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

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

This paper highlights the structural barriers to voting rights that Japanese-Canadians in BC faced in the early 20th century. It documents Tomekichi Homma's challenge of provincial legislation which prevented the Japanese from voting in local elections. His fight went to the Judicial Committee of the Privy Council, then the highest court of appeal in Canada. While Homma challenged the law because it denied voting rights based on racial grounds, the courts made little to no reference to race or ethnicity in hearing the issue; their focus was on questions of constitutionality and the division of powers. The Privy Council employed questionable legal reasoning in dismissing Homma's appeal, and departed from a recent precedent of theirs, Union Colliery*, which promoted the employment rights of Chinese-Canadians in BC. This paper attempts to understand and explain why* Homma *was not successful before the Privy Council in the face of the* Union Colliery *decision.*

Cet article met en lumière les obstacles structurels au droit de vote auxquels les Canadiens d'origine japonaise ont été confrontés en Colombie-Britannique au début du XXe siècle. Il documente la contestation par Tomekichi Homma de la législation provinciale qui empêchait les Japonais de voter aux élections locales. Son combat a été porté devant le comité judiciaire du Conseil privé, qui était alors la plus haute cour d'appel du Canada. Bien que Homma ait contesté la loi parce qu'elle refusait le droit de vote pour des motifs raciaux, les tribunaux n'ont guère fait référence à la race ou à l'appartenance ethnique lors de l'examen de la question; ils se sont concentrés sur les questions de constitutionnalité et de répartition des pouvoirs. Le Conseil privé a utilisé un raisonnement juridique discutable pour rejeter l'appel de Homma et s'est écarté d'un de ses précédents récents, Union Colliery*, qui a promu les droits à l'emploi des Sino-Canadiens en Colombie-Britannique. Cet article tente de comprendre et d'expliquer pourquoi* Homma *n'a pas eu gain de cause devant le Conseil privé, compte tenu de la décision de* Union Colliery.

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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 fraught with racism, which reached its zenith upon the war-time internment of 21,000 Japanese in British Columbia between 1942 and 1949, and the dispossession and forced sale of much of their personal and business property. Ironically, during this period of internment, the Japanese earned, for the first time, the unencumbered right to vote.

This paper will explore an early case of Japanese-Canadian attempts to gain the right to vote, *Cunningham v Homma*. 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 held that jurisdiction in that area was squarely vested in the federal government, which had already

passed legislation granting franchise to naturalized immigrants. But the Privy Council, in a four-page decision, struck down Homma's claim and ruled that BC could restrict voting rights based on racial status. In doing so, the Privy Council departed from their own reasoning in *Union Colliery* decided a mere three years earlier.

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 deciding *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 perceptions of the social and economic positions of Chinese and Japanese immigrants may have impacted the outcomes in *Homma* and *Union Colliery,* respectively. In doing so, we uncover some nuggets of historical interest regarding Tomekichi 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.

I. 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

1. James W St G Walker, *Race, Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo: Wilfrid Laurier University Press, 1997) at 76; *Provincial Elections Act Amendment Act*, SBC 1895, c 20, s 8.

2. Andrea Geiger-Adams, "Writing Racial Barriers into Law: Upholding BC's Denial of the Vote to Its Japanese Canadian Citizens, Homma v Cunningham, 1902" in Louis Fiset & Gail M Nomura, eds, *Nikkei in the Pacific Northwest* (Seattle: University of Washington Press, 2005) 20 at 21.

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, were just the latest to be stripped of their voting rights by British Columbia's white majority.[3]

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 19 October 19 1900, Homma applied to Thomas Cunningham, the collector of voters in Vancouver, to have his name put on the voter registry. Homma was not ignorant of the provincial restriction of Japanese voting 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 and helped 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" that he was responsible for preparing.[9]

Little more than a 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 matters.[11] Harris submitted to Chief Justice McColl that section

3. *Ibid.*
4. *Ibid at* 22-23.
5. *Ibid*.
6. John Price & Grace Eiko Thomson, "Remembering BC civil rights leader Tomekichi Homma," *The Georgia Straight* (8 December 2017), online: <www.straight.com> [perma.cc/89KF-GVYR].
7. Geiger-Adams, *supra* note 2 at 21-22.
8. *Ibid* at 23.
9. *Ibid* at 24.
10. *Vancouver (City) Collector of Voters v Homma*, 1900 CarswellBC 72, 7 BCR 368 (BCSC) [*Homma* 1900].
11. *Archibald v McNerhanie,* 1899 CarswellBC 24, 29 SCR 564 (SCC); The Global Civic Policy Society, "Council Excludes Street Light Near Catholic Church—11 October 1897," online: <transcribimus.ca/oct-11-1897/> [perma.cc/27V2-3WCH].

8 of the *Provincial Elections Act* was ultra vires the province; he relied upon the recent Privy Council decision of *Union Colliery 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, had jurisdiction over naturalization and aliens and, because the Dominion government had previously legislated in that area with the *Naturalization Act*, the province was 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] [Emphasis added]

On first blush, one might read this statement as supporting Homma's case, ideating that it might not benefit 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. However, McColl CJ also made it clear elsewhere 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 opined that denying racialized men the vote might become a source of national danger while also expressing a reluctance to overturn the very legislation which restricted their franchise suggests that the "danger" he envisioned was not the *Provincial Elections Act* itself, but rather the existence of non-white, disenfranchised minorities in the province. Regardless of his intent, McColl CJ's statement set the stage for the xenophobia, sometimes thinly veiled and sometimes shockingly explicit, which plagues the history of this case.

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12. *Homma* 1900, *supra* note 11 at para 3; *Union Colliery Co of British Columbia v Bryden*, 1899 CarswellBC 13, [1899] AC 580 (JCPC) [*Union Colliery*].
13. *Homma* 1900, *supra* note 11 at para 4; *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 92(16).
14. *Homma* 1900, *supra* note 11 at paras 3-5.
15. *Ibid* at para 4 [emphasis added].
16. *Ibid* at para 5.

The County Court's decision was appealed, unsurprisingly, and the case came before the BC Supreme Court on 8 March 1901. Here, we begin to see the judiciary's penchant for focusing on the question of legislative jurisdiction, rather than tackling the difficult social and racial questions undergirding Homma's challenge. Walkem J submitted that the issue at hand is "undoubtedly one of great constitutional importance" but as solely dependent upon the division of powers inscribed by sections 91 and 92 of the *British North America Act*.[17]

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 could regulate and make conditional upon factors like race. He reasoned that naturalized Japanese were not the only ones in the province who could not vote; similarly disenfranchised were 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.[18] Walkem J, in discussing the classes of individuals above, stated:

> No reason is assigned for their disenfranchisement, 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.[19] [Emphasis added]

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 had 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 failed 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 Japanese-Canadians based on ancestry, not just country of birth. 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

17. *Reference Re Provincial Elections Act* and *Reference Re Tomey Homma, A Japanese*, 1901 CarswellBC 36 at para 4, 8 BCR 76 [*Homma* 1901].
18. *Ibid* at para 9.
19. *Ibid*.

Council decision, bound the BC Supreme Court to disallow the appeal and find the legislation invalid.[20]

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 confirmed that, according to the ruling in *Union Colliery*, section 91(25) of the *Constitution Act*, which imbued the Dominion with jurisdiction over naturalization and aliens, fully encapsulated "the rights, privileges and disabilities of the class of Chinamen [sic] who are resident in the Provinces of Canada, and a fortiori Japanese."[21] Consequently, when a Japanese immigrant in BC became naturalized they necessarily became entitled to "all political and other rights" as natural-born British subjects are endowed with, pursuant to the federal government's *Naturalization Act.*[22] In other words, by completing the process to become naturalized, a Japanese immigrant became entitled to the same right to vote that white men born in Canada were entitled to because the Dominion, not the provinces, had jurisdiction over naturalization and aliens per section 91(25), and because *Union Colliery* broadly interpreted that "all matters" concerning naturalized persons fell under that power. The BC Supreme Court neatly tied up the jurisdictional question at the heart of *Homma:* "the Provincial Legislature should not treat [the federal *Naturalization Act*] as nugatory."[23] Following the lead of McColl CJ, they found the *Provincial Elections Act* to be ultra vires the province.

II. Union Colliery v Bryden

Before discussing the Privy Council's decision in *Homma*, which ended up departing from its own precedent and reversing the BC County and Supreme Court decisions that had found the *Provincial Elections Act* ultra vires the provincial legislature, it is worth discussing the *Union Colliery v Bryden* decision and what it 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.[24] [Emphasis added]

20. *Ibid* at para 11.
21. *Ibid* at para 18.
22. *Ibid* at paras 18-19.
23. *Ibid* at para 20.
24. *Union Colliery, supra* note 13 at para 2.

An application for an injunction was brought by John Bryden, a shareholder in the Union Colliery Company, against the company because it had apparently been employing Chinese men to work underground in mines since 1890 in contravention of the law.[25] Bryden engaged themes of equality in his submissions, arguing that the *Coal Mines Regulation 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."[26] 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 in section 92(13) of the Constitution, or whether Parliament's section 91(25) power over naturalization and aliens was authoritative instead.[27]

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 interpretation) 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.[28] As will be explored further below, *Union Colliery* turned out to be a remarkable decision as 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; in reality, it was cast aside by the Privy Council's later decision in *Homma.*

III. 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.[29] The Council was asked to decide whether the voting rights of naturalized immigrants in BC were 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

25. Walker, *supra* note 1 at 75-76.
26. *Ibid*.
27. *Union Colliery, supra* note 13 at para 12.
28. *Ibid* at para 13.
29. Geiger-Adams, *supra* note 2 at 27.

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.[30]

With that, the Lords made it clear that normative considerations about the province's racial restrictions on voting would not factor into the Privy Council's decision.

Ultimately, 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.[31] It reinterpreted 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."[32] 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.[33] Voting, in contrast, was apparently not this same kind of ordinary right and was not protected as such. Lord Halsbury cited 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."[34]

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:

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30. *Cunningham v Homma*, 1902 CarswellBC 117 at para 2, [1903] AC 151 (JCPC) [*Homma*].
31. *Ibid* at para 6.
32. Lindsay Ferguson, "Constructing and Containing the Chinese Male: 'Quong Wing v The King' and the 'Saskatchewan Act to Prevent the Employment of Female Labour'" (2002) 65 Sask L Rev 549 at 563.
33. *Homma, supra* note 33 at para 6.
34. *Ibid* at para 4.

> …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.[35] [Emphasis added]

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 was that, despite the fact the federal government had the exclusive authority to legislate on matters of naturalization and aliens under section 91(25) of the Constitution and had explicitly extended all "rights, powers and privileges", including voting, to naturalized aliens with the *Naturalization Act*, the federal government was now prohibited from specifying the exact consequences that naturalization would confer.[36] 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 being that Parliament could not ensure provincial franchise for naturalized Canadians.

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.[37] 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."[38] 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

35. *Ibid* at para 5 [emphasis added].
36. Geiger-Adams, *supra* note 2 at 30.
37. *Ibid*.
38. *Homma, supra* note 33 at para 4.

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 restricting citizenship.[39] 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, it also misinterprets 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.[40] 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."[41] 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 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.

39. Geiger-Adams, *supra* note 2 at 30.
40. *Homma, supra* note 33 at para 4.
41. Geiger-Adams, *supra* note 2 at 30.

IV. *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.[42]

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.

1. *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, and *Homma* was certainly no exception.[43] 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.[44] Perhaps this should not be surprising, considering the fact Canada was developed

42. Eric M Adams, "Errors of Fact and Law: Race, Space, and Hockey in 'Christie v York'" (2012) 62:4 UTLJ 463.

43. Peter W Hogg, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005) 38:2 UBC L Rev 329 at 339.

44. *Ibid* at 340.

specifically as a decentralized federal system,[45] 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, which 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 them all.[46] Necessarily, it was challenged with a wide variety of case types and "unique governmental arrangements" like the decentralized federal system in Canada.[47] Paul Mitchell described these challenges as the "difficulty of distance."[48] This phrase acknowledges 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 rarely if ever 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.[49] 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 had 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 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

45. *Ibid* at 344.
46. The National Archives (Government of the United Kingdom), "Events of 1901," online: <www.nationalarchives.gov.uk> [perma.cc/6H6F-KQWU].
47. Paul Mitchell, "The Privy Council and the Difficulty of Distance" (2016) 36:1 Oxford J Leg Stud 26 at 28.
48. *Ibid*.
49. *Ibid*.

aspirations" of all of the societies in the British Empire.[50] 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."[51] 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 between 1880 to 1899.[52] 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.[53] 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 Act* 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, and in doing so denied that the provincial legislation was constitutionally valid.[54]

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.*[55] According to Peter Hogg, Lord Watson's decision demonstrated that courts could introduce "egalitarian values into decisions reviewing the validity of

50. *Ibid* at 28-29.
51. *Ibid* at 30. See also Hogg, *supra* note 46 at 341.
52. Hogg, *supra* note 46 at 341.
53. Hogg, *supra* note 46 at 342; Alan Grove & Ross Lambertson, "Pawns of the Powerful: The Politics of Litigation in the Union Colliery Case" (1994) 103 BC Studies 3 at 30.
54. *Union Colliery, supra* note 13 at para 13.
55. Grove & Lambertson, *supra* note 56 at 4-5.

statutes."[56] It is unclear whether Lord Watson was attempting to address the racial elements laden in the *Coal Mines Regulation Act.* As seems typical of judicial decisions of this era, he made 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.*"[57] Schneiderman argues, however, that bodies dealing with Canadian constitutional questions at this time simply did not concern themselves with the prospect of individual rights.[58] Indeed, if Lord Watson was 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.[59] 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 had 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 Supreme Court of Canada's determination that women were to be included under the definition of "persons" in the *British North America Act* for the purpose of qualifying for 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."[60] 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.[61] 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."[62] The Privy Council, by 1929 at least, clearly did not feel as though they were limited

56. *Ibid*.
57. *Union Colliery, supra* note 13 at para 7 [emphasis added].
58. David Schneiderman, "A V Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century" (1998) 16:3 L & History Rev 495 at 495.
59. *Ibid*.
60. Patricia I McMahon & Robert J Sharpe, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2017) at 3.
61. *Union Colliery, supra* note 13 at para 7; *Homma, supra* note 33 at para 2.
62. McMahon & Sharpe, *supra* note 63 at 3-6.

to considering a case without mentioning the historical or social context surrounding the issues involved.

But perhaps Lord Halsbury's line of reasoning in *Homma* is not entirely different from Lord Sankey's in *Persons*. Lord 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*."[63] 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."[64] This is striking when considered in the context of his decision in *Homma* the following year, where he very quickly brushed 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.[65] 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 to expand 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

63. GR Rubin, "Giffard, Hardinge Stanley, first earl of Halsbury (1823–1921)" in *Oxford Dictionary of National Biography* (2008), DOI: <10.1093/ref:odnb/33395>.
64. *Quinn v Leathem*, [1901] AC 495 at 2, [1901] 2 IR 705 (HL (Eng)) (QL).
65. *Homma, supra* note 33 at para 6 [emphasis added].

decision in *Quong-Wing v The King*.[66] 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.[67] 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.[68] 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.

2. *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 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.[69] 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.*

66. *Quong-Wing v R,* 49 SCR 440, 1914 CarswellSask 163 (SCC) [*Quong-Wing*].
67. Constance Backhouse, "The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada" (1996) 14:2 L & History Rev 315 at 315.
68. *Quong-Wing, supra* note 69 at paras 10-15, 22.
69. Jamie Benidickson, "The Combines Problem in Canadian Legal Thought, 1867–1920" (1993) 43:4 UTLJ 799 at 806, 812.

a. *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."[70] After the depletion of California's gold deposits around 1858, miners flocked to Canada's west coast, sparking the Cariboo gold rush which drew people and industry to British Columbia.[71] 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.[72] By 1880, there were 4,383 Chinese in Canada and all but 33 lived in British Columbia.[73] In 1901, only two years after *Union Colliery* was decided, the Chinese population jumped to 16,792 nationally, with 14,376 of that population living in British Columbia.[74] At that time, coal mining was "one of the chief industries" in the province, with an output of nearly one million tons per year and a steady demand in domestic and foreign markets for the resource.[75]

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,* began hiring Chinese men in his Dunsmuir-Diggle Company mines by the early 1870s as a way to reduce labour costs.[76] Robert Dunsmuir was drawn to Chinese labour because he could get away with paying them fifty per cent of the wages that white labourers demanded.[77] 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.[78] Mining companies in BC in the 1870s actually banded together to oppose any government infringement of

70. Jeremy Mouat, *Roaring Days: Rossland's Mines and the History of British Columbia* (Vancouver: UBC Press, 1995) at xi.
71. *Ibid* at 6.
72. House of Commons, "Report of the Royal Commission on Chinese and Japanese Immigration" *Sessional Papers*, No 54 (1902) at 7.
73. *Ibid*.
74. *Ibid*.
75. *Ibid* at 71.
76. Grove & Lambertson, *supra* note 56 at 6.
77. *Ibid*.
78. *Ibid at* 11.

their right to hire Chinese labour, presumably due to the positive economic benefit gleaned from lower labour costs.[79] 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.[80] 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.[81] Robert Dunsmuir hired Chinese workers as non-union labourers throughout the strike, which eventually got so violent Dunsmuir resorted to sending in the militia to quash it.[82] Another disruption at the Wellington mines occurred in 1883 over the topic of miner wages, which forced Dunsmuir to promise that white workers would receive the coveted mining positions, while the Chinese workers would be demoted to the lower-paid "helper" positions.[83] Still, Chinese men were centrally significant to the mining industry in BC, even after their legal restriction from working underground.[84] By 1900, over 700 Chinese were employed in the major BC mines, making up over a quarter of the total workforce.[85]

The 1902 Royal Commission on Chinese and Japanese Immigration, published after *Union Colliery* was decided, was more dismissive of the importance of Chinese labour to the BC mining industry. For one, the Report concluded 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.[86] 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."[87] However, this myth was repeated throughout both the Union Colliery Company's submissions in *Union Colliery* as well as in the Royal Commission's Report.[88] The 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.[89] The

79. *Ibid* at 7.
80. *Ibid* at 6.
81. *Ibid* at 7-8.
82. *Ibid.*
83. *Ibid* at 8-9.
84. *Ibid* at 13.
85. House of Commons, *supra* note 75 at 89.
86. *Ibid*.
87. Grove & Lambertson*, supra* note 56 at 9-10.
88. House of Commons, *supra* note 75 at 89-90; *Union Colliery, supra* note 13 at para 4.
89. House of Commons, *supra* note 75 at 90.

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 those Chinese workers for unsafe workplace behaviour in order to warrant their exclusion from the underground mining positions they so coveted. It is difficult to see the logic in the argument that Chinese workers excluded white labour when the government had already passed legislation specifically restricting the Chinese from working in mines. 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," 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.[90]

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 to promote 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 critical to the coal mining industry in the first place.

b. *Explaining* Homma: *the perception of Japanese in British Columbia*

How may have the Lords viewed the place of the 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. 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 that they would have had that resource at their disposal.

90. *Ibid.*

If the Lords had referenced 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 strikebreakers, 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, despite having a population roughly one-third their size.[91] 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.[92] The Moodyville Sawmill Company employed only another 40 Japanese men.[93]

The fishing industry is where Japanese workers had the most impact. Considering there were only around 4,500 Japanese in BC in this period, it is quite remarkable that they were granted 1,958 fishing licences in 1901.[94] At that time, 43% of the Japanese population would have had a fishing licence, and they would have held over 41% of all available fishing licences 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 relevant to this topic "Too Many Fishermen On the River."[95] The title is nonsensical on its face—how could there be "too many" fishermen when the government regulates how many fishing licences 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 licences 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," a conclusion which echoes their earlier concern about Chinese mine workers displacing local young white men and boys.[96] 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

91. *Ibid* at 7, 372, 389. There were around 4,578 Japanese at the turn of the 20th century, compared to 14,376 Chinese at the same time.
92. *Ibid* at 360.
93. *Ibid* at 362.
94. *Ibid* at 355, 389. There were 4,722 fishing licences issued in British Columbia in 1901.
95. *Ibid* at 391.
96. *Ibid*.

incoming settler."[97] 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 licences granted to Japanese were "in very many cases" obtained through "irregularities, if not actual fraud."[98] While mine owners like Robert Dunsmuir saw the belonging and inclusion of Chinese workers in BC as a potential economic boon, there were no such figures defending the Japanese in the Commission's report, possibly because the fishing industry offered individuals like Tomey Homma an opportunity to be self-employed rather than employees in a white-owned industry. Perhaps Japanese independence and success in the BC fishing industry worked to their detriment in *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 many obtained their naturalization status through fraudulent means as a route to obtaining a fishing licence.[99] Even the attorney general of BC at this time D.M. Eberts, who would later gain public interest standing on Cunningham's side of the *Homma* case, suggested that if the County Court's decision was not overturned the result of granting the ability of 12,000 Japanese and Chinese men to vote, when they made up roughly 10% of BC's total population, would seriously threaten the control of the white majority in the province.[100] They could "never be assimilated with our population" and lacked any genuine interest in the province, according to Eberts.[101] 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.[102] Of course, the fact that Homma and the Japanese community writ large rallied to pursue this challenge to the *Provincial Elections Act,* absorbing the resultant 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 backlash against the potential for Japanese

97. *Ibid* at 356.
98. *Ibid* at 391.
99. Geiger-Adams, *supra* note 2 at 26.
100. *Ibid* at 27.
101. *Ibid* at 28.
102. *Ibid* at 26.

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 1894–1895 Sino-Japanese War.[103] 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."[104] 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.[105] 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,[106] Great Britain chose to ally with Japan, signing the Anglo-Japanese Alliance in January 1902.[107] This alliance continued, of course, as 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 to 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 felt 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, for the fact that cases and issues do not arise in a vacuum. Only by looking at the constellation of social and economic factors at this time can we begin to understand the full context of the *Homma* decision.

Conclusion

This paper detailed the progress of *Cunningham v Homma* through the courts with particular emphasis on the Privy Council's questionable

103. Robert P Porter, *Japan: The Rise of a Modern Power* (Oxford: Clarendon Press, 1918) at 6.
104. *Ibid* at 6, 128.
105. *Ibid* at 128.
106. *Ibid* at 140-141.
107. *Ibid* at 153-154.

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 around 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*. This in turn directed the Supreme Court of Canada's decision in *Quong-Wing*. Perhaps we should not have expected humanitarian lightning to strike twice.

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.