MR. JUSTICE MARTIN'S FINDING IN HINDU CASE

Complete Judicial Decision as Given in Court of Appeal in Victoria on Claims of Komagata Maru Passengers.

The judgment of Mr. Justice Martin in the Munshi Singh vs. the Immigration Act case delivered in the Court of Appeal on July 6 is as follows:

This is an appeal by one Munshi Singh (who describes himself in his affidavit as "a native of India and a British subject," coming from the Punjab in that country "to Canada for the purpose of making this my permanent home") from the order of Mr. Justice Murphy dismissing his application for a writ of habeas corpus by means of which he seeks to be discharged from his present detention by immigration officers on board the Komagata Maru under an order by the Immigration Board of Inquiry at the Port of Vancouver, dated June 25, 1914, whereby he has been rejected as an immigrant, prohibited from landing in Canada and ordered to be deported from Canada by said ship, which brought him to Vancouver on May 22 last.

Many questions were raised before us, some not legal but directed to the policy which led up to the statutes and orders-in-council under review, with respect to which I repeat an extract I gave in re the Coal Mines Regulation Act (1904) 10 B. C. 408, at 419 (a case on the employment of Chinese in coal mines), from the decision of their Lordships of the Privy Council in Tomey Homma's Case (1903) A. C. 151, at 155, as follows:

"The policy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."

And quite recently in Attorney-General for Ontario vs. Attorney-General for Canada (1912) 81 L.J.P.C. 210, in delivering an illuminating judgment (if I may be permitted so to refer to it) on some aspects of the constitution of Canada, and the relation of the Courts thereto, the then Lord Chancellor (the Earl Loreburn) said, at p. 212, with respect to the powers conferred upon Canada by the Imperial Parliament:

"In 1867, the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. . . . . For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces within the limits of the B. N. A. Act."

And at p. 213 he speaks of:

. . . "The interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act."

The power and duty of the Courts under the Constitution he thus defines, at pp. 213 and 216:

"A Court of law has nothing to do with a Canadian Act of Parliament lawfully passed except to give it effect according to its tenor. . . . It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say."

"The policy of the Canadian Parliament . . . is exclusively the business of the Canadian people and is no concern of this Board."

With respect to the legal questions, ing illustration of which occurs in connection with quarantine (sub-section 11) wherein whole shiploads of people, traders, merchants, tourists, immigrants and others, have been frequently detained for weeks at a time in quarantine stations on shore. Some of the cases are to be found conveniently collected in Lefroy on "Canada's Federal System" 1912, at p. 488 et seq., and the Lord Chancellor (the Earl Loreburn) adverts to the subject in the Attorney-General's Case above cited. The best illustration of the domination of Federal jurisdiction over even Provincial public property is to be found in Attorney-General of British Columbia vs. Canadian Pacific Railway Co. (1904-5) 11 B. C. 289, wherein the view I ventured to express that the Parliament of Canada had the power to appropriate provincial public lands for the purposes of a railway connecting two or more provinces received the approval of their Lordships of the Privy Council: (1906) 75 L. J. P. C. 38.

Such being the powers of the Federal Government, I turn then, first, to section 38 (a) of the Immigration Act and the Order-in-Council of 7th January, 1914, No. 23, relating to a continuous journey and through ticket, which are relied upon as a justification of the said deportation order. The appellant first contends that said Order-in-Council is invalid because no express power is given to the Governor-in-Council to alter or rescind any "proclamation or order," and therefore the powers of the Governor-in-Council have in this respect been exhausted by his Order-in-Council on the same subject dated the 9th of May, 1910, No. 920, which has been held to be invalid: In re Narain Singh (1913) 18 B. C. 506. The point is, however, clearly covered by section 31 (g) of the Interpretation Act relating to "rules, regulations or bylaws" and conferring the right to "rescind, revoke, amend, or vary" the same, which language covers the proclamation or order "authorized by section 38," because whatever they may be termed these proclamations and orders are in fact "regulations" and, indeed, are so styled in the heading of the fasciculus of sections numbered 37 to 39 inclusive, viz: "Regulations as to monetary and other requirements, etc." Then, second, it is contended that as the applicant came direct from Hong Kong and is a British subject he as a citizen of the Empire and, therefore, a native of the whole of it, is a native of Hong Kong, which is part of it, and so his journey from that place to this was "a continuous journey from the country of which he is a native," and his ticket "a through ticket" therefrom. But it is obvious from the context, and the whole Act, that the expression "country of which he is a native," is used in a geographical and not racial or national sense, and therefore does not assist the applicant.

In the third place it is said that the Governor-in-Council has power to deal only with the case of each individual immigrant as he arrives ("any immigrant who has come to Canada," as the section puts it), and therefore an omnibus order dealing in advance with immigrants in general is invalid. But the expression "any immigrant" includes all immigrants, and I confess I cannot see the force of this contention, which it would be a very impractical one to work out as a general rule, leading as it would inevitably to great delay and confusion in a vast country like Canada where a constant stream of immigrants is arriving at many ports. The fact that this order is a general prohibition does not prevent the Governor-in-Council from making a special one to meet a particular case "whenever he deems it necessary or expedient." Up to the present time he has only deemed it "expedient" to make a general order dealing with all immigrants alike, and it is somewhat strange that this should be objected to when we have heard so much of the undesirability of any discrimination in these regulations. This order in carrying out the Governor-General-in-Council's conception of expediency as it exists at present only follows, as has been pointed out, the exact words of the section, but I am unable to see how that can detract from its efficacy.

I next turn to the Order-in-Council of simply to the fact that it did not properly weigh the evidence before it and hold it to be insufficient. That there was some evidence before it cannot be denied, because section 16 says that "where the question of the right to enter Canada under this act is raised the burden of proof shall rest upon the immigrant, passenger or other person claiming such right." This reversal of the usual course of a trial in effect means that he must meet what is equivalent to a prima facie case having been made out against him, because if he gives no evidence his application fails, and in attempting to do so he gave evidence which I need only say was of such an inadequate character, and fell so far short of what might reasonably have been expected in the circumstances, that I am not surprised it failed to convince the board of his veracity. This is one of the very things that the statute, I think, intends should not be reviewed, and it is for that reason that the hand of the court is arrested and it is directed not to "interfere with any proceedings" which the board is engaged in, either at the time they are pending or after, by restraining order or otherwise, "upon any ground whatsoever." I am fortified in this opinion by two things, viz: (1) that by the same section the court is allowed to interfere in two specified cases, viz., where "such person is a Canadian citizen, or has Canadian domicile," which emphasizes the intention to arrest the ordinary powers of the court in all other cases; and (2) that Parliament has not left the applicant without a remedy for he has a special one provided in lieu of the ordinary one taken away, viz.: in the appeal to the minister against the decision of the board given him by section 19. The expected case above referred to is In re Lee Him (1910) 15 B. C., 163, which is somewhat similar in principle, being a decision that there was no appeal, except to the Minister of Customs, from the decision of the collector of customs that a Chinese immigrant applying to enter Canada was not a merchant under section 7 (c) of the Chinese Immigration Act cap. 95, R.C.S., 1906. That case is, in my opinion, correctly decided and support is given to this view by something that is not mentioned in the ju viz: that by the next section 8 is given to His Majesty, and no immigrant, to contest the vali any certificate, "and such cont shall be heard and determined summary manner by any judg superior court of any province ada where such certificate is pro All this goes to show that t nothing strange or unusual in the view that in these immigrati ters it was the intention of Par that certain questions, at leas ing to immigrants should be s and summarily decided, on the s to speak, by executive officers Crown.

This being the view I take of 23, I therefore have no power t sider the objection of the applic the evidence, and I have only " ed" as briefly as possible the ceedings" of the board relating evidence before it in order to my meaning clear. This is not those cases where an antecedent has to be found so as to confe isdiction to enter upon a hearing quiry; that is quite a distinct qu But in case I should be wrong o legal point, then, alternatively, satisfied that there was eviden fore the board to give it jurisd and support its finding, because defects I have already noted in th dence. Demeanor is often al portant in such cases and as Lordships of the Privy Council in Khoo vs. Lim (1912), A.C. 3 325, "The trial judge . . . . . see demeanour of the witnesses, an estimate their intelligence, positio character in a way not open to courts who deal with later stages case." These remarks apply more strongly to this board o quiry of three members dealing matters of which they have s knowledge and experience.

A final objection to this orde was taken, that though Canada ha power under section 95 of the B. Act to legislate with respect "t migration into all or any of the inces" yet as it had not done so British Columbia in particular fore the Governor-in-Council ha power to do so by making this

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"The policy of the Canadian Parliament . . . is exclusively the business of the Canadian people and is no concern of this Board."

With respect to the legal questions, they have been reduced in number and scope because it was conceded at the end of the argument (as it ought to have been at the beginning) that since the Federal Parliament has already occupied the common field of legislation conferred upon both Federal and Provincial parliaments by section 95 of the B. N. A. Act, therefore the authority of the former must prevail: cf. In re Narain Singh (1908) 13 B. C. 477. But while this is conceded and also that in the primary exercise of such authority the Federal jurisdiction may incidentally, yet substantially, trench upon one or more of the classes of subjects exclusively assigned to Provincial jurisdiction by section 92, e.g. "property and civil rights in the province," so long as such intrenchment does not exceed what may be necessary to effectuate such Federal jurisdiction, yet it is submitted that in the case at bar this line of intrenchment should be drawn so as to declare that though a British subject may not, by the exercise of due Federal jurisdiction, be permitted to land as an immigrant in Canada, yet the said jurisdiction is exhausted by this prevention and he cannot be detained or deported because once he comes within the territorial waters of Canada the exercise of such control over his person comes within the said class of "property and civil rights in the province." Many observations may be made on the premise of this submission as regards territorial waters and civil rights, but assuming the premise is correct there is one complete and final answer to the whole contention and it is that as a matter of fact, and of reasonable necessity in the carrying out, completely and effectively, of "laws in relation to immigration into all or any of the provinces (sec. 95)," an immigrant is not immediately divested of that character, and freed from the operation of laws relating to the subject-matter of immigration merely because he happens to come within the three-mile limit. Whatever else may be said of him that character, and the Federal jurisdiction which controls it, continues in general to attach to him at least till after he is permitted to land in conformity with the Act. Indeed, it cannot be doubted that he may be subject to such jurisdiction for an indefinite time and may be deported, e.g., as at present provided by section 40 of the Act, "within three years after landing," for the causes therein specified. It can hardly be seriously contended that an immigrant who on a dark night swims ashore from a ship, eludes the preventive officers, and hides in the woods, or, to quote section 33 (7) "who enters Canada by force or misrepresentations or stealth, or otherwise contrary to any provision of this Act," thereby acquires such "civil rights in the province" he elects to enter, that he threw off the Federal jurisdiction with that portion of his clothing which he presumably left behind him when taking to the water. The truth is, of course, that the exercise of Federal jurisdiction necessarily often affects civil rights, including primarily, personal liberty, the most strik-

Governor-in-Council has power to deal only with the case of each individual immigrant as he arrives ("any immigrant who has come to Canada," as the section puts it), and therefore an omnibus order dealing in advance with immigrants in general is invalid. But the expression "any immigrant" includes all immigrants, and I confess I cannot see the force of this contention, which it would be a very impractical one to work out as a general rule, leading as it would inevitably to great delay and confusion in a vast country like Canada where a constant stream of immigrants is arriving at many ports. The fact that this order is a general prohibition does not prevent the Governor-in-Council from making a special one to meet a particular case "whenever he deems it necessary or expedient." Up to the present time he has only deemed it "expedient" to make a general order dealing with all immigrants alike, and it is somewhat strange that this should be objected to when we have heard so much of the undesirability of any discrimination in these regulations. This order in carrying out the Governor-General-in-Council's conception of expediency as it exists at present only follows, as has been pointed out, the exact words of the section, but I am unable to see how that can detract from its efficacy.

I next turn to the Order-in-Council of 31st March, 1914, No. 897, prohibiting until after the 30th of September next, the landing in British Columbia of all "laborers, skilled or unskilled." This is made under sub-section (c) of section 38 and is objected to on the ground that there was no evidence before the Board of Inquiry on which it could reasonably found its finding that Munshi Singh was an "unskilled laborer" or a laborer of any kind, and therefore it lacked jurisdiction to make said order. It was, however, objected on behalf of the Board that under section 23:

"No court and no judge or officer thereof (has) jurisdiction to review, quash, reverse, restrain, or otherwise interfere with any proceeding, decision, 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 person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."

This is a very sweeping and unusual enactment both as regards its object and wording, going direct to the question of our jurisdiction, and it is not really similar, with one exception to be noted, to those sections which have been dealt with in the cases cited to us, or which I have examined. In my opinion it stands by itself, and having regard to the subject matter and the exceptional circumstances which often will necessarily surround cases arising out of it, I think Parliament intended that it should be taken to mean just what it says and be given full effect to, which can and ought to be done, as applied to the present case, by holding that once the Board has duly entered upon an inquiry over which it has been given jurisdiction by the statutes and its orders or regulations there can be no interference "upon any ground whatsoever" with its subsequent proceedings or with the decision or order it decides to make so long as said decision or order is one that the Board is empowered to make; it could not, for example, make an order for fine and imprisonment instead of deportation, which often involves detention. This is what I understand the expression "under the authority and in accordance with the provisions of this Act" to mean. It cannot mean that it is a condition precedent to the right of the Board to take any action, that its proceedings must be in all respects regular, because that would require and insure complete and absolute compliance from beginning to end, and consequently there would be no cause or reason for "reviewing" or "interfering" with something that was already perfect in itself. This is, in truth, exemplified by the present case because in any sense, clearly the inquiry as a matter of fact was held "under the authority of the Act and in accordance with" its provisions, as the Board was properly constituted when it entered upon its duties, and finally made an order within the statute on the fact of it, and no objection is taken to the regularity of its proceedings, but

that it did not prop- evidence before it insufficient. That idence before it can- use section 16 says estion of the right der this act is rais- roof shall rest upon senger or other per- right." This rever- course of a trial in he must meet what prima facie case out against him, be- no evidence his ap- in attempting to do e which I need only an inadequate char- far short of what have been expected ces, that I am not to convince the board This is one of the the statute, I think, e reviewed, and it is iat the hand of the nd it is directed not h any proceedings" engaged in, either at e pending or after, er or otherwise, "up- whatsoever." I am inion by two things, the same section the to interfere in two ., where "such per- citizen, or has Can- hich emphasizes the the ordinary powers other cases; and (2) s not left the appli- medy for he has a d in lieu of the or- away, viz.: in the ster against the de- given him by sec- ected case above re- Lee Him (1910) 15 is somewhat similar a decision that there ept to the Minister the decision of the ns that a Chinese to enter Canada nt under section 7 e Immigration Act . That case is, in ly decided and sup- s view by something

that is not mentioned in the judgment, viz: that by the next section 8 a right is given to His Majesty, and not to the immigrant, to contest the validity of any certificate, "and such contestation shall be heard and determined in a summary manner by any judge of a superior court of any province of Canada where such certificate is produced." All this goes to show that there is nothing strange or unusual in holding the view that in these immigration matters it was the intention of Parliament that certain questions, at least, relating to immigrants should be speedily and summarily decided, on the spot, so to speak, by executive officers of the Crown.

This being the view I take of section 23, I therefore have no power to consider the objection of the applicant to the evidence, and I have only "reviewed" as briefly as possible the "proceedings" of the board relating to the evidence before it in order to make my meaning clear. This is not one of those cases where an antecedent fact has to be found so as to confer jurisdiction to enter upon a hearing or inquiry; that is quite a distinct question. But in case I should be wrong on this legal point, then, alternatively, I am satisfied that there was evidence before the board to give it jurisdiction and support its finding, because of the defects I have already noted in the evidence. Demeanor is often all important in such cases and as their Lordships of the Privy Council said in Khoo vs. Lim (1912), A.C. 323, at 325, "The trial judge . . . . . sees the demeanour of the witnesses, and can estimate their intelligence, position and character in a way not open to the courts who deal with later stages of the case." These remarks apply much more strongly to this board of inquiry of three members dealing with matters of which they have special knowledge and experience.

A final objection to this order 897 was taken, that though Canada had the power under section 95 of the B. N. A. Act to legislate with respect "to immigration into all or any of the provinces" yet as it had not done so as to British Columbia in particular therefore the Governor-in-Council had no power to do so by making this order which relates only to this province. But this ignores the wording of section (c) which says that he may prohibit "the landing at any specfied port of entry in Canada" and that is all the order has done, and though all the ports specified in the order happen to be in this province, their geographical situation does not destroy the power to close them for the purposes of the act.

Such being my views on the effect of sub-sections (a) and (c) of section 38, it follows that the order of deportation may and should be supported under orders-in-councils Nos. 23 and 897.

But, if necessary, it may also be supported, under Order-in-Council No. 24, dated 7th January, 1914, made in pursuance of Section 37, requiring an "immigrant of any Asiatic race" to "possess in his own right money to the amount of at least two hundred dollars. It is contended at the outset, and assuming the order to be otherwise valid, that the expression "Asiatic race" is ethnologically incorrect and too indefinite to be capable of application. The expression must be construed "according to the common understanding of the words," as Mr. Justice Duff said in the very recent case in the Supreme Court of Canada of Quong Wing vs. the King (1914), 49 S. C. 400, at 463, in referring to the Japanese, Chinese and other Oriental races (a subject which I discussed at length as regards the Chinese race in this province in the case he there refers to), and if so, there is no uncertainty about its meaning and application. We speak constantly about European, Asiatic, and even Latin-American races, anad no one doubts what the people at large understand thereby. But "Asiatic race" is, moreover, a proper expression ethnologically, as may be conveniently seen by reference to the Encyclopaedia Britannica (11th Ed.) under the Article Asia, in vol. 2, p. 749, col. 1, where the exact expression "Asiatic races" occurs in an account of the ethnology of that continent; and cf. also the articles on the ethnology and races of Europe, vol. 9, p. 919; Africa, vol. 1, pp. 325-6; America, vol. 1, pp. 810-1; Australia, vol. 2, pp. 954-5; and Polynesia, vol. 22, p. 33.

I am unable to take the view that the order goes beyond the section. No difficulty occurs in reading the word "and" as "or" in the expression "immigrants and tourists," so as to give the obvious meaning, according to a well-known canon of construction, and the very word "or" is to be found in the expression "immigrants or tourists" in the 6th line of the same section. The language, therefore, being disjunctive, the order may properly deal with immigrants alone, as it has done. But it is further objected that even so, it must first deal with all races as a whole by prescribing a minimum amount in general and may then make variations for particular races, and because it has only dealt with "any Asiatic race" it is bad. I am unable to construe the statute in such a narrow and too technical manner. The objection would be satisfied if the order said first that immigrants of all races should be allowed to land if they had only one cent in their possession, but those of "any Asiatic race" must have $500. That would be a general order with a particular variation. But it would also be a ridiculous and empty formality (as well as an offensive emphasis of race discrimination, which diplomatically it would be desirable to avoid) and this statute and order deal with matters of substance. In spirit and effect the order means that as to the races of the world in general the minimum, if prescribed, would be so small as to be infinitesimal and therefore negligble (according to the maxim de minimis non curat lex), but as to Asiatic races it is a matter of substance and is correspondingly "prescribed." I do not doubt that, reading the whole section as applied to the subject matter the order essentially and substantially conforms with the section on which it is founded.

On this topic especially, the decision of Hunter, C. J., in re Narain Singh (1913), 18 B. C., 506, was referred to and its soundness challenged, particularly in connection with Order-in-Council No. 924, of 9th May, 1910, which has never been rescinded, and is put forward as a valid order, despite the ruling of Hunter, C. J., in answer to the said demand for a general "prescription" of an amount for immigrants (if that should be held necessary), as it first deals with all immigrants, prescribing a minimum of $25.00, with an exception at the end in favor of "any Asiatic race," and the present order 24 would, therefore, be regarded as a still later variation requiring Asiatic races to pay $200. The court is not bound by that decision, and after a careful review of it, I do not, with all respect, agree with it, at least in respect to the $200 clause, which is all I am now concerned with, and I note that the writ of habeas corpus therein had been refused by Mr. Justice Murphy before it had been granted by Chief Justice Hunter.

The order there in question, No. 926, provided that the immigrant should not be allowed to enter Canada "unless in actual and personal possession in his or her own right of two hundred dollars." I cannot agree that in effect this language goes beyond the reasonable intendment and scope of Section 37, which says that "immigrants and tourists shall posses in their own right money to a prescribed minimum amount." (i.e., the said sum of $200.00). The learned judge gives as his reason for taking the contrary view that:

"If an immigrant had the money in his own right in a Victoria bank at the time of his arrival, he would satisfy the requirements of the statute, but not those of the order-in-council."

I venture to hold the contrary view, however, that the statute, having regard to the circumstances and necessities of the subject matter, clearly intended by the words "possess in (his) own right money" that he should have and possess it when and where he would, under that section, be called upon to produce it, viz.: on the ship's deck before he was allowed to land. "In his own right" here means nothing more or less than his own money, not that of an employer, or the ship owner, exhibited as his own to deceive the immigration officer, and it is, therefore, inevitable that the possession must be his own actual one, and not that of "a Victoria bank," or a Prince Rupert merchant, or a Nanaimo mill hand, or an Ottawa cousin, or a Singapore money lender, or a Delhi father, because if once the idea of personal possession, then and there

Continued on Next Page.

FREEDOM IS PRICE OF INDIA'S LOYALTY

Three Hundred Million People of Empire Dominion Said to Be Demanding Liberty in Exchange for Loyalty.

"Indians are being driven out of South Africa, Australia, New Zealand, British Columbia, but they must not be shut out of posts in their own country. India must govern herself; she is beginning to realize her strength. Britain must live up to her old traditions and share her birthright with 300 million Indians, for the price of Indian loyalty is the gift of freedom."

So spoke Mrs. Besant, who has been a resident in India for a number of years, to a London audience in Queen's Hall recently.

Mrs. Besant said one heard little of the difficulties and troubles of the people of India, unless, like herself, one had lived years in the country, and were in close touch with Indian friends. Indians admire Britain, and might love her too, if she would only let them. For the first time in history the vast Indian population has been aroused by a question of the outer world, by emigration to other lands. Britain can only hold India if her rule be just and intelligent.

The party of anger and anarchy is small, but the party suffering from the recent repressive measures is large, filled with righteous discontent; it is willing to go slowly, but it demands that progress be made.

Dealing with the Press Act of 1910, Mrs. Besant showed how severe it is. All but two Indians in the Council voted for it, but its repeal is now demanded.

Men, the lecturer said, have been deported and imprisoned, honorable gentlemen have been arrested and thrown into prison without trial.

Kitty Flynn, "The Enchantress of Rag-time Alley," who will appear at the Orpheum Theatre this week.

MUSIC AND DRAMA

The Orpheum Theatre.

entertainment of the patrons of that theatre during the current week. The new bill will be strong in acrobatic features, noted teams figuring in both the first and second halves of the week, while there will also be comedy, musi-