the discharge of the appellant, as my opinion is that Section 25 is an absolute inhibition upon the Court, and there is no jurisdiction in the Court to grant a writ of habeas corpus and thereupon discharge the appellant from custody.