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Conflicting Decisions:
Why the Privy Council Drifted from Precedent in Deciding *Cunningham v Homma*

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1: Introduction

The Japanese have a long and storied history in British Columbia. By all accounts, Manzo Nagano was the first Japanese immigrant to permanently settle in Canada back in 1877. Throughout the late 19th and early 20th centuries, thousands moved to the west coast of Canada to work, primarily in the fishing, farming, mining, and lumber industries. Today, Canada is home to more than 120,000 Japanese-Canadians, over 50,000 of whom reside on the west coast. Of course, this history is also fraught with racism, which reached its zenith with the war-time internment of 21,000 Japanese in British Columbia between 1942 and 1949, and the possession and forced sale of much of their personal and business property. Ironically, during this period of internment, the Japanese also earned the unencumbered right to vote for the first time.

This paper will explore an early case study of Japanese attempts to gain the right to vote, *Cunningham v Homma*, which touches upon a lesser-known history of the Japanese in Canada. This case involved Tomekichi Homma who in 1900 challenged BC's *Provincial Elections Act*, which stripped Japanese of the right to vote in provincial elections. Homma was successful both at the BC County Court and the BC Supreme Court largely because of a Privy Council precedent, *Union Colliery v Bryden*, which restricted the power of provinces to legislate on issues affecting naturalized immigrants in BC, and solidified that jurisdiction in that area was squarely vested in the federal government, who had passed legislation granting franchise to naturalized immigrants. But the Privy Council, in a four-page decision, struck down Homma's claim, ruled that BC could restrict voting rights based on racial status, and in doing so departed from their own reasoning in *Union Colliery* a mere three years prior.

The purpose of this paper is to suggest that there may have been non-legal factors which influenced the Privy Council's choice to depart from the *Union Colliery* precedent in *Cunningham*

v Homma. To do so, the paper will first look at BC's restrictions on Japanese franchise, trace the history of *Cunningham v Homma* through all levels of court, and explain the Privy Council's stated reasoning in overturning the rulings of the lower courts. Second, the reasoning and history behind the *Union Colliery* case will be examined in order to demonstrate that it was, or should have been, influential in the *Homma* decision. Third, the paper will posit some explanations for why the Privy Council decided to depart from the precedent set in *Union Colliery*. This will include both an analysis of the decentralist tendencies of the Privy Council on Canadian constitutional matters in this era and its inherent limitations as a body for final appeal for the entirety of the British Empire, as well as an undertaking into how the perceptions of the social and economic positions of Chinese and Japanese immigrants may have impacted the outcomes of *Homma* and *Union Colliery*, respectively. In doing so, we might uncover some nuggets of historical interest regarding Tomey Homma's fight for franchise, learn about the implications of Canada's use of the Privy Council as a court of final appeal, and gain some insight into the politics of race and belonging for Asian individuals in BC at the turn of the 20th century.

2: *Homma* through the Courts

Less than two decades after the first Japanese immigrant landed in British Columbia, the province eliminated the franchise of all individuals of Japanese descent. An 1895 amendment to the *Provincial Elections Act* stated that "No Chinaman [sic], Japanese or Indian shall have his name placed on the register of voters for the electoral district, or be entitled to vote at any election."[1] This restriction applied both to naturalized immigrants as well as children of Japanese descent born within Canada.[2] Chinese and Indigenous men had been denied voting rights since

1875 – the Japanese, only 130 of whom existed as naturalized immigrants in the province at this time,[3] were just the latest to be stripped of their voting rights by British Columbia's white majority.

Tomekichi Homma, his name often anglicized as Tommy, was born in Japan in 1865. He immigrated to British Columbia in the mid-1880s and worked as a fisherman and community leader, with a prominent role as organizer and chairman of the Gyosha Dantai, the Japanese Fishermen's Association in the province.[4] Homma was also involved in creating *Dai Nippon*, a Japanese newspaper for new Japanese immigrants in Canada, as well as forming an organization focused on protecting the rights and dignity of Japanese-Canadians.[5] Homma became a naturalized British subject by 1896 and moved to Vancouver the year after.[6]

On October 19, 1900, Homma applied to the collector of voters in Vancouver, Thomas Cunningham, to have his name put on the voter registry. Homma was not ignorant of the provincial restriction of Japanese voter rights – this was a direct challenge to the legislation which denied Homma his franchise, and part of a coordinated effort by the Japanese immigrant population in British Columbia to try and overturn the discriminatory legislation.[7] Indeed, Homma's community rallied behind him to help pay the legal fees for what would become a defining test case of section 8 of the *Provincial Elections Act*. [8] Thomas Cunningham was not swayed by Homma's cause, telling a reporter he would "rather go to jail than add a single Chinese or Japanese name to the voters list" he was responsible for preparing.[9]

Little more than one month later, the question of section 8 of the *Provincial Elections Act*'s validity was put before the BC County Court.[10] Homma was represented by RW Harris, partner at a local Vancouver firm which seems to have dealt primarily with corporate and commercial litigation.[11] Harris submitted to Chief Justice McColl that section 8 of the *Provincial Elections Act* was *ultra vires* the province, and relied upon the recent Privy Council decision of *Union Colliery*

Company of British Columbia v Bryden.[12] Counsel for the Vancouver Collector of Voters argued that the *Elections Act* was *intra vires* the province because it touched on a matter of "purely local concern," alluding to the jurisdiction granted to the provinces under section 92(16) of the Constitution.[13]

Ultimately, Chief Justice McColl sided with Homma and found the legislation *ultra vires* the province. The Privy Council precedent in *Union Colliery* bound McColl CJ to find that Parliament, the Dominion government at the time, has jurisdiction over naturalization and aliens, had legislated in that area with the *Naturalization Act*, and that the province was thereby precluded from passing legislation impinging upon the rights of naturalized Japanese immigrants.[14] In obiter, McColl CJ offered the following statement:

> …the residence within the Province of large numbers of persons, British subjects in name, but doomed to perpetual exclusion from any part in the passage of legislation affecting their property and civil rights would surely not be to the advantage of Canada, *and might even become a source of national danger*.[15]

On first blush, one might read this statement as supporting Homma's case, ideating that it might not be good for the nation to restrict Japanese-Canadians from voting, running for office, or engaging with the passing of legislation which has a direct effect upon them. But McColl CJ also made it clear in his decision that, had *Union Colliery* not been binding, he would have agreed to uphold the provincial restrictions on racial disenfranchisement.[16] The fact McColl CJ opines that denying racialized men the vote might become a source of national danger while also expressing reluctance at overturning that legislation which restricts their franchise perhaps suggests that the "danger" he envisioned is not the *Provincial Elections Act* itself, but rather the very existence of non-white, disenfranchised minorities in the province. On the other hand, McColl CJ was a justice

who was quite removed from politics and served exclusively as a lawyer and jurist before being appointed to the bench.[17] This was rather unusual– most BC judges at this time were "almost without exception men who had been active in the political life of the province."[18] Perhaps it was purely his efforts of legal analysis, and not any personal or political leanings, which spurred his reluctance to side with Homma here. But MColl CJ's statement does set the stage for the xenophobia, sometimes thinly veiled and sometimes shockingly explicit, which plagues the history of this case.

The County Court's decision was unsurprisingly appealed, and the case came before the BC Supreme Court on March 8, 1901. Here, we begin to see the judiciary's general penchant for focusing on the question of legislative jurisdiction in this case, rather than tackling the difficult social and racial questions involved. Walkem J submits that the issue at hand is "undoubtedly one of great constitutional importance" but is solely dependent upon the division of powers inscribed by sections 91 and 92 of the British North America Act.[19]

In dissent, Walkem J of the BC Supreme Court described franchise not as an inherent right which might be owed to naturalized Japanese, but a privilege which the provincial legislature can regulate and make conditional on factors like race. He reasoned that naturalized Japanese are not the only ones in the province who cannot vote, including judges of the Supreme and County Courts, Sheriffs, officers in the army and navy, and employees of the provincial government earning over $300 per year.[20] Walkem J:

> No reason is assigned for their disenfranchisement [referring to the above classes of individuals], nor is any needed in view of the well-understood constitutional rule that what a Legislature does is presumed to have been done in the best interests of the community it represents. It is manifest that these observations equally apply to the disenfranchisement of the naturalized Chinese and Japanese.[21]

His argument touches, like McColl CJ's did, upon the rights of provinces to legislate on matters of purely local concern, and suggests that because the province has disallowed certain classes of individuals in professional categories from voting, apparently in the "best interests of the community", so too should the rule apply to disenfranchising Japanese and Chinese individuals. He fails to mention that franchise restrictions on judges, Sheriffs, officers, and government employees would only apply while individuals chose to remain in those positions; Japanese, on the other hand, could not choose to stop being a part of a disenfranchised class, especially as the *Provincial Elections Act* restricted the franchise of Canadians of Japanese descent born in the province. Despite Walkem J's line of reasoning, he concedes at the end of his dissent to the fact that his opinions on the matter are moot because *Union Colliery v Bryden*, then a recent Privy Council decision, bound the BC Supreme Court to disallow the appeal and find the legislation invalid.[22]

The majority opinion, written by Drake J, well explicates the constitutional reasoning undergirding the *Union Colliery* decision and why section 8 of the *Provincial Elections Act* was found *ultra vires* the province. Drake J confirms that, according to the ruling in *Union Colliery*, section 91(25) of the Constitution Act, which imbues the Dominion with jurisdiction over naturalization and aliens, fully encapsulates "the rights, privileges and disabilities of the class of Chinamen [sic] who are resident in the Provinces of Canada, and *a fortiori* Japanese."[23] Consequently, when a Japanese immigrant in BC becomes naturalized they necessarily become entitled to "all political and other rights" as natural-born British subjects are endowed with, pursuant to the federal government's *Naturalization Act*.[24] In other words, by completing the process to become naturalized, a Japanese immigrant becomes entitled to the same right to vote that white men born in Canada are entitled to because the Dominion, not the provinces, has

jurisdiction over naturalization and aliens per 91(25), and because *Union Colliery* broadly interpreted that "all matters" concerning naturalized persons falls under that power. The BC Supreme Court neatly ties up the jurisdictional question at the heart of *Homma*: "the Provincial Legislature should not treat [the federal *Naturalization Act*] as nugatory."[25] Following the lead of McColl CJ, they find the *Provincial Elections Act* to be *ultra vires* the province.

3: *Union Colliery v Bryden*

Before discussing the Privy Council's decision in Homma, which ends up reversing the BC County and Supreme Court decisions finding the *Provincial Elections Act ultra vires* the provincial legislature, and departs from its own precedent, it is worth discussing the *Union Colliery v Bryden* decision and what meant for *Homma*. The legislation at issue in *Union Colliery* was section 4 of the *Coal Mines Regulation Act,* passed by the BC legislature in 1890. It stated that:

> …no boy under the age of twelve years, and no woman or girl of any age, *and no Chinaman* [sic], shall be employed in or allowed to be for the purposes of employment in any mine to which the Act applies, below ground.[26]

An application for an injunction was brought by John Bryden, a shareholder in the Union Colliery Company, against that company because it had apparently been employing Chinese men to work underground in mines since 1890, in contravention of the law.[27] Bryden engaged themes of equality in his submissions, arguing that the *Coal Mines Act* "disabled Chinamen [sic] for the exercise of the ordinary right, preserved to all others, to earn their bread by their labour, for no other reason than that of their origin."[28] The case was not marred by the fact that Bryden was actually the brother-in-law of James Dunsmuir, the Union Colliery Company's owner, that the Privy Council found the suit was "collusive" and that, in reality, Union Colliery had not been

violating the *Coal Mines Regulation Act* by employing Chinese underground miners. Instead, the Privy Council focused on the validity of the law, specifically whether it fell under provincial jurisdiction under the category of property and civil rights per section 92(13) of the Constitution, or whether Parliament's section 91(25) power over naturalization and aliens was authoritative instead.[29]

The Privy Council found the legislation to be *ultra vires* the province. It found that the real "pith and substance" (the first iteration of this now well-established analytical tool for constitutional questions) of section 4 of the *Coal Mines Regulation Act* was that it affected aliens or naturalized subjects, which therefore trenched upon the exclusive authority of Parliament.[30] As will be explored further below, *Union Colliery* turned out to be a remarkable decision, one which defied conventional constitutional interpretation to provide a just outcome for marginalized Chinese labourers in BC. All things considered, *Union Colliery* could have been powerfully influential but, as well will see, it was more or less cast aside by the Privy Council in *Homma*.

4: *Homma* Before the Privy Council

On December 17, 1901, Homma's case came before the courts for the final time. The BC Supreme Court granted the province's request to bypass the Supreme Court of Canada and appeal the decision directly to the Privy Council.[31] The Council was asked to decide whether the voting rights of naturalized immigrants in BC are subject to Dominion jurisdiction, per section 91(25) of the Constitution and the precedent in *Union Colliery*, or whether the province was authorized to legislate in that area. The Privy Council decision made it clear the Lords were looking at the case in purely constitutional terms. Referring to solving the issues raised by section 8 of the *Provincial Elections Act*, Lord Halsbury expressed that:

> …in determining that question the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider.[32]

With that, the Lords make it clear that normative questions about the province's racial restrictions on voting would not factor into the final decision.

The Privy Council shut down Homma's challenge. It assessed that the County Court and BC Supreme Court should not have felt bound by Lord Watson's decision in *Union Colliery* because that case was decided on "totally different" grounds than Homma's.[33] They reinterpret the *Union Colliery* decision as finding that a piece of legislation is *ultra vires* provincial jurisdiction when it deprives individuals of the "ordinary rights of the inhabitants of British Columbia and… prohibit[s] their continued residence" because it "prohibit[s] their earning their living in that province."[34] This seems to depart from the more general finding by the Privy Council in *Union Colliery* that the *Coal Mines Regulation Act* was *ultra vires* the provincial government because it necessarily affected the rights and privileges of naturalized and alien Chinese individuals. Instead, Lord Halsbury, for the Council, distinguished *Union Colliery* from *Homma* by stating that the impugned legislation in the former case affected the "ordinary rights" of a province's residents, which includes the apparent "right" to reside in and earn a living in that province.[35] Voting, in contrast, is apparently not this same kind of ordinary right and is not protected as such. Lord Halsbury cites Lawrence's *Wheaton* to suggest that franchise rights can vary in a nation depending on local constitutions, and therefore that there cannot be "necessarily a right to the suffrage in all or any of the Provinces."[36]

Lord Halsbury continues to say that the Dominion does have jurisdiction over matters dealing with alienage or naturalization, but that the language of the Constitution:

> …does not purport to deal with the *consequences* of either alienage or naturalization… The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization, but the privileges attached to it, where these depend upon residence, are quite independent of nationality.[37]

The Privy Council here drastically narrows the scope of the Parliament's jurisdiction over naturalization and aliens in distinction from the trend set in *Union Colliery*. The result is that, despite the fact the federal government had the exclusive authority to legislate on matters of naturalization and aliens, per section 91(25) of the Constitution, and had explicitly extended all "rights, powers and privileges" like voting to naturalized aliens with the *Naturalization Act*,[38] the federal government was now prohibited from specifying the exact consequences that naturalization would confer. In other words, *Homma* rendered the federal jurisdiction over naturalization and aliens "nugatory", as the BC Supreme Court advised the provincial legislature should not have done, with the outcome that Parliament could not ensure provincial franchise for naturalized Canadians like Tomekichi Homma.

Lawrence's *Wheaton* is the only text that Lord Halsbury references in the entire four-page *Homma* decision. This in itself is a point of interest, considering *Wheaton* is an 1863 treatise written about American law, a peculiar source of authority for 20th century questions of Parliamentary versus provincial jurisdiction in Canadian constitutional law. Andrea Geiger-Adams suggests that the Privy Council, in relying upon *Wheaton* in *Homma,* "adopted an artifice that was both legally and logically unsound" both because it attempted to apply American constitutional law to the distinct structure of the Canadian constitutional system, and because the principle it sought to apply was applied improperly.[39] The passage of *Wheaton* the Privy Council cites states that although the power of naturalization is nominally under the authority of the federal

government in America, "its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws."[40] From this, the Privy Council gleans that local legislatures, not Parliament, should have the final say over who has the right to franchise. Critically, though, the Privy Council fails to mention that the United States constitutional structure was deeply affected by the relationship within the Union of slave and non-slave states prior to the Civil War, and that to maintain national unity the federal government ceded to state governments the power over granting or restriction citizenship.[41] In this, we see that the history and constitutional character of the United States was completely different from Canada's. Nevertheless, the Privy Council granted *Wheaton* extraordinary weight in justifying limiting Parliament's power over naturalization and aliens and expanding the power of the provinces to regulate voting rights. We see the artifice of the *Homma* decision begin to unravel.

The Privy Council not only cites Lawrence's *Wheaton* divorced from its historical context and fails to mention why it may be inapplicable to Canadian constitutional law, they also misinterpret the very principle which that text was purported to demonstrate. The Privy Council used *Wheaton* to conclude that since American states had the right to regulate citizenship, the Canadian Parliament should not be able infringe the provincial legislature's restrictions on franchise of naturalized Japanese individuals.[42] However, Lawrence's point here is that, at least in the context of the United States, any state-level qualifications on franchise have to apply equally to all classes of citizens, whether they are natural-born or naturalized, because if "individual States" could "disenfranchise naturalized citizens, the federal power over naturalization becomes a nullity."[43] In the same way, if the BC government could disenfranchise naturalized Japanese citizens like Tomekichi Homma under the *Provincial Elections Act*, then Parliament's exclusive legislative authority over naturalization and aliens per section 91(25) of the Constitution also

becomes nugatory; a nullity. In other words, the *Wheaton* principle would only apply in *Homma* if the BC legislature had tried to restrict the right of Japanese to become citizens; the text suggests that the provincial legislature should not be allowed to allow the vote for natural-born non-Japanese citizens and deny it for naturalized Japanese-Canadian citizens, because doing so would mean they were distinguishing voting rights within the same class. If the Privy Council accepted the actual principle in *Wheaton*, they must have concluded that the provinces lacked the constitutional authority to legislate in a way that strips naturalized Japanese Canadians of their right to vote. Lost in translating an 19th century American legal treatise, the Privy Council's misinterpretation of *Wheaton* stripped naturalized Japanese Canadians of the right to vote for decades to come.

5: Explaining the Privy Council's Departure from *Union Colliery*

Now that we have established the history and context behind the Privy Council's decision in *Cunningham v Homma* and demonstrated how that case departed from the principle set forward in *Union Colliery*, this paper will now seek to outline whether there were any non-legal factors which may have played a background role in the *Homma* decision. This section will posit that there is historical value in highlighting elements the Lords may have considered, besides those explicitly mentioned on paper, in order to help us understand why the Privy Council expanded Parliament's powers over naturalization and aliens in *Union Colliery*, but then narrowed them a mere three years later in *Homma*. It would be unnecessarily limiting to take any judicial decision at face value when there could be much more to uncover.[44]

This section will first look at the makeup of the Privy Council, its decentralist tendencies on questions of Canadian constitutional law, and its inherent limitations as a body of final appeal

for all in the British Empire. Then it will compare the Chinese and Japanese positions in BC's economy to suggest that the utility of Chinese labour to coal mine owners supported a favourable decision in *Union Colliery*, whereas the overrepresentation of Japanese fishermen supported a negative decision in *Homma*. In addition, this paper will explore how the public viewed the progression of the *Homma* case through the courts, contemporary ideas about Japanese franchise, and the rise of Japan as a global power at the time of the decision.

6: Features and Limitations of the Privy Council and its Lords

Given the record of the Privy Council on Canadian constitutional issues, perhaps *Homma* should be viewed as less surprising than *Union Colliery* is remarkable. When asked to weigh in on questions of sections 91 and 92 of the Constitution relating to the division of powers, the Privy Council "consistently established doctrine that favoured the provinces" and limited the scope of Parliament,[45] and *Homma* was certainly no exception. Indeed, the Council often found new forms of social regulation fell under provincial property and civil rights, rather than under the Parliament's "fill in the gaps" Peace, Order, and Good Governance clause.[46] Perhaps this should not be surprising, considering the fact Canada was developed specifically as a decentralized federal system,[47] but it does speak to the judicial current Lord Watson was pushing against when he sided in favour of Parliamentary jurisdiction in *Union Colliery*.

What can be made of the fact that in *Homma* the Privy Council, sitting in England, overruled two decisions made by the lower courts, far away in BC, who would have had much more local knowledge of the case and its context than the Lords did? At the turn of the 20th century, the British Empire ruled over 400 million people, around a quarter of the world's population, and the Privy Council was the court of final appeal for all of them.[48] Necessarily, they were challenged

with a wide variety of case types and "unique governmental arrangements" like the decentralized federal system in Canada.[49] Paul Mitchell described these challenges as the "difficulty of distance"[50] – the inherent limitations of one small body of five or so Lords sitting in London governing peoples from places far and wide; people and places, no doubt, many Lords never once visited or interacted with.

In 1828, prior to but in contemplation of the establishment of the Privy Council in 1833, Henry Brougham expressed these same concerns before the House of Commons. For one, he believed that a single judicial council would not be able to claim superior legal knowledge over appeals coming from so many different jurisdictions.[51] From a modern perspective, it is certainly unusual to see that the local decisions of the BC County and Supreme Courts, who sided with Homma, would be reversed by a body of English jurists. The concept itself seems misaligned with the very principle of decentralized federalism that the Privy Council sought to uphold so frequently. The Privy Council may have the legal authority to override BC court decisions, but Brougham's criticism of the Council's lack of technical expertise seems particularly salient in *Homma*, given the Lords' meagre four-page decision and dearth of jurisdictionally relevant precedent in their reasoning.

Another criticism Brougham levied at the concept of implementing the Privy Council was that decisions made by such a body would not be perceived as socially legitimate by those they impacted. As Mitchell posits, "it was not obviously plausible for the Privy Council to be claiming to be in touch" with the "needs and aspirations" of all of the societies in the British Empire."[52] Unfortunately, as will be explored further in this paper, it seems as though the outcome of the Lords' decision in *Homma* actually aligned quite well with contemporary public sentiment against Japanese people in Canada. So while the Privy Council was out of touch with BC society's needs

and aspirations as had been interpreted by the BC County and Supreme Courts, it may have been in line with the needs and aspirations of the public in general, and thereby not seen as socially illegitimate in this instance as Brougham had warned.

Perhaps Lord Watson stood as an exception to the Privy Council's difficulty with distance. Lord Haldane, who dominated Canadian constitutional appeals at the Privy Council from 1911 to 1928, said Watson "never failed to endeavour to interpret the law according to the spirit of the jurisprudence of the Colony from which the appeal came."[53] It is significant that Lord Watson was the one who wrote the decision in *Union Colliery*, the last of his lengthy nineteen year career on the Privy Council from 1880 to 1899.[54] He was typically known for deciding on Canadian constitutional questions with a decentralist lens, with outcomes that tended to favour the rights of the provinces to make legislation and limited the constitutional jurisdiction of Parliament.[55] In *Union Colliery*, Lord Watson changed tack. He invented and introduced the now famous "pith and substance" analysis to find that the *Coal Mines Regulation* was, at its core, aimed at affecting the rights of naturalized and alien Chinese individuals. In doing so, he denied the Union Colliery Company's assertion that the legislation was focused on the protection and safety of those working in mines who might suffer harm from underage boys, girls, or Chinese individuals, [56] and in doing so denied that the provincial legislation was constitutionally valid.

Canadian legal scholars have lauded this decision for upholding the human rights of Asian people in BC in this period. Walter Tarnopolsky referred to *Union Colliery* as one of the "good" human rights cases of the era, in notable opposition to the "bad" human rights cases like *Homma*.[57] According to Peter Hogg, Lord Watson's decision demonstrated that courts could introduce "egalitarian values into decisions reviewing the validity of statutes."[58] It is unclear whether Lord Watson was attempting to address the racial elements laden in the *Coal Mines Regulations* – as

seems typical of judicial decisions of this era, he makes clear that, so long as the provinces or Parliament are legislating within their scope of authority, "courts of law have no right whatever to enquire whether" that jurisdiction "has been exercised *wisely or not*."[59] Schneiderman argues, however, that bodies dealing with Canadian constitutional questions at this time simply did not concern themselves with the prospect of individual rights.[60] Indeed, if Lord Watson were trying to comment at all on the more humanitarian elements of *Union Colliery*, it is likely "they were subsumed under arguments" of the division of powers, rather than stated forthrightly.[61] Whether it was intentional or not, Lord Watson's decision in *Union Colliery* advanced the rights of Chinese underground miners in BC, and also convinced the lower courts in *Homma* that the *Provincial Elections Act's* restrictions on Japanese voting rights were constitutionally unacceptable. Lord Watson may have enjoyed a greater legacy as an advocate for the advancement of Asian rights in Canada had *Homma* adopted the rule from *Union Colliery.*

Indeed, the Privy Council has ventured into more humanitarian, less formalistic reasoning in a number of cases. Perhaps most notable was the 1929 *Edwards v Canada (AG)*, also known as the *Persons* case, which reversed the opinion of the Supreme Court of Canada to determine that women were to be included under the definition of "persons" in the British North America Act for the purpose of qualifying to be appointed to the Canadian Senate. Lord Sankey, the recently appointed "reform-minded" Lord Chancellor, proclaimed that the "exclusion of women from all public offices is a relic of days more barbarous than ours."[62] Such a pronouncement stands in stark contrast to the reserved qualifications of the Lords in *Homma* and *Union Colliery* who denied the courts had any role in judging the normative implications of the cases presented before them.[63] Unrestrained by any purely textual or originalist lens, Lord Sankey in *Persons* famously reinterpreted Canada's constitution as "a living tree capable of growth and expansion within its

natural limits" which is in a "continuous process of evolution."[64] The Privy Council, by 1929 at least, clearly did not feel as though they were limited to contemplating a case before them without any mention of the historical or social context of the issues involved.

But perhaps Lord Halsbury's line of reasoning in *Homma* is not entirely different from Lord Sankey's in *Persons*. Halsbury was famously willing to invoke his own reasoning and common sense when he believed it was appropriate and "his own judgments, when closely scrutinized, did not consistently accord with the principle of *stare decisis*."[65] In his own words in deciding *Quinn v Leathem*: "a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."[66] This is striking when considered in the context of his decision in *Homma* the following year, where he very quickly brushes aside the *Union Colliery* precedent that the lower courts had relied so heavily on, stating it "depended upon totally different grounds" and consequently could "have *no* relation" to Homma's case.[67] This paper has gone to lengths to establish that the issues in *Union Colliery* and *Homma* were not totally different; that the decision in the former should have had substantial influence over the analysis in the latter. Similar to how Lord Sankey in *Persons* employed broad-minded reasoning, previously unfounded in the law but right in his mind, Lord Halsbury felt it was more appropriate to insert his own reasoning and common sense in *Homma* rather than follow what precedent dictated should be the outcome.

Maybe if Lord Watson were still on the Privy Council in 1902 when *Homma* was decided he would have applied the *Union Colliery* reasoning expanded provincial franchise to naturalized Japanese in BC. Contemplating such counterfactuals and alternative histories is perhaps useful only to the extent it elucidates deeper themes about how the Privy Council made its decisions. At the end of the day, Lord Halsbury chose to exercise his discretion to depart from the decisions of

the lower courts of BC and from *Union Colliery* and instead employed constitutional interpretation that limited the federal government's scope over naturalized individuals and reversed the strides made in *Union Colliery.* It may have been arbitrary, but it is the decision we are left with, and the one the Japanese community was forced to live with.

The Chinese community in Saskatchewan also had to deal with the effects of the *Homma* decision with the 1914 Supreme Court of Canada decision in *Quong-Wing v The King.*[68] The legislation in question was Saskatchewan's *Act to Prevent the Employment of Female Labour in Certain Capacities* which made it a criminal offence for Chinese men to employ white women in that province.[69] Davies J, dismissing Quong-Wing's appeal, referenced Lord Watson's interpretation in *Union Colliery* of Parliament's exclusive authority over matters concerning the rights and privileges of naturalized Chinese residents in Canada pursuant to section 91(25) of the Constitution. He said *Union Colliery* would "afford a strong argument that the legislation now in question should be held *ultra vires*"; however, because of the Privy Council's later restriction of Parliament's authority in *Homma*, he dismissed the appeal and found the legislation to be subject to provincial jurisdiction over property and civil rights.[70] In *Quong-Wing* we see that *Homma* fundamentally shaped the trajectory of judicial reasoning of Canadian constitutional matters, resulting in the upholding of legislation which had detrimental impacts on Asian Canadians for decades to come.

7: Economic and Social Context of *Homma* and *Union Colliery*

Unlike as is typical in modern constitutional law decisions, neither *Homma* nor *Union Colliery* went into in-depth explorations of the economic or social circumstances undergirding the facts of those cases, or the potential ramifications that could result to the people involved. But

were the Lords entirely and perfectly unaffected by the contemporary opinions of their time, to the extent that any explicit and implicit biases they had did not seep into their decisions in one form or another? This section will operate under the assumption that judges and Lords cannot, and did not, make decisions divorced from the economic and social realities of their day. Historians have demonstrated that "strikingly arbitrary judicial reasoning" has been applied by courts in order to diffuse sensitive legal issues, such as those surrounding Canadian industry and its workers.[71] There is historical value in attempting to uncover whether the Privy Council, whether it said so explicitly or not, may have been swayed by the economic or social implications underlying the facts in *Union Colliery* and *Homma.*

8: Explaining *Union* Colliery: The Perception of Chinese in British Columbia

The importance of Chinese workers to BC's booming mining industry at the turn of the 20th century may have helped persuade Lord Watson to repeal the underground mining law and grant them the "ordinary rights" to live and work in the province. Jeremy Mouat described the history of the mining industry as one "that reflects the history of British Columbia as a whole."[72] After the depletion of California's deposits around 1858, miners flocked to Canada's west coast, sparking the Cariboo gold rush which drew people and industry to British Columbia.[73] The first significant wave of Chinese immigrants to British Columbia occurred in the 1860s, many encouraged by mining jobs and the resulting economic boom in the region.[74] By 1880, there were 4,383 Chinese in Canada, 4,350 of whom lived in British Columbia.[75] In 1901, only two years after *Union Colliery* was decided, the Chinese population jumped to 16,792 nationally, 14,376 of whom lived in British Columbia.[76] At that time, coal mining was "one of the chief industries" in

the province, with an output of nearly one million tons per year with a steady demand in domestic and foreign markets for the resource.[77]

The use of Chinese labour in BC mines aggravated tensions between white mine workers and mine owners, but was also vitally important to the industry. Robert Dunsmuir, father of James Dunsmuir, the mine-owner appellant in *Union Colliery v Bryden*, began hiring Chinese men in his Dunsmuir-Diggle Company mines by the early 1870s as a way to reduce labour costs.[78] Robert Dunsmuir was drawn to Chinese labour because he could get away with paying them fifty percent of the wages that white labourers demanded.[79] Dunsmuir stated that if it "were not for Chinese labor [sic], the business I am engaged in specially, coalmining, would be seriously retarded and curtailed" and went so far as to suggest that the industry would benefit if the provincial government were to grant franchise to all Chinese men, a radical stance at that time.[80] Mining companies in BC in the 1870s actually banded together to oppose any government infringement of their right to hire Chinese labour,[81] presumably due to the positive economic benefit gleaned from lower labour costs. It was actually white mine workers, possibly fearing loss of employment because their employers chose to use cheap Chinese labour, who led the charge against Chinese mine workers, lobbying as early as 1876 for their exclusion.[82] A strike at the Wellington Collieries, owned by Robert Dunsmuir, began in February 1877 over the issue of Chinese employment in the mines and lasted for four months.[83] Robert Dunsmuir hired Chinese workers as scabs throughout the strike, which eventually got so violent Dunsmuir resorted to sending in the militia to quash it.[84] Another disruption at the Wellington mines occurred in 1883 over the topic of miner wages, which forced Dunsmuir to promise that white workers would get the coveted mining positions, and the Chinese workers would be demoted to the lower-paid "helper" positions.[85] Still, Chinese men were centrally significant to the mining industry in BC, even after their legal restriction from working

underground;[86] by 1900, over 700 Chinese were employed in the major BC mines, making up over a quarter of the total workforce.[87]

The 1902 Royal Commission on Chinese and Japanese Immigration, published after *Union Colliery* was decided, was more dismissive towards the importance of Chinese labour to the BC mining industry. For one, the Report came to the conclusion that Chinese employment underground in mines was dangerous, citing an 1887 explosion at a Wellington Coal Company mine which prompted some BC mines to cease hiring Chinese labourers underground.[88] No evidence is presented to support the fact that a Chinese worker was a cause of that accident. Indeed, the stereotype that Chinese labourers were a danger to other workers was likely "more myth than fact", [89] repeated throughout both the Union Colliery Company's submissions in *Bryden* as well as in the Royal Commission's Report.[90] That Report continues to say that the employment of Chinese surface mine workers "excludes white labour" and "promotes idleness" in the youth and young men living near mine towns.[91] The Report fails to mention the potential causal connection between these two ideas: that white workers were disgruntled by mine owners undercutting them with cheaper Chinese workers, then blamed them for unsafe workplace behaviour in order to warrant their exclusion from the underground mining positions that they coveted. It is difficult to humour the argument that Chinese workers excluded white labour when the government had passed legislation specifically restricting them from working in mines, and even so, the Report makes an unfounded judgment that the employment of white labourers was inherently more valuable that the employment of the Chinese. While the Report concludes that "further restriction, or even exclusion, of Chinese labour will not cause any appreciable inconvenience or loss to [the coal mining] industry,"[92] it disregards the importance of Chinese labour to mine owners like Dunsmuir and to the industry in general, and overvalues the concerns of displaced white workers.

Unfortunately, the Privy Council's *Union Colliery* decision does not mention the historical context of Chinese workers in BC mines in any meaningful regard. There is a dearth of documentation surrounding the decision itself, which could have elucidated what, if any, thought the Lords put into the potential impact their decision might have on BC society. Lord Watson's invention of the pith and substance analysis specifically for *Union Colliery* perhaps indicates his desire to ensure that Chinese men could work underground at the mines, whether out of sympathy for the men themselves, to promote the mining industry and its benefits to the BC economy, or for the business interests of the mine owners. But it is also clear that the employment of cheaper Chinese labour in mines was socially divisive, prompting white workers to strike on a number of occasions, despite the fact the Royal Commission found that Chinese mine workers were not even critical to the coal mining industry in the first place.

9: Explaining *Homma*: The Perception of Japanese in British Columbia

How may have the Lords viewed the place of Japanese in BC at this time? The Lords provided no explicit account of the place and position of Japanese people in BC's society and economy at this time. The Royal Commission's Report on Chinese and Japanese Immigration would have been released by the date of the *Homma* decision, and although it is unclear whether any of the Lords consulted that document it seems likely they would have had such a resource at their disposal.

If the Lords had glanced at that report, they would have gleaned from it a palpable sense that the Japanese were a threat to BC's economy. Unlike the Chinese, who to coal mine owners filled a convenient niche as low wage workers and strike breakers, the Japanese were relatively uninvolved in the coal mining industry in the early 1900s. Only around 100 Japanese worked in

the primary mines in BC around 1900, one-seventh the number of Chinese in that field,[93] despite having a population roughly one-third their size.[94] The Japanese were also only marginally involved in the BC lumber industry. The largest BC lumber mill at the turn of the 20th century, Victoria Manufacturing Company, employed only 56 Japanese men, alongside 56 Chinese and 58 white men,[95] and the Moodyville Sawmill Company employed only another 40 Japanese men.[96]

The fishing industry is where Japanese workers had the most impact. Considering there were only around 4,500 Japanese in BC in this period,[97] it is quite remarkable that they were granted 1,958 fishing licenses in 1901;[98] at that time, 43% of the Japanese population would have had a fishing license, and they would have held over 41% of all available fishing licenses issued for that year.

The overrepresentation of Japanese in the BC fishing industry did not go unnoticed. Indeed, the Royal Commission's Report called its section on this topic "Too Many Fishermen On the River",[99] a title which is nonsensical on its face – how could there be "too many" fishermen when the government regulates how many fishing licenses will be issued each year? But, of course, the implication here is that too many fishermen of Japanese descent are fishing BC rivers, peeling away the scarce fish and fishing licenses away from the white majority. The Commission establishes that "white fishermen are being forced out of this industry and that Japanese are taking their places,"[100] a conclusion which echoes their earlier concern about Chinese mine workers displacing local young white men and boys. In particular, the Commission is critical of the fact that "numbers of them" return back to Japan when the fishing season ends, while the rest are "thrown upon the labour market to find employment where they can, to the great detriment of the white working man and the incoming settler."[101] Here there is a palpable undertone of fear regarding the economic displacement and replacement of white workers, and even of other

immigrants who the Commission seems to grant greater value to than the Japanese. No quantitative evidence is proffered to establish the fact the Japanese were disrupting the labour market, nor is anything raised to support the claim that fishing licenses granted to Japanese were "in very many cases" obtained through "irregularities, if not actual fraud."[102] While mine owners like Robert Dunsmuir saw the belonging and inclusion of Chinese workers in BC as a potential economic boon, they were no such figures defending the Japanese in the Commission's report, possibly because that industry offered individuals like Tomey Homma an opportunity to be self-employed. Perhaps Japanese independence and success in the BC fishing industry worked to their detriment in *Cunningham v Homma*.

The Lords may also have been aware of the notoriety surrounding *Homma* as it progressed its way through the courts. After Homma was successful at the County Court level, the *Victoria Daily Colonist* warned against allowing naturalized "Orientals" or "Mongolians" to vote, particularly because they felt that many obtained their naturalization status through fraudulent means as a route to obtaining a fishing license.[103] Even the Attorney General of BC at this time, D.M. Eberts, who would later gain public interested standing on Cunningham's side of the *Homma* case, suggested that if the County Court's decision was not overturned, granting the ability of 12,000 Japanese and Chinese men to vote, when they would make up roughly 10% of BC's total population, would seriously threaten the control of the white majority in the province.[104] They could "never be assimilated with our population" and lacked any genuine interest in the province,[105] according to Eberts. The *Vancouver Daily Province* expressed a similar opinion, that even if the Japanese were granted the right to vote, very few really cared about exercising that right and few would.[106] Of course, the fact that Homma and the Japanese community writ large rallied to pursue this challenge to the *Provincial Elections Act*, absorbing the consequent cost and

public scrutiny, seems to dispel assertions that the Japanese had no desire to vote. Of course, the Lords in *Homma* made no mention of this public scrutiny of the potential for Japanese and Chinese franchise in BC society at the time, and perhaps it would have been unprofessional to do so. But there is no doubt that the public notoriety following the case would have weighed, to some degree, on the Lords in deciding *Homma*.

Japan, at this time, was also rapidly developing into a global power. The country was revolutionized by the 1868 Meiji Restoration in several ways, but most notable of which was the modernization of its army and in particular its military victory over China in the 1894-95 Sino-Japanese War.[107] Historians describe the 115,000 officer-strong Japanese force as "unequally matched" against the Chinese, "of European quality," and even one which was "still uncontrolled by European and Americans."[108] Whether the last point is true is debatable, given the fact the British were rather involved in training the Japanese army for the Sino-Japanese conflict.[109] And while Russia, France, and Germany sided with China, demanding that Japan stay away from Manchuria and advising them to give up the conquered Liao-Tung Peninsula,[110] Great Britain chose to ally with Japan, signing the Anglo-Japanese Alliance in January 1902 in the event of war in the Far East.[111] And of course, Japan and England would both be members of the Allied Powers a little over a decade later in the First World War.

We cannot make any definitive connections between the rise of Japan as a military power, and England's relationship with them, and the Privy Council's decision to allow the exclusion of Japanese franchise in *Homma*: perhaps the Lords completely ignored and were entirely uninfluenced by the geopolitics of their day; maybe they were sympathetic to the plight of their new Japanese allies in BC but did not let that affect their reasoning; or maybe they were wary of the rise of Japan and were threatened by their immigration into the British Empire. We should be

aware of the temporal confluence of Japan's rise as a global power, the rise in Japanese immigration to BC, and the *Homma* case, whether the Privy Council took notice or not, for the very fact that cases and issues do not arise in a vacuum, and that only by looking at the constellation of social and economic factors at this time can be begin to understand the full context of the *Homma* decision.

10: Concluding Remarks

This paper detailed the progress of *Cunningham v Homma* through the courts with particular emphasis on the Privy Council's questionable departure from the *Union Colliery* precedent. It explored the dearth of legal reasoning in restricting Parliament's authority over naturalization and aliens and sought to discover what non-legal explanations could have influenced the Privy Council instead. The decentralist tendency of Privy Council decisions on Canadian constitutional issues in this era was examined, and this paper raised some of the inherent limitations of that body acting as the court of final appeal for 400 million people from all corners of the globe. *Union Colliery* stood out for its expansion of the federal power over naturalization and aliens, which was reversed by the Privy Council in *Homma,* which directed the Supreme Court of Canada's decision in *Quong-Wing*. Perhaps we should not have expected the humanitarian lightning to strike twice in a row. This paper then underwent an analysis of the importance of Chinese workers to BC's coal mining economy in the late 19th and early 20th centuries, and the influence this may have had on the Lords' decision in *Union Colliery* to support the "ordinary rights" of Chinese men to work and live in the province. In contrast, the Lords in *Homma* may have been influenced by the perceived threat of the Japanese to the local fishing industry, the widespread publicity of *Homma* at the County Court level and the media's hazards against granting

Asian-Canadians provincial franchise, and the rise of Japan as a military power. There can be no definitive conclusion to the question of why the Lords decided *Homma* the way they did. But by exploring the history of the case, of the Privy Council, and by examining how Chinese and Japanese immigrants were positioned in BC around the early 1900s, I hope this paper was able to provide some depth and context to *Cunningham v Homma*, the history of the Privy Council, and the history of anti-Asian racism in this country.

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