BETWEEN:

TORAZO IWASAKI .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Vancouver 1968
Sept. 30, Oct. 1-3
Oct. 29

War Measures—Sale of property of Japanese evacuee—Whether breach of trust—Person "of Japanese race"—Whether order in council void for vagueness—Sale by Custodian to agent's company, effect—War Measures Act, R.S.C. 1927, c. 206, s. 3—Defence of Canada Regulations (Consolidation) 1941—Regulations Respecting Trading With the Enemy (1939).

In 1945 the Custodian of Alien Enemy property purporting to act under orders in council made under the *War Measures Act* sold for $5,250 certain land in British Columbia belonging to suppliant (who was born in Japan of Japanese parents) to a company in which the Custodian's agent had a 20% interest. Later the land was revalued and suppliant paid an additional $6,750 upon giving the Crown and the Custodian a release. Suppliant by petition of right demanded return of the land or damages on the ground that the Custodian held suppliant's land in trust to manage and return it to suppliant and that he committed a breach of trust by selling it.

Held, rejecting the petition, (1) the court could not entertain the claim for return of the land which involved rescission of the titles issued to the Custodian and subsequent titleholders since these were not parties to the proceedings, and (2) the orders in council did not create a trust and suppliant was therefore not entitled to damages or an account. *Nakashima v. The King* [1947] Ex. C.R. 486, discussed. Nor were the orders in council void for vagueness because made applicable to "any person of the Japanese race". *Reference re Validity of Orders in Council* [1947] 1 D.L.R. 577, referred to.

Held also, no conflict of interest arose because the Custodian sold the land to a company in which his agent had a 20% interest.

PETITION OF RIGHT.

J. R. MacLeod and *Daniel W. Small* for suppliant.

N. D. Mullins and *R. W. Law* for respondent.

SHEPPARD D.J.:—The suppliant, Torazo Iwasaki, alleges by petition that the Custodian as trustee for the suppliant as evacuee committed a breach of trust in selling land of the suppliant without any power of sale, or by selling to the specific grantee, Salt Spring Lands Limited, and for such acts of the Custodian the Crown is liable by *respondeat superior.*

The Crown in defence says:

(1) that there was no trust;

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(2) that there was no breach of trust in selling;

(3) that the suppliant's claim is barred by limitation of action and by laches;

(4) that the suppliant's claim is barred by release.

As the issue raises the effect of certain orders-in-council, it is convenient to recite the legislation in proper sequence. The *War Measures Act,* R.S.C. 1927, c. 206, s. 3 empowers the Governor-General-in-Council to enact such orders-in-council as he may deem necessary or advisable. That legislation has been held to be valid: *Japanese Reference* [1946] S.C.R., 248, affirmed [1947] 1 D.L.R. 577 (P.C.).

The first group of orders-in-council relates essentially to the person in declaring a protected area and by requiring any person of the Japanese race to leave that area. Those orders-in-council are order-in-council 5295, being the *Defence of Canada Regulations (Consolidation) 1941* which by s. 4 conferred the power to declare a protected area and to control the movement of persons therein; order-in-council 365 amended s. 4 by allowing the Minister of National Defence and the Minister of Justice to delcare the protected area and to require all or any enemy alien to leave; order-in-council 9760 declared a protected area in all land west of the Cascades, including Saltspring Island, where are situated the lands in question; order-in-council 1486 amended the *Defence of Canada Regulations, 1941,* by authorizing the Minister of Justice to require any or all persons to leave the protected area, and by order of the Minister of Justice of the 26th February 1942 every person of the Japanese race was to leave the protected area forthwith.

The second group of orders-in-council relates to the lands in question. Order-in-council 1665 established a security commission and s. 12 provided that all property situate in the protected area of British Columbia belonging to any person of the Japanese race and resident in such area should be vested in and subject to the control and management of the Custodian. Order-in-council 2483 amended order-in-council 1665 by defining a person of the Japanese race as follows:

> "Person of the Japanese race" means any person of the Japanese race required to leave any protected area of British Columbia by Order of the Minister of Justice under Regulation 4, as amended, of the Defence of Canada Regulations (Consolidation) 1941.

and by repealing s. 12 and substituting therefor the following:

> 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 13th, 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.
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> (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.
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> (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.

The *Regulations Respecting Trading with the Enemy, (1939)*, which are incorporated by reference by s. 12(3), defines Custodian by s. 23(1), vests the property of the enemy in the Custodian, and by s. 24(2) provides:

> This regulation shall be a vesting order and shall confer upon the Custodian all the rights of the original enemy holder, including the power of sale, management and otherwise dealing with such property rights and interests as he may in his sole discretion decide.

Additional powers of the Custodian are conferred by secs. 36 to 40 inclusive and 43 to 46 inclusive.

Order-in-council 469 empowered the Custodian to sell property of persons of the Japanese race.

Sec. 12(3) of order-in-council 2483 adopts by reference *Regulations Respecting Trading with the Enemy (1939). Consolidated Regulations* under order-in-council 3959 were in force and applied initially to the Custodian. On 13th November 1943 *Revised Regulations Respecting Trading with the Enemy (1943)* were substituted and the former *Regulations* were repealed.

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The facts follow.

The suppliant was born in Japan of parents who were also born in Japan and was naturalized as shown by certificate of Canada citizenship dated 19th June 1951. On the 5th April 1942 the suppliant, pursuant to the notice did register as a person of the Japanese race. The suppliant was subsequently evacuated and moved to Greenwood British Columbia and on May 23, 1943, the Custodian filed in the Land Registry Office in the City of Victoria a certificate of vesting of the suppliant's land.

In 1944 the Custodian issued a catalogue of real properties for sale by public tender which included the lands of the suppliant on Saltspring Island, and this catalogue states:

> Persons interested in the purchase of any of the properties listed herein are asked to contact the agent whose name is set opposite each property. These agents will be pleased to supply additional information and to arrange for the inspection of the property.

Also the catalogue referred interested parties for property on Saltspring Island, B.C. to Gavin C. Mouat of Ganges, B.C., described as an agent. The Custodian received offers from Captain Smith and Salt Spring Lands Limited to which the Custodian replied, saying that he required an independent valuation. The Custodian also received a third tender from one Bush which was refused as filed too late. D. K. Wilson, the evaluator of the Custodian, reported the value of the land at $5,000 and the Custodian thereupon wrote Smith and Salt Spring Lands Limited that he would not consider any offer of less than $5,000. Subsequently Salt Spring Lands Limited offered to purchase at $5,250 and that offer, being the highest, was ultimately accepted. By deed of the 1st March 1945 the Custodian conveyed to Salt Spring Lands Limited. Having received the purchase money the Custodian, on the 23rd May 1945 accounted to the suppliant.

By order-in-council 1810 of the 14th July 1947 it is recited that persons of the Japanese race were evacuated and claims have been made that they suffered pecuniary loss and therefore it was deemed advisable to appoint a Commissioner to investigate the claims and to make recommendations. H. I. Bird, then Justice of the Appeal Court, later the Chief Justice of British Columbia, was

appointed Commissioner. By letter of the 23rd May 1945 to the suppliant, the Custodian reported the sale of the land at $5,250 and reported the balance of $4,838.54 standing to the suppliant's credit. By letter of the 19th August 1947 the suppliant objected to the sale of his property, and by letter of the 28th August 1947 the Custodian remitted the balance standing to the credit of the suppliant and reported to him that Mr. Justice Bird had been appointed as Commissioner to investigate certain claims of persons of the Japanese race evacuated from British Columbia. Cheques were enclosed by letters of the 5th October 1948. Subsequently the suppliant was notified of the date of the hearing before the Commissioner and the suppliant gave evidence before the Commissioner and was there represented by counsel.

The Commissioner reported as follows:

> I have the honour to report upon the investigation into claims of persons of the Japanese race made by me pursuant to the terms of Order-in-Council P.C. 1810 of July 18th, 1947, as subsequently amended.
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> Subsequently a policy of liquidation of the property of these evacuated persons was laid down by Order-in-Council P.C. 469 of January 19th, 1943. This policy was put into operation soon after, and on March 8th, 1943, two Advisory Committees were set up by the Custodian to advise the Director upon the disposition or effective use of real and personal property of evacuated persons of the Japanese race then vested in the Custodian.
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> The first of these Committees was appointed for the Greater Vancouver area, the personnel of which comprised The Honourable Mr. Justice Sidney Smith, Justice of Appeal, British Columbia, as Chairman; Charles Jones, Esquire (then Alderman of the City of Vancouver and later Mayor); and K. Kimura, Esquire.
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> The other Advisory Committee, known as the Rural Property Committee, had jurisdiction over all vested property situate outside the Greater Vancouver area, including Prince Rupert and the vicinity, Victoria and elsewhere on Vancouver Island, as well as the Fraser Valley. This Committee was composed of His Honour the late Judge David Whiteside, deceased, as Chairman; D. E. McKenzie, Esquire, New Westminster; Hal Menzies, Esquire, Haney, B.C., and J. J. McLellan, Esquire. Mr. McLellan resigned soon after his appointment and was replaced by William Mott, Esquire, Mayor of New Westminster.
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> The personnel of these Advisory Committees was such as to provide complete assurance that the administration and liquidation of the property of evacuated persons under their auspices would be performed with competence and just consideration for the interests of the owners.
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> I am satisfied on the evidence adduced before me that the very onerous task imposed upon the Director of the Custodian's office at

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Vancouver, under the guidance and with the assistance of the Advisory Committees, was competently performed, with due regard to the interest of the owners of such property, notwithstanding that the task had to be performed in an atmosphere of public hysteria induced by war The fact that I have found that in certain respects fair market value was not realized on sales made by the Custodian in no sense reflects upon the work of the Custodian's organization. On the contrary, the evidence brought out on this Inquiry strongly supports the conclusion that this organization, in spite of the magnitude of the responsibilities imposed upon it, has substantially succeeded in administering and subsequently selling property of evacuated persons with due regard to the owner's interest.

These Committees advised the Director in respect to all matters arising in connection with the administration and sale of real and personal property under their jurisdiction, including the disposal of all property vested in the Custodian under the Orders-in-Council before mentioned, the methods to be adopted in appraisal of such property, the offering of the same for sale, the prices which should be realized, and the terms of contracts for sale, as well as the leasing of lands the immediate sale of which was considered inadvisable by the Committees.

Dealing now with Group 2 above, being real property situate in rural areas other than those included in numbers 1 and 3: The parcels included in this group, as before noted, were widely distributed throughout the Province of British Columbia. Consequently, the Director of the Custodian's office in many instances was unable to obtain the assistance of appraisers with such outstanding qualifications as those who were retained to act in the urban area of Greater Vancouver, nor does it appear that the appraisers employed had the intimate knowledge of the properties appraised which was enjoyed by those retained in the urban area. Moreover, the Rural Advisory Committee, drawn largely from residents of the Fraser Valley, could not bring to their deliberations the same intimate knowledge of properties dealt with by them as was possible in the case of the Urban Committee. I have directed attention earlier to the fact that the Rural Advisory Committee found it necessary to adopt in all circumstances the price fixed by the appraisers. Furthermore, the market for real properties passed upon by the Rural Advisory Committee was a much more limited market than that available in the Greater Vancouver area.

The evidence satisfies me that all reasonable efforts were made by the Director of the Custodian's office, as well as the Rural Advisory Committee, to realize the fair market value on the sale of those properties. However, it is my conclusion that the circumstances before outlined did not permit of that realization to the same degree as in the case of properties in the Greater Vancouver area.

and further reported his conclusions:

Counsel for the claimant caused an appraisal to be made in June, 1949, by R. M. Hall, of Pemberton Homes, Ltd., Victoria, B C This appraisal shows that a cruise of the timber on this parcel was made in 1921 by Ryan, Hibbertson, Ltd., who estimated the timber stand to comprise 4,335,000 ft. Claimant sold part of this timber on a stumpage contract made in 1939, at $2.00 per M.

The logging contractors took out, in the period 1940 to 1944, approximately 1,250,000 ft. Hall estimates that from 3,000,000 to 3,500,000 ft. remained on the property at the date of sale, which then had a stumpage value of about $4.00 per M., i.e., that there was a value in timber alone of from $12,000 to $14,000.

Hall describes the sea frontage to a depth of approximately 300 ft. as being exceptionally valuable for building sites. He considers that this part of the land, comprising approximately 100 acres, could have been sold, if subdivided and road connection furnished, at about $5,000, i e, minimum $50.00 per acre. He appraises the property as at March, 1945 (the date of sale) at $12,000.00.

Mr. Hall's estimate of the value of 100 acres having water-frontage, i e, about $5,000, taken into consideration along with the value of timber as well as the remaining 400 acres of wild land lying back of the water frontage mentioned, in my opinion supports the conclusion that the property at the date of sale had a fair market value of not less than $12,000 00.

Since the property was sold by the Custodian at $5,250 00 I recommend payment to the claimant of the sum of $6,750 00, to which should be added any charges deducted by the Custodian from the purchase price paid to the claimant.

The Commissioner found that although the land had been valued at $5,000, yet the fair market value was $12,000, and therefore he recommended that payment of the excess of $6,750 be made. That amount was eventually paid to the suppliant pursuant to his release under seal dated 28th October 1950 whereby the suppliant purported to release His Majesty the King and the Custodian from all actions, claims and demands; the additional sum was paid to the suppliant or to his order. Subsequently these proceedings were commenced by petition of right.

The suppliant alleges in the petition of right:

I. a trust—The Secretary of State, the Custodian, took custody in trust for and in the interest of the suppliant;

II. a breach—The lands were vested in the Custodian and sold and conveyed by him to Salt Spring Lands Ltd;

III. that such breach imposed liability on the Crown.

The prayer for relief (clause G) asks:

(a) that the Crown return the lands or

(b) alternatively, pay damages of $1,500,000. The declarations preceding clause G are merely ancillary to the allegations and relief in clause G.

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As to the prayer for return of the lands the suppliant cannot succeed on the suppliant's own pleading. The return of the lands involves more than a simple action in ejectment, but involves also rescission of the title issued to the Custodian and any subsequent title, also the certificate of vesting and the deed from the Custodian to Salt Spring Lands Ltd. The remedy of rescission is a remedy to be obtained in equity (*Richards v. Collins*[1], excepting the Ontario Statutes not here applicable) and in equity a decree will not be made in the absence of a person who will be affected thereby. In *Tryon v. Peer*[2], Van Koughnet, C. at p. 316 stated: "It is a general rule that all parties interested in the subject matter of a suit should be before the Court..." In *Best v. Beatty, Calvert v. Beatty*[3], Masten, J. at p. 273 stated:

> Upon this ground it is that in all actions by persons claiming under a trust, the trustee or other person in whom the legal estate is vested is required to be a party to the proceeding; and the rule is the same whether the trust be expressed or implied.

(quoting from *Daniells Chancery Practice* (8th Ed.) pp. 151-2). Moreover, under the rule *audi alteram partem,* all such parties must be given an opportunity to plead and to present their case: *Manning v. Gieschen*[4]; *DeSmith on Judicial Review of Administrative Action,* p. 103. In the absence of such necessary parties as the Salt Spring Lands Ltd. and the present holder of the legal title, no decree for rescission can be made. It cannot be assumed that such persons could have no answer to this remedy, by election to affirm as in *Clough v. London and North Western Railway*[5]; *Barron v. Kelly*[6] or by laches as in *Lagunas Nitrate Co. Ltd. v. Lagunas Syndicate.*[7]

The alternative remedy to rescission is account. The obligation to account depends upon a trust. Where there is a trust there is the obligation to account; where no trust, there is no obligation to account. In *Civilian War Claimants Association v. The King*[8], Lord Buckmaster at p. 24 stated:

> Finally when the moneys were received, it is said that from and after that moment the Crown became a trustee. I have pointed out in the

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1 (1912) 27 O.L.R. 390 at p. 398
2 (1867) 13 Gr. 311.
3 (1920) 47 O.L.R. 265.
4 (1965) 56 W.W.R. 124
5 (1871) L.R. 7 Ex. 26 at p. 34.
6 (1918) 56 S.C.R. 455.
7 [1899] 2 Ch. 392.
8 [1932] A.C. 14.

course of the argument, and I repeat, that if that were the case, unless you are going to limit the rights which the beneficiaries enjoy, those rights must include, among other things, a claim for an account of the moneys that were received, of the expenses incurred, and the way in which the moneys have been distributed. Such a claim presented against the Crown in circumstances such as these would certainly have no precedent, and would, as it appears to me, invade an area which is properly that belonging to the House of Commons.

In *Barnes v. Addy*[9] and in *Mara v. Browne*[10] the evidence was not sufficient to make the defendants trustees, therefore the suit was dismissed. In *Barnes v. Addy, (supra)* Lord Selborne, L.C. at p. 251 stated:

> Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort,* or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust.* But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case.
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> If those principles were disregarded, I know not how any one could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees.

Equity does not give damages: *Erlanger v. New Sombrero Phosphate Co. Ltd.*,[11] except where provided by *Lord Cairns Act* (21 & 22 Vict. c. 27, s. 2) in lieu of injunction or specific performance and that is not this case. However, this suppliant alleges a trust and breach thereof as the basis of his petition, hence the claim for damages may be read as a claim for the personal remedy of account as the remedy arising out of a trust. The pleadings may be taken to allege:

I. a trust in the Custodian to the suppliant under orders-in-council 1665 and 2483;

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[9] (1874) L.R. 9 Ch. App. 244. [10] [1896] 1 Ch.D 199.
[11] (1878) 3 App. Cas. 1218

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II. the breach thereof in part by reason that order-in-council 469 authorizing a sale is alleged *ultra vires,* therefore there was a breach in the trustee having sold and conveyed to Salt Spring Lands Ltd;

III. for such breach the Crown is responsible in account.

Those allegations have not been made good.

I. The suppliant contends that the lands vested in the Custodian as trustee and that trust is inferred under the following circumstances:

The suppliant contends that the trust arises because any vesting under orders-in-council 1665 and 2483 is subject to the provisions of sec. 12 (order-in-council 2483) which provide that the vesting is "as a protective measure only" and limited to "the control and management of the Custodian" and "for the purpose of protecting the interests of the owner or other person" (s. 12(2)) and to administer "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" (s. 12(2)). "For the purpose of control and management" the *Consolidated Regulations* are made applicable (s. 12(3)).

In *Nakashima v. The King*[12], Thorson, P. at p. 494 points out the discretionary powers given to the Custodian under the *Consolidated Regulations Respecting Trading with the Enemy (1939)* (order-in-council 3959). By Sec. 21(2) he may deal with the interest of the enemy; by s. 23 he may have the property transferred to his name; by s. 38 he may liquidate; by s. 40 he may dispose of the property publicly or privately. Further by s. 40 the property is free from attachment or execution; by s. 50 the Custodian is not liable for any charge; by secs. 42 to 44 he may set up an office and engage a staff, have full control over his funds and may deposit in any bank and may pay office expenses therefrom. Those powers, and particularly the discretionary powers of the Custodian are inconsistent with any trust.

Again, in referring to the alleged limitations, "as a protective measure only" and "to the control and manage-

[12] [1947] Ex. C.R. 486.

ment of the Custodian", which the suppliant alleges limit the application of the *Consolidated Regulations*, Thorson P. in the *Nakashima* case states at p. 496:

> 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 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.

and Thorson, P. thereafter stated that order-in-council 469 was valid, in the following words (p. 504):

> 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, the properties of the Suppliants.

It therefore follows that the Custodian is under no trust in favour of an alien enemy, but all the rights and powers of the alien enemy in the property are vested in the Custodian, and the Custodian is in the same position with reference to evacuee property.

The *Nakashima* case refers to *Consolidated Regulations Respecting Trading with the Enemy (1939)* contained in order-in-council P.C. 3959 of 27 August, 1940. Those *Regulations* were cancelled on 13th November 1943 and *Revised Regulations Respecting Trading with the Enemy (1943)* were substituted therefor, but these *Revised Regulations (1943)* have not lessened the powers of the Custodian in that the equivalent sections are included sometimes under different numbers. The Custodian is vested with the property (s. 21(1)) and all the rights of the enemy (here evacuee) (s. 21(2) and s. 22), with power of sale (secs. 38, 40(1)), with discretion to release (s. 39) and to deal with property (secs. 21(2), 38, 39); vested property is excepted from attachment (s. 49); the custodian is not liable for charge or tax (s. 50) and may deduct his charges (s. 44). There appears to be no material lessening of the powers of the Custodian by the *Revised Regulations (1943)* and hence it is immaterial whether there is applicable to the Custodian the *Consolidated Regulations* P.C.

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3959 referred to in the *Nakashima* case or the *Revised Regulations (1943)*. Both depend upon the *War Measures Act*, R.S.C. 1927, c. 206, s. 3(2) and hence are conditioned that once the Governor-in-Council has considered "that the order is necessary or advisable for any of the purposes mentioned that is the end of the matter" *Nakashima* case, p. 504.

The suppliant contends that the orders-in-council 1665, 2483 and 469 are void in that the words "any person of the Japanese race", are so vague and indefinite as to be without clear meaning, and as such race is the basis of application of orders-in-council, therefore the orders-in-council are void. If that contention were sound, the contention would put the suppliant out of court in that the suit would be for the Custodian's wrongful taking of the lands and the remedy would be by rescission as in *Richards v. Collins, supra,* but not for trust as alleged in the petition; in this proceeding there could be no rescission for want of necessary parties such as Salt Spring Lands Ltd.

In support of his contention the suppliant has cited *Noble and Wolfe v. Alley*[13]; in that judgment other words excluding sale to designated races appeared in a restrictive covenant which covenant the court was asked to enforce specifically by way of injunction, and this the court refused to do because a restrictive covenant to be enforced must have the same clarity as the court requires in a condition subsequent to a grant. As a condition subsequent is subsequent to and in derogation of an absolute grant, the condition subsequent must be clearly expressed else it is defeated by the preceding intention to grant. Hence, that case is distinguishable as different words are there used in other circumstances, that is, in a restrictive covenant. Here the words "any person of the Japanese race" appear in orders-in-council, which orders-in-council have been held valid in the *Nakashima* case. Also, in *Reference re Validity of Orders-in-Council 7355, 7356 and 7357,* the words "persons of the Japanese race" appear in order-in-council 7355 and in the recitals of order-in-council 7357, and the words "of the Japanese race" appear in s. 2 of order-in-council 7355 and in secs. 2 and 4 of order-in-council 7357; and all orders-in-council were held valid in the Supreme Court of

[13] [1951] 1 D.L.R. 321.

Canada ([1946]S.C.R. 248) and in the Judicial Committee of the Privy Council ([1947] 1 D.L.R. 577). Under such judgments the words must be taken to be not vague or indefinite and not affecting the validity of the orders-in-council.

Further, no statute has been declared void because the words thereof are indefinite. In *Fawcett Properties Ltd. v. Buckingham County Council*,[14] Lord Denning at p. 516 stated:

> My Lords, it is a bold suggestion to make that these words, taken as they are from a statute, are void for uncertainty. Counsel for the appellants was unable to point to any case where a statute had ever been held void for uncertainty. There are a few cases where a statute has been held void because it is meaningless but none because it is uncertain...But when a statute has some meaning even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meaning the statute is to bear rather than reject it as a nullity.

It follows that the words "any person of the Japanese race" are not vague or indefinite and they do not invalidate the orders-in-council.

The suppliant contends that there is no evidence that he is of the Japanese race and therefore no evidence that he comes within the orders-in-council 1668, 2483 or 469. On the contrary, there is ample evidence. In the suppliant's examination for discovery he gave his name as Iwasaki Torazo, or, in English, Torazo Iwasaki. That is not an English name. Questions 5-10- he was born in Japan of Japanese parents who were born there.

Order-in-council 9760 required every person of the Japanese race to register with a Justice of the Peace or the R.C.M.P. There was an order to leave the protected area. The suppliant registered to leave and was evacuated as shown by letter of the 17th September 1942 by the suppliant's solicitor. The suppliant's lands were vested in the Custodian because he was of the Japanese race. Finally, under order-in-council 1810, a Commission was set up to hear claims of persons of the Japanese race of which the suppliant was notified. The suppliant then appeared as a person of the Japanese race with counsel before the Commissioner and there gave evidence. Following the hearing the lands were valued by the Commissioner at $12,000.00

[14] [1960] 3 All E.R. 503.

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and the excess over the previous selling price was paid to the suppliant or on his order and he gave a release. The suppliant was of the Japanese race; that is more readily found than the alternative, that he received money under false pretences.

II. The suppliant further contends that there was a breach of trust: the suppliant contends that order-in-council 469 is void as in derogation of the *War Measures Act*, R.S.C. 1960, c. 209, s. 3(2), which reads:

> 2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

The suppliant has cited *Reference re Regulations (Chemicals) under War Measures Act* [1943] 1 D.L.R. 248, where Duff, C.J.C. said at p. 263:

> Section 7 of the *War Measures Act* must prevail over paragraph 4 of the Order-in-Council since it is not open to the Governor-in-Council to derogate from the provisions of the *War Measures Act* except...

The suppliant's contention is that orders-in-council 1665 and 2483 set up a trust of the Custodian to the suppliant to keep the lands for the suppliant, and s. 3(2) of the *War Measures Act* preserved that right of *cestui que trust* in the suppliant, therefore order-in-council 469 in authorizing a sale was in derogation of the rights of the suppliant as *cestui que trust*, which rights were preserved by s. 3(2) of the *Act*, hence order-in-council 469 was in derogation of the statute and was invalid. That contention fails for the following reasons:

(1) The contention depends upon the Custodian holding as trustee but the Custodian did not hold under any trust but held absolutely.

(2) The Order-in-Council 469 was held valid by the *Nakashima* case, p. 504, and that finding concludes the matter.

(3) The contention is based on the misconstruing of s. 3(2) of the *War Measures Act*. The purpose of s. 3(2) is seen in *Maxwell on Interpretation of Statutes* (11th

Ed.) p. 390, namely, that at common law a statute when repealed was deemed never to have existed except as to completed transactions, hence if a person committed an offence against a statute and the statute was repealed before conviction therefore he went free althrough an information had been laid. The purpose of s. 3(2) was to prevent such results following the varying, extending or repealing of an order-in-council. Hence the section (3(2)) means that the validity of anything done is determined by the law including orders-in-council then existing, notwithstanding an order-in-council be subsequently varied, extended or revoked. But the subsequent varying, extending or revoking is valid because that power is expressly conferred by s. 3(2).

No trust was created for the suppliant under orders-in-council 1665 and 2483; that was excluded by the *Nakashima* case, *supra*. Further, order-in-council 469 is valid as held in the *Nakashima* case, being within the express power of s. 3(2) to vary, extend or revoke.

The suppliant also contends that the breach of trust occurred by the Custodian selling to Salt Spring Lands Ltd., in that G. C. Mouat was an agent of the Custodian and had also a 20% interest in the company, therefore the Custodian's duty and interest were in conflict.

The Custodian did sell to Salt Spring Lands Ltd. by deed of 1st March, 1945 and G. C. Mouat did have an interest in Salt Spring Lands Ltd. to the extent of 20% and was also a director at all material times.

Further, the catalogue of properties for sale issued by the Custodian referred to G. C. Mouat as an agent, and referred prospective purchasers to G. C. Mouat, and it has been held that when a trustee or fiduciary puts himself in a position where his duty to his principal and his interest are in conflict, the trustee or fiduciary may be held a trustee of any secret profit or advantage.

In *Parker v. McKenna*[15], the director of a company took an assignment by the purchaser of an executory agreement by such purchaser with the company, and the directors were held liable to account for their profit on the

[15] (1874) 10 L.R. Ch.A. 96.

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transaction, as the conflict arose by reason of the duty being in the directors to enforce the agreement for the company and it was their interest as assignees to relax the enforcement.

In *Boston Deep Sea Fishing & Ice Co. v. Ansell*[16], the defendant shareholder of another company received a commission on business he introduced to that other company and he, an officer of the plaintiff, had induced the plaintiff to contract with the other company.

The difficulty in the case at bar is in seeing what is the conflict, that is, between what interest and what duty. The Custodian sold to Salt Spring Lands Ltd. but the Custodian had no interest in that company and was not selling to himself. Hence there was no conflict on the part of the Custodian. G. C. Mouat was not selling. There is no evidence that Mouat's duty as agent was in any wise inconsistent with his purchasing in person the lands in question or that his minority interest in the company was inconsistent with that company buying, because Mouat was not selling, and his being agent may have had nothing to do with buying or with selling. The selling was by the Custodian with the advice of a committee consisting of Judge Whiteside and two other persons who were all above reproach. In the report of the Commissioner (Bird, J.A., later C.J.B.C.) he commends the Custodian for making records available, approves the advisory committees; states that the work of the Custodian was well performed and that real efforts had been made to get fair value for the real property.

In Appendix III the Commissioner found that the real value of the lands formerly owned by the suppliant was $12,000 and not $5,000 as had been reported by the Custodian's real estate agent (Wilson). The selling was by the Custodian with the help of the advisory committee.

The position of this Custodian is stronger than that of the bank manager in *The Bank of Upper Canada v. Bradshaw*[17]. There a bank manager was alleged to be liable for the deficiency of a loan which he as bank manager had made for the bank to a company in which he had an interest. Lord Cairns at pp. 489-90 stated:

> It is said, either that he should have given no accommodation to the Company, or, at all events, that before doing so he should have

[16] (1888) 39 Ch.D. 339.

[17] (1867) L.R. 1 P.C. 479.

told the Bank that he was interested in the Company, a fact which it is alleged the Bank did not know. And it is contended that he should be made liable for the deficiency upon this account. Their Lordships are desirous in no way to qualify or to abridge the doctrine of law prevailing in almost all systems of jurisprudence, that any one standing in the position of an Agent cannot be allowed to put his duty in conflict with his interests, and they are certainly not prepared to rest the application of the doctrine on the amount of the interest, adverse to that of his employer, which the Agent may be supposed to have. But it is to be observed that in the present case the dealings between the Bank and their customer were dealings in which the customer was not *Bradshaw,* but an incorporated Company, *Bradshaw* being a shareholder in that Company, distinct in point of law from the Company itself. It is also to be observed that *Bradshaw* had been appointed to manage the business of the Bank in the midst of a community consisting of individuals and of incorporated trading companies similar to the *Telegraph Company,* in which companies *Bradshaw* might or might not hold shares. Now their Lordships entertain no doubt, that if any case of bad faith or fraud were shewn to occur in dealings between the Manager and corporations in which he was a shareholder, dealings of that kind could not be supported. But their Lordships think that the just conclusion to be drawn from the facts, and from the course of business in the present case, is, that it was within the power of *Bradshaw,* as Manager of this Bank, to deal in the ordinary and proper course of banking business, not merely with the individuals, but also with the trading corporations of the place in which he was placed as Manager, and to deal in that way with the trading corporations, even although he himself might hold shares in any one of them. And if that be the true view of the position and authority of *Bradshaw,* it cannot, their Lordships think, be denied that the advance made to the *Telegraph Company* upon the account that I have described, was entirely a legitimate act in the course of the ordinary business of the Bank. Their Lordships, therefore, preserving entirely intact the general rule as to the conduct and duty of Agents, are not prepared to hold that *Bradshaw* exceeded his power or authority in dealing with the *Telegraph Company* in the way that has been described.

There is neither alleged nor proved any bad faith by the Custodian in the case at bar and the finding of the Commissioner, Bird, J. A. precludes any bad faith in selling the property. Hence as there was no trust there could be no breach and assuming a trust, there was no breach proven in this instance.

DEFENCES:

The Crown as respondent relies upon the limitation that any action for the recovery of land must be commenced within twenty years: *Statute of Limitations,* R.S.B.C. 1960, c. 370, s. 16. Here no land may be recovered because of the absence of necessary parties, and it has not been argued whether or not the remedy *in personam* has been

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barred by analogy after some shorter period, as in *Knox v. Gye*[18]. Hence the defence by limitation need not be decided.

The crown has also contended that the claim of the suppliant is released by the release of 28th October 1950 given by the suppliant under seal to the Crown and the Custodian, whereby the suppliant has released all his rights. Such a "release under seal" would divest an obligation to account: *Debussche v. Alt*[19].

The suppliant contends that the order-in-council 469 authorizing the sale is *ultra vires* of the Governor-in-Council and is therefore a nullity, therefore the release having been given pursuant to such order-in-council releases a nullity and is ineffective: *Great North-West Central Railway v. Charlebois*[20]. The doctrine of *ultra vires* applies to statutory companies and where such company purports to enter into a transaction beyond its powers, there it is no person and the transaction is a nullity as in *Sinclair v Brougham*[21], but that doctrine of *ultra vires* has no application to a natural person, which is stated in *Bonanza Creek Gold Mining Co. v. The King*[22] by Viscount Haldane at p. 584:

> In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies.

and at p. 577:

> For the company it is said, is a pure creature of statute existing only for objects prescribed by the Legislature within the area of its authority, and is therefore restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Railway Carriage and Iron Co. v. Riche*, L.R. 7 H.L. 653,

and at p. 584 Viscount Haldane referred to a prerogative company having "a general capacity analagous to that of a natural person".

The release was given under seal by the suppliant, a natural person, and the doctrine of *ultra vires* cannot apply thereto.

In any event, this contention fails in that order-in-council 469 is not *ultra vires: Nakashima* case, *supra*, at p. 504.

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[18] (1871) L.R. 5 H.L. 656
[19] (1878) 8 Ch.D. 286 at p 314.
[20] (P C) [1899] A C. 114
[21] [1914] A.C. 398.
[22] [1916] 1 A.C. 566.

The basis of the suppliant's complaint is without foundation. The complaint is that orders-in-council 1665 and 2483 set up a trust to return the lands to the suppliant, wherefore the lands vested in the Custodian as trustee under duty to manage and return, and that order-in-council 469 in authorizing a sale, was void. That was in error; there was no trust: *Nakashima v. The King* (*supra*) and the vesting in the Custodian was absolute; nor was there any breach of trust.

Further, the suppliant contended before the Commissioner that the lands were of greater value than that realized by the Custodian; and the Commissioner reported the additional value of the lands and that value so found was paid to the suppliant under a release under seal of all his claims. That release still stands.

In conclusion, there is no merit in the suppliant's petition of right, therefore the proceeding is dismissed with costs payable by the suppliant to the Crown as respondent.