A Suitable Population: British Columbia's *Japanese Treaty Act* Litigation, 1920-1923

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In the early 1920s, the courts of British Columbia, the Supreme Court of Canada and the Judicial Committee of the Privy Council considered a series of constitutional challenges to a British Columbia law requiring the provincial government to discriminate against Japanese and Chinese persons in the making of government contracts. The attack on this racially-motivated law was founded on the 1911 Treaty of Commerce and Navigation *between the United Kingdom and Japan, under which Canada was bound to respect the right of the Japanese Empire's subjects "equally with native [British] subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce". Some of British Columbia and Canada's best-known advocates argued these cases. The decisions they produced addressed important and still relevant questions about the relationship between international and domestic law, the Crown's treaty power and Canadian federalism. These cases are remarkable early instances of Canada's international obligations being invoked by litigants to challenge domestic law.*

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For nearly four years, from November 1920 to October 1923, the courts of British Columbia, the Supreme Court of Canada and the Judicial Committee of the Privy Council considered a series of constitutional challenges to a BC law requiring the provincial government to discriminate against Japanese and Chinese persons in the making of government contracts. The challenge was founded in large part on promises of non-discrimination set out in a treaty between the British and Japanese empires. Some of British Columbia and Canada's best-known advocates argued these cases. They raised important and still relevant questions about the relationship between international and domestic law, the Crown's treaty power and Canadian federalism. They are also a grim reminder of the history of anti-Asian discrimination in British Columbia.

I. "Asiatic" Discrimination and the 1894 treaty

On 16 July 1894 the Earl of Kimberley, for Great Britain, and Viscount Aoki, for Japan, signed a treaty of commerce and navigation in London ("1894 treaty").[1] Five weeks later, the parties exchanged ratifications in Tokyo. With the conclusion of this agreement, the era of unequal treaties between Britain and Japan came to a close. Unlike the notoriously one-sided Ansei treaties between Western and Asian powers earlier in the century, the 1894 agreement was authentically reciprocal. In the following two years, the United States and other Western nations also

1. *Anglo-Japanese Treaty of Commerce and Navigation*, 16 July 1894, UKTS No 23 (entered into force 17 July 1899) [*Anglo-Japanese Treaty*].

concluded reciprocal treaties with Japan.[2] In 1902, Britain and Japan entered into a formal alliance.[3]

Britain's recognition of Japan as an equal in international relations was in marked contrast to growing efforts to exclude and discriminate against Japanese nationals and other "Asiatic" immigrants by legislation in British colonies. At the Colonial Conference of June, 1897, the Secretary of State for the Colonies, Joseph Chamberlain, addressed the issue in a remarkable speech to the prime ministers of Canada, Newfoundland, New Zealand, the several Australian colonies, the Cape Colony and Natal.[4] "I wish to direct your attention to certain legislation which is in process of consideration, or which has been passed by some of the Colonies, in regard to the immigration of aliens, and particularly of Asiatics",[5] Chamberlain began:

> I have seen these Bills, and they differ in some respects one from the other, but there is no one of them, except perhaps the Bill which comes to us from Natal, to which we can look with satisfaction. I wish to say that Her Majesty's Government thoroughly appreciate the object and the needs of the Colonies in dealing with this matter. We quite sympathise with the determination of the white inhabitants of these Colonies which are in comparatively close proximity to millions and hundreds of millions of Asiatics that there shall not be an influx of people alien in civilization, alien in religion, alien in customs, whose influx, moreover, would most seriously interfere with the legitimate rights of the existing labour population. An immigration of that kind must, I quite understand, in the interest of the Colonies, be prevented at all hazards, and we shall not offer any opposition to the proposals intended with that object …[6]

From here, Chamberlain's comments took a different turn:

> … but we ask you also to bear in mind the traditions of the Empire, which

2. See generally Michael Auslin, *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (Cambridge, MA: Harvard University Press, 2004).
3. *Agreement Between the United Kingdom and Japan Relative to China and Korea*, 30 January 1902, UKTS No 3 (entered into force 30 January 1902).
4. Proceedings of a Conference between the Secretary of State for the Colonies and the Premiers of the Self-Governing Colonies, at the Colonial Office, London, June and July 1897, PP (1897) (ch 8596), LIX at 13-14.
5. *Ibid.*
6. *Ibid.*

> makes no distinction in favour of, or against race or colour; and to exclude, by reason of their colour, or by reason of their race, all Her Majesty's Indian subjects, or even all Asiatics, would be an act so offensive to those peoples that it would be most painful, I am quite certain, to Her Majesty to have to sanction it. Consider what has been brought to your notice during your visit to this country. The United Kingdom owns as its brightest and greatest dependency that enormous Empire of India, with 300,000,000 of subjects, who are as loyal to the Crown as you are yourselves, and among them there are hundreds of thousands of men who are every whit as civilized as we are ourselves, who are, if that is anything, better born in the sense that they have older traditions and older families, who are men of wealth, men of cultivation, men of distinguished valour, men who have brought whole armies and placed them at the service of the Queen, and have in times of great difficulty and trouble, such for instance as on the occasion of the Indian Mutiny, saved the empire by their loyalty. I say, you, who have seen all this, cannot be willing to put upon those men a slight which I think is absolutely unnecessary for your purpose, and which would be calculated to provoke ill-feeling, discontent, irritation and would be most unpalatable to the feelings not only of Her Majesty the Queen, but of all her people.[7]

This note, with its plea for tolerance and even respect of differences of race and colour, immediately soured with Chamberlain's next words:

> [w]hat I venture to think you have to deal with is the character of the immigration. It is not because a man is of a different colour from ourselves that he is necessarily an undesirable immigrant, but it is because he is dirty, or he is immoral, or he is a pauper, or he has some other objection which can be defined in an Act of Parliament, and by which the exclusion can be managed with regard to all those whom you really desire to exclude. Well, gentlemen, this is a matter I am sure for friendly consideration between us.[8]

Chamberlain concluded his remarks by praising legislation recently brought in Natal, whereby exclusion of Asiatics was effected not by overt racial discrimination but by the administration of a language test that new immigrants could not hope to pass. This disguised form of discrimination was, Chamberlain explained, "absolutely satisfactory" to Natal and would "avoid hurting the feelings of any of Her Majesty's subjects".[9]

Overtly discriminatory legislation risked more than hurt feelings, however. Article I of the 1894 treaty between Britain and Japan granted

7. *Ibid.*
8. *Ibid.*
9. *Ibid.*

each state's subjects "full liberty to enter, travel and reside in any part of the dominions and possessions of the other Contracting Party".[10] Colonial measures to exclude or discriminate against Japanese immigrants were therefore potentially contrary to international law. The breach was only potential because Article XIX provided that the treaty's stipulations were not applicable to the Dominion of Canada and other specified British possessions unless Britain so notified Japan within two years of ratification.[11] The reason for delaying the operation of the 1894 treaty in self-governing British possessions was that the imperial authorities could not live up to promises of freedom of movement to Japanese subjects without first ensuring the colonies would enact conforming measures in

10. *Anglo-Japanese Treaty*, *supra* note 1, art I.
11. *Ibid*, art XIX.

their jurisdictions.[12, 13]

Opposition to Japanese immigration, particularly into British Columbia, was a serious obstacle to Canadian adherence to the 1894 treaty.[14] By order in council of 6 August 1895, Canada's federal government demanded "a stipulation with respect to Japanese immigration" before

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12. The 1894 Treaty's delayed operation in Canada and other British territories is remarkable. Today we tend to assume that Great Britain wholly controlled Canadian foreign affairs until the Statute of Westminster 1931 (UK) 22 Geo V c 4, reprinted in RSC 1985 App II No 27. The truth is subtler. While Whitehall had the necessary legal authority as a matter of international law to bind Canada and its other possessions unilaterally, it lacked (in self-governing territories) the internal legislative power to perform the international obligations without colonial cooperation. The constitutional requirement that treaties be implemented in domestic law to take direct legal effect (see generally Gib van Ert, *Using International Law in Canadian Courts*, 2d (Toronto: Irwin Law, 2008) at 234-55) had the practical consequence of giving colonial jurisdictions a role, however limited, in the conduct of imperial foreign relations. Percy E Corbett and Herbert A Smith, *Canada and World Politics: A Study of the Constitutional and International Relations of the British Empire* (Toronto: Macmillan, 1928) at 57 note that one of the earliest British treaties to provide for non-application to British possessions until their desire to accede was established was the *Convention for the Protection of Submarine Telegraph Cables 1884*, 14 March 1884, 75 UKFS 356, and that the Canadian delegate at the Paris conference that gave rise to this treaty, Sir Charles Tupper (discussed below) claimed in his memoirs to have taken a stand contrary to that of the British representative on a point, with a consequent change in the draft agreement. Corbett and Smith also relate that the practice of exempting British dominions from the operation of imperial treaties until they indicated their desire to adhere was established by the time of the 1894 treaty between Britain and Japan.
13. The British imperial predicament is strikingly similar to that faced regularly by the Canadian federal government since 1937: while it has an acknowledged power to conclude treaties with foreign states, it must rely on the provinces to perform those treaties if their subject matters fall within provincial legislative jurisdiction.
14. See generally Patricia Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: UBC Press, 1989), especially ch 5.

adhering.[15] Even after this matter was agreed to by Japan in February 1896, however, Canada declined to consent, now citing concerns about the treaty's most favoured nation provisions.[16] It was not until 1905 – long past the treaty's deadline for adherence by British possessions – that Canada finally promulgated an order in council declaring its willingness to adhere to the treaty "absolutely and without reserve".[17] In 1906 Britain and Japan concluded a supplementary convention to extend the 1894 treaty to Canada,[18] and in January 1907 the federal Parliament implemented the 1894 treaty in Canadian law by means of the *Japanese Treaty Act*, *1906*.[19]

II. The Japanese Treaty of 1911

The 1894 treaty's guarantee to Japanese subjects of full liberty to enter, travel and reside in Canada was now federal law. Yet it was not long before the federal government sought ways to undo it. There were estimated to be about 7,500 Japanese in Canada in January 1907, mostly in British Columbia. In the following ten months, another 4,429 entered.[20] In September 1907, three days of anti-Asian rioting broke out in Vancouver and the Steveston area of Richmond, BC. The rioters targeted Chinese and Japanese people and businesses.[21] Despite Canada's having just adhered to the 1894 treaty and implemented it by statute, the federal government now moved quickly to negotiate a variation on the treaty's freedom of movement provisions. In December 1907, the Japanese foreign minister,

15. *Immigration of Japanese Labourers to British Colonies*, PC 1895-0929 J.
16. Raymond Buell, "Treatment of Japanese by Other Countries" (1924) World Peace Foundation Pamphlet Series 332 at 335.
17. *Treaty of Commerce and Navigation between Great Britain and Japan*, 25 September 1905, PC 1905-0677 (entered into force 25 September 1905).
18. *Convention Between the United Kingdom and Japan Respecting Commercial Relations between Canada and Japan*, 31 January 1906, UKTS No 13 (entered into force 31 January 1906).
19. 1906 SC 1907 c 50 (6-7 Edw VII).
20. Buell, *supra* note 16 at 336.
21. Roy, *supra* note 14 at 185-226. See also James Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Osgoode Society for Canadian Legal History, 1997) at 68-69.

Tadasu Hayashi, advised the Canadian minister of labour, Rodolphe Lemieux, that Japan would not insist upon its rights under the treaty and would in fact act to restrict Japanese emigration to Canada.[22] This so-called Gentlemen's Agreement continued in place, with added strictures from time to time, well into the 1920s.

Meanwhile, relations between Britain and Japan continued to develop. In 1911, the two empires concluded a new treaty of commerce and navigation ("Japanese Treaty").[23] Like the previous agreement, this one provided (at Article XXVI) that it would not apply to British dominions and other territories unless notice of their adhesion was given within two years of the treaty's ratification. The new agreement also reaffirmed (at Article I) the "full liberty" of each state's subjects "to enter, travel and reside in the territories of the other". A further guarantee was added at Article I(2), namely that subjects of each of the parties shall have "the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce".

This time it did not take Canada eleven years to adhere to the Japanese Treaty. The Dominion's main concern, it seems, was to ensure that implementing the agreement in federal law would not prejudice the power Parliament had granted the Governor-General in the *Immigration Act* of 1910,[24] to "prohibit for a stated period, or permanently, the landing in Canada … of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character".[25] The federal government corresponded with Japan's consul general in Ottawa on the point, who advised that Japan would not object as the 1910 *Act* was "applicable … to the immigration of aliens into the Dominion of Canada from all countries" and thus involved no discrimination against Japanese subjects

22. Buell, *supra* note 16 at 336. See also Roy, *ibid* at 208-209.
23. *Treaty of Commerce and Navigation Between the United Kingdom and Japan*, 3 April 1911, UKTS No 15 (entered into force 3 April 1911).
24. 1910 SC c 27.
25. *Ibid*, s 38(c).

particularly.[26] With both the Dominion and Japan content to settle for this dodge, in April 1913 Parliament enacted *An Act respecting a certain Treaty of Commerce and Navigation between His Majesty the King and His Majesty the Emperor of Japan*[27] ("*Japanese Treaty Act*"). The *Japanese Treaty Act* sanctioned the new treaty and declared it to have the force of law in Canada, provided that nothing in either the treaty or the Act shall be deemed to repeal or affect any of the provisions of the *Immigration Act*.[28] British officials in Tokyo gave Japan notice of Canada's adhesion to the new treaty on 1 May 1913.[29]

Canada was now bound to observe and perform all the Japanese Treaty's obligations. Ironically, the stipulation that became the subject of litigation in British Columbia, taking the province to the Privy Council with stops at the Supreme Court of Canada on the way, was not about freedom of movement but freedom of contract. As noted, Article I(2) of the new treaty required each party to guarantee the other party's subjects "the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce". This requirement was clearly at odds with a British Columbia legislative resolution of 15 April 1902 that "in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith".[30] The British Columbia government gave legal effect to this resolution on 18 June 1902 by promulgating an order in council that "a clause embodying the provisions of the resolution be inserted in all instruments issued by officers of the Government for the various purposes above quoted",[31] and proceeded regularly to insert the discriminatory provision in a variety of

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26. Buell, *supra* note 16 at 337.
27. 1913 SC c 27 (3 and 4 Geo V) [*Japanese Treaty Act*].
28. *Ibid*, s 2.
29. *In re the Japanese Treaty Act, 1913* (1920) 29 BCR 136 at 137 [*Re Japanese Treaty Act* (BCCA)].
30. Reproduced in the Schedule to the *Oriental Orders in Council Validation Act*, SBC 1921 c 49 [*Validation Act*].
31. *Ibid*.

government contracts concerning public works and lands. The provision was one of over one hundred similarly discriminatory enactments adopted in British Columbia in the late nineteenth and early twentieth centuries.[32]

III. The *Treaty Act* at the British Columbia Court of Appeal

Anti-Asian agitation in British Columbia was briefly suspended during the First World War, in which Japan was a British ally. At the war's end, however, the old fears revived.[33] In 1920, the Lieutenant Governor of British Columbia referred four questions to the Court of Appeal concerning the lawfulness of the discriminatory, pre-war provisions. The first two questions asked whether the federal *Japanese Treaty Act* or its underlying Japanese Treaty limited the legislative jurisdiction of BC's Legislative Assembly. The third and fourth questions were whether it was competent to the Legislature to authorize the BC government to insert the discriminatory terms into contracts for public works and public lands.

Some of British Columbia's leading counsel presented the argument in the Court of Appeal for British Columbia in Victoria over a three day period in June 1920. The province's Attorney General, J.W. De B. Farris KC, appeared for the province. He later became a senator and was described in his 1970 obituary as "the Father of the British Columbia Bar".[34] His name lives on today in the leading Vancouver firm of Farris, Vaughn, Wills, & Murphy LLP. Sir Charles Tupper KC, son of the famous Nova Scotia father of Confederation and a remarkable person in his own right, represented the Canadian Japanese Association. Tupper was both a physician and a lawyer, served as a cabinet minister under Sir John A. Macdonald and other Conservative prime ministers, and continued as the Member of Parliament for Pictou, Nova Scotia for seven years

32. See Bruce Ryder, "Racism and the Constitution: the Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) 29 Osgoode Hall Law Journal 619 at 621.
33. Roy, *supra* note 14 at 265.
34. (1970) 28 *The Advocate* 168 at 168.

after his move to British Columbia in 1897. Like Farris, Tupper's name lived on, until very recently,[35] in the well-known Vancouver firm of Bull, Housser & Tupper LLP. Appearing for the federal Minister of Justice was A.P. Luxton KC, while C. Wilson KC appeared for a trade association of roof shingle manufacturers (the shingle business being one in which many Chinese and Japanese were employed).[36] Luxton and Wilson were well acquainted, having been jointly appointed in 1910 to revise the British Columbia statutes.[37]

The Court of Appeal gave its opinion on the reference questions, after deliberation, on 16 November 1920. It sided against the province. Macdonald CJ (with whom Galliher JA agreed) began by observing that neither the *Japanese Treaty Act* nor its underlying treaty strictly applied to limit the power of the provincial legislature "in relation to the rights, duties and disabilities in pursuit of their callings in this province of subjects of his Majesty the Emperor of Japan" for the simple reason that the provincial legislature had no such power in the first place.[38] This, in Macdonald CJ's view, was the effect of the Privy Council's decision in *Union Colliery of BC v Bryden*[39] ("*Bryden*") where, in a case about a BC law prohibiting "Chinamen" in underground coal mines, their Lordships held that in all matters directly concerning aliens and naturalized persons resident in Canada, legislative authority was exclusively vested in the Dominion Parliament by section 91(25) of the 1867 *British North America Act*[40] ("*BNA Act*"). "Neither the Treaty nor the Treaty Act can", said Macdonald CJ, "limit or affect that which has no existence".[41] Turning to the third and fourth questions (concerning the legislature's

35. Bull Housser announced a merger with Norton Rose Fulbright LLP on 12 September 2016 (Bull, Housser and Tupper LLP, News Release, "Bull Housser Combines with Global Law Firm Norton Rose Fulbright" (12 September 2016) online: < www.bht.com/our-firm/firm-news-press-releases/2016/09/bull-housser-combines-global-law-firm-norton-rose>.
36. Roy, *supra* note 14 at 251.
37. (1910) 30 Canada Law Times 177 at 181.
38. *Re Japanese Treaty Act* (BCCA), *supra* note 29 at 141-42.
39. [1899] AC 580 (PC) [*Bryden*].
40. 30 & 31 Vict, c 3 [*BNA Act*].
41. *Bryden*, *supra* note 39 at 142.

competence to authorize the government to insert discriminatory terms into contracts for public works and public lands), Macdonald CJ gave the same answer but added that if section 91(25) did not preclude such laws:

> then as the Treaty Act has made the Treaty the law of Canada, in so far as the subjects embraced in it are within the legislative powers of Parliament, any Act or resolution of the provincial Legislature repugnant thereto would be contrary to the Dominion Statute and therefore, beyond the competence of the provincial Legislature to enact or pass.[42]

Mr. Justice McPhillips gave his own, longer reasons concurring with the majority. He could not agree with Mr. Farris that the *Japanese Treaty Act* was passed in exercise of Parliament's trade and commerce power (section 91(2)) rather than its treaty implementation power (section 132). In the learned judge's view:

> [t]he sovereign Parliament of Canada in the full exercise of its powers – as extensive as the Imperial Parliament in such matters – has by statutory enactment given its adhesion to, and imposed upon Canada and all the provinces, the Treaty obligations as contained in the Japanese Treaty.[43]

His Lordship noted that the *Japanese Treaty Act* provided that the treaty should "have the force of law in Canada" and therefore "must be held to be destructive of all that has gone before … Nothing may be done in derogation of this statute law to the end that the Treaty obligations may be conformed to by Canada and the Provinces".[44] Turning specifically to the province's 1902 resolution and order in council requiring discrimination against Chinese and Japanese in government contracts, McPhillips JA held that the order in council could no longer have the force of law in British Columbia – "if it, at any time, had the force of law" – in view of the *Japanese Treaty Act* and section 132 of the *BNA Act* for the Lieutenant-Governor-in-Council "must perform the obligations of the province as contained in the Japanese Treaty given the force of law

42. *Re Japanese Treaty Act* (BCCA), *supra* note 29 at 142-43.
43. *Ibid* at 144.
44. *Ibid*.

throughout Canada" by the 1913 Act.[45]

After some consideration of *Union Colliery* and other authorities concerning Parliament's jurisdiction over aliens and naturalized persons, in which he reached a similar conclusion to the majority, McPhillips JA returned to the effect of the *Japanese Treaty Act*. He concluded that while there was no need for any specific answers to questions 1 and 2:

> it may be said that [the treaty] has the force of law in Canada and throughout the Provinces of Canada and any legislation, which, in its terms, is in conflict with, or repugnant to the Japanese Treaty, as validated by The Japanese Treaty Act, 1913, must be held to be repealed by necessary implication, and any future legislation, limiting the privileges guaranteed by the Japanese Treaty during the life of the Japanese Treaty, would be *ultra vires* legislation in that the Treaty, as long as it is existent, has the effect of inhibiting legislation, Federal or Provincial, which would be in conflict with the terms of the Treaty, *i.e.* to that extent the powers of the Parliament of Canada and the Parliaments of the Provinces of Canada, as conferred by *The B.N.A. Act*, 1867, are curtailed.[46]

It is remarkable how broadly McPhillips JA is willing to cast the effect of the Japanese Treaty and its implementing Act: not only is provincial legislation predating the implemented treaty *ultra vires*, but subsequent laws (both federal and provincial) are 'inhibited' for the life of the treaty. Most likely, McPhillips JA would have made an exception for federal legislation repealing the *Japanese Treaty Act*, or expressly derogating from it. Short of that, however, his Lordship's view appears to have been that the courts must ensure Canada's performance of its treaty obligations.

The strong opinions expressed by the Court of Appeal in this reference might have been expected to end the matter. But they proved to be only a prelude to the main litigation.

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45. *Ibid* at 146. This passage bears a resemblance to the observation of LeBel J in *GreCon Dimter Inc v J R Normand Inc*, 2005 SCC 46 at para 39 to the effect that both Canada and Quebec have "international commitments". The orthodoxy is that Canada as a state under international law can have international obligations, but its provinces and other organs do not.
46. *Re Japanese Treaty Act* (BCCA), *ibid* at 151.

IV. The *Treaty Act* at the Supreme Court of Canada

The British Columbia legislature responded to the Court of Appeal's opinion with defiance. On 2 April 1921, the Lieutenant Governor assented to what became chapter 49 of the 1921 statutes, the *Oriental Orders in Council Validation Act* ("*Validation Act*").[47] The law approved the discriminatory June 1902 order in council and purported to validate "any provision … relating to or restricting the employment of Chinese or Japanese" – despite the Court of Appeal's ruling.[48] This extraordinary turn of events prompted the Consul General of Japan to write the federal Minister of Justice, suggesting that the Governor General in Council disallow the *Validation Act* pursuant to sections 56 and 90 of the *BNA Act*. After all, the Court of Appeal's decision had held that the new law was *ultra vires* the provincial legislature. A report on the matter by a committee of Canada's Privy Council recorded that the BC government "maintains the constitutionality of the Act".[49] The same report recommended a reference to the Supreme Court of Canada to resolve the issue.[50]

Meanwhile, in the fall of 1921, the result of the BC Court of Appeal decision in the 1920 reference was applied by Murphy J of the Supreme Court of British Columbia in a claim by a BC timber licensee, Brooks-Bidlake & Whittall Ltd., for declaratory and injunctive relief to protect the company's right to employ Chinese and Japanese on its timber lands notwithstanding the discriminatory clause in its licence and the legislature's passage of the *Validation Act*. Mr. Justice Murphy held that the Court of Appeal's decision in the 1920 reference bound him. He granted the injunction.[51] That decision was then appealed by consent directly to the Supreme Court of Canada (a procedure known as a *per*

47. *Validation Act*, *supra* note 30.
48. *Ibid*, s 3(1).
49. Quoted in *In re Employment of Aliens* (1922), 63 SCR 293 at 295-96 [*Employment of Aliens*].
50. *Ibid*.
51. The decision was not reported but a transcript of the decision and counsels' submissions – both models of brevity – are found at pp 8-9 of the Case on Appeal document filed in the Registry of the Supreme Court of Canada.

saltum appeal).[52] The *Brooks-Bidlake* case was heard together with the federal government's reference on the constitutionality of the *Validation Act* over two days in December 1921.

At the Supreme Court, the Dominion's case against the *Validation Act* in the reference was put by E.L. Newcombe KC, the much-admired and long-serving Deputy Minister of Justice, who later became a judge of the Supreme Court of Canada.[53] Tupper appeared again for the Japanese Association, Wilson appeared again for the shingle manufacturers, and Farris appeared again for the Province, this time together with J.A. Ritchie KC. Ritchie, the son of Canada's second chief justice, Sir William J. Ritchie, was an Ottawa Crown Attorney to whom the aphorism "The Crown never wins; the Crown never loses" is ascribed.[54] He was also a poet and playwright. His verse, "The wholesome sea is at her gates/Her gates both east and west", which he appears to have written at about the time of the Supreme Court hearings, is carved over the main doorway of Parliament's Centre Block.[55] The report of the *Brooks-Bidlake* case in the *Supreme Court Reports* indicates that in that appeal Ritchie alone was counsel for the Province, while Wilson and Tupper acted for the timber company and Newcombe for the federal attorney-general.

The Supreme Court of Canada gave judgment in the two cases on 7 February 1922. The *Validation Act* reference prompted longer reasons than the *Brooks-Bidlake* appeal. Chief Justice Davies began by noting:

> the object and intention of these orders in council clearly is to deprive the Chinese and Japanese of the opportunities which would otherwise be open to them of employment upon government works carried out by the holders of provincial leases, licenses, contracts or concessions.[56]

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52. See, today, *Supreme Court Act* RSC 1985 c S-26, s 38.
53. Newcombe was deputy from 1893 until his appointment to the bench in 1924. See "The Late Honourable Edmund Leslie Newcombe, C.M.G." (1931) 9 CBR 737.
54. "The Crown Attorney", *The Ottawa Evening Citizen*, (3 April 1933) at 20.
55. Christopher Moore, "That's History: From Bar to Bard: the Poet Lawyers", *Law Times* (14 April 2008) online: <www.lawtimesnews.com/200804142474/commentary/thats-history-from-bar-to-bard-the-poet-lawyers>.
56. *Employment of Aliens*, *supra* note 49 at 300.

In a succinct but thorough judgment, he explained that the *Validation Act* was *ultra vires* the provincial legislature, both for being a matter of exclusive federal jurisdiction under sections 91(25) of the *BNA Act* (naturalization and aliens) and for being in conflict with the *Japanese Treaty Act*, *1913*. On the aliens point, Chief Justice Davies applied the Privy Council's decision in *Bryden*, as explained in *Cunningham v Tomey Homma*[57] ("*Tomey Homma*"), to the effect that the *Validation Act* was not really aimed at the regulation of industry but was "devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and in effect, to prohibit their continued residence in that province".[58] As for the *Japanese Treaty Act*, Davies CJ noted that it sanctioned and gave the force of law in Canada to the Japanese Treaty, and that Article 3(1) of the Treaty states that subjects of the parties "shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation". Parliament's authority to implement the Japanese Treaty was found in section 132 of the *BNA Act*, which granted the "Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada or any province thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries". The *Validation Act*'s attempt to discriminate against Japanese was "contrary to the obligations of the treaty and in direct conflict with the Dominion statute which must prevail".[59] The Chief Justice noted that even if the *Validation Act* were *intra vires* the province in other respects it was "in absolute conflict with the Treaty and the Dominion statute".[60] He concluded:

> [t]he Crown was undoubtedly bound by the force of the "Japanese Treaty Act" of 1913 to perform within Canada its treaty obligations, and, if so, I cannot understand how it can successfully be contended that the Crown can by force of enactments of a provincial legislature directly or indirectly break its treaty

57. [1903] AC 151 (PC) [*Tomey Homma*].
58. *Ibid* at 157, quoted in *Employment of Aliens*, *supra* note 49 at 301.
59. *Employment of Aliens*, *ibid* at 302-303.
60. *Ibid* at 304.

obligations.[61]

Mr. Justice Idington, dissenting, would have upheld the *Validation Act* entirely. His reasoning was premised on the right of private persons to conclude racially discriminatory contracts with each other – a right later abolished in anti-discrimination laws throughout the country and much of the world but still in place in 1922.[62] Given that private owners remained free to discriminate in contracts concerning their properties, and given BC's ownership of lands, mines, minerals and royalties as assured by section 109 of the *BNA Act* read together with section 10 of the *British Columbia Terms of Union*,[63] Idington J concluded that "the responsible government of British Columbia …had power to enact such orders in council relative to the administration of all the said properties".[64] As for the effect of the *Japanese Treaty Act*, Idington J's answer is hard to follow but suggested that to permit that statute to override the *Validation Act* would "strain and positively wreck our constitution".[65]

The long and, at points, difficult reasons of Mr. Justice Duff (as he then was) concluded that the *Validation Act* did not encroach upon Parliament's exclusive jurisdiction over naturalization and aliens. Unlike the legislation at issue in *Bryden*'s case, the *Validation Act* did not directly

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61. *Ibid* at 305.
62. See *Re Drummond Wren* [1945] OR 778 (HCJ), in which Mackay J invalidated a racially discriminatory covenant in a deed of land on the ground of public policy, citing such post-1922 developments as the *Racial Discrimination Act, 1944* (Ontario Statutes 1944 c 51), the *Charter of the United Nations*, 26 June 1945, CanTS No 7 and the *Atlantic Charter*, 14 August 1941, reproduced in (1942) UNTS No 5.
63. Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871, reproduced in Appendix to RSBC 1871.
64. *Employment of Aliens*, *supra* note 49 at 308.
65. *Ibid* at 311. His worry seems to be the same one that animated the Privy Council, in the *Labour Conventions* case, to limit the application of s 132 to Empire treaties. To do otherwise, said Lord Atkin, would permit the Dominion to "clothe itself with legislative authority inconsistent with the constitution that gave it birth": *Attorney-General for Canada v Attorney General for Ontario and others* [1937] AC 326 (PC) at 352.

prohibit Chinese and Japanese people from pursuing their occupation:

> the legislature has not by the Act of 1921 attempted to deny the Chinese and Japanese the right to dispose of their labour in the province nor has it attempted to prohibit generally the employment of Chinese and Japanese by grantees of rights in the public lands of the province.[66]

Mr. Justice Duff went on to explain:

> [i]n some of the provinces perhaps the most important responsibility resting upon the legislature was the responsibility of making provision for settlement by a suitable population …. I find it difficult to affirm that a province in framing its measures for and determining the conditions under which private individuals should be entitled to exploit the territorial resources of the province is passing beyond its sphere in taking steps to encourage settlement by settlers of a class who are likely to become permanently (themselves and their families) residents of the province.[67]

But while the *Validation Act* was not void on division of powers grounds, it was nevertheless, in Duff J's view, invalid for inconsistency with the *Japanese Treaty Act*. The learned judge began his analysis with an admirable explanation of the nature of treaties in both international and Canadian law:

> [a] treaty is an agreement between states. It is desirable, I think, in order to clear away a certain amount of confusion which appeared to beset the argument to emphasize this point that a treaty is a compact between states and internationally or diplomatically binding upon states. The treaty making power, to use an American phrase, is one of the prerogatives of the Crown under the British constitution[.] That is to say, the Crown, under the British constitution, possesses authority to enter into obligations towards foreign states diplomatically binding and, indirectly, such treaties may obviously very greatly affect the rights of individuals. But it is no part of the prerogative of the Crown by treaty in time of peace to effect directly a change in the law governing the rights of private individuals, nor is it any part of the prerogative of the Crown to grant away, without the consent of parliament, the public monies or to impose a tax or to alter the laws of trade and navigation and it is at least open to the gravest doubt whether the prerogative includes power to control the exercise by a colonial government or legislature of the right of appropriation over public property given by such a statute as the B.N.A. Act. All these require legislation.[68]

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66. *Employment of Aliens*, *supra* note 49 at 324, 326.
67. *Ibid* at 326-27.
68. *Ibid* at 328-29.

As to whether the authority given by section 132 was broad enough to support the *Japanese Treaty Act*, Duff J was satisfied it was:

> [t]he treaty validated by statute of 1913 deals with subjects which are ordinary subject matters of international convention: with precisely the kind of thing which must have been in the contemplation of those who framed this section [132]. The effect of the Act of 1913 is, in my opinion, at least this: that with respect to the right to dispose of their labour, the Japanese are to be in the same position before the law as the subjects of the most favoured nation. Equality in the eye of the law in respect of these matters is what I think the legislation establishes. Does the Act of 1921 in its true construction infringe these rights of Japanese subjects? In my opinion it does. It excludes them from employment in certain definite cases. It is not, I think, material that the province in passing the Act is engaged in administering its own corporate economic affairs. If it goes into effect, it goes into effect (as a law of the province) abrogating rights guaranteed by the treaty. It is thus not only a law passed against the good faith of the treaty but it is, in my opinion, a law repugnant to the treaty and as such I think it cannot prevail.[69]

Of course the Japanese Treaty offered no protection to people of Chinese descent. Despite this, Duff J took the view that the *Validation Act* "must be treated as inoperative *in toto*".[70]

The reasons of Mr. Justice Brodeur were similar in thrust to those of Duff J but more briefly put. He noted that the question of restricting the employment of Chinese and Japanese labour had been a subject of legislative discussion in BC, and diplomatic discussion between the interested countries, for years.[71] After referring to the *Tomey Homma* case and the Supreme Court of Canada's decision in *Quong Wing v The King*,[72] in which the Court upheld a Saskatchewan law prohibiting a naturalized Canadian of Chinese origin from employing "any white woman or girl" in his restaurant, Brodeur J concluded that the *Validation Act* would be *intra vires* were it not for the Japanese Treaty. On the effect of the treaty, Brodeur J cited *Walker v Baird*[73] for the proposition that "[i]f the treaty had not been adhered to [*i.e.*, implemented] by the Dominion parliament, it could be contended with force that a Canadian province

69. *Ibid* at 330-31.
70. *Ibid* at 331.
71. *Ibid* at 336.
72. [1914] SCR 440.
73. [1892] AC 491 (PC).

was not bound to obey the provisions of this treaty". The learned judge explained:

> [t]he King has the power to make a treaty, but if such a treaty imposes a charge upon the people or changes the law of the land it is somewhat doubtful if private rights can be sacrificed without the sanction of Parliament. The bill of rights[74] having declared illegal the suspending or dispensing with laws without the consent of parliament, the Crown could not in time of peace make a treaty which would restrict the freedom of parliament.
>
> In the United States a different rule prevails. Under the United States constitution the making of a treaty becomes at once the law of the whole country and of every state. In our country such a treaty affecting private rights should surely become effective only after proper legislation would have been passed by the Dominion parliament under section 132 B.N.A. Act.[75]

The necessary implementing legislation having been adopted, the Japanese Treaty "becomes binding for all Canadians and for all the provinces".[76] British Columbia could not, consistent with the Japanese Treaty, give the Japanese treatment different than that given to other foreigners, and so the *Validation Act* was illegal "as far as the Japanese are concerned".[77] Here Brodeur J differed from Duff J, concluding that the legislation remained valid in respect of Chinese.

Finally, Mr. Justice Mignault briefly held that the *Validation Act* "comes well within the rule of the *Bryden Case* as explained in the *Tomey Homma Case*, and therefore the statute and the orders in council are *ultra vires*".[78] Having so concluded, Mignault J found it unnecessary to consider whether the Japanese Treaty furnished a further ground of nullity.[79]

The Court's short judgment in the *Brooks-Bidlake* companion appeal was unanimous in the result but varied in its reasoning.[80] Recall that the issue here was whether the BC Supreme Court was right to grant

74. That is, the Bill of Rights 1689 1 William & Mary sess 2 c 2.
75. *Employment of Aliens*, *supra* note 49 at 339.
76. *Ibid* at 339.
77. *Ibid* at 339-40.
78. *Ibid* at 341.
79. *Ibid* at 340-41.
80. *Attorney-General for British Columbia and the Minister of Lands v Brooks-Bidlake and Whitall, Ltd* (1922), 63 SCR 466 [*Brooks-Bidlake*].

declaratory and injunctive relief to the timber licensee to protect its right to employ Chinese and Japanese despite the licence's express requirement (inserted pursuant to the discriminatory June 1902 order in council) that it not do so. Mr. Justice Idington again emphasized the right of an owner to impose limitations or conditions upon grants such as the right to cut provincial timber under licence. As for the Japanese Treaty, the learned judge blithely concluded that it was "certainly never intended to deprive the owners of property, whether private citizens or provinces, of their inherent rights, much less to destroy a contract made before the Act in question".[81] He would have allowed the appeal.

Mr. Justice Duff, for his part, was prepared to assume that the *Japanese Treaty Act* did make the June 1902 order in council inoperative. But it did not follow that the licensee was entitled to have its licence renewed, for it had failed to observe a condition precedent of the licence, namely that it not employ Japanese and Chinese on its timber lands.[82]

In the most succinct of reasons, Mr. Justice Anglin explained that the licensee's claim was bound to fail whether the discriminatory provision in the licence was valid or not, for "[i]f the condition was good, the plaintiffs have no grievance; if it was bad, the licence I think fails with the result that the plaintiffs have no status as licensees".[83]

Mr. Justice Mignault, with whom Chief Justice Davies agreed, reached the same conclusion. He quoted *Anson's Law of Contract*:

> [w]here there is one promise made upon several considerations, some of which are bad and some good, the promise would seem to be void, for you cannot say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise.[84]

Thus, if the discriminatory clause in the licence were bad, the entire licence was bad and the company could not sustain or renew it. The constitutional issue did not require a decision.[85] The province's appeal was

81. *Ibid* at 473.
82. *Ibid* at 477-78.
83. *Ibid* at 478-79.
84. *Ibid* at 480.
85. Curiously, Brodeur J did not take part in this judgment, despite having heard and decided the companion appeal.

allowed and the injunction granted by the BC Supreme Court vacated.

V. The *Treaty Act* at the Privy Council

As a result of the Supreme Court of Canada's opinion in the reference, on 31 March 1922 the Governor-General in Council disallowed the *Validation Act*.[86] Meanwhile the timber company sought and was granted leave to appeal to the Judicial Committee of the Privy Council from *Brooks-Bidlake*. Local counsel were instructed. Sir Malcolm Macnaghten KC, later a judge in the King's Bench Division, appeared for the company together with Hugh Bischoff. The Attorney General of British Columbia was represented by Sir John Simon KC, a future Lord Chancellor, and Geoffrey Lawrence, later Lord Oaksey and the presiding judge at the International Military Tribunal at Nuremburg. In a judgment of 13 February 1923, Viscount Cave (with Viscount Haldane and Lords Dunedin, Shaw and Carson) dismissed the appeal.

Viscount Cave began with an account of the facts that included this unusual (and perfectly fair) remonstration of the BC legislature for enacting the *Validation Act* in the first place:

> It is not easy to understand why it was considered worth while to pass this enactment, for if (as the Court of Appeal had held) the stipulation was void as conflicting with Imperial or Dominion statutes, no provincial legislation could give it validity.[87]

Viscount Cave was also gently critical of the Supreme Court of Canada, observing that the result of its varied reasons in the reference was "to leave the law in some doubt".[88] Rather than attempt a clarification, however, Viscount Cave's reasons in *Brooks-Bidlake* sidestep the Japanese Treaty and its implementing Act, resolving the case instead on conventional federalism lines. Viscount Cave explained that while section 91(25) of the *BNA Act* reserves to Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons, "the Dominion

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86. See *Attorney-General of British Columbia v Attorney-General of Canada* [1923] 3 WWR 945 at 945 (headnote).
87. *Brooks-Bidlake & Whittall Ltd v Attorney General of British Columbia* [1923] AC 450 (PC) at 455 [*Brooks-Bidlake* (PC)].
88. *Ibid* at 456.

is not empowered by that section to regulate the management of the public property of the province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race".[89] His Lordship distinguished *Bryden* as being on the ground that the enactment there "was in truth devised to prevent Chinamen from earning their living in the province", whereas the present case more resembled *In re Provincial Fisheries*,[90] in which the Board held that Parliament's jurisdiction to legislate as to the sea coast and inland fisheries did not prevent the provinces from imposing their own conditions on fishing rights.[91] The licence having been found valid on this (fishy) basis, the only remaining question was whether the company had complied with its terms. Of course it never claimed to have done so; the company admitted having employed both Chinese and Japanese labour. The licence's stipulation against doing so having been broken, Viscount Cave concluded that the company could claim no right to renew the licence, endorsing Mr. Justice Brodeur's reasons in the court below.[92] The point raised on the *Japanese Treaty Act* did not, therefore, arise and their Lordships found it unnecessary to deal with it – for now.

An appeal to the Board from the Supreme Court of Canada's decision in the *Validation Act* reference came later in 1923.[93] This time Canadian counsel appeared. Newcombe KC argued the respondents' position with T. Mathew. The Attorney General of British Columbia, appellant, was represented by Sir John Simon KC and Mr. Lawrence (BC's counsel in *Brooks-Bidlake*) together with the attorney general himself, Farris KC. The Board consisted of Viscount Haldane and Lords Buckmaster, Atkinson, Shaw (also a judge in *Brooks-Bidlake*) and Sumner. Viscount Haldane delivered the judgment.

After reviewing the facts and litigation history, Viscount Haldane noted that the *Brooks-Bidlake* case had been brought on appeal to the

89. *Ibid* at 457.
90. (1896) 26 SCR 444.
91. *Brooks-Bidlake* (PC), *supra* note 87 at 457.
92. *Ibid* at 458.
93. I have been unable to determine why the two appeals were not heard together.

Privy Council but the Board had found no need to deal with the *Japanese Treaty Act* point as the appeal was resolved on the basis of the company's licence having been breached. "On the present occasion", Viscount Haldane explained, "a wholly different question presents itself",[94] namely the constitutionality of the *Validation Act* generally. On this point their Lordships "entertain no doubt [that] … the provincial statute violated the principle laid down in" the *Japanese Treaty Act* and:

> if re-enacted in any form will have … to be re-enacted in terms which do not strike at the principle in the Treaty that the subjects of the Emperor of Japan are to be in all that relates to their industries and callings in all respects on the same footing as the subjects or citizens of the most favoured nation.[95]

In conclusion, Viscount Haldane suggested that it "may not be necessary to enact [the *Validation Act*] in a fresh form" but reiterated that "if this is to be done it may be possible so to redraft it as to exclude from the operation of its principle all subjects of the Japanese Emperor and also to avoid the risk of conflict with sec. 91 (25) of *The B.N.A. Act*".[96]

VI. Conclusion

Aside from its historical interest as a chapter in British Columbia race relations, the *Japanese Treaty Act* litigation is important as an early instance of Canada's international obligations being invoked by litigants to challenge domestic law. However unfamiliar the subject matter today, the legal and constitutional questions raised, directly or indirectly, in these cases remain relevant: What use can be made of an international agreement in domestic proceedings? What are the implications of such agreements for Canadian federalism? Why do such agreements require implementation by legislation, and what are the domestic effects of such implementing laws? How should courts balance the location of the treaty-making power in the Crown (whether imperial, as then, or federal, as today) with the self-government rights of provincial jurisdictions? How do treaty-making entities (the imperial government at the time, the

94. *Attorney-General of British Columbia v Attorney-General of Canada* [1924] AC 203 (PC) at 211.
95. *Ibid* at 212.
96. *Ibid.*

federal government today) avoid incurring responsibility for breaches of international law by provincial executives and legislatures? All of these questions are raised, and in some respects left unanswered, in the *Japanese Treaty Act* cases.

While the outcome of the *Japanese Treaty Act* litigation was ultimately a victory (however partial) for those opposing BC's discriminatory labour practices, it certainly did not bring about racial harmony in the province. The result only applied to Japanese in BC, there being no Britain-China friendship treaty for Chinese nationals to rely on against BC's discriminatory laws. Even for the Japanese, the litigation was at best a minor advance. In particular, it did nothing to prevent the internment of Japanese nationals and Canadians of Japanese descent during the Second World War. Despite this brief setback to its discriminatory policy, the governments of British Columbia and Canada continued, in the euphemistic words of Duff J, to "[make] provision for settlement by a suitable population" in British Columbia for many years to come.