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### Promises of Law: The Unlawful Dispossession of Japanese Canadians

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## Abstract

This article is about the origins, betrayal, and litigation of a promise of law. In 1942, while it ordered the internment of over twenty-one thousand Canadians of Japanese descent, the Canadian government enacted orders in council authorizing the Custodian of Enemy Property to seize all real and personal property owned by Japanese Canadians living within coastal British Columbia. Demands from the Japanese-Canadian community and concern from within the corridors of government resulted in amendments to those orders stipulating that the Custodian held that property as a “protective” trust and would return it to Japanese Canadians at the conclusion of the war. That is not what happened. In January 1943, a new order in council authorized the sale of all property seized from Japanese Canadians. The trust abandoned, a promise broken, the Custodian sold everything. This article traces the promise to protect property from its origins in the federal bureaucracy and demands on the streets to its demise in *Nakashima v Canada*, the Exchequer Court decision that held that the legal promise carried no legal consequence. We argue that the failure of the promise should not obscure its history as a product of multi-vocal processes, community activism, conflicting wartime pressures, and competing conceptions of citizenship, legality, and justice. Drawing from a rich array of archival sources, our article places the legacy of the property loss of Japanese Canadians at the disjuncture between law as a blunt instrument capable of gross injustice and its role as a social institution of good faith.

## Keywords

Japanese--Canada--Evacuation and relocation, 1942-1945; Enemy property--History; Canada; British Columbia

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## Cover Page Footnote

This work was inspired by conversations with the Landscapes of Injustice Community Council, especially Keiko Mary Kitagawa, Tosh Kitagawa, Art Miki, and Vivian Wakabayashi Rygnestad. We are also deeply indebted to the exceptional research assistance of William Archibald, Lauren Chalaturnyk, Kaitlin Findlay, Adam Kostrich, Rachel Weary, and Monique Ulysses. Trevor Wideman played a particularly key role in identifying documents and formulating early analyses of this material. Thanks also to the Journal's anonymous reviewers, Penny Bryden, Philip Girard, Malcolm Lavoie, Laura Madokoro, Jim Phillips, Hildy Ross, Jim Walker, and Bruce Ziff, who read and commented on earlier versions of this paper. This article benefited from presentations at the 2016 Landscapes of Injustice Spring Institute, York University's conference honouring Douglas Hay, and the Queen's Faculty of Law Speaker Series. We thank the organizers and audiences at those events.

## Special Issue

Law, Authority &amp; History: A Tribute to Douglas Hay

# Promises of Law: The Unlawful Dispossession of Japanese Canadians\*

ERIC M. ADAMS, JORDAN STANGER-ROSS &  
THE LANDSCAPES OF INJUSTICE RESEARCH COLLECTIVE†

This article is about the origins, betrayal, and litigation of a promise of law. In 1942, while it ordered the internment of over twenty-one thousand Canadians of Japanese descent, the Canadian government enacted orders in council authorizing the Custodian of Enemy Property to seize all real and personal property owned by Japanese Canadians living within coastal British Columbia. Demands from the Japanese-Canadian community and concern from within the corridors of government resulted in amendments to those orders stipulating that the Custodian held that property as a “protective” trust and would return it to Japanese Canadians at the conclusion of the war. That is not what happened. In January 1943, a new order in council authorized the sale of all property seized from Japanese Canadians. The trust abandoned, a promise broken, the Custodian sold everything. This article traces the promise to protect property from its origins in the federal bureaucracy and demands on the

\* An earlier version of this article was presented at the Law/Authority/History: A Tribute to Douglas Hay symposium to mark the retirement of Douglas Hay. The symposium took place on 5 and 6 May 2016 at Osgoode Hall Law School and the York University History Department, Toronto.

† Eric M Adams, Jordan Stanger-Ross & the Landscapes of Injustice Research Collective. This work was inspired by conversations with the Landscapes of Injustice Community Council, especially Keiko Mary Kitagawa, Tosh Kitagawa, Art Miki, and Vivian Wakabayashi Rygnestad. We are also deeply indebted to the exceptional research assistance of William Archibald, Lauren Chalaturnyk, Kaitlin Findlay, Adam Kostrich, Rachel Weary, and Monique Ulysses. Trevor Wideman played a particularly key role in identifying documents and formulating early analyses of this material. Thanks also to the Journal’s anonymous reviewers, Penny Bryden, Philip Girard, Malcolm Lavoie, Laura Madokoro, Jim Phillips, Hildy Ross, Jim Walker, and Bruce Ziff, who read and commented on earlier versions of this paper. This article benefited from presentations at the 2016 Landscapes of Injustice Spring Institute, York University’s conference honouring Douglas Hay, and the Queen’s Faculty of Law Speaker Series. We thank the organizers and audiences at those events.

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Cet article aborde les origines, la trahison et le litige entourant une promesse juridique. En 1942, alors qu'il ordonne l'internement de plus de 21 000 Canadiens d'ascendance japonaise, le gouvernement canadien promulgue des décrets autorisant le séquestre des biens ennemis à saisir tous les biens immobiliers et personnels appartenant à des Canadiens d'origine japonaise vivant dans les régions côtières de la Colombie-Britannique. Face aux demandes de la communauté nippo-canadienne et aux préoccupations soulevées au sein même du gouvernement, ces décrets seront modifiés afin de préciser que le séquestre détient ces biens en fiducie « productrice » et qu'il les rendrait aux Canadiens d'origine japonaise à la fin de la guerre. La réalité allait être tout autre. En janvier 1943, un nouveau décret autorise la vente de tous les biens confisqués aux Canadiens d'origine japonaise. La confiance s'amenuise, la promesse vole en éclats, le séquestre se départit de tous les biens sous sa garde. Cet article relate la promesse de protéger ces biens, depuis ses origines au sein de la bureaucratie fédérale et les revendications exprimées dans la rue, jusqu'à sa violation dans l'arrêt *Nakashima c. Canada*, rendu par la Cour de l'Échiquier, qui décide de ne reconnaître aucune conséquence juridique. Nous soutenons qu'en dépit de sa violation, cette promesse revêt une importance historique qui ne saurait être occultée, dans la mesure où elle est le fruit de l'expression de différents points de vue, de la mobilisation populaire, des pressions conflictuelles en temps de guerre et de visions contradictoires sur la citoyenneté, la légalité et la justice. À partir d'une mine d'archives, nous retraçons dans cet article les conséquences de la perte des biens des Canadiens d'origine japonaise pour illustrer la dichotomie du droit, entre instrument grossier capable d'une injustice flagrante et institution sociale œuvrant de bonne foi.

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**ON THE EVENING OF 28 MAY 1944**, Eikichi Nakashima, Tadao Wakabayashi, Jitaro Tanaka and their lawyer, J. Arthur MacLennan, entered the dining room at the Chateau Laurier in Ottawa. Given the anxiety over the ongoing war in

the Pacific and the hotel's history of racial exclusion, the appearance of three Japanese Canadians in the Laurier's ornate dining room likely drew unwanted attention.<sup>1</sup> But Nakashima, Wakabayashi, and Tanaka had greater concerns than the prejudices of their fellow diners. In September 1942, government officials had forcibly removed them and their families from their Vancouver homes, seized control of their real and personal property, and interned them in crowded camps in the interior of British Columbia. They were, along with over twenty one thousand other Canadians of Japanese descent, "the enemy that never was,"<sup>2</sup> victims of a "politics of racism" that disregarded their basic human rights.<sup>3</sup> In the spring of 1944, Nakashima, Wakabayashi, and Tanaka came to Ottawa not to protest those injustices, but to place their faith in the promise of law.

This article is a history of a largely forgotten legal promise. It is a story of law's capacity to carry multiple meanings—protection and coercion, trust and duplicity, justice and injustice—and to shift in meaning over time. The racist treatment of Japanese Canadians before, during, and after the Second World War has been the subject of important scholarship,<sup>4</sup> but legal historians have

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1. The dinner was sufficiently memorable to appear in MacLennan's obituary. ATC, "Nos Disparus: J. Arthur MacLennan, Q.C." (1997) 55:1 *The Advocate* 123 at 124. For a sample of reporting detailing rumours of an imminent "enormous Pacific offensive," see "Tokyo's Next Bombing Very Close, U.S. Is Told" *Toronto Daily Star* (30 May 1944) 1. On racial exclusions of the period, see Eric M Adams, "Errors of Fact and Law: Race, Space, and Hockey in *Christie v York*" (2012) 62:4 UTLJ 463. At the *Christie v York* trial one of the former waiters at the Chateau Laurier recalled, "If I remember rightly, at the Chateau Laurier we were told not to serve colored people." *Christie v York Corporation* (1937), 75 RJQ 136 (Sup Ct) (Discovery Transcript), Bibliothèque et Archives nationales du Québec.
  2. Ken Adachi, *The Enemy that Never Was: A History of the Japanese Canadians* (Toronto, McClelland & Stewart, 1976).
  3. Ann Gomer Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War*, 2nd (Ottawa: Ann Sunahara, 2000).
  4. In addition to Adachi and Sunahara, *supra* notes 2, 3, see e.g. Mona Oikawa, *Cartographies of Violence: Japanese Canadian Women, Memory, and the Subjects of the Internment* (Toronto: University of Toronto Press, 2012); Pamela Sugiman, "'Life is Sweet': Vulnerability and Composure in the Wartime Narratives of Japanese Canadians" (2009) 43:1 *J Can Stud* 186; Stephanie Bangarth, *Voices Raised in Protest: Defending Citizens of Japanese Ancestry in North America, 1942-49* (Vancouver: UBC Press, 2008); W Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Towards Orientals in British Columbia* (Montreal: McGill-Queen's University Press, 2002); Patricia Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: University of British Columbia Press, 1989); *Ibid*, *The Oriental Question: Consolidating a White Man's Province, 1914-41* (Vancouver: University of British Columbia Press, 2003); *Ibid*, *The Triumph of Citizenship: The Japanese and Chinese in Canada, 1941-67* (Vancouver: University of British Columbia Press, 2007) [Roy, *Triumph of Citizenship*].

overlooked key aspects of these events, including the laws that dispossessed Japanese Canadians of everything they owned. While interning Japanese Canadians, the federal government seized control of all of their real and personal property within the “protected area in British Columbia.”<sup>5</sup> In the spring of 1943, federal officials began to sell virtually everything that the government had taken, often below market value.<sup>6</sup> Families lost heirlooms, vibrant businesses, and everyday possessions. They lost cars, boats, books, toys, furniture, and cameras. They lost homes and farms. Beyond the tangible, Canadians of Japanese descent lost opportunities, neighbourhoods, and communities. They lost connections to place. They lost retirements, livelihoods, and educations. They lost agency over their property and life choices. They lost, as Rikizo Yoneyama poignantly expressed in a defiant letter to the Minister of Justice, “more than just a home.” Japanese Canadians, he lamented, lost “the foundation of security and freedom as Canadian citizens.”<sup>7</sup>

The sale of Japanese-Canadian-owned property was consistent with other moments in Canadian history when promises lost meaning as government interests shifted, officials’ memories (conveniently) faded, and new legal interpretations of those promises took their place. The events chronicled here echo the federal government’s treaty promises to First Nations, which were backed by oral promises that officials later abandoned in favour of narrow legal interpretations—with devastating consequences for Indigenous peoples.<sup>8</sup>

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5. Adachi, *supra* note 2 at 208-209.

6. Before this date, important categories of property had already been sold including automobiles and fishing vessels. However, in the spring of 1943, the government authorized and undertook the forced sale of everything else that Japanese Canadians had been forced to leave behind. On the evolution of federal policy in this respect, see Jordan Stanger-Ross & Landscapes of Injustice Research Collective, “Suspect Properties: The Vancouver Origins of the Forced Sale of Japanese-Canadian-owned Property, WWII” (2016) 15:4 *Journal of Planning History* 271 [Stanger-Ross & LIRC, “Suspect Properties”].

7. Héritage Project, “Rikizo Yoneyama to Minister of Justice” (31 July 1944), online: <heritage.canadiana.ca/view/oocihm.lac\_reel\_c9476/1448?r=0&s=2>. See Jordan Stanger-Ross, Nicholas Blomley & the Landscapes of Injustice Research Collective, “‘My land is worth a million dollars’: How Japanese-Canadians contested their dispossession in the 1940s” (2017) 35:3 *L & Hist Rev*.

8. See Arthur J Ray, Jim Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen’s University Press, 2000) at 214; James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013), especially ch 6-9. On remembering and forgetting Crown promises, see William Wicken, “‘Heard It From Our Grandfathers’: Mi’kmaq Treaty Tradition and the *Syliboy* Case of 1928” (1995) 44 *UNBLJ* 145. See also Eric M Adams, “Ghosts in Court: Jonathan Belcher and the Proclamation of 1762” (2004) 27 *Dal LJ* 321.

The dispossession of Japanese Canadians is another instance in which the Crown created circumstances of dispossession coupled with a paternalistic promise of protection that it did not keep. When the federal government seized the property of Japanese Canadians, it made assurances in law, repeated by officials to Japanese Canadians on the doorsteps of their homes, that the property would be held as a “protective measure only” and would someday be returned. This article excavates this legal promise to protect, examines its reception among property owners, and assesses the little known legal case it initiated, *Nakashima v Canada*.<sup>9</sup> A full accounting of the power of law in twentieth-century Canada must wrestle equally with its dual capacity to impose and constrain power.

Given the eventual fate of Japanese-Canadian-owned property, the dispossession can appear as a linear story in which widespread racist views always prevailed. One possibility is that the promise to protect was a ruse, a tool that encouraged Japanese Canadians to cooperate with their uprooting and internment, but abandoned when that process was completed and the property could be acquired by whites and other non-Japanese Canadians.<sup>10</sup> The influence of racist leaders in the political process and the vehemence with which they expressed their discriminatory objectives encourages this view. Racist prejudice against Japanese Canadians intensified after the war began. Ian Mackenzie, the sole British Columbia representative in the federal cabinet and a key figure in the formulation of orders in council concerning Japanese Canadians, advocated the exile of the entire community (of which 60 per cent were Canadian born) to Japan on the grounds that he did “not believe the Japanese are an assimilable race.”<sup>11</sup> Prime Minister William Lyon Mackenzie King privately agreed that “[e]veryone of them ... would be saboteurs and would help Japan when the moment came.”<sup>12</sup> Glenn McPherson, Deputy Custodian of Enemy Property

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9. [1947] Ex CR 486 [*Nakashima*]. The decision is much less well known (even among Canadians) than the American case law on the Japanese American internment. See e.g. *Hirabayashi v United States*, 320 US 81 (1943), 63 S Ct 1375 [*Hirabayashi*]; *Ex Parte Endo*, 323 US 283 (1944); *Korematsu v United States*, 323 US 214 (1944), 65 S Ct 193 [*Korematsu*]. On the American cases, see Eugene V Rostow, “The Japanese American Cases—A Disaster” (1945) 54:3 Yale LJ 489; Eric K Yamamoto et al, *Race, Rights and Reparation: Law and the Japanese American Internment*, 2nd (New York: Wolters Kluwer, 2013).
  10. This perspective is conveyed in the most widely cited source on the dispossession of Japanese Canadians, *The Politics of Racism*. Sunahara, *supra* note 3.
  11. Ian Mackenzie to John Godwin (7 December 1942), Ottawa, Library and Archives Canada [LAC] (MG27 III-B5, vol 25, file 70-25(3)).
  12. LAC, “Diaries of William Lyon Mackenzie King” (28 February 1942), online: <[www.bac-lac.gc.ca/eng/discover/politics-government/prime-ministers/william-lyon-mackenzie-king/pages/item.aspx?IdNumber=23884](http://www.bac-lac.gc.ca/eng/discover/politics-government/prime-ministers/william-lyon-mackenzie-king/pages/item.aspx?IdNumber=23884)>.

and the most important federal bureaucrat handling the property of Japanese Canadians, wrote that the Japanese Canadians had “developed a high inferiority complex and realize ... that the only way the Yellow Race can obtain their place in the Sun is by winning the war.”<sup>13</sup> Politicians and government officials might have had little compunction in misleading the members of a ‘race’ that they despised.

In addition to racism on the part of government officials, some evidence suggests that the laws protecting Japanese-Canadian-owned property were meant from the outset to deceive. Before the war in the Pacific began, officials in the British Columbia government had their eyes on the property holdings of the Japanese-Canadian community. A “quiet” government initiative compiled a list of “the names, addresses, and business of Japanese who hold trade licences in British Columbia” as part of a study into “the extent and character of oriental penetration in the economy of this Province.”<sup>14</sup> After the war began, McPherson met with City of Vancouver officials on 1 September 1942, while Japanese Canadians were still being rounded up and sent inland, to discuss the city’s interest in acquiring their property. McPherson advised city leaders to delay pursuing this plan, at least for the moment, “to avoid taking any action that would conflict with the steps now being taken” to remove Japanese Canadians.<sup>15</sup> McPherson may have hinted to city officials, however, that the Custodian’s approach to Japanese-Canadian-owned property would not always be one of protection.<sup>16</sup> In a similar vein, once the entire Japanese-Canadian population of coastal British Columbia had been uprooted, George Collins, Chairman of the British Columbia Security Commission told his staff that the organization would now shift its focus: “[t]hese people will be dispersed across Canada in small groups ... *That is the undeclared policy of Ottawa.*”<sup>17</sup> If an “undeclared” plan to permanently exile Japanese Canadians from the province existed from the

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13. Memorandum Re Japanese (December 18, 1941), Ottawa, LAC (RG 117, vol 2, file 16).

14. G Neil Perry to Colonel E Pepler, (10 August 1940), Victoria, Royal BC Museum/BC Archives, (GR-0268, box 14, file 3).

15. City Council Minutes (1 September 1942), Vancouver, City of Vancouver Archives (City of Vancouver Fonds, series 27, box 27-E-6, folder 17: Japanese Property, Powell Street).

16. Quoted the next day in the Japanese-Canadian newspaper, *The New Canadian*, Alderman George Buscombe, who had attended the meeting with McPherson, said “[w]e’ll wait and see what happens after September 30,” when he presumed the internment would be complete. “We don’t want the Japanese to return here after the war,” he continued, “[T]hey are going to outbreed the whites and eventually outnumber us.” “Custodian Not Selling Real Estate Left Behind by Evacuated Owners” (2 September 1942) 1-2.

17. Minutes of the BC Security Commission Conference (6 March 1943), Ottawa, LAC (RG36-27, vol 7, file 163) [emphasis added].



start of Canada's war in the Pacific, then its blueprints could not have included Japanese Canadians maintaining their homes in coastal British Columbia.<sup>18</sup>

Direct evidence of the creation of the laws of dispossession, however, suggests that the ubiquity of racism and the government's ultimate violation of the promise should not obscure its full history. The promise to protect resulted from multi-vocal processes, conflicting pressures, and competing conceptions of citizenship, legality, and justice, rather than simple racist deceit and financial opportunism. Certainly, some of the officials responsible for drafting the laws of dispossession believed that promises to protect would facilitate the uprooting and internment. Yet those same officials—almost all of them lawyers—also saw the protection of property as a requirement of orderly governance, natural justice, and inchoate notions of citizenship and liberty. Lofty sentiments are more likely to find their way into official documentation than is a secretive plot to deceive. Archives have gaps, some of them deliberate. Nonetheless, the records of law-making, and the broader context in which they are embedded, demonstrate that officials also intended the promise of protection to carry legal significance, and to create a trust, in both the legal and colloquial sense, in the government's treatment of seized property. From this perspective, we might conceive of the dispossession as fundamentally unlawful on its own terms, rather than as the regrettable culmination of legalized racism.

Part I of this article explains how and why the orders of dispossession took shape. It reveals a wartime bureaucracy of conflicting interests, intense pressures, and administrative constraints. From this context arose the promise to protect the property of Japanese Canadians. The story of that promise has been lost in large part because of the decision of Justice Thorson in *Nakashima v Canada*, the focus of Part II. In *Nakashima*, the promise to protect disappeared under evasive legal argument, medieval conceptions of Crown liability, absolute deference to government decision-making in times of war and judicial sanction of racialized injustice. Contrary to the position adopted by Canada to win the *Nakashima* case, we argue that the promise to protect enacted a legal trust as the product of the interaction of text, intention, administrative action, and the interpretations of those subject to it. The risk in overlooking the promise to protect property is to cast Canada's wartime history as inexorable. Throughout this history, there

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18. Note, however, that other federal officials, including Ephraim H Coleman, Undersecretary of State, saw the decision to force the sale of the property of Japanese Canadians as a *change* in policy toward permanent exile from BC. Coleman did not understand this as the implicit approach from the outset. See Stanger-Ross & LIRC, "Suspect Properties," *supra* note 6 at 280.

were choices made, paths not taken, doubts suppressed, and promises made. To focus only on promises broken or, worse yet, to ignore legal promises entirely, is to misrepresent the laws of dispossession and to silence Japanese Canadians and the federal officials who inscribed in law an obligation to protect. As part of this collection in honour of Douglas Hay, we follow his use of legal history to scrape away the obfuscating veneers painted in judicial decisions to reveal the varied shades of colour that lie beneath the surface.<sup>19</sup> The dispossession of Japanese Canadians was a complicated product of law—enabled by legal force, yet equally constrained by legal principle. Its neglected history sheds light on the nature of law and Canadian history in equal measure.

## I. CREATING A PROMISE: THE ORIGINS OF THE DISPOSSESSION ORDERS IN COUNCIL

The promise to protect property and its subsequent violation emerged out of the context of Canada at war. In the emergency federal cabinet meeting on 1 September 1939, following news that Germany had attacked Poland, Justice Minister and Acting Secretary of State, Ernest Lapointe, proclaimed an apprehended state of war and invoked the *War Measures Act (WMA)*.<sup>20</sup> As in the First World War, the *WMA* transferred virtually unlimited legislative authority to the federal cabinet. In the broad words of the Act: “The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may ... deem necessary or advisable for the security, defence,

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19. See generally, Jim Phillips, “Why Legal History Matters” (2010) 41:3 VUWLR 293.

20. RSC 1927, c 206 [*WMA*]. Despite being proclaimed on 1 September, the apprehended state of war was backdated to 25 August 1939 to capture certain military purchases that had already been made. For a history of the *WMA*, see F Murray Greenwood, “The Drafting and Passage of the War Measures Act in 1914 and 1927: Object Lessons in the Need for Vigilance” in W Wesley Pue & Barry Wright, eds, *Canadian Perspectives on Law & Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 291. After passage of the *WMA* in 1914, orders in council were passed to register enemy aliens and then to intern over 8,000 persons, the majority of whom were Ukrainian Canadians. See Bohdan S Kordan, “‘They Will Be Dangerous’: Security and Control of Enemy Aliens in Canada, 1914” in Barry Wright, Eric Tucker & Susan Binnie, eds, *Canadian State Trials Volume IV: Security, Dissent and the Limits of Toleration in War and Peace, 1914-1939* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2015) 44 at 45. See also, Peter McDermott, “Enemy Aliens in the First World War: Legal and Constitutional Issues” in *ibid*, 71 at 77.

peace, order and welfare of Canada.”<sup>21</sup> The Act specifically placed “appropriation, control, forfeiture and disposition of property” within federal executive control.<sup>22</sup> In litigation arising out of the First World War, the Judicial Committee of the Privy Council upheld the constitutionality of the *WMA* under the federal power to legislate for the “peace, order, and good government of Canada” in times of national crisis.<sup>23</sup> As one government committee summarized, the Act granted “the Executive ample authority to take pretty well whatever action might be found to be necessary to meet the exigencies of war.”<sup>24</sup>

Long before the war in the Pacific, Japanese Canadians had been the subject of racist treatment under the law.<sup>25</sup> In keeping with longstanding state hostility to Japanese Canadians, on 1 October 1940, the Cabinet War Committee established a “Special Committee on Orientals in British Columbia,” to keep “the Government constantly informed ... as to the oriental situation in that Province.”<sup>26</sup> Hundreds of orders in council restricting the liberty of Japanese Canadians followed. The eventual dispossession, internment, incarceration, exile, and prohibitions on returning to British Columbia were all products of law: Orders in council drafted by a federal bureaucracy and approved by committees of cabinet.

Following Canada’s declaration of war against Japan on 7 December 1941,<sup>27</sup> the legal focus on Japanese Canadians intensified. A series of orders in council

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21. *WMA*, *supra* note 20, s 3. The language parallels President Roosevelt’s Executive Order No 9066 of 19 February 1942, subsequently ratified by Congress, authorizing actions deemed “necessary or desirable to prescribe military areas ... from which all persons may be excluded.” *Hirabayashi*, *supra* note 9 at 86.
  22. *WMA*, *supra* note 20. This is contrary to the clear peacetime allocation of matters of “Property and Civil Rights” to provincial jurisdiction.
  23. *Fort Frances Pulp and Paper Co v Manitoba Free Press Co*, [1923] 3 DLR 629 at 633, AC 695 [*Fort Frances*]. Fitzpatrick CJ also commented on this, holding that “[i]t seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of [section 3 of the *WMA*] contains unlimited powers.” *Re George Edwin Gray*, [1918] 57 SCR 150 at 158-59, 42 DLR 1 [*Re Gray*].
  24. Interdepartmental Committee on Emergency Legislation, *Report* (Ottawa: King’s Printer, 1939).
  25. See Bruce Ryder, “Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909” (1991) 29:3 *Osgoode Hall LJ* 619; Andrea Geiger, “Writing Racial Barriers into Law: Upholding BC’s Denial of the Vote to its Japanese Canadian Citizens, *Homma v Cunningham*, 1902” in Gail M Nomura & Louis Fiset, eds, *Nikkei in the Pacific Northwest: Japanese Americans and Japanese Canadians in the Twentieth Century* (Seattle: University of Washington Press, 2005).
  26. PC 1941-117 (1941) Ottawa, LAC (RG2-A-1-a, vol 1701, file 2247G). See also Adachi, *supra* note 2 at 190-91.
  27. PC 1941-9592 (1941), Ottawa, LAC (RG2-A-1-a, vol 1741, file 2463G).

over the ensuing months enabled the uprooting and dispossession of all those living within the “protected area” of British Columbia, an enormous area of land covering the coast to 100 miles inland.<sup>28</sup> As a precursor to the internment, in late February 1942, Order 1486 empowered the government to “require any and all persons to leave such protected area.”<sup>29</sup> On 4 March 1942, Order 1665 put the internment policy into legal effect. Citing the necessity of “the security and defence of Canada,” the Order established the British Columbia Security Commission (BCSC), headquartered in Vancouver, “to plan, supervise and direct the evacuation from the protected areas of British Columbia of all persons of the Japanese race.”<sup>30</sup> The uprooting and internment of Japanese Canadians created an immediate problem of what to do with the empty properties and vulnerable possessions of Japanese Canadians forced from their homes. The solution was for the Secretary of State, Norman McLarty, to take custody of seized property, and promise its protection.

#### A. THE NEED TO PROMISE

The office of the Custodian of Enemy Property, acting under the authority of the Secretary of State, administered the dispossession of Japanese Canadians. The role of the Custodian evolved rapidly during the eight days between 24 February 1942, when the government announced its authority to require “any and all persons” to leave the “protected area” of British Columbia, and 4 March, when Order 1665 specified that this power would be applied to “all persons of the Japanese race.” Prior to this crucial week, the Custodian managed only the property of “all persons regardless of their nationality who reside in enemy or enemy occupied territory” as well as the property of “all persons who are detained under the Defense of Canada regulations.”<sup>31</sup> Very little Japanese-Canadian-owned property fit this description. As the Custodian specified in an announcement on 12 December 1941, its activities did “not affect the property of persons of the Japanese Race who are conducting themselves in a proper manner and who

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28. PC 1942-365, Ottawa, LAC (RG2-A-1-a, vol 1744, file 2487G). See Adachi, *supra* note 2 at 199-224.

29. PC 1942-1986, (1941) C Gaz 3475.

30. PC 1942-1665 (1942) s 10(1), Ottawa, LAC (RG2-A-1-a, vol 1750, file 2516G) [Order 1665][See Appendix I]. In addition to powers to “require by order any person of the Japanese race, in any protected area in British Columbia ... to leave his place of residence and proceed to any other place within or without the protected area,” the order granted the Commission the power to “make orders respecting the conduct, activities, and discipline of any person evacuated under the provisions of these Regulations. *Ibid.*, ss 11(1), (2).

31. *Consolidated Regulations Respecting Trading with the Enemy* (1939), s 1(b)(ii), (iv), Ottawa, LAC (RG125, vol 1550, file 11367, part 2).

have not been detained.<sup>32</sup> At this juncture, the Custodian remained primarily an agency of international affairs.

A late intervention in the planning of the internment transformed the Custodian's function.<sup>33</sup> The first drafts of Order 1665 overlooked the question of property and omitted the Custodian from the list of departments and agencies (RCMP, Departments of Transport, National Defense, Munitions and Supply, and Labour) whose involvement civil servants imagined necessary to the internment.<sup>34</sup> But what would become of the property of Japanese Canadians once interned? Austin C. Taylor, the man most responsible for overseeing the uprooting of Japanese Canadians in its first months, raised the question first. Taylor agreed to serve as the Chairman of the BCSC and saw early drafts of Order 1665. A British Columbia mining magnate, reported to have invested \$1 million in war bonds, Taylor was a man accustomed to thinking about property.<sup>35</sup> Seeing an oversight in the proposed law, Taylor wrote Cabinet Minister Ian Mackenzie on 28 February 1942 to inquire about a "custodian for evacuated property."<sup>36</sup> Mackenzie responded quickly. By 1 March he had secured from Ephraim H. Coleman, the Undersecretary of State responsible for the operations of the Custodian of Enemy Property, agreement to appoint "additional custodians ... with a view to providing for the care" of the property of Japanese Canadians.<sup>37</sup> Officials failed to document the nature of the "care" envisioned (the exchange between Mackenzie and Coleman took place by phone), but, whatever its details, the order in council was revised by the Department of Justice and submitted to cabinet the following day.<sup>38</sup>

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32. Notice (newspaper clipping) (12 December 1941), Ottawa, LAC (RG 117, vol 1, file 10). On property and the performance of citizenship, see Gregory S Alexander, "Property as Propriety" (1998) 77:4 *Neb L Rev* 667.

33. Before this time, the Custodian controlled the property of several hundred Japanese Canadians whose property was deemed "enemy" property. The new orders in council, vested the Custodian with the property of more than 15,000 Japanese Canadians. See Glenn W McPherson to EH Coleman (2 February 1942), Ottawa, LAC (RG 117, vol 1, file 10). Report of the Vancouver Office of the Custodian (G W McPherson) (25 February 1942), Ottawa, LAC (RG 117, vol 1, file 10).

34. Draft to His Excellency the Governor General in Council (28 February 1942), Ottawa, LAC (RG 25, vol 3005, file 3464-q-40).

35. "Austin C Taylor, Financier, Dead," *The New York Times* (2 November 1965).

36. Telegraph from Austin C Taylor to Ian Mackenzie (28 February 1942), Ottawa, LAC (MG27 III-B5, vol 24, file 67-25(1)). On the origins of the Custodian of Enemy Property, see Judith Roberts-Moore, "The Office of the Custodian of Enemy Property: An Overview of the Office and its Records, 1920-1952" (1986) 22 *Archivaria* 95.

37. Ian Mackenzie to Prime Minister (2 March 1942), Ottawa, LAC (MG27 III-B5, vol 24, file 67-25(1)).

38. Ian Mackenzie to John E Read (1 March 1942), Ottawa, LAC (MG27 III-B5, vol 24, file 67-25(1)).

Under the heading “Custody of Japanese Property,” Order 1665 provided as follows:

12.(1) As a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race resident in such area ... 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.<sup>39</sup>

Section 12 concluded that the “property, rights and interests so vested in and subject to the control and management of the Custodian ... shall be dealt with in such manner as the Governor in Council may direct.”<sup>40</sup>

The cavalier treatment of property in Order 1665 met with immediate internal criticism. Among its most trenchant opponents was John Erskine Read, legal advisor for the Department of External Affairs, and former Dean of Dalhousie Law School.<sup>41</sup> Reviewing Order 1665, he expressed a professorial attentiveness and attachment to the common law of property and natural justice. Read had written the first drafts of the Order, which had been silent on the question of property.<sup>42</sup> Having been assured on 1 March that his draft was “right in every way,” he was shocked a day later to read a key change in the law: The proposed vesting of all Japanese-Canadian-owned property in the hands of the Custodian.<sup>43</sup> As he interpreted the revisions, “all property of any sort in

39. Order 1665, *supra* note 30, s 12(1).

40. *Ibid*, s 12(3). Punishment for breach of any aspect of the Order or by-laws made under it involved a five hundred dollar fine, up to twelve months of imprisonment, or both. *Ibid*, s 15.

41. Read studied at Dalhousie, Columbia, and then Oxford as a Rhodes Scholar. He briefly practised law before joining Dalhousie, where he specialized in property law. After the war, Read would go on to a distinguished judicial career on the International Court of Justice. On Read’s deanship during Dalhousie’s so-called “golden age,” see John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979) at 93, 96-99.

42. John E Read to Ian Mackenzie (copied to F P Varcoe) (28 February 1942), Ottawa, LAC (RG 25, vol 3005, file 3464-q-40).

43. Ian Mackenzie to John E Read (1 March 1942), Ottawa, LAC (RG 25, vol 3005, file 3464-q-40); Note for the Undersecretary of State for External Affairs (2 March 1942), Ottawa, LAC (RG 25, vol 3005, file 3464-q-40) [Note for Undersecretary]. We believe that the promise of protection was inserted into the draft by the Deputy Minister of Justice, Frederick Varcoe, or by someone working directly under his supervision in the Department of Justice. Unfortunately, the records of this process have been significantly withheld from research by LAC, in part on the basis of the view that the records contain “information the disclosure of which would reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada ... or the detection, prevention or suppression of subversive or hostile activities.” Security rationales continue to play perplexing and

the protected areas is being taken away from the Japanese and handed over to the Custodian.” In a memo to his supervisor, Undersecretary of State, External Affairs, Norman Robertson, Read excoriated the version that ultimately became law for “abandoning completely” the principle of “fairness.”<sup>44</sup>

Emphasizing that Japanese Canadians were British subjects, Read saw Order 1665 as a betrayal of good governance and natural justice. “It strips them of every cent they may have in their pockets or in the banks,” Read wrote, “it takes the clothes off their backs and removes the tools of their trade: fountain pens from their pockets, books from their libraries; and hands them all over to the tender mercies of the Custodian.”<sup>45</sup> Read himself had drafted the provisions that would tear Japanese Canadians from their communities in coastal British Columbia. These, however, he justified as necessities of war. The confiscation of property, he noted by contrast, had “nothing whatever to do with security.”<sup>46</sup> Read’s advocacy for the property rights of Japanese Canadians also had a more instrumental rationale. Although he criticized government excess in relation to property, he accepted that “the scheme of evacuation,” as he called it, “is based upon [the] ultimate absorption of at least a substantial part of [Japanese Canadians] ... outside of the protected areas.” Thus, he joined others like Ian Mackenzie, in intending that most Japanese Canadians would never return to British Columbia. In Read’s view, recklessness with respect to property would “hamper absorption” because it deprived Japanese Canadians of the means to re-establish themselves east of the Rocky Mountains.

Instead, Read advocated measures similar to the law that governed Japanese-Canadian-owned fishing vessels (a scheme he had created). With respect to fishing vessels, Read explained, “care was taken to establish a benevolent trusteeship ... to protect the interests of British subjects whose fishing vessels were taken.”<sup>47</sup> Indeed, Order 288, of January 1942, had explicitly acknowledged that the owners of the vessels “though being of Japanese origin, are Canadian citizens,” and had emphasized that their dispossession should have “due regard to the equity of the *Japanese Canadian* owners.”<sup>48</sup> The law created a committee, headed by a judge and including a Japanese-Canadian member, whose explicit

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disconcerting roles in this history.

44. Note for Undersecretary, *ibid.*

45. *Ibid.*

46. *Ibid.*

47. *Ibid.*

48. PC 1942-288 (13 January 1942), Ottawa, LAC (RG2 A-1-a, vol 1744, file 2484G) [emphasis added] [Order 288]. This may be one of the only instances in which the wartime government referred in law to “Japanese Canadians.” Note for Undersecretary, *supra* note 43.

mandate was to “make it possible for the present owners of detained vessels to freely negotiate for charters, leases, or sales.”<sup>49</sup> In practice, however, the freedom of owners was severely constrained from the outset by the circumstances of their uprooting, and, ultimately, the committee broke the law and forced the sale of vessels.<sup>50</sup> Still, in March 1942, Read criticized Order 1665 by pointing to a precedent offering more explicit property protection, in contrast to a law in which he saw “no element of trusteeship recognized, and no attempt to set up machinery that would enable the property of these British subjects to be sold so as to preserve and protect their interests.”<sup>51</sup>

Japanese Canadians also closely scrutinized the laws that would upend their lives and threaten their property. The sole Japanese-Canadian newspaper permitted to publish after the attack on Pearl Harbor, *The New Canadian*, diligently reported on and sometimes challenged federal policy, even as government censors oversaw the paper’s operation.<sup>52</sup> Published under the editorial leadership of Thomas Shoyama, the paper was, in the words of one reader at the time, “intoxicating ... [i]t brought young kids like me to our first contact with the bright young Nisei minds. It filled us in with political background and news.”<sup>53</sup> The paper’s accomplishments were in significant measure attributable to Shoyama. Born in Kamloops in 1916 and a 1938 graduate of the University of British Columbia, Shoyama viewed *The New Canadian* as a “vehicle of our response” to government policy, an opportunity, “in spite of the bonds of wartime censorship ... to try to voice a right and forceful demand for democratic justice.”<sup>54</sup>

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49. Order 288, *supra* note 48 [emphasis added].

50. The illegality of these sales was later acknowledged by the federal government. Héritage Project, “Japanese Fishing Vessels” (13 February 1948), online: <heritage.canadiana.ca/view/oocihm.lac\_reel\_c9434> at images 458-77. On the disposal of the fishing vessels, see Masako Fukawa & Stanley Fukawa, *Spirit of the Nikkei Fleet: BC’s Japanese Canadian Fishermen* (Madeira Park, BC: Harbour, 2009) ch 7; Sunahara, *supra* note 3, ch 2; Adachi, *supra* note 2 at 228-29; Jordan Stanger-Ross, “Telling a Difficult Past: Kishizo Kimura’s Memoir of Entanglement in Racist Policy” (2014) 181 BC Stud 39 at 40 [Stanger-Ross, “Kishizo Kimura”].

51. Note for Undersecretary, *supra* note 43.

52. Except for a short time, when it was brought under full government control (21 April–27 June 1942), the paper maintained a critical editorial perspective. Adachi, *supra* note 3 at 233.

53. Frank Moritsugu, “My Love Affairs with The New Canadian,” *The New Canadian* (31 May 1958) 8.

54. Shoyama went on to a distinguished postwar civil service career in the Saskatchewan and federal governments. Gregory Marchildon, “Shoyama, Thomas Kunito (1916-2006)” (2006), online: <esask.uregina.ca/entry/shoyama\_thomas\_kunito\_1916-.html>. See also, Tom Shoyama, “As I Remember a Bit of It,” *The New Canadian* (31 May 1958) 2. On the censorship process, see Frank Moritsugu, “My Love Affairs with the New Canadian,” *The New Canadian* (14 June 1958) 1.



Government officials allowed *The New Canadian* to continue in part because they regarded it as an effective propaganda tool, but Shoyama and his colleagues managed to preserve the integrity of the paper even in the context of government oversight. The editorial team continued to serve the community by carrying announcements and human interest stories, detailing the experiences of Japanese Americans, and selectively criticizing federal policies. Although editors could not prevent the federal government from inserting policy statements and notices directly into the paper, they found subtle ways to contextualize and criticize such official announcements. In the first months of Canada's war in the Pacific, *The New Canadian* usually carried government statements on its back pages. In many cases, the editors contrasted these back-page bulletins with front-page journalistic articles. These articles distinguished the federal announcements from journalism (government insertions were subjects of reportage, not acts of reporting) and allowed the editors to emphasize facets of policy and law that they saw as especially important. In doing so, they preserved the sense that the newspaper was more than a mouthpiece for the government. If reading the paper was an intoxicating experience, it was partly because of the opportunity to decode subtle, multi-vocal explanations of law.

In the first weeks of March 1942, *The New Canadian* conveyed the federal promise to protect Japanese-Canadian-owned property, but at the same time it warned readers that Order 1665 should be regarded with caution. The 12 March 1942 edition was the first to report the Order, running a "Notice to Persons of the Japanese Race," penned by McPherson, the Deputy Custodian. Quoting the law, "[a]s a protective measure only," McPherson wrote, "all property situated in any protected area of British Columbia belonging to any person of the Japanese race" would be vested in the Custodian, who would charge "no commission" for services in the "control and management" of property. Japanese Canadians were "urged to report their property immediately instead of waiting until their evacuation as this will enable the Custodian to take prompt action to protect and administer the same."<sup>55</sup> McPherson's announcement repeatedly echoed the language of "protection," a term that he explained in private government communication as positioning the Custodian as a "Trustee."<sup>56</sup> "[I]nsofar as the property of Japanese Evacuees is concerned," McPherson would argue near the

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55. GW McPherson, "Notice to Persons of the Japanese Race," *The New Canadian* (12 March 1942) 4. This notice was also carried in mainstream Vancouver dailies. See e.g. *Vancouver News Herald* (11 March 1942).

56. GW McPherson, "Appendix C, Memorandum by Counsel for the Custodian," (30 July 1941), Ottawa, LAC (MG30-E148, vol 8, file 52).

end of the war, “the Custodian is definitely holding such property, in trust, for the former Japanese owners, and will be held strictly accountable to them.”<sup>57</sup>

Editors at *The New Canadian* expressed scepticism. A short front-page article undermined the government’s official statement. McPherson’s notice, the author explained, was “a paid newspaper announcement,” not journalism. The article avoided use of the phrase “protective measure,” emphasizing instead the wide discretionary power granted to the Custodian.<sup>58</sup> Five days later, another front-page article highlighted the relationship between the Custodian’s activity and the disruption of Vancouver’s Powell Street neighbourhood. The Custodian had established “miniature offices” in a previously bustling Japanese-Canadian-owned restaurant, Fuji Chop Suey, where “booths formerly used for dining” were equipped with typewriters and staff ready “to assist those anxious to report their assets and liabilities” to the federal government. Once again, the newspaper eschewed the language of protection, explaining that “[u]nder [Order 1665], the Custodian has been authorized to take control of property,” subjecting it “to the consolidated regulations on trading with the enemy” and authorizing its disposal at “the direction of the federal government.”<sup>59</sup> The issue also reprinted a biting editorial from the non-Japanese-Canadian press, a rarity at this juncture of the Pacific War, asking, “What is this anyway—Hitler’s country or a democracy?”<sup>60</sup> An advertisement printed alongside this disconcerting comparison encouraged Japanese Canadians to seek alternatives to the federal government for the safekeeping of their property: “Your Household Goods Are Valuable” read an advertisement for Campbell’s Storage Limited, “Have them carefully packed and stored or shipped by trained professionals at very reasonable rates.”<sup>61</sup> For readers of *The New Canadian* in early March 1942, Campbell’s Storage may well have seemed the more reliable promise of protection.

Federal officials knew that Japanese Canadians distrusted their policies, including the promise to protect property. Many feared that disbelief might

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57. McPherson to DesRosiers, “Re: Japanese Language Association School,” (14 July 1945), Ottawa, LAC (RG117, vol 2535, file 58998).

58. “Make Application: Custodian to Take Control of Property of Evacuees,” *The New Canadian* (12 March 1942) 1.

59. “Powell Offices Aid Report of Property to Custodian,” *The New Canadian* (17 March 1942) 1.

60. “A Country Editor Views Evacuation,” *The New Canadian* (17 March 1942) 2.

On comparisons of Canada to Nazi Germany, see Jordan Stanger-Ross & The Landscapes of Injustice Research Collective, “Nazism in Canada?: The Internment of Japanese Canadians and the History of Comparison” in Helga Thorson, Charlotte Schallie & Andrea van Noord, eds, *Holocaust Education in a Time of Transition* [under review].

61. “Your Household Goods are Valuable,” *The New Canadian* (17 March 1942) 2.

encourage resistance to the internment process, a particular worry because public calm on Canada's Pacific coast was widely regarded as fragile.<sup>62</sup> On 4 March 1942, when Order 1665 created the BCSC, Taylor wrote to Mackenzie discouraging actions or pronouncements that might further alienate Japanese Canadians. "[A]t [the] moment we believe we have cooperation of [the] Japanese community," he remarked. However, "if ... further restrictions be placed on [the] Japanese we will lose present cooperation and create an element of distrust and complete lack of confidence which will add tremendously to our present problem."<sup>63</sup> Quieting unrest among Japanese Canadians would remain a preoccupation for Taylor and the BCSC in the months that followed. In April, Taylor speculated that the unchecked circulation of "fears" and "rumour" among Japanese Canadians might eventually prompt sufficient defiance to require their mass imprisonment, a prospect far more difficult and expensive than their confinement in sites of internment.<sup>64</sup> Central among the "rumours" of concern to Japanese Canadians were hints that government policy might leave them destitute after the war. Such impressions, many officials worried, could have spiralling consequences.

Distrust of the government posed additional practical problems for federal officials. As a report by the Vancouver Office of the Custodian later reflected, "the Japanese were obviously distrustful of the whole machinery set up ... and it shortly became quite clear that they were taking little advantage of the facilities which were offered [to register their property]."<sup>65</sup> This failure to cooperate posed a problem for the office because the Custodian risked being "charged with the administration and control of large quantities of property of which he had no knowledge."<sup>66</sup> Ignorance of the property vesting in the Custodian obstructed officials scrambling to respond to their mandate under Order 1665. As they struggled to hire staff for a range of property management tasks—assessing the condition and value of property, maintaining insurance, making repairs, collecting rents, and paying creditors—they needed Japanese Canadians to help them understand the extent of the property concerned and, even better, to deliver property to government officials.<sup>67</sup> The government would

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62. Roy, *Triumph of Citizenship*, *supra* note 4 ch 1 at 20ff.

63. Austin C Taylor to Ian Mackenzie (4 March 1942), Ottawa, LAC (MG27 III-B5, vol 24, file 67-25(1)).

64. Minutes of the British Columbia Security Commission (23 April 1942), Ottawa, LAC (RG 36-27, vol 7, file 163).

65. Report to the Undersecretary of State Regarding the Japanese Evacuation Section of the Office of the Custodian at Vancouver, BC (26 June 1942), Ottawa, LAC (RG 117, vol 2).

66. *Ibid.*

67. *Ibid.*

soon extend a more robust promise to protect property in hopes of securing Japanese-Canadian cooperation.

## B. STRENGTHENING THE PROMISE

Facing internment, Japanese Canadians could see the precarious position of their property and they demanded its protection. Undersecretary of State Coleman<sup>68</sup> realized that the promise of protection in Order 1665 was insufficient. On 16 March he explained to the Departments of Justice and External Affairs that “leaders in [the Japanese-Canadian] community” were “exercised” about the property situation and indicated that the BCSC regarded this as a matter of “importance and urgency.”<sup>69</sup> He recommended an amendment to Order 1665, which included “dropping completely” the offending clause, 12(3). “I do not think,” wrote Coleman, “it was ever contemplated by the Government that they would deprive the Japanese owners of their property or the proceeds thereof.” The existing wording, however, left the law “susceptible of the interpretation that something in the nature of confiscation is taking place and I am sure,” he repeated, “this was not the intention of this Government.”<sup>70</sup> Citing the necessity to encourage Japanese Canadians to register their property with the Custodian, and the “very heavy responsibilities” placed upon the BCSC, Coleman proposed a rewording of the law.

The promise to protect emerged from a number of interests that, for the moment, intersected. One thread, most clearly expressed by Read, drew together a connection between the rights of British subjects, common law property rights, and rights of natural justice. Normative concerns for fairness were bolstered, however, by instrumental values that sought cooperation, administrative simplicity, and cost effectiveness in the implementation of the racialized internment and dispersal of Japanese Canadians. Coleman, for his part, made a pragmatic case.

68. Having served as part-time dean of the Manitoba Law School, Coleman left legal practice in 1933 to take up a position in Ottawa. Considered an “urbane intellectual with a mania for reading,” Coleman “was a quiet, cautious, rather formal man who put heavy emphasis on form, precedent, and tradition. He never gave a swift judgement and seldom made a quick decision.” R St J Macdonald, “An Historical Introduction to the Teaching of International Law in Canada: Part III” (1976) 14 Can YB Int’l Law 224 at 227, n 153; Hugh L Keenleyside, *Memoirs of Hugh L Keenleyside: Volume 1: Hammer the Golden Day* (Toronto: McClelland & Stewart, 1981) at 485. On Coleman’s conservative views on legal education, see W Wesley Pue, *Lawyer’s Empire: Legal Professions and Cultural Authority, 1780-1950* (Vancouver: UBC Press, 2016) at 159-60, 209.

69. EH Coleman to Norman Robertson (16 March 1942), Ottawa, LAC (RG 25, vol 3121, file 4606-c-13-40).

70. *Ibid.*

Japanese Canadians were “exercised” and their fears about the handling of their property jeopardized the activities of both the BCSC and the Custodian. His proposed amendments, which would take the form of Order 2483 on 27 March 1942, aimed to reassure Japanese Canadians and hence facilitate the work of the uprooting. And yet, his argument also conveyed something of Read’s view that confiscation would violate core principles of property rights.<sup>71</sup> Coleman took for granted, at least rhetorically, that the government would not confiscate the property of British subjects. Almost a year later, Coleman and his supervisor, the Secretary of State, described a contemplated new Order that would force the sale of all Japanese-Canadian-owned property as a significant shift away from the protection envisioned in Order 2483.<sup>72</sup>

Just over three weeks after Order 1665 became law, the cabinet amended it with Order 2483.<sup>73</sup> The preamble explained the reasons for the revisions, noting “that it is desirable to provide that any plan with regard to the placement of such persons be limited to making provision for the temporary placement only of such persons during the continuation of the state of war now existing.” The preamble also cited recommendations by the BCSC that “a greater degree of protective control over persons of the Japanese race and the property of such persons be provided for.” The substantive provisions stipulated the powers of the Commission to include “the temporary placement only” of Japanese Canadians “during the continuation of the state of war now existing.”<sup>74</sup> Additionally, section 12 was amended to add the following:

12 (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.<sup>75</sup>

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71. Positioning the protection of property as a premise of discussion, Coleman seemed to ascribe to property the same foundational role explicated by Joseph Singer, who writes “[p]roperty law defines things that we would like to take for granted; it does so by setting the boundaries of just social relationships.” Joseph William Singer, “Democratic Estates: Property Law in a Free and Democratic Society” (2009) 94:4 *Cornell L Rev* 1009 at 1062.

72. EH Coleman re: Real Estate owned by persons of the Japanese race evacuated from the Defence Area of British Columbia (December 1942), Ottawa, LAC (MG 27 III-B5, vol 25, file 70-25c).

73. PC 1942-2483 (1942) Ottawa, LAC (RG2-A-1-a, vol 1752, file 2531G) [See Appendix II].

74. *Ibid*, s 2 [emphasis added].

75. *Ibid*, s 4 [emphasis added].

The Order continued to incorporate referentially the wide discretionary power of the Custodian in relation to the “control and management” of the property as found in the *Regulations Respecting Trading with the Enemy*.<sup>76</sup> On the basis of Orders 1665 and 2483, the Custodian seized control of hundreds of millions of dollars worth of property belonging to Japanese Canadians.<sup>77</sup>

In the wake of Order 2483, the federal government once again addressed Japanese Canadians in *The New Canadian*. A lengthy statement by Austin Taylor on 6 April 1942 sought to allay concerns, or, in his words, to counter “baseless rumors being bandied about.”<sup>78</sup> Promising the “true facts,” Taylor urged readers to “PAY ATTENTION TO THEM AND NOTHING ELSE,” before beginning his explanation of multiple facets of government policy. With respect to property, he wrote:

A Custodian of (Alien) property has been appointed by the Government and charged with the protection of all property placed voluntary [sic] under his control. This is not confiscation and the Custodian will administer the property in the interests of the people which should prevent them from disposing of their assets at a sacrifice or in an unfavourable market. We mention this because there seems to be a lack of understanding [sic] of the Custodian’s position.

We repeat that property delivered to the Custodian will be administered in the interests of the Japanese evacuated ... and such property will not be disposed of at a sacrifice to pay ... debts.

We feel it is in the interest of those evacuated to place their property under the Custodian’s control, and if this is not done before leaving the Protected Area, the Custodian cannot protect the property during the absence of any person evacuated.<sup>79</sup>

The statement mischaracterized the law on several points, both understating and overstating the promise to protect. The Custodian’s responsibility for the property of Japanese Canadians was not limited to that property registered with its office, nor was the vesting of property voluntary. The promise was more

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76. *Regulations Respecting Trading with the Enemy*, *supra* note 31. The regulations stipulated that “[t]he Custodian may, where he considers it advisable to do so, liquidate any enemy property vested in him.” *Ibid.*, s 38. See also, sections 39 and 40(1) which allowed for any “notice, conveyance, transfer or release as he may think proper,” and granted the authority to “dispose of any property, right or interest at such time and place and to such person or persons and upon such terms and in such manner, whether publicly or privately, as he in his discretion shall think proper.”

77. Value expressed in current dollars.

78. Austin C Taylor, “Roads, Ont Mills, Beet Fields, Interior Towns,” *The New Canadian* (6 April 1942) 3.

79. *Ibid.*

encompassing than advertised. On the other hand, the promise of protection did not prevent sales for the purpose of paying debts owed by Japanese Canadians. On the contrary, the equity of creditors was explicitly guaranteed in Order 2483. However, the notice did repeat three times that the Custodian served the interests of Japanese-Canadian property-owners. Taylor's statement unambiguously relayed the most substantive and important facet of the amended order in council: The position of the Custodian as a trustee.

As it had with Order 1665, *The New Canadian* contextualized Taylor's announcement with an article of its own. While the front-page story, "Custodian to Act for Evacuated People" carried Taylor's statement, the article that followed questioned the reliability of that assurance in the absence of specifics. Quoting the essential message of Order 2483—"Property delivered to the Custodian will be administered in the interests of the Japanese Evacuated"—the article nonetheless articulated grounds for misgivings. "Confusion thus far has arisen over the fact that the administrative policy of the Custodian has not yet been defined," the article pointed out; "he is thus unable to answer many details which arise in the disposing of various kinds of property."<sup>80</sup> Shoyama and his colleagues knew, just as Read did, that the devil was in the details. On 15 April, *The New Canadian* announced that Japanese-Canadian organizations would press the federal government for answers to "many questions of basic importance," including "losses and damage to property arising out of the evacuation program."<sup>81</sup> Responses would not be forthcoming. The federal government never took responsibility for such losses, later using them disingenuously to justify the forced sales of the property they had promised to protect and return.

As would become evident in the *Nakashima* case, the Orders that constituted the dispossession created a cross-weave of conflicting powers and responsibilities. Aspects of the orders suggest essentially unlimited governmental power over all Japanese-Canadian-owned property, including the power to dispose of the property for any reason. Reference to the *Regulations Respecting Trading with the Enemy* also indicated a pervasive tendency to conflate Japanese Canadians with the country of Japan and to cast loyal Canadians of Japanese descent as enemies. But the wide powers of disposal and racist framing must be considered alongside provisions that created a legal trust. Beginning with the notion that property was being held in "custody," without charging administrative fees, the orders overlaid the vesting of Japanese-Canadian-owned property in the Custodian with a legally significant purpose: "[A]s a protective measure only." Order 2483

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80. "Custodian to Act for Evacuated People," *The New Canadian* (6 April 1942) 1.

81. "Ask Details of Custodian Policy," *The New Canadian* (15 April 1942) 1.

further stipulated that property was to be held for the “benefit” of “interested persons” (earlier defined as “the *owner* or any other person”—presumably family members and creditors without title). Moreover, given that the orders granted only the “temporary” power to remove and intern Japanese Canadians, the orders assumed that property would be returned to original owners at the conclusion of “the state of war now existing.” Read together, and in sequence, the orders circumscribed the Custodian’s powers over Japanese-Canadian-owned property with deliberate limits. Without saying so expressly, Order 1665 as amended by Order 2483 created a legal trust.

### C. UNDERMINING THE PROMISE

In the months that followed, property owners concerned about the implementation of the orders of dispossession would find no answers in the pages of *The New Canadian*. On 21 April 1942, the BCSC announced that it had taken control of the newspaper, which, they explained, was to convey only “the truth about measures being taken.”<sup>82</sup> Rebranded as the “recognized organ for the dissemination of official information,” the paper was to be distributed free to all Japanese Canadians. Commissioners hoped privately that these measures would dispel “fears being created . . . by the spread of unfounded rumour.”<sup>83</sup> In May and June 1942, the paper fell almost silent on the topic of property, even as significant assets were sold without the consent of their owners, including fishing vessels and automobiles.<sup>84</sup> In these months, the only hint that the property of Japanese Canadians still hung in the balance came in the form of classified advertisements from those seeking to benefit from Japanese-Canadian losses: A “refined” elderly woman sought to rent a home in suburban Vancouver and hoped that a displaced Japanese Canadian might offer an affordable option, a store promised to pay “highest cash prices” for Japanese-Canadian-owned furniture, and two clinics offered to painlessly “destroy” the household pets of Japanese Canadians forced to internment.<sup>85</sup>

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82. “An Editorial Message from the BC Security Commission,” *The New Canadian* (21 April 1942) 2.

83. *Ibid.* See also, the Minutes of the British Columbia Security Commission, *supra* note 74.

84. During this period, the Japanese Fishing Vessel Disposal Committee commenced forced sales and the Custodian transferred automobiles without consent to federal departments. See Adachi, *supra* note 2 at 229, 233; Stanger-Ross, “Kishizo Kimura,” *supra* note 50 at 39-42; “Army to Absorb Japanese Cars,” *The Vancouver Province* (2 June 1942).

85. “Classified Ads,” *The New Canadian* (6 May 1942) 2; “List your House for Rent,” *The New Canadian* (20 May 1942) 3; “Classified Ads,” *The New Canadian* (23 May 1942) 3; “Pets May Be Destroyed Painlessly at Clinic,” *The New Canadian* (27 May 1942) 3.



In these crucial months of the uprooting, *The New Canadian* never questioned the government's policy. The promise of Order 2483—to administer the property of Japanese Canadians in their interest and to return it—had been stated, but its mechanisms had never been adequately explained. When Shoyama and his editorial team re-assumed control of the paper in early summer 1942, the question of property quickly returned to the headlines. However, by this time the promise of protection seemed perhaps a distant past as Japanese Canadians struggled to grapple with the uprooting of the entire population as well as the Custodian's neglect, and in some cases sale, of their property.<sup>86</sup>

During the summer and fall of 1942, federal officials began to contemplate a breach of the legal trust and a betrayal of the promise to protect. Officials in the Custodian's office faced mounting pressure to sell Japanese-Canadian-owned farms (from staff of the Soldier Settlement Board, which wanted them for veterans) and urban properties (particularly in the City of Vancouver, where officials contemplated a redevelopment of the largest prewar Japanese-Canadian neighbourhood). As the Custodian's office considered these proposals, they began to discuss the sale of all Japanese-Canadian-owned property, including real estate and personal belongings. These communications continued to focus on pragmatic concerns. McPherson in particular came to see sale as the most feasible solution to the problems of property management. At the same time, the sales would allay concerns about costs of the internment, since the funds realized in the sale of the property would be credited to the Japanese-Canadian property-owners and put towards the costs of maintaining internment.<sup>87</sup> By leaving Japanese Canadians with virtually nothing in British Columbia, the forced sales also advanced the aim, shared by almost all officials (even advocates of robust trusteeship), to permanently disperse Japanese Canadians from the province. In a letter to the Minister of Justice, Louis St. Laurent, Secretary of State McLarty (a former lawyer as well), conveyed the policy consensus that, "[t]he situation in British Columbia concerning both urban and farm properties of Japanese who have been evacuated is exceeding difficult." "[I]t was the unanimous view of the members of Council who looked into the problem," he wrote, "that it would probably be

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86. "Control Farm Land Sale, Lease," *The New Canadian* (8 July 1942) 1; "Berry Crop One-Quarter of Normal; Weeds Over-run Many Farms," *The New Canadian* (11 July 1942) 1; "Confiscated Cars Offered For Sale; Custodian to Credit Former Owners," *The New Canadian* (18 July 1942) 1; "Fish Boat Committee to Wind Up July 31," *The New Canadian* (22 July 1942) 1; "Custodian Not Selling Real Estate Left Behind by Evacuated Owners," *The New Canadian* (2 September 1942) 1.

87. Stanger-Ross & LIRC, "Suspect Properties," *supra* note 6 at 272. See also, Sunahara, *supra* note 3, ch 5.

necessary to take steps to liquidate, with appropriate safeguards for the protection of the interests of the owners of the Japanese race.”<sup>88</sup> In effect, the government decided that all Japanese-Canadian-owned property remaining in the “protected area” would be sold.

On 19 January 1943, the Government announced in Order 469 that “the evacuation of persons of the Japanese race from the protected areas has now been substantially completed and that it is necessary to provide facilities for liquidation of property in appropriate cases.”<sup>89</sup> “Wherever,” Order 469 stated,

under Orders in Council ... the Custodian has been vested with the power and responsibility of controlling and managing any property of persons of the Japanese race evacuated from the protected areas, such power and responsibility shall be deemed to include and to have included from the date of the vesting of such property in the Custodian, the power to liquidate, sell, or otherwise dispose of such property.<sup>90</sup>

Sales of the real property of Japanese Canadians began in the spring of 1943. Within the year, the Custodian had sold the majority of Japanese-Canadian-owned property, although periodic sales continued for more than six years thereafter.<sup>91</sup>

Despite the fact that Order 469 reiterated that the Custodian’s power of “management and control” included the authority to sell, that power had always been present as long as the Custodian acted according to the terms of the trust: Namely, selling property only if such sales were for the protective benefit of Japanese-Canadian owners, and if the property could not be returned at the conclusion of the war. The power to sell was always qualified by a legal promise to protect the owners’ interest in their property. The government’s promise to protect was all the more important since the government had created the conditions that made the protection necessary in the first place; it was the uprooting that emptied houses, abandoned vehicles in driveways, and left household possessions the target of looters and thieves.<sup>92</sup> It was the demands of Japanese Canadians, and

88. Norman McLarty to Louis St. Laurent (15 January 1943), Ottawa, LAC (RG13 vol 2819, file 144935).

89. PC 1943-469 (1943), Ottawa, LAC (RG2-A-1-a, vol 1789, file 2710G) [See Appendix III].

90. *Ibid.*

91. The final sale of a parcel of real estate in Vancouver’s Japanese-Canadian neighbourhood surrounding Powell Street occurred on 9 January 1950. See the Landscapes of Injustice Real Estate Database.

92. In this sense the promise and its breach can be considered in comparison with other contexts in which the Canadian state placed people at great disadvantage while simultaneously and paternalistically purporting concern for their interests. See Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen’s University Press, 1990). See also, Tina Loo, “Africville and the Dynamics of State Power in Postwar Canada” (2010) 39:2 *Acadiensis* 23.

the threats of their resistance, in addition to internal concerns about property rights and natural justice, that led to the promise to protect.

Even as officials settled on a policy of forced sales, the notion of government trusteeship lingered. They described the sales as benefitting Japanese-Canadian owners, claiming that urban properties were amassing debts, farms were being mishandled by tenants, and chattels were going to waste in government warehouses. Under these conditions, officials argued that forced sales benefited owners: Better to hold equity in cash, the argument went, than in diminishing assets. Few Japanese Canadians would agree, particularly given the prices for which the Custodian sold their property and the requirement that those living in government camps exhaust their equity in order to pay for their own incarceration. Further, the records of government contradict the argument that the sales served the interests of owners. Virtually all Japanese-Canadian-owned urban properties were rented, generating sufficient income to cover the costs of their maintenance. The farm properties were in intense demand and rapidly increasing in value. The government could have done far more to protect chattels.<sup>93</sup> Nonetheless, even as officials turned toward the forced sale of everything that Japanese Canadians owned, they preserved the language of interest and the logic of trust, if disingenuously, that had been established by the promise to protect. Ironically, both the undermining and preservation of the trust combined to support the forced sales. The notion of a trust allowed officials to reason that it was in the best interests of Japanese-Canadian owners for the Custodian to sell—a rationale enabled by the failure of the Custodian to honour the obligation to protect the property in the first place.

The editors of *The New Canadian* saw the forced sales as a breach of trust, a violation of basic civil norms, and a betrayal that would undermine the loyalty of Canadian citizens. A powerful editorial on 20 February 1943 portrayed the new powers as a direct threat to the promise to protect. Calling on the federal government to issue a clear statement to “bolster” Japanese-Canadian “belief in a democratic government,” the editors described Order 469 as a “great shock and disappointment” to property owners who “were content to leave control of their property to the Custodian, because of the implied assurance that the

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93. Telegram to McPherson (4 January 1943), Ottawa, LAC (RG 117, vol 2536, file 59008, part 1.1); Real Estate Agents Cash Journal (December 1942), Ottawa, LAC (RG 117, vol 69); Ivan Barnet to Gordon Murchison (28 March 1943), Ottawa, LAC (RG 38, vol 403, file V-8-10, part 3); Héritage Project, “Annual Report of the Vancouver Office of the Custodian (1943)” (28 January 1944), online: <heritage.canadiana.ca/view/oocihm.lac\_reel\_c9469> at images 218-42.

Federal Government was taking over ‘as a protective measure only.’” Explicitly tying ownership in land to citizenship, the editors argued:

[I]t is safe to declare here and now, that those who invested their earnings in assets as solid as good Canadian soil thereby gave notice of their wish and intention to remain in Canada as good Canadian citizens. There is assuredly no reason today why any policy needs to be carried out in a way that weakens, rather than strengthens that wish.<sup>94</sup>

“The common feeling among property-owners,” they continued, “was ... that no matter how their cash and other assets might dwindle and vanish during the war, they were assured at least of a house or a piece of land which might see them through the uncertain period after the war.” Now this security was lost and, as many Japanese Canadians correctly anticipated, their equity in real estate would “dwindle and vanish” along with the other cherished and quotidian assets of their lives.

In the same issue, *The New Canadian* reprinted an article from *The Vancouver Daily Province* attempting to reassure readers that the promise of protection had not been abandoned. Frank Shears, who managed the Vancouver office of the Custodian, told the Vancouver paper: “A lot of people are assuming that because the property may be sold the Japanese will not come back.” Despite allowing this possibility, he explained that “it could also mean that the Dominion Government prefers to have the property held for them in cash.”<sup>95</sup> While Shears equivocated on the intention of the policy, property, in his formulation was still “held for them”—the power to sell was commensurate with the duty of the federal government to hold property for the benefit of owners. Indeed, according to the *Daily Province*, “[s]hould the Japanese be allowed to return here it may be in the better interest of both the government and the Japanese to hand them a cash sum rather than return their property.”<sup>96</sup> Japanese Canadians, according to the logic of the federal government, were best served by a policy of forced sale.

That argument failed to convince Japanese Canadians. It also failed to persuade Henry Forbes Angus, a prominent official in External Affairs. In a memo to Norman Robertson on 15 March 1943, Angus forcefully objected to the turn in policy, which, in his view, would “legalize acts of gross injustice and oppression.” In complying with their internment, Angus argued, many citizens

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94. “A Statement is in Order,” *The New Canadian* (20 February 1943) 2.

95. “Government Prefers Money: Selling of Japanese Property Does Not Mean Japs Banned,” *The Vancouver Daily Province* (11 February 1943).

96. “Japanese Property Sale Does Not Mean Ban from BC After War,” *The New Canadian* (20 February 1943) 1.

of “unimpeachable character” had already “been called on to make very great sacrifices in the interests of public security.” These policies had brought grievous harm to the economic well-being of Japanese Canadians. “Through no fault of his own,” Angus wrote, the Japanese-Canadian citizen “has been deprived of the major part of his earning power, has been removed from his home, has seen his children’s educational opportunities gravely impaired.” The new policy would mean that “[he] finds himself in a position in which he may be substantially forced to use the proceeds of the enforced liquidation of his capital assets to meet what would for citizens of other races would be considered normal living expenses.” Angus raised a number of legal objections to the policy: It exceeded the necessity of war, trespassed provincial jurisdiction, contravened the previous word of the Prime Minister in the House of Commons, and violated the Atlantic Charter. He portrayed it as a breach of “British tradition” that encouraged the “belief among responsible citizens that the Canadian Government is emulating the Nurnberg decrees.”<sup>97</sup>

Japanese Canadians objected with even greater force and clarity. Hundreds wrote in protest when notified of the sale of their property without consent. Many among them referenced the promise of protection that had been betrayed. When Hanjiro Yoshijima was informed in July 1943 that his property in New Westminster had been rented for what he viewed as an astonishingly low figure, he wrote the Office of the Custodian in “shock”: “We had believed,” he wrote “that the custodian was to protect and administer our property ... in a way in which the owner would have done himself and had trusted you to handle our affairs as sanely and as sensible as possible in our interest.”<sup>98</sup> The language of protection and administration, of the “interest” of the owner, suggests that Yoshijima knew Order 2483 and saw it as committing the government to act in his interest. He was to be disappointed. Almost two years later, when officials sold his property without his consent, he wrote again, but without faith that the government could be held to its word: “Perhaps it is useless to inform you now, but, all the prices listed [for his property] are outrageous and believe me, there is not a single article that was sold for even a quarter of its real value.”<sup>99</sup>

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97. Henry Angus to Robertson (15 March 1943), Ottawa, LAC (RG 25, vol 3121, file c-4606-13-40). The correct spelling in German would be “Nürnberg” or “Nuernberg.” Angus, a long-time University of British Columbia sociology and political science professor, and a former member of the Rowell-Sirois Commission, served during the war as an assistant to the Canadian Prime Minister.
98. Héritage Project, “Hanjiro Yoshijima to Office of the Custodian” (21 July 1943), online: <[heritage.canadiana.ca/view/oocihm.lac\\_reel\\_c9476](http://heritage.canadiana.ca/view/oocihm.lac_reel_c9476)> at image 1332.
99. *Ibid* at image 1594.

Others wrote the federal government to express similar views of a promise breached. “I never thought,” wrote Tokujiro Takenaka, “that the trustworthy custodian will dispose of my property at such a cheap price.”<sup>100</sup> Aya Suzuki remembered, “before leaving Vancouver your men told us that this process was to protect us and in your assurance we had our businesses put into our local agents whom we trusted as you had promised ... [b]ut now you say according to Ottawa this land has been sold.” She forcefully objected to this reversal, accusing authorities of an unforgivable breach of the rights of citizens.<sup>101</sup> Macer Okamoto wrote in disbelief that his family’s belongs were slated for forced sale: “[S]urely,” he wrote, “there must have be a terrible mistake somewhere! ... We had everyfaith [sic] that it was for our protection when we handed everything to the Custodian for safe keeping [sic]. Otherwise we would have sold some of the things on our own as many were doing.”<sup>102</sup> Toyo Takahashi, in a letter protesting the sale of her home in Victoria, described it as “against your promises, and my wishes, furthermore it is utterly undeserved.”<sup>103</sup> Many Japanese Canadians, seeing few other options, had placed their trust in the federal government’s repeated promise to protect their property. When the federal government sold all Japanese-Canadian-owned property under Order 469, letters of protest conveyed the bitterness, disappointment, and regret of a broken trust.

## II. LITIGATING THE PROMISE: NAKASHIMA V CANADA

Between the passage of Order 469 and the start of property sales in the spring of 1943, leaders in the Japanese-Canadian community repeatedly sought clarification and assurance from the federal government concerning the fate of their property. Tempering their outrage at the prospect of sale was a continuing faith in the Custodian’s trusteeship and rumours that rented properties would not be sold.<sup>104</sup> By early April 1943, however, *The New Canadian* reported that the “[l]atest developments seem to dispel this impression”; all property would be sold regardless of rental status.<sup>105</sup> Still, the newspaper found cause for faint

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100. *Ibid* at image 1333.

101. *Ibid* at image 1334.

102. *Ibid* at image 1335.

103. *Ibid* at image 1339. For dozens of other letters expressing similar sentiments, see Office of the Custodian of Enemy Property, Vancouver Office Files, Microfilm Reel C9476, online: <[heritage.canadiana.ca/view/oocihm.lac\\_reel\\_c9476](http://heritage.canadiana.ca/view/oocihm.lac_reel_c9476)>. See also Stanger-Ross, Blomley & the Landscapes of Injustice Research Collective, *supra* note 7.

104. “Legal Opinion Disposal Beyond Governm’t Power,” *The New Canadian* (3 April 1943) 1.

105. *Ibid*.

hope, noting that the government had emphasized that “the whole purpose of the custodian’s taking over the property ... is in order that it may be properly protected.”<sup>106</sup> Despite the dire circumstances in which they had been forced to live, Japanese Canadians organized to hold the government to its promise. In April 1943, *The New Canadian* announced that “[n]umbers of former residents of the coastal district in the Slocan, New Denver and Kaslo [sites of internment] have voiced their wish to organize as an amalgamated ‘property-owners’ association’ in order to carry the fight to the courts of law.” Calling for the establishment of local committees of concerned property owners, editors predicted “that the litigation is likely to be long, involved and costly.”<sup>107</sup> They were right.

At Kaslo, under the chairmanship of Dr. Kozo Shimotakahara, the “well known pioneer physician,” the Amalgamated Property Owners’ Association (APOA) began to organize its litigation strategy.<sup>108</sup> Seeking to challenge “the constitutional power of the government even in war time to order liquidation of evacuee-owned property,” the committee called upon all “[r]eal property owners anxious to retain their interest in their homes, land and buildings” to defray the anticipated legal costs of \$8,500.<sup>109</sup> “It is not known as yet,” the article admitted, “whether goods, chattels, and personal property falls within the provisions of the order or the policy to be adopted by the Custodian,” but, if so, all Japanese Canadians would be enmeshed “in an issue fundamental and basic to Canadian democracy as the right to hold property clearly is.”<sup>110</sup> Subsequent articles suggested that all property owners should contribute to the legal fund, setting contributions at “ten per cent of the annual taxation paid upon their property,”<sup>111</sup> while reinforcing the argument that what was at stake involved “the safeguarding of fundamental” and “democratic rights.”<sup>112</sup> By the end of May 1943, small amounts of money collected from Japanese Canadians, in mostly desperate circumstances enabled the APOA to retain the Vancouver law firm of Norris and MacLennan. The appearance of legal counsel setting out the route by which the Orders might be legally challenged offered some solace from what was

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106. *Ibid.*

107. *Ibid.*

108. “United Action of Evacuees Sought to Aid Test Case,” *The New Canadian* (10 April 1943) 1.

109. “Test Case Receiving Support From Evacuees Across Canada,” *The New Canadian* (17 April 1943) 1.

110. *Ibid.*

111. “Launch Fund Campaign – Ten Per Cent of Taxes Asked,” *The New Canadian* (1 May 1943) 1.

112. “Property Sale Cases Studies By Dominion Wide Organizations Occidentals Send Contributions,” *The New Canadian* (8 May 1943) 1.

otherwise a week of bad news: McPherson had announced that the Custodian's office had prepared a catalogue of all Japanese-Canadian-owned property for listing and that sales were imminent.<sup>113</sup>

Thomas Grantham Norris and J. Arthur MacLennan had joined as partners in legal practice in the late 1930s. Norris, the senior partner, had been called to the British Columbia Bar in 1919 after distinguished military service in the First World War.<sup>114</sup> Norris's legal career had included stints in Vernon and Kelowna and, for a short while, as Solicitor for the Soldier Settlement Board. As a lawyer, Norris engaged in a wide ranging practice and was regarded among his peers as a tough-minded, "openly declared law and order" lawyer.<sup>115</sup> It is unclear how Norris came to represent members of the Japanese-Canadian community, although we know that by the mid-1930s Norris had begun to represent Eikichi Kagetsu, owner of a highly successful lumber business.<sup>116</sup> By the outbreak of war, Norris's firm was widely known for its advocacy on behalf of Japanese Canadians, "at a time when few would do anything for them."<sup>117</sup> In filling out their declarations of property in the lead-up to the internment, many Japanese Canadians turned to Norris and MacLennan for assistance. Norris's firm was the obvious choice for the APOA, although not Norris himself. Having agreed to serve as Deputy Judge Advocate General for the Twenty-First Army Group for the duration of the war, Norris had handed his practice over to his junior partner, Art MacLennan.<sup>118</sup> With Norris returning to military service in 1941, MacLennan found himself handling Norris's clients, including the challenge to the constitutionality of the sale of Japanese-Canadian-owned property.

The case against the government on behalf of Japanese-Canadian property-owners posed a number of substantive and procedural difficulties. The first issue concerned the nature of the suit itself. Still protected by medieval theories of Crown immunity, the Crown could not be sued without its consent.<sup>119</sup>

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113. "Property Sale to Begin This Week Warns Custodian," *The New Canadian* (29 May 1943) 1.

114. GS Cumming, "Nos Disparus: The Honourable Thomas Grantham Norris, MC, QC" (1977) 35:1 *The Advocate* 69 at 69. Norris would go on to serve as President of the Vancouver Bar Association, a Bencher and then Treasurer of the British Columbia Law Society, and, in 1959, on the bench of the Supreme Court of British Columbia.

115. *Ibid.*

116. Thomas Norris Fonds, UBC\_RBSC, box 13 (file 13-1) and box 31 (file 31-17).

117. Cumming, *supra* note 114 at 70.

118. ATC, *supra* note 1 at 124.

119. *Petition of Right Act 1876*, SC 1876, c 27. See also, Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 4-5, 8. As the authors explain, "the reason why the King could not be sued in the royal courts was the feudal principle that a lord could not be sued in his own court."



Likewise, the *Trading with the Enemy Regulations* stipulated that the Custodian could not be sued without his consent.<sup>120</sup> Finally, as MacLennan pointed out in an opinion letter to his clients, a reference case concerning the constitutionality of the orders of dispossession would require the cooperation of either the provincial or federal government.<sup>121</sup> In other words, either the Custodian or Cabinet would be required to give consent before the lawsuit could even begin.

The case also raised a number of substantive obstacles. The Canadian judiciary had shown consistent deference to government action throughout the war, and the widespread racist animosity towards Japanese Canadians would not have inspired confidence about a different outcome in this particular case.<sup>122</sup> And yet, as some lawyers plainly saw, the injustice of the forced sale, the severity of its consequences, its affront to notions of fairness and citizenship, the absence of any logical security rationale, and, perhaps above all, the promises of protection in the form of a legal trust made this a case worth fighting. On 1 June 1943, the APOA instructed MacLennan to initiate a Petition of Right in the Exchequer Court of Canada seeking an injunction against property sales and challenging the constitutional validity of orders that “[cast] aside the rights of a citizen under conditions not related to the efficient prosecution of the war.”<sup>123</sup> “In the past half century of our somewhat troubled life on the coast,” editors of *The New Canadian* wrote,

we have had numerous instances of test cases, in the highest courts, in the legislative buildings, in the local community halls. We cannot say that they met with success, but when we look back in the years to come, perhaps these cases will be the milestones that will mark our long and rocky road to citizenship.<sup>124</sup>

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120. *Supra* note 31, s 27.

121. “Property Sale to Begin This Week Warns Custodian,” *The New Canadian* (29 May 1943) 1.

122. For wartime deference to government action under the DOCR, see *Yasny v Lapointe*, [1940] 48 Man R 56, 3 DLR 204 (Man CA); *R v Stewart*, [1940] OR 178, 1 DLR 689 (Ont CA); *R v Burt*, [1941] OR 35, 1 DLR 598 (Ont SC); *R v Ravenor* [1941] 1 WWR 191, 75 CCC 294 (BC Co Ct); *R v Cooper*, [1941] 2 WWR 206, 76 CCC 277 (BCSC). As the Ontario Supreme Court put it in *Ex parte Sullivan*, “[w]ar could not be carried on according to the principles of Magna Carta.” [1941] OR 417 at para 16, 1 DLR 676 (Ont CA). See also, Eric M Adams, “Fighting for Freedom” in *The Idea of Constitutional Rights and the Transformation of Canadian Constitutional Law, 1930-1960* (SJD Thesis, University of Toronto Faculty of Law, 2009) [unpublished].

123. “Property Owners Give Go-Ahead Signal for Action,” *The New Canadian* (5 June 1943) 1.

124. “Our Fights for Justice,” *The New Canadian* (12 June 1943) 2.

Vindication did not seem imminent. One week after the editorial, the Custodian listed hundreds of parcels of Japanese-Canadian-owned real estate for sale.

MacLennan drafted three Petitions of Right dated 19 July 1943. They were filed with the Exchequer Court in October of the same year. To challenge the orders in their application to all Japanese Canadians, the APOA put forward three categories of litigants: Eikichi Nakashima, a naturalized British subject; Tadao Wakabayashi, a British subject by Canadian birth; and Jitaro and Takejiro Tanaka, Japanese nationals resident in Canada.<sup>125</sup> Before the internment, Nakashima had worked as a fish buyer for BC Packers Co and lived in the Powell Street District of Vancouver (688 E Cordova St.) with his wife and eleven-year-old son, Shinji. Nakashima and his family had registered their property with the Custodian in April 1942, before the government interned them at Lemon Creek in September. Wakabayashi, a *Nisei*, had been born in Vancouver and had made his living as a truck driver. Along with his wife, Akiko, Tadao had lived at 2456 McGill Street in Vancouver before being forced from his home. In addition to his residential property, Tadao and Akiko listed “53 Pieces Japanese Dishes” and one “pair ice skates” among the extensive list of personal property seized by the Custodian. The third set of litigants comprised brothers born in Japan, Jitaro and Takejiro Tanaka. The brothers were joint tenants of 162 E 5th Street in Vancouver. A Manager at the West Coast Trading Company before the internment, Takejiro lived with his wife Ayako, and four children under the age of 10. Listing his possessions for the Custodian he included three five-dollar war savings certificates in the names of his children.<sup>126</sup>

Although the personal details in the opening paragraphs of each Petition of Right differed, the balance of the claim was common to all. Disputing the authority of the Custodian to “sell, liquidate or otherwise dispose of the said property against the wishes and desires of the Suppliant,” the Petition cited Orders 1665 and 2483 to assert that the Custodian acquired Japanese-Canadian-owned property “upon Trust requiring him to hold same in Trust for the protection of

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125. At the start of the war, approximately 23,000 of the total population of 25,000 Japanese Canadians lived in British Columbia. Of British Columbia's population of Canadians of Japanese descent, approximately 7,200 were Japanese nationals, 2,400 were naturalized Canadians, and 13,400 were Canadian by birth. HF Angus, “The Effect of the War on Oriental Minorities in Canada” (1941) 7:4 *Can J Econ Poli Sci* 506 at 506. Until the passage of the *Canadian Citizenship Act* created the legal status of Canadian citizenship in 1946, Canadians had status as British subjects and naturalized Canadians under the *Naturalization Act*, RSC 1927, c 138 and *Canadian Nationals Act*, RSC 1927, c 21.

126. *Nakashima* case file, Ottawa, LAC (R14188, vol 2186, file 20087, 20088, 20089).

the Suppliant and under his management and control upon a condition requiring the Custodian to return to the Suppliant the said property... upon expiration of the existing war".<sup>127</sup> In the alternative, the Petition alleged that the orders, individually or collectively, were beyond the powers allocated by the *WMA* and therefore unconstitutional. As to a remedy, the Petition sought a declaration of constitutional invalidity, a declaration that the Custodian was a trustee of the dispossessed Japanese-Canadian property-owners, and an injunction restraining the sale of the property of Japanese Canadians.<sup>128</sup> As the Custodian initiated property sales, the litigants, MacLennan, and the broader Japanese-Canadian community waited for the government's permission to sue.

Permission of the Secretary of State arrived in October 1943, triggering the Crown's duty to produce a Statement of Defence but introducing another procedural difficulty: The location of the trial. MacLennan explained to his clients that the trial could be held in Vancouver, but that would require the government to send one of the two judges on the Ottawa-based Exchequer Court to hold a special session on the West Coast. Failing that, the case would have to be heard in Ottawa and, in that instance, not until the following September, at which point most of the property might have been sold.<sup>129</sup> In response, MacLennan dispatched lawyer F. Drewe Pratt to Ottawa to inquire about expediting a hearing in Vancouver, while the APOA requested that the Custodian cease all property sales until the legal matter had been resolved. Neither effort succeeded.<sup>130</sup> Periodic reports in *The New Canadian* speculated about when the case might finally be heard. "Auctioning of goods and chattels has also been proceeding steadily," the paper reported "from warehouses, private homes and stores in which the goods were kept."<sup>131</sup>

Finally, word arrived that the case would be heard at the end of May 1944. "[T]he long delay," MacLennan explained, "had been caused by the pressure of duties of Department of Justice officials entrusted with the handling of the case."<sup>132</sup> Indeed, the litigation had attracted the attention of the highest officials

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127. Petition of Right, filed 13 October 1943, *ibid.*

128. The *New Canadian* continued its coverage of the case, including quoting the legal arguments drawn from the Petitions of Right at length for its readers. See "Japanese Property Bids Very Slow: Case Likely to be Held in Vancouver September," *The New Canadian* (31 July 1943) 1.

129. "Property Owners Win Right to Sue Ottawa in Exchequer Court," *The New Canadian* (23 October 1943) 1.

130. "Visits Ottawa to Ask Haste in Property Case," *The New Canadian* (27 November 1943) 1; "Property Owners Review Situation," *The New Canadian* (18 December 1943) 1.

131. "No Official Word on Exchequer Case," *The New Canadian* (8 April 1944) 1.

132. "Court to Rule If Sale of Property is Constitutional," *The New Canadian* (13 May 1944) 1.

in the Department of Justice. The case would be defended by the Deputy Minister of Justice himself, Frederick Percy Varcoe, along with David W. Mundell, who would go on to a famed career as a government constitutional lawyer in his own right. Varcoe began his career in the Department of Justice during the First World War as an expert in the operation of the *Military Service Act*.<sup>133</sup> Rising to the position of Deputy Minister in 1941, Varcoe knew each of the orders at issue having overviewed their drafting from his chair at the Department of Justice.

On the morning of 29 May 1944, after dining at the Chateau Laurier the night before, MacLennan along with Nakashima, Wakabayashi, and Tanaka (having received government permission to leave their sites of internment to attend their hearing), appeared in the grey stone gothic court house near Parliament Hill. Back in British Columbia, the editors at *The New Canadian* recognized that “delay has served to increase suspicion that Justice may be conveniently blinded to suit the purpose of the Government,” but counselled all the same that “[w]e must pledge in this, our responsibility, every resource at our command, to defend rights which never before have been so violated in a democratic country.”<sup>134</sup> Reporting for *The New Canadian* directly from the courthouse was Kunio Hidaka, a graduate student at Queen’s University.<sup>135</sup>

Hidaka, the litigants, and the gowned lawyers—MacLennan, Varcoe, and Mundell—rose for the arrival in court of Justice Joseph Thorarinn Thorson. Varcoe knew the presiding judge well. Thorson had been Dean at the Manitoba Law School before entering public life as a Liberal Member of Parliament, first in Winnipeg, and then in Selkirk, Manitoba. In 1941, Mackenzie King

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133. “Frederick P Varcoe: Lawyer Headed Department,” *The Globe and Mail* (16 October 1965) 46.

134. “To The Highest Court,” *The New Canadian* (20 May 1944) 2. See also, “Broad Constitutional Rights at Stake In Court Battle Against Forced Sale,” *The New Canadian* (27 May 1944) 1.

135. Kunio Hidaka, “Pro and Con on Property Rights,” *The New Canadian* (10 June 1944) 7. Hidaka, a graduate of the University of British Columbia, was no stranger to legalized racism. At UBC, he compiled a list of racist legislative instruments targeting Japanese Canadians. He would go on to play an important role in the Redress movement. See Roy Miki, *Redress: Inside the Japanese Canadian Call for Justice* (Vancouver: Raincoast Books, 2004) at 16-18.

appointed Thorson Minister of National War Service.<sup>136</sup> As Minister, Thorson coordinated domestic local volunteer groups in assisting the war campaign, as well as domestic censorship and propaganda.<sup>137</sup> His time in cabinet was short. A year later, on 6 October 1942, his cabinet colleague, Louis St. Laurent, recommended Thorson's appointment as president of the Exchequer Court of Canada. As Deputy Minister, Varcoe would have supervised the mechanics of Thorson's judicial appointment. Two years into a judicial career that would stretch another twenty, Justice Thorson settled the courtroom and asked Varcoe to begin his arguments.

Varcoe's first argument was a sweeping one: "[T]hat the Custodian is not the Crown, and ... that this is not a proper action against His Majesty because the Custodian is not His Majesty or the servant or agent of His Majesty."<sup>138</sup> The position had the advantage of dismissing the entirety of the claim and it found some favour in recent case law.<sup>139</sup> It was also purely strategic. Varcoe argued precisely the opposite a year later when confronted with a dispute between the Custodian and the Department of National Defence (DND) concerning thousands of dollars of damage that Canadian soldiers had caused to the Vancouver Japanese Language School while the DND had leased the premises from the Custodian during the war. When the Custodian sought compensation for the damage, the DND sought Varcoe's support shielding it from liability. Putting his argument

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136. Ian Bushnell, *The Federal Court of Canada: A History, 1875-1992* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1997) at 124-25. See also, W Kristjanson, "Hon Joseph Thorarinn Thorson" (1978) 37 *The Icelandic Canadian* 13. Thorson is best remembered for his contribution to the law of public interest standing. In the early 1970s, a retired Thorson launched a quixotic attack on the constitutionality of the *Official Languages Act*. In the Supreme Court of Canada decision granting him standing to pursue his claim, Justice Laskin held that "[t]he question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied." "It would be strange," Laskin J held, "and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power ... could be made the subject of adjudication." *Thorson v Canada*, [1975] 1 SCR 138 at 145, 151, 43 DLR (3d) 1. The result is deeply ironic when contrasted with Thorson J's judgment in *Nakashima*.

137. See *The National Resources Mobilization Act, 1940*, SC 1940, c 13, s 2. See generally, Jeffrey A Keshen, *Saints, Sinners, and Soldiers: Canada's Second World War* (Vancouver: UBC Press, 2003) at 27.

138. An incomplete transcript of the hearing is contained in the *Nakashima* case file. *Supra* note 126 at 8-9.

139. *Ritcher v Canada*, [1943] Ex CR 64.

in *Nakashima* out of mind, Varcoe bluntly informed the Custodian that since both the Custodian and DND operated as instruments of the Crown there could be no liability between them. A frustrated McPherson pointed out that such a position was directly at odds with Varcoe's argument in *Nakashima*. Varcoe coolly replied that the contexts were different.<sup>140</sup>

Varcoe also argued that the relevant orders created no trust. Stressing that Order 2483 contained two distinct methods by which property might become vested in the Custodian, Varcoe noted that section 12(1) concerned all property vested in the Custodian by virtue of being "situated in any protected area," "turned over to the Custodian," or otherwise left behind because of the internment.<sup>141</sup> Property which vested under this subsection, Varcoe argued, did not contain any of the additional protections outlined in section 12(2): Namely, stipulations that the Custodian was to hold property "for the purpose of protecting the interests of the owner," and the promise to "release such property" at the conclusion of the war.<sup>142</sup> Section 12(2) and its protections, he argued, only pertained to property vested in the Custodian by "order" of the Custodian. All of the property at issue in this case, Varcoe declared, had vested under section 12(1).<sup>143</sup> Accordingly, Varcoe concluded, the Custodian remained unhindered by any trust and possessed full discretion to do whatever he liked with the property of *Nakashima*, *Wakabayashi*, and *Tanaka*, including the power to sell.

As to the constitutional validity of the orders at issue, Varcoe stressed that the question was beyond judicial competence to review. Relying on the Supreme Court of Canada's decision *Reference Re: Regulations in Relation to Chemicals*,<sup>144</sup> Varcoe averred that judges could not second-guess what the Governor in Council deemed "necessary or advisable for the security, defence, peace, order and welfare of Canada."<sup>145</sup> Certain passages of the *Chemicals Reference* bolstered Varcoe's interpretation of virtually absolute deference to government in executing its

140. Varcoe to McPherson, 10 May 1945, "Re Lease – Japanese Language Ass'n," Ottawa, LAC (RG117, vol 2535, file 58998).

141. Section 4 amending Order 1665, s 12(1). *Supra* note 73.

142. Section 4 amending Order 1665, s 12(2). *Ibid.*

143. Varcoe's distinction between the various subsections of section 12 possesses a certain superficial logic, but falls apart quickly on closer inspection. To begin, there was no property that would have vested independently under section 12(2), since section 12(1) covered "all property situated in any protected area ... belonging to any person of the Japanese race resident in such area." Moreover, the drafting history of Order 2483 makes clear that section 12(2) was intended as an elaboration of the promise of protection outlined in section 12(1), and was conveyed as such to Japanese Canadians.

144. [1943] SCR 1 at 12, 1 DLR 248 [*Chemicals Reference*].

145. *WMA*, *supra* note 20, s 3.

legislative capacities in times of war. Noting the “plenary discretion” afforded by the *WMA*, in the *Chemicals Reference*, Chief Justice Duff doubted “that it is competent to any court to canvass the considerations which have, or may have, led [the Governor General in Council] to deem such Regulations necessary or advisable for the transcendent objects set forth.” “The authority and duty of passing on that question,” Chief Justice Duff stated, “are committed to those who are responsible for the security of the country—the Executive Government itself.”<sup>146</sup> In rhetoric, reasoning, and result, the *Chemicals Reference* followed the judicial trend of extending unfettered deference to government officials in the exercise of their wartime duties. Varcoe knew he was on sure footing, especially in making such arguments to a judge present at the cabinet table only two years prior.

In response, MacLennan challenged Varcoe’s interpretation of the *Chemicals Reference*. Arguing that the *WMA* circumscribed the federal government’s authority to legislate, MacLennan proposed that since “the liquidation of the properties has no conceivable relationship to the prosecution of the war,” Order 469 was *ultra vires* the *WMA* and hence illegal.<sup>147</sup> Since the *WMA* was itself only constitutional insofar as it related to the emergency powers of peace, order, and good government (the constitutional regulation of property normally lying within provincial jurisdiction), any order passed under the *WMA*’s authority must comply strictly with its conditions: “[O]rders and regulations, as [the Governor General in Council] may by reason of the existence of real or apprehended war, invasion, insurrection deem necessary or advisable for the security, peace, order and welfare of Canada.”<sup>148</sup> Without saying so explicitly, MacLennan impressed upon Justice Thorson the continuing constraints of the rule of law, notwithstanding the existence of war, which suggested that statutes could only lawfully empower state action in accordance with the purpose and conditions for which they had been enacted.

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146. *Chemicals Reference*, *supra* note 144 at 12. The Canadian wartime jurisprudence never cited American cases from the period, but the points of convergence are striking. In upholding a similarly broad granting of discretion authorizing curfews imposed upon Japanese Americans in the “Military Area,” the United States Court held that “[s]ince the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgement and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.” *Hirabayashi*, *supra* note 9 at 93.

147. Transcript, *supra* note 126 at 97.

148. *WMA*, *supra* note 20, s 3. See also, *Re Gray*, *supra* note 23 at 150.

As the argument carried over to the following morning, Justice Thorson questioned whether a judge could ever second-guess government decisions during war. MacLennan argued that a careful reading of the *Chemicals Reference* reinforced the capacity of judicial review.<sup>149</sup> Despite a general tone of deference, MacLennan drew attention to Chief Justice Duff's concession that in some cases "the plain terms of the order in council itself" may indicate that the order was not deemed "necessary or advisable by reason of the existence of war."<sup>150</sup> MacLennan bolstered his argument with reliance on *Price Brothers*, a Supreme Court decision of the First World War in which a majority struck down a federal order setting the price of newsprint as bearing insufficient connection "to the perils actual or possible of real or apprehended war ... or ... to the prosecution of the war or the objects of it."<sup>151</sup> The powers of judicial review in relation to war matters were to be exercised with caution, but that did not mean they did not exist, MacLennan argued. Turning to the case before them, MacLennan concluded that the sale of property "does not add one iota to the object of winning the war or the security of Canada."<sup>152</sup> Without a necessary connection to wartime security, Order 469, insofar as it authorized the blanket sale of all property, was therefore unconstitutional.

As to the validity of the power of sale more broadly, MacLennan argued that "sale might be justifiable if it is for the protection of the property, itself, or the Japanese because ... properties are to be held by the Custodian for the benefit of the owners, to be managed and controlled for their benefit."<sup>153</sup> MacLennan rejected Varcoe's theory that there were two methods of property vesting in section 12 of Order 2483, arguing instead that subsection 2 was merely an explanation of subsection 1.<sup>154</sup> As an alternative, he stressed that the protective

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149. *Chemicals Reference*, *supra* note 144.

150. *Ibid* at 13.

151. *Re Price Bros and The Board of Commerce of Canada*, [1920] 60 SCR 265 at 272, 54 DLR 286. Duff J (as he then was) also stated: "I think such orders are reviewable, in this sense that when in a proper proceeding the validity of them is called into question, it is the duty of a court of justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not being fulfilled, to pronounce the sentence of the law upon the illegal order." On the economic theory animating the Court's decision, see BJ Hibbits, "A Bridle for Leviathan: The Supreme Court and The Board of Commerce" (1989) 21:1 *Ottawa L Rev* 65.

152. Transcript, *supra* note 126 at 113. "As a matter of fact," MacLennan elaborated, "you could ... say it is more of a war measure for him to maintain the property, to make sure it is being kept under government control, rather than in the hands of someone who might do some danger because once the Custodian sells it he has no more control over it."

153. *Ibid* at 106.

154. *Ibid* at 143.



language of subsection 1, as well as the notion of “management and control,” similarly enacted a trusteeship premised on the promise that property would be protected and returned. In addition, he raised a handful of other less persuasive arguments on the basis of a contract formed between the Custodian and Japanese Canadians. The crux of his argument, however, lay in two overarching claims: Order 469 was *ultra vires* because sale promoted a policy objective divorced from either emergency or wartime security; and, if Order 469 was *intra vires*, then the Custodian’s power to sell under that order was constrained by the trust conditions imposed by Order 2483.

In reply, Varcoe argued that, even if a trustee, the Custodian was fully entitled to sell. It is worth quoting Varcoe at length to illustrate how the logic of trust became contorted to support white supremacist aims.

Varcoe: Suppose ... that the Custodian is compelled to sell parcels X,Y,Z, three blocks of property. Then, the next block is not in such a bad position. I have sold X, Y, Z to be inhabited by white persons. I could not sell to anyone else. I think it is undesirable, under those circumstances, that that next parcel should be held by or for Japanese and therefore I think it is time to sell this property...

Justice Thorson: You mean that the evacuation may be a permanent thing.

Varcoe: It may be that, yes, he does not know.

Justice Thorson: In which case, you could not just leave the properties in a mere state of management and control, they would have to be sold. You may decide there is an area which has been inhabited by Japanese people, but you are not going to have any more Japanese in that district, that is going to be for white people or somebody else; therefore, you will sell all the houses in that particular block or area.

Varcoe: Yes, some of which are in bad condition. They are in bad condition and I cannot remove them because they are held by Japanese, too. If I can go to the purchaser with some kind of assurance that this will be a white man’s property, I can get a good price for it. Assuming everything in my friend’s favour, these are the things the Custodian would be bound to take into account in determining whether or not he would continue to hold the property at this high rental or whether he would sell it.<sup>155</sup>

Here the presence of the trust took on a sinister character. Varcoe alleged that selling everything would be in the interests of Japanese-Canadian owners since white purchasers would only pay a “good price” with assurance that adjacent properties would also be sold. Varcoe’s theory that prospective purchasers would balk at ownership next to a Japanese Canadian was not supported by evidence—Japanese Canadians had long owned alongside neighbours of other

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155. *Ibid* at 169-70.

backgrounds and, in rural areas, officials struggled in the face of excess demand for Japanese-Canadian-owned farms, not the opposite.<sup>156</sup> Facts were not Varcoe's concern, however. Instead he gestured to a deeper perception: That fulfilling the terms of the trust required British Columbia to be "white man's property."<sup>157</sup>

Whether Justice Thorson followed this particular logic was unclear. His interjections pushed towards conceptualizing the permanent exclusion of Japanese Canadians as an act of emergency:

Justice Thorson: So that the power of sale might have some relationship to the emergency that brought about the evacuation in the first place and it might be ancillary.

[...]

Varcoe: I would say that I would doubt whether any greater emergency was created in the Dominion of Canada than was created by the Japanese situation and everything which was done in connection with it was ancillary to the emergency.

Justice Thorson: Even sale, after the Custodian had obtained full control.

Varcoe: Yes, that he had to have that wide power to dispose of these properties if, for nothing else, to satisfy public opinion in Vancouver.<sup>158</sup>

In his final gesture, Varcoe argued that racial anxiety in British Columbia was itself a sufficient emergency to authorize government action under the *WMA*. With that, two days of argument concluded. "I do not think anyone expects me to give judgment now," Justice Thorson said. "Judgement will be reserved."<sup>159</sup>

Three years passed with no decision in *Nakashima* from the Exchequer Court. During that time, the government completed the bulk of its sales (excluding the three properties at issue in the *Nakashima* case), the Second World War ended, and the government began to exile almost 4,000 Japanese Canadians to Japan.<sup>160</sup>

156. Stanger-Ross & LIRC, "Suspect Properties," *supra* note 6 at 276.

157. See Ward, *supra* note 4. See also, Roy, *supra* note 4.

158. *Ibid* at 170.

159. *Ibid* at 171.

160. In the summer of 1944, Prime Minister King explained that after the war, "loyal" Japanese Canadians would be permanently settled in central and eastern Canada, "disloyal" Japanese Canadians would be exiled to Japan, and any persons wishing to voluntarily return to Japan could do so at the government's expense. As the war neared its end, government officials toured internment sites pressuring Japanese Canadians to sign forms indicating a "desire to relinquish my British nationality and to assume the status of a national of Japan" in order to "effect my repatriation to Japan." By the time of Japan's official surrender in September 1945, nearly ten thousand people had signed (or had signed on their behalf in the cases of wives and minors) repatriation forms. Canadian Parliamentary Historical Resources, "House of Commons Debates, 19th Parliament, 5th Session: Vol 6" (4 August 1944), online:

“Inquiries in Ottawa as to why the decision has not been handed down,” *The New Canadian* reported, “draw a blank.”<sup>161</sup> The injustice of the delay in releasing the *Nakashima* decision began to attract wider attention. In the House of Commons, Angus MacInnis, the CCF Member of Parliament for Vancouver East, asked the Liberal Justice Minister to explain how a decision could take three years to complete. “I regret that condition of affairs,” the Minister admitted, offering only that “[s]ome judges were slower than others . . . and perhaps some took more pains than others.”<sup>162</sup> With only two judges, both seemingly beset by procrastination, delay had become endemic at the Exchequer Court.<sup>163</sup> Justice Thorson finally released his decision on 28 August 1947. There was nothing in the relatively short judgment of twenty-one paragraphs that would even remotely account for the three years and three months it took him to decide the case. *Nakashima*, *Wakabayashi*, and *Tanaka* lost.

Perhaps in part because of the delay, Justice Thorson’s decision largely slipped from legal and historical attention. By the summer of 1947, the question of the government’s treatment of Japanese-Canadian-owned property had become moot—there was no property left to protect. Justice Thorson began his reasons noting the “Japanese origin[s]” of the “suppliants.” Avoiding any personal details of the litigants, Justice Thorson explained that *Nakashima* “is a British subject by naturalization,” *Wakabayashi* “a British subject by birth,” and the *Tanaka* brothers, “Japanese nationals.”<sup>164</sup> Such differences, he ruled, were immaterial—“the answer in any one case will be equally applicable in the others.”<sup>165</sup> Justice Thorson devoted not another moment to the litigants themselves: their history, families, real estate, possessions, and lives. Instead, his necessary “sequence of events” detailed the orders creating the protected area of British Columbia, implementing the “evacuation,” and dealing with property.<sup>166</sup> Turning to the issue of whether the legal claim had been properly initiated, he noted that the proceedings assumed that the Custodian held the property “as the servant of the Crown.”<sup>167</sup> That,

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[parl.canadiana.ca/view/oop.debates\\_HOC1905\\_06/482?r=0&cs=1](http://parl.canadiana.ca/view/oop.debates_HOC1905_06/482?r=0&cs=1) at 5916-17. In his speech, King also announced the cessation of all future Japanese immigration. Sunahara, *supra* note 3 at 117.

161. “One for the Lawyers,” *The New Canadian* (22 February 1947) 2.

162. Harvey Hickey, “Ilsley in Quandary as MP’s Score Exchequer Court’s Judgment Delays,” *The Globe and Mail* (2 July 1944) 10.

163. Most cases took over a year to be decided, 30 per cent took over two years, and 7 per cent took over three. Bushnell, *supra* note 136 at 135.

164. *Nakashima*, *supra* note 9 at 488.

165. *Ibid.*

166. *Ibid.*

167. *Ibid.* at 491.

Justice Thorson maintained, was a fatal error. Emphasizing the Custodian's wide discretion in dealing with property and its independence from government, he held that the Custodian could neither be characterized as the Crown, nor its servant.<sup>168</sup> The plaintiffs should have sued the Custodian and not the Crown, he concluded. The case ended before it began.

Despite declaring that "this ends the matter" and expressing misgivings about even considering the broader issue of constitutional validity, Justice Thorson decided to address the issue in *obiter* "since it is of great importance."<sup>169</sup> "[T]he two conditions of jurisdiction prescribed by the War Measures Act have both been satisfied," he stated without explication. "It is, therefore, not open to the Court to question the validity of the order in council empowering the Custodian to sell the properties vested in him."<sup>170</sup> "The Court has no right," he continued, "to substitute its opinion of what is necessary or advisable for that of the Governor in Council or to question the validity of an order so made."<sup>171</sup> "The Custodian has," Justice Thorson concluded, "the lawful right to liquidate, sell, or otherwise dispose of the property vested in him."<sup>172</sup> As to the question of whether the Custodian was a trustee, he declared that since the Custodian was not a servant of the Crown the question need not be answered. There was only one final matter. Justice Thorson ordered Nakashima, Wakabayashi, and Tanaka to pay the government's legal costs.

In contrast to the attention *The New Canadian* gave the case at the outset, by the time of its release, the result in *Nakashima* was met with sparse coverage and only muted disappointment.<sup>173</sup> MacLennan informed his clients that he could see no grounds for appeal.<sup>174</sup> Probably Japanese Canadians had long reconciled themselves to the outcome. Certainly there would have been ample grounds to have lost faith in the judicial process. By the summer of 1947, more

168. *Ibid* at 492, 495, 498.

169. *Ibid* at 498.

170. *Ibid* at 502. "Parliament," Thorson J continued, "has left the decision as to the necessity or advisability of such an order for the security, defence, peace, order and welfare of Canada, not to the Court, but to the Governor in Council." The non-justiciability of whether government decisions were necessary or advisable under the *WMA* had been "conclusively settled", Thorson J held, by *Reference re Persons of Japanese Race*, [1946] SCR 248, 3 DLR 321. *Ibid* at 504.

171. *Ibid* at 504.

172. *Ibid*.

173. "Property Owners' Petitions Dismissed in Test Cases," *The New Canadian* (20 September 1947) 1.

174. "Property Owners Asked to File Loss Claims by November 30," *The New Canadian* (27 September 1947) 10.

pressing legal matters preoccupied the Japanese-Canadian community, including the Bird Commission's inquiry into the Custodian's sales and continuing orders restricting the movement and liberty of Japanese Canadians. Their wartime experiences had also caused Japanese Canadians to shift their attention towards the project of constitutional change. Just before the *Nakashima* ruling, a meeting of Japanese-Canadian organizations in Toronto called for "a national bill of rights for Canada—to define the fundamental and inalienable rights of citizenship."<sup>175</sup> "The Canadian emergency laws," *The New Canadian* editors agreed, "are too ready-made for a would-be dictator."<sup>176</sup> Legal change, Japanese-Canadian community leaders would argue for the next half-century, must come in the form of constitutional rights.

Its relative obscurity has meant that the reasoning in *Nakashima* has not received much scrutiny. Certainly, to modern eyes, the case and its reasoning raise a number of concerns. One might question, at the outset, whether Justice Thorson should have heard the case in the first place given his membership in the cabinet that produced several of the orders under review and his recent professional relationship with the Custodian. While the Exchequer Court only had two members in 1944, the case could have been assigned to a judge less implicated in government wartime policy. More pointedly, the delay in hearing and especially in deciding the case was inexcusable and unjust. Neither the government nor Justice Thorson dealt with the case with the expediency that the issue required and deserved. It is also difficult not to see the delay as motivated at least partly by a desire to dispose of Japanese-Canadian-owned property before the legal issues in the case were determined. At the very least, Justice Thorson should have issued an injunction preventing sales until the legality of the Custodian's actions could be determined and possibly appealed. Time only sharpens the sense that bad faith lay at the heart of the government's handling of the case from the outset.

Justice Thorson was also wrong to uncritically accept the government's convenient distinction between the Custodian and Crown as a matter of law. Without question, the issue was complicated by a common law that effectively insulated government from legal proceedings. Change and rationalization of proceedings against the Crown would not arrive in Canada until the 1950s when Parliament and provincial legislatures enacted legislation that enabled legal claims against government.<sup>177</sup> Perhaps MacLennan should have attempted to sue the Custodian directly rather than pursuing the Crown via a Petition of Right. But as

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175. "Ready-Made for Dictatorship," *The New Canadian* (4 October 1947) 2.

176. *Ibid.*

177. Hogg, Monahan & Wright, *supra* note 119 at 8-9.

the *Regulations Respecting Trading with the Enemy* stipulated, the Custodian could not be sued without its consent either. Further, even if the Custodian had granted consent, the *Regulations* suggested a claim against the Custodian could only address a narrow range of issues and certainly not ones involving the constitutional validity of the orders themselves.<sup>178</sup> Given the Petition of Right's origins in equity, it was open to Justice Thorson to find that his court provided the only avenue for the petitioners to question the exercise of the Custodian's trusteeship and the constitutional validity of the orders. Nakashima, Wakabayashi, and Tanaka were defeated not only by the common law's hostility to Crown liability but also by Justice Thorson's narrow interpretation of civil procedure.

Justice Thorson also had questionable grounds for dismissing MacLennan's constitutional argument. Orders passed under the *WMA* were constitutional only insofar as they complied with the specific preconditions of the *WMA* itself: 1) *by reason* of war, invasion, or insurrection; 2) *deemed* necessary or advisable by the Governor in Council; and 3) *for the* security, defence, peace, order and welfare of Canada.<sup>179</sup> The Governor in Council may have favoured the forced sale of Japanese-Canadian-owned property and the permanent exclusion of Japanese Canadians from British Columbia, but that policy did not have any connection to the war beyond timing and opportunity, nor could it be justified as advancing the security, defence, peace, order and welfare of Canada, notwithstanding racist prejudice and assumptions to the contrary. Selling Japanese-Canadian-owned property promoted an altogether different long-standing objective: Making British Columbia a "white man's province." As Justice Murphy of the United States Supreme Court famously held in dissent in *Korematsu*, the internment of Japanese Americans on racial grounds, "goes over 'the very brink of constitutional power' and falls squarely into the ugly abyss of racism."<sup>180</sup> That Justice Thorson was unwilling or incapable of seeing the forced sales as acts of racism rather than security does not change their unconstitutional nature.

MacLennan's strongest argument concerned the promise to protect. Justice Thorson ignored this argument entirely, but there was ample evidence that the Custodian controlled and managed the property of Japanese Canadians as a trustee, including the Custodian's interpretation of its own mandate. The history of Order 2483 makes the existence of a trust relationship clear. Read's critique of Order 1665 stemmed from his concerns that an insufficient trust relationship had been established in its drafts. Order 2483 replaced Order 1665 specifically

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178. *Supra* note 31, s 27.

179. *Supra* note 20.

180. *Korematsu*, *supra* note 9 at 233.

to address that concern and said so in its preamble. McPherson, the policy architect behind the dispossession and the orders, did not hesitate to describe the Custodian as a trustee and he deliberately impressed the notion of trusteeship in communicating the dispossession to Japanese Canadians. The Japanese-Canadian community, with justifiable suspicion of false motives, relied on the promise to protect in good faith.

Canadian trust law of the 1940s, as today, recognized that a trust could be created in a variety of ways, most typically by express words and intent.<sup>181</sup> “A trust,” a leading text writer of the period explained, “is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries).”<sup>182</sup> Whether a trust arises expressly by explicit intention, or constructively by circumstances and conduct, the legal result is the same: An obligation on the part of the trustee to manage the property for the benefit of the beneficiary.<sup>183</sup> The circumstances, intentions, and language of Order 2483, and probably Order 1665 as well, created an express trust. The power to sell, stipulated from the outset in the Custodian’s powers, was also fully consistent with the existence of a trust because it may be in the interests of the beneficiary for the trustee to sell a rapidly deteriorating asset. Significantly, Order 469 did not amend or repeal Order 2483, it simply confirmed a qualified power of sale that had always been present in the Custodian’s powers. Content to weave a promise to protect property into law, to create a trust relationship, and to accept the cooperation of Japanese Canadians on that basis, Canada abandoned its legal promise at the moment it was needed most. The Custodian breached that trust in its negligent treatment of chattels and household goods, in its failure to police and protect vacant properties, and in its bad faith sales of all Japanese-Canadian-owned property in promotion of racist policy objectives unconnected to the war. The Department of Justice further breached that trust in its bad faith litigation

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181. The existence of a trust remained largely a question of the common law, with some modifications of the duties of a trustee expressed by statute. See *Trustee Act*, RSCB 1936, c 292, s 2.

182. Sir Arthur Underhill assisted by Edward Bagshawe, *The Law Relating to Trusts and Trustees*, 9th ed (London: Butterworth & Co, 1939) at 3. See also, *Attorney-General of Canada v CC Fields & Co*, [1943] OR 560, 1943 CanLII 97 (Ont CA).

183. *Ibid* at 8. The duties of the trustee include the duty to manage and treat the property with a reasonable standard of care. “A trustee is not called upon to be omniscient,” Middleton J explained. “All that he is called upon to do is honestly to exercise his best judgment, to take the same care of the property as he would have taken if it had been his own.” *Davies v Nelson*, [1928] 1 DLR 254 at 256, 1927 CanLII 452 (Ont CA).

strategy and its warping of the trust to justify racist ends. In its inexcusable delay, its failure to recognize the harms suffered by the litigants, and its sanction of racist policy, motive, and argument, Justice Thorson's decision in *Nakashima* betrayed that promise too.

### III. CONCLUSIONS

This legal history has traced the life of a promise of law from its origin to its demise, chronicling its shifting meanings, interactions, and consequences for the people whose lives it forever altered. Reading the origins of the promise to protect alongside its defeat in court helps us to better understand and contextualize both. Multiple actors shape the life, death, and meaning of law: Drafters and civil servants crafting government policy into words on a page; the subjects of law in their acts of interpretation, resistance, and compliance; and the officials, lawyers, and judges enforcing, arguing, and interpreting law in retrospect. In litigation, government lawyers turned the trust against the interests of the people it was intended to protect. More brazenly, the government's legal objective was to write the promise to protect out of the law entirely. The history of the dispossession should not do the same.

The story of this legal promise is one of stark simplicity and tangled complexity. In important ways, the promise of law was meaningless. Eikichi Nakashima, Tadao Wakabayashi, Jitaro and Takejiro Tanaka, and thousands of other Japanese Canadians lost their homes and livelihoods; they lost their court case too. A long history of failing to see racialized minorities as full citizens, the unjust association of Japanese Canadians with an enemy country, and economic and territorial avarice motivated by a commitment to white supremacy fuelled the dispossession policy. A combination of war, racism, and exclusionary citizenship gave the patina of legal licence to virtually all discriminatory actions taken against the Japanese-Canadian community, even those that made no one safer. Many in British Columbia intended that Japanese Canadians never return from internment. The Custodian sold the property of Japanese Canadians without compunction or sanction. Varcoe, in defending the Custodian's actions, and Justice Thorson, in his inexcusably delayed ruling, ignored or looked past the legal trust that had been created. The promise of law failed to halt a single sale of property.

But the dispossession is also complicated by the presence of a promise. At earlier moments in the life of the laws of dispossession, figures like Read, Angus, and Coleman invoked legal principles that should have constrained government action. They did so in direct response to the actions of Japanese



Canadians. McPherson believed, and rightly so, that the laws of dispossession imposed a trustee relationship between the Custodian and Japanese Canadians. MacLennan had a legal case to argue because the activism of Japanese Canadians carved a promise of protection into law. Acknowledging this complexity does not absolve the federal government of responsibility for the promise's ultimate breach. As Tina Loo has argued, "oppression is not automatic and the reproduction of relations of domination is not straightforward because the power of the law is not totalizing." History, by foregrounding people in their variety, ambiguity, and complexity, renders visible the "opportunities within the rule of law and the larger discourse from which it is derived" for alternative outcomes.<sup>184</sup> A different history would have been possible had promises been honoured. Remembering the dispossession only as a story of the power of sale runs the risk of perpetuating a narrative adopted by government actors in order to conceal the legal significance of the promise to protect. The laws of dispossession and *Nakashima* are a story not only of law's will to power, but its will to promise as well. That those promises lay broken and abandoned with such injustice should not obscure the ways in which the law finds meaning not only in after-the-fact judicial interpretation, but in the good faith actions and interpretations of the people subject to its rule.

This article is also about the role of vulnerable citizens in making law and resisting state power, and the limits of the rule of law. Japanese Canadians demanded and placed their trust in the promise to protect, just as they prepared for it to be broken. Alert to the possibility that some British Columbians would attempt to use a temporary state of war to exile Japanese Canadians from the province, they interrogated state action and sought to hold officials to their own principles and legal promises. While Japanese Canadians were shocked by the betrayal of the promise, their legal challenge was also part of a vigilance to uphold the law and an expression of faith in legality. Disappointment in the *Nakashima* ruling did not end the community's engagement with legal promises. In the decades after the conclusion of their legal challenge, Japanese Canadians continued to remind the government in public testimony, Royal Commission hearings, the redress movement, and courts of law, of the legal significance of the broken promise.<sup>185</sup>

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184. Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994) at 162.

185. See the powerful testimony of the National Association of Japanese Canadians at the special parliamentary hearings prior to the enactment of the *Canadian Charter of Rights and Freedoms*, *Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada*, (Government of Canada: Ottawa, 1980) at 13:6.

In 1968, *Nakashima* and the promise to protect returned briefly to the legal spotlight. Torazo Iwasaki sued the federal government, alleging that the Custodian had breached its trust obligations in selling his land on Salt Spring Island in 1945 without his consent.<sup>186</sup> Relying on Justice Thorson's reasoning in *Nakashima*, Justice Sheppard of the Exchequer Court held that "the discretionary powers of the Custodian are inconsistent with any trust."<sup>187</sup> Iwasaki's "complaint is without foundation," the judge declared.

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 an error; there was no trust ... nor was there any breach of trust.<sup>188</sup>

After hearing Iwasaki's appeal, a unanimous Supreme Court of Canada issued its decision orally from the bench. "We are all of the opinion that the appeal fails," Justice Fauteux informed the courtroom. "The property in question in these proceedings became vested in the Custodian by legislative action. He had the power to sell and he did sell."<sup>189</sup> *Nakashima* has not been cited by a court of law since.

The rule of law project is a long one, and legal history can play a key role within it by excavating lost promises and the people and stories behind them. The history of the dispossession revealed here suggests that the forced sales should be approached not simply as bad law but as the unlawful manipulation of the law. Ultimately, the promise of law encompasses more than the responsibilities encoded in any specific law. The rule of law is also a promise, perhaps especially necessary in times of emergency, to rule by a legal order of good faith, non-discrimination, and rationality.<sup>190</sup> Telling the dispossession as a story of promises highlights the extent and tragedy of the government's breach but it also helps to reclaim a deeper set of principles of justice and the promises of legality that the law makes to all.

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186. Further, the agent of the Custodian, GC Mouat, sold Iwasaki's land to a company, Salt Spring Lands Ltd, in which Mouat held a 20 per cent interest. *Iwasaki v Canada*, [1969] 1 Ex CR 281 at para 35, 2 DLR (3d) 241.

187. *Ibid* at para 21.

188. *Ibid* at para 49.

189. *R v Iwasaki*, [1970] SCR 437 at 438, CanLII 191 (SCC).

190. "Surely," Lon Fuller wrote, "it is not only in the affairs of everyday life that we need clarity about the obligation of fidelity to law, but most particularly and urgently in times of trouble." Lon L Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 at 634. See also, David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006).

## IV. APPENDICES:

### A. ORDER IN COUNCIL 1665

Order in Council 1665

AT THE GOVERNMENT HOUSE AT OTTAWA  
WEDNESDAY, THE 4TH DAY OF MARCH, 1942

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS in view of the serious situation prevailing in the Province of British Columbia arising out of the war with Japan it is deemed necessary for the security and defence of Canada to take further steps for the evacuation of persons of the Japanese race from the protected areas in that Province;

NOW, THEREFORE, on the recommendation of the Right Honourable W.L. Mackenzie King, the Prime Minister, and under and by virtue of the powers conferred by the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make the following regulations and they are hereby made and established accordingly:

...

Custody of Japanese Property

12. (1) As a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race resident in such area (excepting fishing vessels subject to Order in Council P.C. 288 of the 13th January, 1942, and deposits of money, shares of stock, debentures, bonds or other securities), delivered up to any person by the owner pursuant to the Order of the Minister of Justice dated February 25, 1942, or which is turned over to the Custodian by the owner, or which the owner, on being evacuated, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy, 1939; provided, however, that no commission shall be charged by the Custodian in respect of such control and management.

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

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

**B. ORDER IN COUNCIL 2483**

Order in Council 2483

AT THE GOVERNMENT HOUSE AT OTTAWA

Friday, the 27th day of March, 1942.

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS by Order in Council P.C. 1665 dated March 4th, 1942, the British Columbia Security Commission was established for the purpose of planning, supervising and directing the evacuation from the protected areas of British Columbia of all persons of the Japanese race and for such purpose was empowered to determine amongst other things all matters relative to the placement of such persons;

AND WHEREAS it is represented to the Minister of Justice that it is desirable to provide that any plan with regard to the placement of such persons be limited to making provision for the temporary placement only of such persons during the continuation of the state of war now existing and that the authority of the Commission should include power to vary or amend any placement order;

AND WHEREAS recommendations have been made to the Minister of Justice by the British Columbia Security Commission to the effect that a greater degree of protective control over persons of the Japanese race and the property of such persons be provided for than was provided for by the Order establishing the Commission, above referred to;

NOW, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and under and by virtue of the powers conferred by the War Measures Act, Chapter 206, R.S.C., 1927, is pleased to amend the Regulations established by Order in Council P.C. 1665, dated March 4th, 1942, as follows:

Regulation one is hereby amended by adding thereto the following paragraph:

“(bb) ‘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”

Regulation ten is hereby amended by adding thereto the following paragraphs:

“(5) Any such plan or plans shall make provision for the temporary placement only of such persons during the continuation of the state of war now existing.

...

Regulation twelve is hereby rescinded and the following substituted therefore:

“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 resident in such area (excepting fishing vessels subject to Order in Council P.C. 288 of the 13th January, 1942, and deposits of money, shares of stock, debentures, bonds or other securities), delivered up to any person by the owner pursuant to an Order of the Minister of Justice, or which is turned over to the Custodian by or on behalf of the owner, or which the owner, on being evacuated from the protected area, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy, (1939); provided, however, that no commission shall be charged by the Custodian in respect of such control and management.

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

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

**C. ORDER IN COUNCIL 469**

Orders in Council 469

AT THE GOVERNMENT HOUSE AT OTTAWA

Tuesday, the 19th day of JANUARY, 1943

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

...

That by Orders in Council relating to the property of persons of the Japanese race evacuated from the protected areas of British Columbia, the Custodian has been vested with the responsibility of controlling and managing property belonging to persons of the Japanese race who have been evacuated from the protected areas, except deposits of money, shares of stock, debentures, bonds or other securities or other property which the owner on being evacuated from the protected areas was able to take with him; and

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

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Secretary of State, concurred by the Minister of Mines and resources, the Minister of Pensions and National Health, the Minister of Labour and the Minister of Fisheries, and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to order and doth hereby order as follows:

...

Wherever, under Orders in Council under the War Measures Act, Chapter 206 of the Revised Statutes of Canada 1927, the Custodian has been vested with the power and responsibility of controlling and managing any property of persons of the Japanese race evacuated from the protected areas, such power and responsibility shall be deemed to include and to have included from the date of the vesting of such property in the Custodian, the power to liquidate, sell, or otherwise dispose of such property; and for the purpose of such liquidation, sale or other disposition the Consolidated Regulations Respecting Trading with the Enemy (1939) shall apply mutatis mutandis as if the property belonged to an enemy within the meaning of the said Consolidated Regulations.

