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University of Durham
Department of Law

**Human Rights and the Effluxion of Time: Canada's *Chinese Immigration Act* as
Illustrative of the Need for Judicial Remedies for Human Rights Violations of the
Distant Past**

A Thesis Submitted to the Graduate School
in Fulfillment of the Requirements of the Degree of Master of Jurisprudence

by

Michael P. Doherty

March, 2007

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17 OCT 2007



Abstract

In the post-World War II era, the concept that all humans possess certain fundamental rights has achieved widespread acceptance. While no geographic limitations are acknowledged to the universality of human rights and the availability of remedies for the violation of those rights, temporal limitations seem to persist. That is, even very serious human rights violations of the distant past have often failed to attract remedies, particularly judicial remedies. The result can be lingering societal discontent. One example has been the case of Chinese immigrants to Canada, who for many decades were required to pay a “head tax” and were for a further period banned altogether. An examination of the history of Canada’s *Chinese Immigration Act* provides evidence of the need for courts to be able to effectively consider and, where appropriate, provide remedies for human rights violations of the distant past. Recommended changes that would facilitate this include: recognition that at least some human rights exist independently of the legislative instruments that have been created to protect them, and can be given judicial effect without recourse to those legislative instruments; recognition that the policy grounds underpinning judicial remediation of human rights violations are essentially the same as those underpinning judicial remediation of criminal offences; and development of a reasoned approach by which to distinguish between those cases for which the courts should provide remedies and those for which they should not.

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Chapter I: Introduction

What is the relationship between human rights and time? More specifically, why does the obligation to respect human rights seem to be relegated to a small band of present time, with no recognition of an obligation on present generations to either take the human rights of future generations into account in decision-making or to address unresolved human rights violations that were committed by and against people in times past? This is the fundamental question that prompts this inquiry. The experiences of Chinese immigrants to Canada who had to pay a “head tax” beginning in the nineteenth century and were excluded altogether for two decades of the twentieth century will be the vehicle for exploring this topic.

Perhaps it is not immediately apparent that time has, in fact, any relevance to human rights, or that there might be any reason to look forward to the future or back to the past when considering questions of human rights. If human rights are important, however – and it will be asserted in this paper that they are – then they should be promoted and protected in all times and places and in the face of whatever challenges there might be to their recognition and affirmation. The more obvious obstacles to the protection and promotion of human rights are, of course, not directly connected to the passage of time. Prejudice; xenophobia; hatred; greed; the pursuit of power through the exploitation of societal divisions: all of these are easily recognized as factors that contribute to human rights being ignored or deliberately infringed. When such infringements happen in the present or the narrow band of time that surrounds it, this generates concern and possibly action on the part of governments, individuals and non-governmental organizations. It must be suggested, however, that concern for the



protection of human rights fails to extend into either the future or the past to any meaningful degree.

Consider the effect that contemporary actions are predicted to have on future generations. Anthropogenic climate change, for example, is expected to have disastrous consequences, including increased sea levels which in turn will cause island nations and coastal lowlands and deltas to disappear, turning countless millions of people into refugees. Discussion of these and other effects, however, is generally relegated to the intellectual ghetto of the “environment”, with no consideration of whether contributing to climate change, such as by driving to work or to the supermarket, constitutes a human rights violation being committed against people of the future by people of the present.¹

If looking at the relationship between current actions and future rights seems too speculative or difficult to conceptualize, then it might be thought that human rights questions related to the past would pose less difficulty. After all, other than the transient moment of “the present”, it is only the past that is real to us, and only those events that have occurred in the past which most of us can ever hope to understand.² Indeed, it could be argued that virtually every consideration of human rights

¹ A notable exception was the March 1, 2007 testimony before the Inter-American Commission on Human Rights of the Organization of American States of Sheila Watt-Cloutier and Martin Wagner concerning the effect of global warming on the human rights of indigenous peoples in the Arctic. The Commission had previously refused to consider a complaint that greenhouse gas emissions by the U.S.A. constituted a human rights violation. See <<http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html>>.

² “In daily life we divide time into three parts: past, present and future. The grammatical structure of language revolves around this fundamental distinction. Reality is associated with the present moment. The past we think of as having slipped out of existence, whereas the future is even more shadowy, its details still unformed.” Paul Davies, “That Mysterious Flow”, *Scientific American*, Volume 288, No. 9 (September 2002), pp. 40-47, at p. 40.

violations is, in fact, a consideration of human rights violations that have occurred in the past.

Granted that this is so, it must still be argued that a problem arises when we turn our attention from human rights violations that have occurred in the recent past to those that have occurred in the more distant past, and it is this problem that will be the specific focus of this paper. Despite history being full of examples of serious human rights violations, there seems to be little impetus for governmental action to redress these incidents, whether by administrative, legislative or judicial action. Instead, as such incidents recede into the distant past, the likelihood of them being addressed appears to diminish, so that human rights violations that resulted in thousands or millions of people losing their lives, their liberty, or all of their possessions a lifetime ago are less likely to be dealt with by government-sponsored human rights mechanisms than are relatively trivial incidents involving hurt feelings that took place a week or a month ago.

Does this matter? Is it significant if the passage of time results in human rights violations remaining indefinitely unresolved? Or would a suggestion that remedies can and should be provided for human rights violations that took place in the distant past seem hopelessly out-of-touch with the pragmatic realities of legal and political life, the sort of lofty philosophizing or moralizing that has no place in the “real” world?

The answers to such questions will be central to this paper, which will argue that legal remedies can be and should be provided for human rights violations that have

occurred in the distant past. The policy grounds for arguing that unresolved human rights violations should be addressed are readily apparent when one considers the consequences of the failure to address them. On the day that these words are being written, for example, the news media feature prominent stories about political controversies in France, Sweden, and Turkey all of which arise from the Armenian genocide, an event that occurred ninety years earlier but which the Turkish government continues to deny and therefore continues to fail to remediate.³ Many other examples could easily be cited of situations where the failure to address unresolved human rights grievances has led to them continuing to fester, as well as of the reverse, instances of new governments recognizing the importance of setting up mechanisms such as truth and reconciliation commissions by which the unfortunate legacy of human rights violations can be addressed in order to allow their countries to move forward.

The case that will be made in this paper for providing legal remedies for outstanding human rights violations from the distant past – *i.e.* remedies that can be pursued as a matter of right through the ordinary court system rather than through the political system - may require greater explication. A summary version, however, might be stated as follows. Modern democratic states universally recognize the concept of “human rights.” Although the concept can be shown to be a relatively modern invention, it is one that relies upon a shared belief in the universality and enforceability of human rights, regardless of whether or not any particular government regime chooses to endorse the concept; thus, those who authorize human rights violations can be held accountable for doing so, even if their powers as the

³ Debate on this issue has been revived by Turkey’s bid to join the European Union. See, for example, Bernhard Zand, “Armenian Genocide Plagues Ankara 90 Years On,” Spiegel Online International, April 25, 2005, <<http://www.spiegel.de/international/0,1518,353274,00.html>>.

governments of sovereign nation-states might otherwise seem to give them unlimited authority and immunity. If the concept of human rights is indeed to be deemed universal rather than being a phenomenon that was invented and is therefore subject to repeal, then human rights must also be deemed to have existed prior to any statutory instrument that purports to embody them. That is, if human rights are “universal” then that must have consequences not merely for their geographic or spatial application but also for their temporal application. Just as we can view certain human rights violations as having happened in Turkey or Chile, for example, so can we look at those same events as having happened in 1915 or 1973, and can be equally certain that neither their location nor their date makes them justifiable or excuses the governments that committed them from responsibility. And because a “right” is a form of legal entitlement, it must give rise to a legal remedy that should continue to exist unless it has been legally extinguished or has become impossible to exercise for practical reasons. The mere passage of time should not, by itself, constitute an impediment to the provision of remedies for human rights violations.

To make this argument is not to deny that human rights violations do, in fact, go unremedied. In fact, it seems likely that the more serious a human rights violation is, the less likely it is to be promptly redressed. The most serious human rights violations are often committed by governments themselves, governments that will not be quick to redress human rights violations that they have only recently committed. Instead, it is more likely that time will have to pass before there is any real hope of redress, time during which societal attitudes can progress and the incumbents in government offices can be replaced, but time during which those responsible for the human rights violations will be continuously resisting any demands for redress. Even

after time has passed and governments have changed, however, there is no guarantee that redress will be provided, since new governments may be reluctant to accept the moral or financial responsibility for dealing with problems created by their predecessors, while voters may not place matters that have begun to seem more like history than politics very high on their agendas.

If enough of a delay occurs, then eventually memories will fade, witnesses will move away, evidence will be lost, and finally the individuals whose human rights were directly violated will all die. Once these things happen, do governments get to metaphorically shrug their shoulders, pronounce the appropriate platitudes, and then carry on with their other business without ever having to resolve outstanding grievances? Yes, unfortunately, as will be discussed in this paper, it appears they may often be able to do exactly that. The effluxion of time would seem to have the effect of diminishing the prospect that unresolved human rights violations will ever give rise to remedies.

Why is this the case? Is it, perhaps, for a reason as grand as our inability to comprehend the nature of time itself? A contemporary physicist has noted that, "To be perfectly honest, neither scientists or philosophers really know what time is or why it exists."⁴ Or, as St. Augustine put it fifteen hundred years ago:⁵

What, then, is time? If no one ask of me, I know; if I wish to explain to him who asks, I know not.

⁴ *Ibid.*, at p. 41.

⁵ St. Augustine, *Confessions*, Book XI, Chapter XIV.

Perhaps we are instead reluctant to address past human rights violations because we are uncomfortable about applying our own contemporary human rights standards to past eras. As Macklin puts it, perhaps we worry that:

The modernist conceit of progress inclines us towards the belief that we are endowed with a moral acuity superior to our ancestors.⁶

Or it may be that difficulties in dealing with time's relationship to human rights issues are attributable to factors as mundane as the fragility of human memory or the overcrowded agendas of human rights agencies.

Whatever the reason, this paper will attempt to shed light on the problem. And while not seeking to deny that the legislative and executive branches of government can have a role to play in remediating past human rights violations, this paper will specifically consider why legal systems do not function effectively as mechanisms for holding governments to account for past human rights violations and, perhaps more importantly, whether there are changes that could be made to permit remedies to be provided for human rights violations that have remained unresolved for long periods of time.

In order to consider these and related questions, the focus will be on one specific human rights violation that took place over a period of sixty years, from the late nineteenth century to the mid-twentieth century.⁷ Beginning in 1885, the Government of Canada introduced immigration laws that discriminated against Chinese people,

⁶ Audrey Macklin, "Can We Do Wrong to Strangers?", in David Dyzenhaus and Mayo Moran, *Calling Power to Account* (Toronto: University of Toronto Press, 2005), pp. 60-91, at p. 82.

⁷ For a more detailed account, see Chapter II.

imposing restrictions upon them that were not faced by any other race. For forty years, they had to pay a “head tax” to enter the country, a tax at rates which escalated dramatically throughout this period in increasingly drastic attempts at discouraging Chinese entry to Canada. When this financial penalty failed to achieve its goal, Chinese immigrants to Canada were eventually banned completely from entering the country, a situation that persisted for another twenty years.

Admittedly, Canada’s Chinese head tax and exclusion laws do not represent the most serious human rights violation that could be extracted from the historical record, and although thousands of people were affected directly and thousands more indirectly, there are many other historical examples of human rights violations that affected more people and with greater severity. If anything, Canada’s anti-Chinese laws might seem mundane for their time, given that other jurisdictions, including Australia, New Zealand, the United States, and Newfoundland & Labrador, all had similar statutes at approximately the same time. These laws did not, however, seem mundane to members of Canada’s Chinese population, who for another sixty years after the repeal of the legislation made repeated attempts to obtain redress for the violation of their human rights, having recourse to both the political and legal systems in their pursuit of a remedy. During these six decades, those who had paid the head tax and those who had been separated from their families by the ban on Chinese immigration gradually grew old and the vast majority died, so that it began to seem certain that there would be no one left to hold government to account.

Surprisingly, however, a remedy was eventually provided and closure of sorts achieved in 2006. The many years before that occurred, however, provide useful

elements for a consideration of the relationship between human rights and the effluxion of time, namely a serious and undeniable human rights violation, obdurate government administrations unwilling to acknowledge that any wrong had occurred, aggrieved citizens refusing to allow the issue to disappear from the agenda, and legal institutions unable or unwilling to provide any recourse, all combining to result in the passage of a very significant length of time during which the issue remained alive but unresolved. This paper will therefore use Canada's anti-Chinese legislation as a vehicle by which to explore the nexus between human rights and time. While the result will be a paper that focuses primarily upon the Canadian legal and political systems, it is hoped that the issues raised will have a broader application.

In order to understand why the Chinese head tax and exclusion laws constituted a human rights violation and why it was that a human rights violation in this instance could go for so long without attracting any remedy, it will first be useful to begin by considering three fundamental concepts and questions that are relevant to this inquiry: what are rights, particularly human rights; do they adhere only to individuals, or can groups, such as the collectivity of Chinese-Canadians, possess them; and do people – in this case residents of China wishing to relocate to Canada - have a right to immigrate?

A. Rights, and the Evolution of Human Rights

The terms “rights”, “human rights”, “civil rights” and “fundamental rights” are used frequently and virtually interchangeably in the modern world, occasionally supplemented by less contemporary terms such as “natural rights” or “the rights of

man". The result can be a lack of intellectual rigour and a failure to understand the history and underlying reasons for the existence of these concepts. In countries such as Canada which possess human rights codes and constitutionally entrenched guarantees of human rights, there is seldom any need to look behind the expressly guaranteed rights set out in those documents. When issues arise concerning rights that are outside of a central core of recognized rights, however, then it becomes necessary to revert to first principles and consider the nature and existence of these concepts and the dividing line between those rights that society is prepared to protect and those assertions of alleged rights that society does not recognize as deserving of protection. In the case of the present study, this is necessitated by the fact that the events concerning the Chinese head tax and exclusion laws occurred before contemporary legislative and constitutional human rights instruments were enacted.

A starting point for the consideration of human rights and related concepts might be their definition. Beginning with the broadest of concepts, Canadian courts have adopted the following definition of a "right":

A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong.⁸

Within the broad category of "rights" will be various types of right, such as "civil rights":

By the term 'civil rights,' in its broader sense, is meant those rights which are the outgrowth of civilization, which arise from the needs of civil, as distinguished from barbaric, communities, and are given, defined, and circumscribed by such positive laws, enacted by such

⁸ *R. v. Oldham* (1996), 460 A.P.R. 321 at 338 (N.B.C.A.), quoting Glanville Williams ed., *Salmond on Jurisprudence*, 11th ed. (London: Sweet & Maxwell, 1957) at page 261. Please note that a list of abbreviations used in this work for courts and law reports is attached as Appendix A.

communities, as are necessary to the maintenance of organized government... The word 'civil' is derived from the Latin *civilis*, a citizen, as distinguished from a savage or barbarian, and the term 'civil rights' comprehends all rights which civilized communities undertake, by the enactment of positive laws, to prescribe, abridge, protect, and enforce.⁹

If a civil right is one that belongs to a person only by virtue of membership in a particular “community”, such as a nation-state, then this would suggest that what is and is not a civil right would vary from one jurisdiction to another. It also seems unlikely to apply to the subject of the current study, people from one jurisdiction seeking to immigrate to another. A more universal type of right would now be considered a “human right”, a concept which has its origins in the somewhat archaic notion of a “natural” right:

A right that is conceived as part of natural law and that is therefore thought to exist independently of rights created by government or society, such as the right to life, liberty, and property.¹⁰

This idea that there are rights that exist “naturally” is linked to the broader notion that there are laws that exist naturally, the “immutable, unwritten laws of heaven” referred to in Sophocles’ *Antigone*. At the time of the ancient Greek city states, fundamental rights grounded in natural law would have included at least the rights of *isogoria* – equal freedom of speech – and *isonomia* – equality before the law.¹¹ Despite it being possible to trace these concepts back to ancient Greece, however, the history of natural law usually begins with the Stoics, who believed natural law to provide the underpinning of positive law. Cicero’s principle that “true law is right reason in

⁹ *Hill v. Hill*, [1929] 2 D.L.R. 735 (Alta. S.C.A.D.) at 740.

¹⁰ *Black’s Law Dictionary*, Eighth Edition (St. Paul: West Publishing, 2004), p. 1348.

¹¹ Maurice Cranston, *What Are Human Rights?* (London: Bodley Head, 1973), p. 2. G. Tenekides, “The Relationship Between Democracy and Human Rights”, in Council of Europe, *Democracy and Human Rights* (Strasbourg: N.P. Engel, 1990), pp. 9-83, at 10-12.

agreement with nature”¹² may be the best-known example of this belief. The concept of natural law remained central to western legal systems for many centuries, with the writings of St. Thomas Aquinas on natural law in the 13th Century being particularly important.

The transition from notions of natural law to contemporary conceptions of human rights is usually traced to the second of John Locke’s 1690 *Two Treatises of Government*, in which he articulates those rights as “life, liberty and estate.”¹³ The English *Bill of Rights* that was enacted contemporaneously with Locke’s work established rights such as trial by jury, the free election of members of Parliament, freedom from excessive fines or bail, and freedom from cruel and unusual punishment.¹⁴

The influence of Locke on political thinking in the American colonies was explicitly acknowledged in documents such as Samuel Adams 1772 “Rights of the Colonists as Men,”¹⁵ and Locke’s rights to “life, liberty and estate” became the right to “life, liberty and the pursuit of happiness” in the Declaration of Independence. The United States Constitution of 1789 set out additional rights, such as the right of people to be secure against unreasonable searches and seizures and the right to the free exercise of religion.

¹² Marcus Tullius Cicero, *The Republic*, at III, XXII.

¹³ John Locke, *An Essay Concerning the True, Original Extent and End of Civil Government*, Book 2, Chapter 7.

¹⁴ 1 Wm. & Mary (1688), 2d Sess., ch. 2.

¹⁵ *The Rights of the Colonists* by Samuel Adams at “I. Natural Rights of the Colonists As Men”, online: Constitution Society Webpage <http://www.constitution.org/bcp/right_col.htm> (accessed January 17, 2005).

The Declaration of the Rights of Man and the Citizen approved by the National Assembly of France in 1789 closely followed the English and American models. It asserted that men are born free and remain equal in rights,¹⁶ with the natural and imprescriptible rights of man being liberty, property, security and resistance to oppression.¹⁷

Subsequent to these classic declarations of natural rights, the constitutions or legal codes of virtually every state came to include some similar declarations of rights. In Canada, the constitutionally-entrenched *Canadian Charter of Rights and Freedoms*¹⁸ (the “*Charter*”) that was adopted in 1982 had been preceded by the *Canadian Bill of Rights*¹⁹ and by federal and provincial codes of human rights.²⁰

The various rights that are set out in all of these documents are presented as though they are self-evident; indeed, in at least one of those documents, the United States Declaration of Independence, the claim to being self-evident is made explicitly. This is not particularly helpful in terms of understanding why rights exist, and why some rights exist rather than others. Academic writers, however, have attempted to shed light on this and related questions. Cranston, for example, divides rights into two

¹⁶ *Declaration of the Rights of Man – 1789* (National Assembly of France, August 26, 1789) at Article 1, online : Avalon Project at Yale Law School Webpage, <http://www.yale.edu/lawweb/avalon/rightsof.htm>. (accessed January 10, 2005).

¹⁷ *Ibid.*, Article 2.

¹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁹ S.C. 1960, c. 44.

²⁰ For a writer in the Canadian milieu, the existence of these instruments conveys the advantage that academic discussions about whether or not fundamental human rights exist have been rendered academic. It can be confidently asserted that fundamental human rights do exist, since they have been given legally binding recognition as such by our courts. See, for example, *R. v. Demers*, [2004] 2 S.C.R. 489 at ¶ 91.

categories, legal rights and moral rights.²¹ He posits that what we call “human rights” are at least moral rights, although they may also enjoy legal protection, and differ from other moral rights in being the rights of all people at all times and in all situations.²² Counter-intuitively, Cranston says that human rights are the most difficult type of rights to justify, since, unlike other moral rights, they cannot be justified on the basis of having been bought or earned or otherwise acquired. Human beings possess them simply because they are human beings.²³ As Cranston notes:²⁴

In classifying human rights as moral rights it is important to notice something which distinguishes them from other kinds of moral right. This is that they are universal. Many of the moral rights that we speak of belong to particular people because they are in particular situations: the rights of a landowner, for example, or the rights of an editor, or a clergyman, or a judge, or a stationmaster. These men’s special rights arise from their special positions and are intimately linked with their duties. But human rights are not rights which derive from a particular station; they are rights which belong to a man simply because he is a man.

The proposition that there are universal human rights is not universally recognized. Ewin,²⁵ for example, points out that if a claimed right is really a “right”, it must be definitive, in the sense that it is public and agreed upon by the community, determined by a community procedure, and disputes concerning its application and existence are subject to resolution by a generally accepted binding procedure. In contrast, “natural”

²¹ He further subdivides them into five categories of legal rights and three categories of moral rights. The former include: (a) general positive rights enjoyed by and assured to everyone living under a given jurisdiction; (b) traditional rights and liberties; (c) nominal “legal” rights which may exist on paper but not be given practical effect; (d) positive rights, liberties, privileges and immunities of a limited class of persons, such as doctors or ratepayers or peers; (e) the positive rights, liberties, privileges and immunities of a single person, such as the President of the United States. Moral rights include: (a) moral rights of one person only, such as the right of someone who has entered into a contract to expect completion of the terms of that contract; (b) the moral rights of anyone in a particular situation, such as a parent or a schoolteacher; (c) the moral right of all people in all situations, *i.e.* human rights. *Supra*, note 11, pp. 19-21.

²² *Ibid.*, p. 21.

²³ *Ibid.*, pp. 23-24.

²⁴ *Ibid.*, p. 7.

²⁵ R.E. Ewin, *Liberty, Community and Justice* (Totowa: Rowman & Littlefield, 1987). See particularly Chapter 3, “All Rights Are Social Rights”, pp. 36-69.

rights, as such, including allegedly universal human rights, tend to be ill-defined, subject to disagreement, and lacking in authority. On the basis of his proposition that rights must be definitive, Ewin argues that natural rights must become definitive rights or they will be useless,²⁶ from which he suggests that it follows that rights are always conventional. That is, if a particular right happens to be given definitive effect in a particular society, it derives its authority not from being on anyone's list of supposedly universal human rights, but instead from the fact that it has been agreed upon and given effect in that particular society. Ewin states, therefore, that rights depend upon and emerge from the particular arrangements that people make or particular ways in which they cooperate, so that there will be no rights apart from such arrangements. He explicitly acknowledges that:

...my thesis has the consequence that there are no human rights: there are no rights that everybody (or anybody) has simply because they are human without consideration of how they behave and how they are cooperatively related to other people.²⁷

Ewin admits, however, that reference to human rights is not necessarily pointless, since common talk about human rights – even if imprecise and misleading – at least locates problems of moral importance which are likely to result in classes of convention that may be recognized in most societies.²⁸ In addition, he suggests that there may be some conditions for coöperation so necessary that one can sensibly talk of people having a human right to them.²⁹

Ewin's view that rights must be definitive is at odds with the observation by Donnelly that an appeal to human rights is actually testimony to the absence of enforceable

²⁶ *Ibid.*, p. 48.

²⁷ *Ibid.*, p. 52.

²⁸ *Ibid.*, p. 60.

²⁹ *Ibid.*, p. 62.

positive rights.³⁰ He suggests that all human rights claims are a sort of last resort, claimed only when one does not have a “lower” right, such as a constitutional or legislated or contractual right to what one wants.

While Donnelly discusses the nature and source of human rights at length, he sidesteps the question of which rights are, in fact, human rights, dismissing this as the “problem of lists.” He complains that attempts to identify protected rights, particularly the post-World War II debates about economic and social rights versus civil and political rights, have been grounded in ideology rather than any sound conceptual foundation.³¹ His complaint on this point can be supported by reference to Kymlicka’s demonstration of just how disjointed and internally inconsistent a basis ideologies provide for thinking about rights. Kymlicka’s examination of both liberal and socialist traditions with respect to the rights of ethnic and national minorities shows how different thinkers, historical contexts, and political agendas have resulted in conflicting and confused positions with respect to rights within each of these ideological camps.³²

In the final analysis, it is difficult to disagree with Bobbio’s view that human rights are a variable category, ill-defined and heterogeneous, and that searching for an absolute principle for human rights is futile.³³ As he wryly observes:

In spite of countless attempts to come up with a definitive analysis, the terminology for rights remains very ambiguous, lacking in rigour, and is often used rhetorically. There is no rule against using the same term for rights which have only been proclaimed, however renowned the declaration, as for rights actually protected by a judicial system

³⁰ Jack Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985), p. 21.

³¹ *Ibid.*, pp. 89-91.

³² Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1997), Chapter 4, pp. 49-74.

³³ Norberto Bobbio, *The Age of Rights* (Cambridge: Polity Press, 1996), pp. 5-9.

founded on constitutional principles with impartial judges whose decisions have various forms of executive power. There is, however, a great deal of difference between the two!³⁴

Despite that, there is one point that is surely undeniable, even if only on etymological grounds, and that seems to be agreed upon by all those who acknowledge human rights as possessing any significance: if the concept of “human” rights means anything, it must be that there are rights that accrue to all humans simply by virtue of their humanity. If this is so, then for the purpose of this study it will be relevant to note that people who lived fifty or one hundred years ago were no less human than those who live today, and they must therefore have possessed the same human rights. As the following section will indicate, however, it may be that their human rights were not recognized as such until much time had passed.

B. Group Rights and Individual Rights

The Chinese head tax and exclusion laws exemplify a conceptual duality in the notion of human rights. While each Chinese immigrant who paid the head tax and each would-be immigrant who was refused entry suffered discrimination as an individual, the basis for that discrimination was their membership in a particular group, namely persons of Chinese ethnicity. Since this is a typical pattern in human rights violations, the question arises of whether rights should properly be perceived as pertaining to individuals or to groups.

³⁴*Ibid.*, p. xiv.

That this is not merely an abstract question can be perceived by considering how remedies are to be pursued when human rights violations have occurred. In order for there to be some recourse or recognition arising from the violation of human rights, there must be some assertion of those rights. In the case of victims of rights violations who have died – as, for example, all but an estimated 300 of the approximately 81,000 Chinese who paid the head tax³⁵ - who can assert those rights? While the state might be well-placed to do so, it will often be the state that was the human rights violator. Family members or descendants may, as will be seen later, have a role to play, but arguably some human rights are so important that their advancement should not depend upon the initiative of family members alone. This suggests that non-governmental organizations or groups that reflect the characteristics that led to the human rights violation could have a role to play. Not only may they be in a position to represent the interests of individual human rights victims, their involvement might also be a tacit acknowledgement that an injury to individual members of a group can also be seen as an injury to group interests. To recognize this is to recognize the possible existence of “group rights”.

Prior to considering group rights, however, it might be best to at least briefly consider what constitutes a “group”. Lerner equates groups with “communities” as that term is used by the U.N. Secretary-General, as “groups based upon unifying and spontaneous (as opposed to artificial or planned) factors essentially beyond the control of the

³⁵ Jordana Huber and Jonathan Fowlie, “Head-tax survivors will get compensated,” *Vancouver Sun*, Monday, April 10, 2006, p. B4. Estimates of the number of surviving head tax payers vary widely, however, with the *Toronto Star* using a figure of approximately twenty surviving head tax payers: Joseph Hall, “Chinese Head Tax Shameful, PM says,” *Toronto Star*, September 10, 2006, on-line < http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1157838637224&call_pageid=968350130169&StarSource=RSS>.

members of the group.”³⁶ Among his approaches to defining “groups” of the type that are of interest for discussions of human rights, is a statement of their characteristics: spontaneity, permanency, identification with the whole, a feeling of belonging.

Another approach would be to simply look at those group characteristics that are likely to be the basis of human rights violations; in 1949, a memorandum of the U.N. Secretary-General³⁷ listed “race, color, sex, ethnic origin, cultural circle, language, religion, political or other opinion, national or social origin, property, birth, caste, social status.” A more contemporary consideration might at least add sexual orientation to that list.

Since it is group characteristics that may lead to a human rights violation, this leads to the question of whether it is only the individuals whose rights were violated who have any recourse for such violation, or if the group itself has some claim to be able to assert claims for rights violations. While those familiar with the conflict between notions of group rights versus individual rights may immediately think of the events of the twentieth century, the recognition of group rights significantly predates this era. Lerner points to international instruments beginning in the seventeenth century that attempted to protect religious minorities, particularly those in territories that underwent changes in their legal status as a result of the European wars of religion.³⁸ Examples he cites include the Treaty of Westphalia (1648), the Treaty of Oliva (1660), the Treaty of Nimeguen (1678), the Treaty of Ryswick (1697), and the Treaty of Paris (1763), each of which recognized the rights of a Protestant or Roman Catholic minority. The international recognition of the rights of minority groups was

³⁶ UN Doc. E/CN.4/Sub. 2/85 (1949), p. 4, as cited at Nathan Lerner, *Group Rights and Discrimination in International Law*, Second Edition (The Hague: Martinus Nijhoff Publishers, 2003), p. 34.

³⁷ E/CN.4/Sub.2/40/Rev. 1

³⁸ Lerner, *supra*, note 36, p. 1.

gradually expanded to include non-religious minorities. In the Final Act of the Congress of Vienna in 1815, for example, Poles under the rule of Russia, Austria and Prussia were to have been endowed with institutions to preserve their national existence according to such forms of political existence as the governments to which they belong should judge expedient and proper.³⁹ Provisions in favour of Turks, Greeks and Romanians under Bulgarian Rule were included in the Treaty of Berlin (1878).⁴⁰

This pattern of diplomatic intervention in favour of persecuted minorities is acknowledged to have represented only modest progress: "No real system was developed; the protection extended was partial; no machinery was established."⁴¹ It was, however, the most significant international incarnation of the notion of "group rights" that predated the minority protection system between the World Wars.

Following the Great War and the creation of the League of Nations, the notion of including general provisions on the rights of minority groups in the Covenant of the League was proposed by U.S. President Wilson but rejected.⁴² Instead, certain minority groups were recognized and protected by several types of instruments. Poland, Czechoslovakia, Yugoslavia, Hungary and Greece each entered into separate treaties for the protection of racial, linguistic and religious minorities in their territories. In addition, the general peace treaties with Austria, Bulgaria, Hungary and Turkey incorporated provisions on minority rights. Finally, as conditions for their

³⁹ Quoted in Rhona K.M. Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press, 2003), p. 16.

⁴⁰ Lerner, *supra*, note 36, p. 1.

⁴¹ *Ibid.*, p. 8.

⁴² Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, Second Edition (Oxford: Oxford University Press, 2000), p. 94.

admission to the League of Nations, Albania, Lithuania, Latvia, Estonia and Iraq made declarations before the Council of the League undertaking the protection of minorities.

Some of these instruments set out general protections for minorities, including rights to life, liberty, freedom from discrimination, and other rights of the sort that are now often set out in domestic and international rights documents. In addition, there were very specific rights for specific groups, such as provisions in the treaty with Poland protecting Jews from being compelled to perform acts which would violate the Sabbath.

Although actual enforcement of the League's guarantees of minority group rights was uncommon,⁴³ it is notable that after 1920 petitions to the Council of the League of Nations could be brought by individuals or by associations acting on behalf of minority groups.⁴⁴

The advent of World War II spelled the end of the minority protection approach. Most notably, this was because this approach had given international recognition to German minorities in Czechoslovakia and Poland, and the Nazis had been able to manipulate this situation to create a precedent for aggression.⁴⁵

⁴³ Smith, *supra*, note 39, notes that in 1929 about three hundred petitions reached Geneva, with about half being admitted, but only eight reaching the Council, and only two finally resulting in any action being undertaken, namely requests by the Council that the state concerned cease the offending behaviour.

⁴⁴ Lerner, *supra*, note 36, p. 13.

⁴⁵ For a full discussion of this and other factors, see Kymlicka, *supra*, note 32, p. 57 *ff.*

Following World War II, the focus of human rights protection shifted almost entirely from the protection of groups to the protection of individuals. Thus, the violation of rights that were connected to group identity was now to be remedied via guarantees of non-discrimination against individuals. Post-war instruments such as the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights all embodied this approach,⁴⁶ even when – in the case, for example, of the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁷ – the individual rights protected were entirely bound up with membership in a particular group. Not until 1992, when the General Assembly adopted the Declaration on Minorities⁴⁸ was there a universal instrument specifically intended to address the problems and rights of minorities.⁴⁹

The subject of whether human rights can be best protected by conceptualizing them as group rights or individual rights has been the subject of much debate, in both academic and political fora. The fundamental divide between these two paradigms and the dilemma it poses is summed up by Glazer:⁵⁰

Can we, however, solve the problems of group discrimination by using the language, and the law, of individual rights?

In that question is encapsulated the dilemma of justice for discriminated-against minorities. The individual has received

⁴⁶ “In 1947, the system for the protection of minorities, as groups, established under the League of Nations and considered by the United Nations to have outlived its political expediency, was replaced by the Charter of the United Nations and the Universal Declaration of Human Rights. These instruments were based on the protection of individual human rights and freedoms and the principles of non-discrimination and equality.” Office of the U.N. Commissioner for Human Rights, “Fact Sheet No.18 (Rev.1), Minority Rights”.

⁴⁷ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

⁴⁸ G.A. Res. 47/135, December 18, 1992, “Declaration on the Rights of Persons Belonging to National Ethnic, Religious or Linguistic Minorities”.

⁴⁹ Steiner and Alston, *supra*, note 42, p. 987.

⁵⁰ Nathan Glazer, “Individual rights against group rights”, in Eugene Kamenka and Alice Erh-Soon Tay *Human Rights* (London: Edward Arnold, 1978), pp. 87-103, at 88.

discriminatory treatment because of a group characteristic. The law is written so as to vindicate the rights of individuals. But can the rights of individuals be vindicated, can the effects of past discrimination on the groups be overcome, if only that individual who takes action on the basis of discrimination receives satisfaction and compensation as the result of his individual charge of discrimination? Does not every other individual who is a member of the group also require satisfaction and compensation? But if the whole concept of legal rights has been developed in individual terms, how do we provide justice for the group?

While accepting that a focus on individual rights can result in satisfactory progress toward resolution of societal problems in some situations, Glazer argues that rights based on membership in particular groups are recognized in many countries, and that the example of those countries should give comfort to those who fear the recognition of group rights may undermine societal unity.⁵¹

The relationship between individual and group rights is of particular interest in Canada, where both types of rights are recognized, even if the relation between them is not always clear. Kymlicka⁵² quotes the 1991 constitutional proposal of the Government of Canada:

In the Canadian experience, it has not been enough to protect only universal individual rights. Here, the Constitution and ordinary laws protect other rights accorded to individuals as members of certain communities. This accommodation of both types of rights makes our constitution unique and reflects the Canadian value of equality that accommodates difference. The fact that community rights exist alongside individual rights goes to the very heart of what Canada is all about."⁵³

⁵¹ *Ibid.*, pp. 91, 99-103. While mentioning countries such as Malaysia, Belgium and India, Glazer singles out for special mention the relationship between Anglophones and Francophones in Canada, as well as the high degree of group maintenance among Slavic and Jewish immigrants to Canada.

⁵² Will Kymlicka, "Individual and Community Rights", in Judith Baker, *Group Rights* (Toronto: University of Toronto Press, 1994), pp. 17-33.

⁵³ Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa, September 1991) 10, 3, quoted in Kymlicka, *Ibid.*, p. 17.

Such “community rights” protected under the *Charter* would include minority-language rights (s. 23), Aboriginal rights (ss. 25 and 35) and the affirmation of multiculturalism (s. 27). Kymlicka suggests that community rights can be characterized in two ways, either by: a view that communities have rights independent of, and perhaps conflicting with, the rights of the individuals who compose them; or by a view that sees community rights as owed to people as members of a particular community, *i.e.* that such rights may themselves be individual rights, but not universal rights, being accorded only to people who belong to certain communities. It is only the former version of community rights that Kymlicka would call “group rights”, since they affirm the priority of the group over the individual. The latter type of rights, which he terms “special rights”, are, he suggests, the most important in Canada, with there being little support for group rights even in minority communities.⁵⁴

Lerner acknowledges that under international law, ethnic, religious and cultural or linguistic groups do not possess legal personalities, but points to the *Western Sahara* decision of the International Court of Justice⁵⁵ as leaving open the possibility that such groups could claim to be legal entities distinct from their members. In suggesting that a first step might be to allow such groups the right to act before international organizations and bodies in representation of their members, he asserts that “This may involve problems as to who is entitled to speak or act for the group, but this is a practical issue that can be solved.”⁵⁶ As will be seen later, negotiations

⁵⁴ Kymlicka, *supra*, note 52, pp. 20-21.

⁵⁵ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*.

⁵⁶ Lerner, *supra*, note 36, p. 43.

concerning remedies for Chinese-Canadians illustrate that Lerner's confidence on the latter point may be misplaced.

The focus on the individual is ascribed by Van Dyke to a "problem" that liberals have in dealing with collective entities.⁵⁷ He suggests that certain kinds of collective entities – in which he explicitly includes ethnic and racial communities⁵⁸ – have both legal and moral rights. While the former is one that a government is bound to uphold, he states that "By a moral right, I mean a claim or entitlement that ought to be honoured if justice is to be done or the good promoted, regardless of the attitude and actions of any government."⁵⁹ He advocates granting ethnic minority communities special rights as collective entities, saying that failing to do so is simply a method by which those in a majority can insure their dominance.⁶⁰

The preceding summary of the history and academic debate on group rights versus individual rights illustrates that it is not a question that is likely to be definitively resolved. For the purposes of this paper, the discussion illustrates two relevant points. First, the generally accepted view that human rights accrue to individuals rather than groups may constitute an impediment that will make it difficult for groups to enforce the rights of their members, and thus make it difficult for anyone to assert the rights of deceased individuals whose human rights have been violated in the past. Second, and more importantly, the fact that the debate concerning notions of group versus individual rights is so much a product of the post-World War II era is related to the fact that our conception of human rights is also a product of this era. Undoubtedly,

⁵⁷ Vernon Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", *The Journal of Politics*, Volume 44, Number 1, February, 1982, pp. 21-40 at 21.

⁵⁸ *Ibid.*, p.23.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p. 40.

the origins and elements of this conception can be traced back thousands of years, and certainly no one connected with the debates or drafting surrounding human rights instruments in the post-World War II era would have claimed that they were inventing the concept of “human rights” out of whole cloth. It should not be surprising, however, that certain challenges will be posed by any attempts to address human rights violations from the pre-World War II era, a time when it would appear that human rights as we now know them existed in a conceptual bardo, awaiting their current incarnation. Such a challenge will be examined in Chapter III, in the context of modern litigation that sought remedies for damage caused by Canada’s Chinese head tax and exclusion legislation.

C. Rights and Immigration

Many human rights violations of the past have involved governments violating the rights of their own citizens within their own borders. These were cases of discrimination between different categories of citizen, based upon criteria such as race or ethnicity. The violation of the rights of prospective Chinese immigrants to Canada was different from such situations, however, in that it principally involved the Government of Canada choosing to treat particular non-citizens⁶¹ differently from both citizens and from other non-citizens when they sought to enter Canada.

Describing these measures in such a way, however, might suggest the possibility that

⁶¹ Strictly speaking, there were no Canadian “citizens” during the time period discussed in this paper. Despite Canada having become an independent nation in 1867, it retained vestiges of its former colonial status for many years. One of these was that Canadians were British subjects, and Canadian citizenship only came into existence on January 1, 1947. It will, however, be convenient to use the term “citizen” in this discussion as shorthand for a more unwieldy description of the status of those British subjects who were domiciled – *i.e.* resident for more than five years exclusive of time spent in prisons or lunatic asylums – in Canada, as per the *Immigration Act*, 1910, or “Canadian Nationals” as per the *Canadian Nationals Act*, 1921.

what was done was not so different from what governments do all the time with respect to non-citizens; that is, the very existence of nation-states and the fact that they have citizens indicates their intention to discriminate between citizens and non-citizens. Can they legitimately do this, and, if so, what questions does this raise that may be relevant to the current inquiry?

At a very practical level, it is easy to answer the question of whether a nation-state can discriminate against non-citizens of that state: yes, it can. Just as a nation-state can require its citizens and permanent residents to discharge obligations that it would not expect of others – the payment of certain types of taxes, for example, or the performance of national service – so it can accord to them rights that it does not extend to others. The very existence of every nation-state is, in a sense, based upon the exclusion of everything and everyone that is not part of that nation-state. As noted by the Judicial Committee of the Privy Council in *Cain*:⁶²

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, book 1, s. 231; book 2, s. 125.

⁶² *Attorney General for Canada v. Cain*, [1906] A.C. 542 at 545-6. A modern Supreme Court of Canada decision to the same effect is *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at 714: “The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country:...” This was expressed even more strongly in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 834: “The Government has the right and duty to keep out and to expel aliens from this country if it considers it advisable to do so.... If it were otherwise, Canada could become a haven for criminals and others whom we legitimately do not wish to have among us.”

Conversely, however, it does not seem that a nation-state should accord no rights whatsoever to non-citizens. Non-citizens within the boundaries of any modern state would not, for example, expect to be arbitrarily killed by its government just as a result of their being non-citizens. At the very least, therefore, it may be expected that there will be some academic debate about where the line is drawn in the allocation or non-allocation of rights.

Most of the academic debate seems to take place between liberal theorists, for whom the justification of discrimination can be problematic. Generally, it seems to be about the legitimacy of discriminating between residents and immigrants, rather than discriminating between different groups of immigrants, as was the case with Canada's anti-Chinese legislation. Ackerman, for example, explores the issue through a series of sometimes fanciful dialogues, such as one between the colonizers of a new planet and the occupants of a second space ship that arrive a split second later and demand to know by what right they are excluded from citizenship.⁶³ He asserts that the only legitimate reason to restrict immigration is to protect the liberal nature of the state.⁶⁴ He supports this conclusion by a dialogue based upon the division of the world into two nation-states, the poor East and the rich West, with the Western democratic institutions organized in a "liberalish" way while the East is an authoritarian dictatorship. Although the West has adopted a policy of admitting a large number – "Z" – of Eastern immigrants, the amount Z is so large that it strains the capacity of Western institutions to sustain their liberal character; any more than Z, and the West's liberal standing will be endangered since the presence of so many alien newcomers will generate sufficient anxiety in the native population that a fascist group will seize

⁶³ Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), pp. 89-92.

⁶⁴ *Ibid.*, p. 95.

control and assure native control over the immigrant underclass. In this situation, he considers it legitimate for the West to close its border to any more than Z Easterners.

Goodin brings a liberal egalitarian perspective to an attempt to elucidate the principal reasons both for and against free movement across international borders.⁶⁵ The case for free movement he bases upon notions of egalitarianism and universalism, in that there should be at least rough equality in the distributions of life prospects among people in general; since he believes it unlikely that richer nations will make any real attempt at global redistribution, he accepts that free movement of people from poorer nations to richer nations is a “second-best” method of global redistribution.⁶⁶ The weaker case against free movement he bases upon “communitarianism”, a notion that different people and peoples are morally entitled to lead their own different lives in their own different ways without undue influence from other people in other communities organized on different premises. A stronger case against free movement he bases upon a pragmatic recognition that a state that provides a generous welfare system or pursues enlightened fiscal policies may be at risk if it opens its borders too freely to the movement of people or capital; this is another “second-best” alternative to a world where all borders would be open and all states would pursue the same progressive goals.⁶⁷

⁶⁵ Robert E. Goodin, “If People Were Money...”, in Brian Barry and Robert E. Goodin, *Free Movement: Ethical Issues in the Transnational Migration of People and of Money* (University Park: Pennsylvania State University Press, 1992), pp. 6-22.

⁶⁶ *Ibid.*, p. 8.

⁶⁷ *Ibid.*, pp. 9-11.

Macklin brings this liberal perspective to a specific consideration of Canada's Chinese head tax, and argues that the fact that it discriminated on the basis of race was not its only objectionable feature:⁶⁸

...the problem is not just that the Chinese were taxed, but rather that taxing migrants for the 'privilege' of entering Canada was (and is) presumed to constitute a legitimate exercise of state power. In my view, the only way in which a head tax on admission would be genuinely non-discriminatory is if each child born in Canada were also taxed upon delivery.

In addition to academic discourse on the justification for immigration laws generally, there has been some consideration by a few academic authors on exclusionary laws of the type typified by Canada's anti-Chinese legislation. Ringer and Lawless, for example, consider U.S. exclusion of Chinese immigrants as part of a broader consideration of race and ethnicity in the United States. They point out that the law that was eventually used to deny citizenship to Chinese immigrants was one drafted in 1790 in response to President Washington's request to Congress for a uniform rule of naturalization.⁶⁹ While the law initially restricted naturalization to any "white person", it was broadened during the Reconstruction to allow citizenship to aliens of African nativity and descent. Asians, however, were still excluded. These authors see the treatment of Asians within a concept of "duality", a notion of us-versus-them that they say has characterized the United States throughout its history. In considering the California-led campaign to exclude Chinese and later Japanese immigrants beginning in the 1860s and throughout subsequent decades, they say, in

⁶⁸ Macklin, *supra*, note 6, at p. 83. Note that Macklin would probably take issue with being characterized as a liberal theorist: pp. 84-85.

⁶⁹ Benjamin B. Ringer & Elinor R. Lawless, *Race-Ethnicity and Society* (New York: Routledge, 1989), p. 110.

fact, that the attempts to exclude Chinese actually “revitalized” American duality at a time when the vestigial effects of Reconstruction were still muting it.⁷⁰

While the academic literature on immigration and rights is interesting, it seems to lack any explicit discussion of whether or not governments can legitimately discriminate against particular categories of prospective immigrants on the basis of race or similar characteristics. It seems likely that this is because the illegitimacy of such discrimination is so apparent as not to be considered worthy of serious discussion. Alternatively, the absence of such a discussion may reflect the observation by Benhabib that recent attempts to develop theories of international and global justice have been “curiously silent” on the matter of migration.⁷¹ And despite the debate among liberal theorists such as Goodin and Ackerman about the legitimacy of state exclusion of immigrants or the appropriate level of permeability of state borders, there does not seem to be any attempt to suggest that there exists a fundamental human right of immigration, as opposed to whatever legal rights might be accorded to immigrants under the domestic laws of a given nation.

This would suggest that for the purpose of this study, no special considerations arise from the fact that Chinese immigrants to Canada were, in fact, immigrants. That is, they were neither entitled to any special right of immigration nor disentitled to any human right which they would otherwise possess, such as the right not to be subject to discrimination on the basis of race.

⁷⁰ *Ibid.*, p. 170.

⁷¹ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), p. 2.

D. Preliminary Observations and Precepts

The preceding review indicates that there is considerable academic debate about several of the concepts that are central to this inquiry. There is, for example, even disagreement about whether fundamental human rights exist, let alone about what package of rights might be considered to constitute such fundamental human rights. In one respect, this is not surprising, given that the notion of inalienable human rights is an artificial rather than a natural phenomenon, and that our current conceptions of rights are the product of thousands of years of thought and history.

Those of us living in the twenty-first century, however, can confidently assert the existence of fundamental human rights. We live in an era when such rights have been endorsed at the international level, and have been embraced at the domestic level by many countries. In Canada, where the events that are the specific subject of this inquiry took place, fundamental human rights have been given legally binding recognition by the courts, and have been incorporated into legal and constitutional instruments. To assert that fundamental human rights exist and that their violation should result in some sort of remedy is, therefore, a relatively cautious position from which to begin the following inquiry.

Furthermore, while there might be some disagreement about which rights are truly fundamental, examination of the various human rights instruments mentioned in this chapter would reveal that the right not to be subject to racial discrimination is a right that is generally recognized. At the international level, this right is prominently manifested in, for example, Article 2 of the Universal Declaration of Human Rights:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race....

The International Convention on the Elimination of All Forms of Racial

Discrimination provides an even more explicit and detailed statement of the right to be free from discrimination on the ground of race, most saliently in Article 2, which states in part:

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

In Canada, the right to be free from racial discrimination is given its strongest endorsement by s. 15(1) of the *Charter*, which states that:⁷²

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Many more documents could be mustered in addition to those referred to above that would demonstrate the near-universal recognition and endorsement of a right to be free from discrimination on the ground of race. As discussed elsewhere in this paper, there may be academic debate about the existence and exact nature of human rights,

⁷² *Supra*, note 18.

but as far as governments and international bodies are concerned, any such debate has indeed been rendered academic. In proceeding to consider the case of immigrants to Canada who were subject to discrimination solely on the basis that they were Chinese, therefore, it is clear that if that discrimination were happening today rather than a century ago, then those discriminated-against immigrants would have recourse to a powerful tools by which to assert their legal and moral right to be free from such discrimination. The fact that they were immigrants would not in itself seem to be an impediment to the recognition of their rights. While there is academic debate about the extent to which a state has any right to bar immigrants, nothing would seem to suggest that a state's legal right to control those who cross its borders can legitimately be exercised on a ground as objectionable as racial discrimination. Why, then, did such discrimination occur and what obstacles prevented remedies that might otherwise have been available in the case of human rights violations from being applied in this instance? The remainder of this paper will be devoted to exploring this question.

E. Overview of Chapters II Through VI

The exact nature of the discrimination that Chinese immigrants to Canada did, in fact, suffer will be recounted in Chapter II, which will provide a legal history of Canada's anti-Chinese legislation, including its genesis in the prejudice and competitive labour market of British Columbia, the federal government's gradual complaisance with provincial demands for exclusionary measures, the judicial challenges to both federal and provincial anti-Chinese statutes, and the eventual repeal of these measures in the post-World War II era.

Chapter III will examine a modern attempt by those affected by the Chinese head tax and exclusion laws to seek a remedy in the courts. It will be seen that that attempt failed, and that that failure was attributable to how long ago it was that the discrimination occurred, and particularly the fact that it predated positive law guarantees of human rights. This outcome, while perhaps reflecting a reasonable judicial response to the arguments that were actually made in that case, will be argued in a later section of this paper to have reflected a fundamental misunderstanding of the ability of the courts to provide remedies for long-past human rights violations.

Chapter III will also look at attempts to obtain non-legal remedies in response to the Chinese head tax and exclusion laws, including their ultimate success.

Since judicial decisions should not be completely divorced from non-legal considerations, Chapter IV will consider policy arguments for and against providing judicial remedies for long-past violations of human rights, as well as considering those legal principles that could either be mustered in support for or in opposition to any proposal for such judicial remedies. It will be argued that in both policy and law, arguments in favour of judicial remedies for long-past human rights violations outweigh any arguments that might be made against them. That conclusion naturally leads to the question of how past failures by the courts to provide such remedies can be avoided in future. Chapter V will make several recommendations in that regard. Finally, Chapter VI summarizes certain conclusions arising from this study.

It is hoped that this discussion will succeed in demonstrating that legal remedies for long-past human rights violations can and should be provided, and that any judicial

approach that would deny such remedies on an across-the-board basis would be both wrong in law and contrary to the public interest.

Chapter II: Legal History of the Chinese Head Tax and Exclusionary Laws

In considering the history of Canada's anti-Chinese legislation, it will be convenient to divide that history into two parts. The first part, which will be covered in this chapter, includes the arrival of the first Chinese immigrants in Canada, agitation against their presence, and the six decades from the adoption of the original head tax in 1885 to the repeal of the *Chinese Immigration Act* in 1947. The second part, which will be covered in the next chapter, includes attempts by the Chinese-Canadian community to obtain redress for those who suffered from the effects of Canada's anti-Chinese legislation.

While a comprehensive history of Canada's anti-Chinese legislation might include a broad consideration of the personal stories of the more than eighty thousand head tax payers as well as the social consequences of the legislation, the focus in this chapter will be principally upon the legal history.⁷³ That will include the legislation itself, the Royal Commissions that resulted in its introduction and its various amendments, and the court challenges of the legislation that arose while the legislation was still in effect.

⁷³ Many books and other materials are now available that chronicle the social history of the Chinese in Canada, including the following selection: Peter S. Li, *The Chinese in Canada*, 2nd ed. (Toronto: Oxford University Press, 1998); Paul Yee, *Struggle and Hope: The Story of Chinese Canadians* (Toronto: Umbrella Press, 1996); Wai-man Lee, *Portraits of a Challenge: An Illustrated History of the Chinese Canadians* (Toronto: Council of Chinese Canadians in Ontario, 1984).

A. Chinese Workers and Immigrants in Canada and Elsewhere

Although it is often assumed that a Chinese presence in what is now Canada began in the 1880s, the first Chinese workers had already been in what would become British Columbia for almost a century by that time. In the 1780s, fifty Chinese artisans were brought to Nootka on the west coast of what is now called Vancouver Island by Captain John Meares to assist in various aspects of the trade in sea otter pelts, including construction of a trading post and schooner.⁷⁴ Some may have stayed on after the fur trading ended.⁷⁵ Meares' account of his reason for importing Chinese labourers foreshadows their later employment in other industries and a major cause of resentment toward them by white workers:

The Chinese were, on this occasion, shipped as an experiment: - they have been generally esteemed a hardy, and industrious, as well as an ingenious race of people; they live on fish and rice, and, requiring but low wages, it was a matter also of economic consideration to employ them;..⁷⁶

A more significant influx of Chinese immigrants occurred with the Fraser River Gold Rush of 1858 and Cariboo Gold Rush of 1860-1863, which attracted tens of thousands of miners from the United States and elsewhere. The latter event prompted the establishment of the first Chinese community in British Columbia, after an 1862 gold strike led to the founding of Barkerville.

By this time, conditions in both China and elsewhere had become ripe for the large-scale emigration of Chinese workers. In North America, the abolition of slavery in

⁷⁴ *Re Coal Mines Regulation Act, 1903* (1904), 10 B.C.R. 408 (Full Ct.) at 430.

⁷⁵ E.B. Wickberg & Anthony B. Chan, "Chinese", online: *The Canadian Encyclopedia* <<http://thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001588>>.

⁷⁶ Quoted in Lee, *Portraits of a Challenge*, *supra*, note 73, p. 22.

the United States in 1865 led to a search for a new source of cheap labour in that country. In China, the economic intrusion of western nations caused a breakdown of the village economy, as domestic industries were unable to compete with the dumping of foreign products, and heavy taxation was imposed by the Qing government to pay for tribute and war indemnity. Political persecution after the suppression of the Tai-ping Rebellion also spurred emigration.⁷⁷

Between 1880 and 1885, approximately fifteen thousand Chinese labourers completed the westernmost portion of the Canadian Pacific Railway. While it is doubtful whether the railways in Canada and the United States could have been completed without Chinese labour, the willingness of Chinese labourers to work for less than their white counterparts was a major factor in the anti-Chinese agitation that persisted through the following decades.⁷⁸

B. Anti-Chinese Opinion and Agitation

If the anti-Chinese legislation enacted by the Government of Canada in the late nineteenth and early twentieth centuries is judged to be a violation of the human rights of those Chinese immigrants and would-be immigrants that it affected, then it would be easy to affix the blame for it to the Government itself. While even democratically elected governments may sometimes take actions that are at odds with the prevailing

⁷⁷ *Ibid.*, p. 17.

⁷⁸ Although this paper examines Canadian discrimination against Chinese immigrants between the 1880s and the 1940s, it should not be presumed that either the factors that led to that discrimination or the governmental response that resulted were unique. Castles and Davidson note, for example, the restrictions on labour, residence, benefits and political participation that were faced by workers who emigrated to Western Europe from Southern Europe, North Africa and Turkey in the 1960s and 70s: Stephen Castles & Alistair Davidson, *Citizenship and Migration* (London: Macmillan Press, 2000), p. 70.

views of their times and the wishes of their citizens, however, this was not the case with regard to the Chinese head tax and exclusion laws. Instead, these laws were created after long and vociferous periods of domestic anti-Chinese agitation and also reflect anti-Chinese attitudes and legislation in other countries that had received significant numbers of Chinese immigrants.

In California, for example, attitudes toward Chinese immigration were succinctly stated by one commentator:

In 1852 the Chinamen were allowed to turn out and celebrate the fourth of July, and it was considered a happy thing; in 1862 they would have been mobbed; in 1872 they would have been burned at the stake.⁷⁹

In Australia, the first Chinese labourers arrived in order to remedy a labour shortage that occurred after the transportation of convicts to New South Wales ended in 1840. Large numbers began to arrive in 1852 as part of the gold rush, and peaked in 1858 at 40,000, when they represented 3.3% of the total Australian population. The incitement of anti-Chinese mob violence in the goldfields began as early as 1854 at Bendigo, with other incidents of mob violence taking place at Buckland River in 1857, Ararat in 1858, and Lambing Flat in 1861.⁸⁰ Eventually, this anti-Chinese sentiment led to a series of exclusionary laws that were emulated in other jurisdictions.

⁷⁹ Testimony of Jonathan F. Swift, *Report of the Royal Commission on Chinese Immigration*, Ottawa, 1885, at 339.

⁸⁰ Victorian Cultural Collaboration, "Gold!", online: <<http://www.sbs.com.au/gold/#>>

New Zealand also attracted Chinese workers to its gold fields in Otago beginning in 1865. They remained a relatively small minority, constituting approximately 1% of the non-Maori population in the 1881 census, and appear not to have suffered violence and hatred on the scale that occurred in Australia and North America. Despite that, New Zealand did also adopt legislation aimed at excluding Chinese immigrants, beginning with the *Chinese Immigrants Act* in 1881.⁸¹

In British Columbia, the anti-Chinese sentiment seems to have grown gradually. In 1860, a Victoria newspaper argued that Chinese immigrants would help to remedy a “lack of consumers” in the colonies,⁸² and thus that a “poll-tax on Chinamen is clearly opposed to the interests of Victoria, as a commercial depot and starting point for the mines.”⁸³ The prevailing opinion would seem to have changed, however, so that by as early as May 9, 1876 the Legislative Assembly had adopted a report advocating legislation to prevent Chinese immigration. Because the *Constitution Act, 1867* generally allocates matters of an interprovincial or international nature – such as immigration – to the federal government rather than to provincial governments, however, the Government of British Columbia was limited in its legal ability to obstruct Chinese immigration directly, and was therefore obliged to resort to attempting to influence the federal government.⁸⁴ Another resolution of the Legislative Assembly was passed on July 31, 1878 against the employment of Chinese labourers on public works. On April 21, 1880, the Legislature passed a resolution asking that the anti-Chinese legislation in Queensland be made the basis of

⁸¹ Amity Centre Publishing Project, “Chinese in New Zealand”, online: <http://www.stevenyoung.co.nz/chinesevoice/history/chinesesettlement.htm>

⁸² Vancouver Island and British Columbia were separate colonies until 1866.

⁸³ The *Colonist*, quoted in *The Globe* (Toronto, Canada West), Saturday, April 14, 1860, Vol. XVII, No. 90, p. 1

⁸⁴ For further discussion of the constitutional relationship between the federal and provincial governments, see *infra*, page 56, under “D. Provincial Legislation.”

legislation by the Government of Canada. On February 26, 1882, the Legislature passed another resolution, and a Minute of the Executive Council dated March 7, 1882 was sent to the Government of Canada requesting that Chinese labour not be employed on the construction of the Canadian Pacific Railway and asking that it assist with white immigration. On August 19, 1882, a Minute of Council was transmitted to the Government of Canada asking it to promote the necessary legislation to prevent Chinese immigration to the Province, to prevent the employment of Chinese workers on public works, and to prevent their employment on any railway that might be given a charter. On February 28, 1883, the Legislature passed another resolution making a similar request. In 1884, the Legislature sent a petition to the Government of Canada asking that legislation be introduced “restricting and regulating the immigration of Chinese.”⁸⁵

The Government of Canada was not immediately receptive to the anti-Chinese agitation. As Secretary of State Joseph Adolphe Chapleau later remarked:

...I was rather struck with a feeling of surprise, which I am sure has been shared by many hon. Members of this House, that a demand was made for legislation to provide that one of the first principles which have always guided the English people in the enactment of their laws and regulations for the maintenance of the peace and prosperity of the country, should be violated in excluding from the shores of this great country, which is a part of the British Empire, members of the human family.⁸⁶

In addition to whatever principled concerns may have motivated the Government of Canada, there were also worries that any measures to discourage or prevent Asian

⁸⁵ *Official Report of the Debates of the House of Commons of the Dominion of Canada*, Third Session – Fifth Parliament, 48–49 Victoriae, 1885, (2 July 1885) at 3004–3006 (Mr. Chapleau).

⁸⁶ *Ibid.*, at 3003 (Mr. Chapleau).

immigration could negatively affect international trade, might interfere with a proposed trans-Pacific steamship line, and might conflict with British Imperial foreign policy.⁸⁷ The 1860 Convention of Beijing had included provisions designed to facilitate the emigration of Chinese labourers to British colonies,⁸⁸ and the extent to which Canada was to be permitted to pursue an independent foreign policy was not clear.

It should also be noted that immigration to Canada had been virtually unregulated up until that time. Although this was soon to change, with an aggressive program to attract new immigrants instituted by Minister of the Interior Clifford Sifton in the 1890s and the first decade of the twentieth century, that program would be aimed at prospective white immigrants in the United Kingdom and the United States, and at Ukrainians and Doukhobors in the Austrian Empire. In the 1880s, however, the Government of Canada was not yet in the business of attempting to attract immigrants, let alone Chinese immigrants.⁸⁹ The situation was, in fact, similar to that advocated by those liberal theorists discussed in Chapter I of this paper.

⁸⁷ *Official Report of the Debates of the House of Commons of the Dominion of Canada*, Second Session – Fifth Parliament, 47 Victoriae, 1885, (2 April 1884) at 1287 (Sir John A. Macdonald).

⁸⁸ *Article V* stated, “As soon as the Ratifications of the Treaty of one thousand eight hundred and fifty-eight shall have been exchanged, His Imperial Majesty the Emperor of China, will, by decree, command the high authorities of every province to proclaim throughout their jurisdictions, that Chinese, choosing to take service in the British Colonies or other parts beyond sea, are at perfect liberty to enter into engagements with British Subjects for that purpose, and to ship themselves and their families on board any British vessel at any of the open ports of China. Also that the high authorities aforesaid, shall, in concert with Her Britannic Majesty’s Representative in China, frame such regulations for the protection of Chinese emigrating as above, as the circumstances of the different open ports may demand.” “Convention of Beijing”, online: <<http://www.koreanhistoryproject.org/Ket/C19/FN1907b.htm>>

⁸⁹ Regarding Canadian encouragement of immigrants generally, see Library and Archives Canada, “Contact: Making the West Canadian”, <http://canadaonline.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=canadaonline&zu=http%3A%2F%2Fwww.collectionscanada.ca%2F05%2F0529%2F052902%2F05290203_e.html>.

Pressure continued to be exerted upon the Government in the House of Commons throughout 1885,⁹⁰ however, and eventually the Government gave in. When Chapleau finally introduced legislation to restrict Chinese immigration, another member of Parliament said of his remarks “one would almost imagine [they] were in opposition to the Bill rather than in favour of it”, and that “nine-tenths of his remarks were leaning towards what he was pleased to term pro-Chinese rather than anti-Chinese.”⁹¹ Indeed, after considering and dismissing all of the various charges that had been levelled against Chinese immigrants – that they were “degraded,” “mischievous,” “uncivilised,” “barbarians” – and considering possible reasons for the antipathy against them, such as their colour, their clothing, their hair, their diet, their religion, their habitations, and their health,⁹² Chapleau concluded that the only real basis for the proposed legislation was to support white labourers who would otherwise be undercut by Chinese labourers willing to work for lower wages:

Why is there such an antipathy? That antipathy exists, and the only reason, or the great reason for it, is in the antagonism between the Chinese and the other laborers. It is not to be found really in any other cause than the competition of cheap labor with laborers who want to exact a higher price. Is the object of the white laborer, in trying to force himself into the building of works and the carrying on of industries at higher wages than the cheap labor which is offered by the Chinese – is that a laudable object, and is Parliament going to come to the rescue?⁹³

In a remarkably frank concession to political pragmatism, Chapleau acknowledged that the Government was, in fact, going to “come to the rescue” despite the dubious grounds for its support:

⁹⁰ *Supra*, note 85, (2 February 1885) at 29 (Mr. Shakespeare); (24 February 1885) at 211 (Mr. Shakespeare); (12 March 1885), at 505 (Mr. Blake); (19 March 1885) at 632 (Mr. Blake).

⁹¹ *Ibid.*, at 3013 (Mr. Baker).

⁹² *Ibid.*, at 3006 (Mr. Chapleau).

⁹³ *Ibid.*, at 3008.

I have indicated the real, fundamental reason why opposition is given to Chinese immigration. I am satisfied that my statement will not be contradicted when I say that prejudice and rivalry are the main sources of opposition to their presence amongst us. But are we for that reason not to take into consideration the social and moral condition of the country where they are living? Are we to ignore feelings and antipathies? Is it not necessary for a Government dealing with questions on its responsibility, to respect even prejudices? Are we not obliged very often to respect prejudices? Do we not respect them very often in our legislation?⁹⁴

C. Response of the Government of Canada

When faced with difficult problems involving significant political risk and unpalatable policy choices, parliamentary governments will sometimes resort to appointing royal commissions prior to taking any action. This was the case with regard to immigration from China and other Asian countries, an issue which spawned three royal commissions, which in turn led to the adoption of a series of statutes aimed at controlling or preventing such immigration.

1. The Royal Commission of 1885 and *The Chinese Immigration Act, 1885*

Repeated attempts by British Columbia members of Parliament to propose a prohibition on Chinese immigration to that province in the House of Commons⁹⁵ eventually led to the Royal Commission on Chinese Immigration of 1885. In establishing the Royal Commission, Canada was following the lead of the United

⁹⁴ *Ibid.*, at 3009.

⁹⁵ See, for example, *Official Report of the Debates of the House of Commons of the Dominion of Canada*, Second Session – Fourth Parliament, 43 Victoria, 1880, (21 April 1880) at 1640 (Mr. DeCosmos) and *Official Report of the Debates of the House of Commons of the Dominion of Canada*, First Session – Fifth Parliament, 46 Victoria, 1883, (29 March 1883) at 323 (Mr. Shakespeare).

States Congress, which had established a joint committee of the Senate and House of Representatives to consider Chinese immigration in 1876.

The Royal Commission consisted of two men, Secretary of State Chapleau and B.C. Supreme Court Judge and former New Brunswick Premier John Hamilton Gray. The volume they produced contained their separately written reports plus almost five hundred pages of evidence, detailing their hearings in British Columbia, investigations in California, and information concerning Chinese immigration to the Sandwich [Hawai'ian] Islands,⁹⁶ Jamaica and Peru,⁹⁷ Australia,⁹⁸ the Philippines and Singapore.⁹⁹ Although the report is extremely wide-ranging, its most striking content is evidence of the societal division in both British Columbia and California between those large employers who favoured Chinese immigration because of its utility to their enterprises – coal mining, railway building, fruit and vegetable farming, among others – and those who opposed it because of the competition it posed to white labourers or on various other grounds.

The division in public opinion in British Columbia was summed up by Commissioner Gray:

1st. Of a well meaning, but strongly prejudiced minority, whom nothing but absolute exclusion will satisfy.

2nd. An intelligent minority, who conceive that no legislation is necessary – that, as in all business transactions, the rule of supply and demand will apply and the matter regulate itself in the ordinary course of events.

3rd. Of a large majority, who think there should be a moderate restriction, based upon police, financial and sanitary principles,

⁹⁶ *Report of the Royal Commission on Chinese Immigration*, Ottawa, 1885, at 411-412.

⁹⁷ *Ibid.*, at cxxix (Chapleau).

⁹⁸ *Ibid.*, at cxxii-cxxix (Chapleau).

⁹⁹ *Ibid.*, at cx-cxxi (Chapleau).

sustained and enforced by stringent local regulations for cleanliness and the preservation of health.¹⁰⁰

Gray declared himself as concurring in the majority view, and made recommendations to Parliament consistent with that view.

Chapleau's report gives the impression that he would have preferred no restriction on Chinese immigration at all, but in the end he did give his equivocal support to some form of restriction:

...if restrictive legislation were considered opportune it should aim at gradually-achieved results, and the history of the question, as well as the evidence, shows that by legislation regulating, not excluding Chinese laborers, every purpose can be effected which those who apprehend evils from Chinese immigration could, and actually do desire.¹⁰¹

As will be seen, it was this notion of gradually restricting Chinese immigration that was subsequently given statutory expression. This occurred with the passage of *The Chinese Immigration Act, 1885*.¹⁰² The rationale for the statute was set out in its preamble, namely that it was "expedient to make provision for restricting the number of Chinese immigrants coming into the Dominion and to regulate such immigration", and that it was "expedient to provide a system of registration and control over Chinese immigrants residing in Canada".

The restriction of the number of Chinese immigrants was effected principally through the imposition of a fifty dollar duty (more commonly referred to as a "head tax" or

¹⁰⁰ *Ibid.*, at cii (Gray).

¹⁰¹ *Ibid.*, at cxxxiii (Chapleau).

¹⁰² *An Act to restrict and regulate Chinese immigration into Canada*, S.C. 1885 (48-49 Vict.), c. 71.

“capitation tax”) on every person of Chinese origin upon entering Canada.¹⁰³

Exception was made for diplomats and their servants, tourists, merchants (with the exception of hucksters, peddlers or persons trading in dried fish), men of science and students.¹⁰⁴ Persons of Chinese origin already resident in Canada were exempted from the duty.¹⁰⁵ The onus for ensuring that all Chinese immigrants were registered and paid for was largely placed upon the masters of vessels carrying Chinese immigrants, who faced minimum fines of five hundred dollars or twelve months imprisonment if they allowed any Chinese immigrants to land without payment of the duty.¹⁰⁶

This initiative to restrict Chinese immigration was at odds with the more general immigration law, represented by the *Immigration Act, 1869*¹⁰⁷ as amended by the *Immigration Act, 1872*.¹⁰⁸ Section 2 of the former statute had imposed a one dollar duty on each immigrant arriving in Canada by vessel. Section 1 of the latter statute, however, replaced this duty with a two dollar per immigrant duty imposed only on vessels which did not carry a surgeon and which did not take proper measures for the preservation of the health of the passengers and crew during the voyage. This provision specified that the two dollar duty would “thereafter be the only duty payable in respect of immigrants,” a clause which the much higher duties on Chinese immigrants would eventually belie.

¹⁰³ *Ibid.*, s. 4.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, s. 13

¹⁰⁶ *Ibid.*, s. 7.

¹⁰⁷ S.C. 1869 (32-33 Vict.), c. 10.

¹⁰⁸ S.C. 1872 (35 Vict.), c. 28.

A further restriction on the flow of Chinese immigrants was ensured by limiting the vessels carrying Chinese immigrants to Canadian ports to carrying no more than one such immigrant for every fifty tons of their tonnage.¹⁰⁹ By comparison, the legislative provision for non-Chinese immigrants was one person for every two tons of the tonnage of vessels bringing them to Canada.¹¹⁰ An earlier version of the statute, Bill 124, would have allowed one Chinese passenger per every ten tons of a vessel's tonnage.¹¹¹ On the other hand, the limit would have been one Chinese passenger per every hundred tons of a vessel's tonnage, if some British Columbia members of Parliament had had their way.¹¹²

The "registration and control" referred to in the preamble was effected through a certificate system. Every Chinese immigrant upon paying the fifty dollar duty, plus every person of Chinese origin already resident in Canada who chose to pay a fee of fifty cents,¹¹³ was issued with a certificate containing their description, date and port of arrival, and acknowledgement of payment of the duty. This certificate constituted *prima facie* evidence of their right to enter or reside in Canada.¹¹⁴ Anyone wishing to leave Canada with the intention of returning was required to give notice at their port of departure, surrender their certificate, and receive, upon payment of a one dollar fee, a certificate of leave to depart and return; this was then exchanged for their certificate upon their return to Canada.

¹⁰⁹ *Ibid.*, s. 5.

¹¹⁰ *Immigration and Immigrants Act*, R.S.C. 1886, c. 65.

¹¹¹ *Debates of the House of Commons*, *supra*, note 87, (13 April 1885) at 1037.

¹¹² *Ibid.*, (2 July 1885) at 3023 (Mr. Baker).

¹¹³ *Chinese Immigration Act*, s. 13.

¹¹⁴ *Ibid.*, s. 10.

A comprehensive register of all certificates was maintained by a controller appointed under the statute. This controller was also required to send an annual list of all new Chinese immigrants to the Provincial Secretary of the Province in which certificates of entry had been granted.¹¹⁵ One quarter of all of the revenues collected each year were also sent to the Province in which the revenues had been collected.¹¹⁶ Most of the additional provisions of the statute dealt with the logistics of the implementation of the head tax and registration scheme, though there was also one completely unrelated section which made it an offence to participate in or assist with a system of criminal courts set up within the Chinese community that were outside of the official justice system.¹¹⁷

It should be noted that restrictions on immigration were not the only impediments to full Chinese participation in Canadian society introduced by the federal Government in 1885. The *Electoral Franchise Act* set out the right of “persons” to vote, but with “person” meaning “a male person, including an Indian and excluding a person of Mongolian or Chinese race.”¹¹⁸

2. The Royal Commission of 1902 and the *Chinese Immigration Act*, 1903

To the extent that the \$50 per person duty on Chinese immigrants introduced in 1885 was intended to discourage or prevent Chinese immigration, it did not succeed. While the 1880-81 census had counted 4,350 Chinese people in British Columbia, and an 1884 estimate indicated an increase to 9,629, by 1901 a conservative estimate was

¹¹⁵ *Ibid.*, s. 15.

¹¹⁶ *Ibid.*, s. 20.

¹¹⁷ *Ibid.*, s. 17.

¹¹⁸ *Electoral Franchise Act*, S.C. 1885 (48-49 Vict.), c. 40.

14,376, with a total population in Canada of 16,792.¹¹⁹ In comparison, the estimated total populations of British Columbia and Canada in 1901 were 179,000¹²⁰ and 5,371,000¹²¹ respectively.

The reaction from those opposed to Chinese immigration to these growing numbers was predictable. In 1891, for example, trade unions and labour organizations presented over 70 petitions to the Canadian Parliament, with an even larger number presented in 1892, all declaring that "the importation into Canada of Chinese labour is not in the best interests of the country and should be prohibited, and praying for such legislation as will have the effect of totally prohibiting the importation of Chinese labour into the Dominion".¹²² Reluctant to take that step, the Government of Canada did increase the amount of the duty from \$50 to \$100 in 1900.¹²³ That step left the Government of British Columbia unsatisfied, as noted by the Minister of State:

The minister observes that at a recent sitting of the Legislative Assembly of the province, a resolution was adopted declaring that the Chinese Immigration Act passed at the last session of the parliament of Canada, increasing the capitation tax from \$50 to \$100 is ineffective and inadequate to prevent Chinese immigration into Canada, and expressing the opinion that the only effective mode of dealing with the question of restricting Mongolian immigration into Canada would be by either increasing the amount of per capita tax to the sum of \$500, or by the passing of an Act based on the lines of the Natal Act, known as the 'Immigration Restriction Act of 1897.'¹²⁴

¹¹⁹ *Report of the Royal Commission on Chinese and Japanese Immigration*, (Ottawa: Kings Printer, 1902), pp. 7-8. The report stated that a more realistic estimate for the number of Chinese people in British Columbia in 1901 was 16,000.

¹²⁰ Government of British Columbia, "BC Stats" <<http://www.bcstats.gov.bc.ca/data/pop/pop/BCPop.asp>>.

¹²¹ Statistics Canada, "Estimated Population of Canada, 1605 to present", <<http://www.statcan.ca/english/freepub/98-187-XIE/pop.htm>>.

¹²² *Ibid.*, p. 1.

¹²³ *Chinese Immigration Act*, S.C. 1900 (63-64 Vict.), c. 32, s. 6.

¹²⁴ *Report of the Royal Commission on Chinese and Japanese Immigration*, p. xii.

The “Natal Act” referred to was South African legislation restricting Indian immigration, and served as the basis for statutes restricting Chinese immigration that were adopted in Western Australia in 1897, New South Wales in 1898, Tasmania in 1899, and the Commonwealth of Australia in 1901. Since a *Chinese Exclusion Act*¹²⁵ had also been passed in the United States in 1882 banning Chinese immigration – a ban that was to remain in place in that country until 1943 - those who advocated for such legislation in Canada had no shortage of international models to draw on in support of their proposals.

Rather than respond directly to demands for greater restriction on Chinese immigration, the Government of Canada once again resorted to referring the issue to a Royal Commission. This time, it was the Royal Commission on Chinese and Japanese Immigration, reflecting the increasing ethnic diversity of immigrants to Canada. The Royal Commission found, however, that Japanese immigration had become a non-issue by the time of their report, due to instructions by the Government of Japan to the Governors of the Japanese Prefectures to entirely prohibit the emigration of Japanese labourers to Canada, in order “to avoid any friction that might occur by allowing them to come into British Columbia where their immigration was not desired by a certain element of that province”.¹²⁶

In its inquiry into Chinese immigration, the Commission was much more systematic than its predecessor, taking detailed evidence on sanitary conditions, crime statistics, morality and religion,¹²⁷ taxes paid, land clearing, market gardening, coal mining,

¹²⁵ 22 St. p. 59, c. 126

¹²⁶ *Ibid.*, p. 399.

¹²⁷ Interestingly, there was virtual unanimity among the clergy who testified before the Royal Commission that Chinese people should be excluded altogether. *Ibid.*, pp. 22-40.

placer mining, lode mining, the lumber industry, the shingle industry, canning, domestic servants, laundries, tailors, unskilled labour and the effect on youth. This Commission was also much less equivocal than its predecessor, reaching a conclusion that was much more in keeping with the anti-immigration sentiment that had spawned it:

Your Commissioners are of opinion that the further immigration of Chinese labourers into Canada ought to be prohibited;
That the most desirable and effective means of achieving this end is by treaty supported by suitable legislation;
That in the meantime and until this can be obtained the capitation tax should be raised to \$500.

This recommendation was implemented by the *Chinese Immigration Act*, 1903,¹²⁸ s. 6 of which provided for the new \$500 tax. As an additional concession to the Province of British Columbia, the percentage of the tax remitted to the Province where the tax was collected was increased from one-fourth to one-half.¹²⁹

The new \$500 tax was an enormous sum for the time, estimated as the equivalent of two year's wages for a Chinese labourer.¹³⁰ The imposition of the new tax did not, however, completely halt Chinese immigration. It did cause a sharp but temporary decline in immigration numbers, which went from 5,329 in 1903 to 77 in 1905.¹³¹

¹²⁸ *Chinese Immigration Act*, 1903, S.C. 1903 (3 Edw. VII), c. 8.

¹²⁹ *Ibid.*, s. 24.

¹³⁰ *Shack Jang Mack v. Canada* (2001), 55 O.R. (3d) 113, [2001] O.J. No. 2794 (Sup. Ct. Jus.), at ¶ 4.

¹³¹ Canada, Dominion Bureau of Statistics, *Canada Year Book 1934-35* (Ottawa: King's Printer, 1935), p. 224. As the following table shows, there was considerable variation on a year-to-year basis in the early twentieth century, prior to the outright prohibition of Chinese immigration in 1923:

1901	2544	1906	168	1911	5320	1916	89	1921	2435
1902	3587	1907	291	1912	6581	1917	393	1922	1746
1903	5329	1908	2234	1913	7445	1918	769	1923	711
1904	4847	1909	2106	1914	5512	1919	4333	1924	674
1905	77	1910	2302	1915	1258	1920	544	1925	0

After that, however, Chinese immigration gradually began to increase again and was supplemented by immigration from other non-white ethnic groups. The result was continued tension, which when combined with economic recession, acute housing shortages, and rumours of a deal by which the Grand Trunk Railway would import tens of thousands of Japanese workers, eventually sparked “Anti-Asiatic Riots” in Vancouver in September of 1907.¹³² Deputy Minister of Labour (and future Prime Minister) W.L. MacKenzie King was appointed as a Royal Commissioner to investigate losses sustained by the Chinese population, losses which were “almost exclusively incurred on account of broken windows, signs and glass”.¹³³ The Government of Canada accepted King’s recommendation that it allocate \$26,990 to fully compensate members of the Chinese community who had suffered these losses.

At the same time as he was serving as a Royal Commissioner investigating compensating victims of the anti-Oriental riots, however, King received notice that he was also being appointed to investigate how it was that “a largely increased influx of Oriental labourers” had been induced to come to Canada, their immigration being seen as the cause of the riots.¹³⁴

¹³² Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998), p. 145.

¹³³ *Report of the Royal Commission Appointed to Investigate into the Losses Sustained by the Chinese Population of Vancouver, B.C. on the Occasion of the Riots in that City in September, 1907* (Ottawa: S.E. Dawson, King’s Printer, 1908), p. 11.

¹³⁴ Canada, *Report of W.L. MacKenzie King, C.M.G., Commissioner Appointed to Enquire into the Methods by Which Oriental Labourers, Have Been Induced to Come to Canada* (Government Printing Bureau, 1908), p. 7.

3. The Royal Commission of 1908 and Amendments to the *Chinese Immigration Act*

If anything, King's 1908 Royal Commission report might have diminished anti-Chinese sentiments, at least in comparison to those concerning other Asian immigrants; the report indicated that during the first ten months of 1907, the ports of Vancouver and Victoria had received 8,125 Japanese and 2,047 "Hindus", compared to only 1,266 Chinese.¹³⁵

On the other hand, however, King's report revealed that the \$500 head tax which had initially served to reduce Chinese immigration to virtually nil had become less effective over time. His explanation was basic supply and demand economics: when the influx of new Chinese labourers was effectively cut off by the tax, a shortage resulted in those fields where Chinese labourers were normally employed, allowing Chinese labourers who were already in the country to successfully demand increased wages. Those increased wages not only enabled them to send more money back to China to pay for their friends' and relatives' passages to Canada, but they also meant that new immigrants who had to borrow money to pay the \$500 head tax could count on paying off their debts that much more quickly.¹³⁶

King must have construed his responsibilities as being confined to fact-finding, since the only recommendation he made was that Canadian representatives should be posted to Asian countries.¹³⁷ The 1908 Royal Commission therefore did not result in immediate, significant legislative changes, and only relatively minor amendments to

¹³⁵ *Ibid.*, p. 3. Note that there is a considerable discrepancy between this number and that subsequently reported by the Dominion Bureau of Statistics; see note 131, *supra*.

¹³⁶ *Ibid.*, pp. 70-71.

¹³⁷ *Ibid.*, p. 81.

the *Chinese Immigration Act* occurred in the following years. Amendments in 1908, for example, clarified that it was only “minor children” of merchants and clergymen who were excused from paying the head tax, not “children,”¹³⁸ tightened restrictions on students,¹³⁹ and made it easier to deport persons in violation of the *Act*.¹⁴⁰ Amendments in 1917 made students and clergymen exempt from the tax¹⁴¹ and provided for reverse onus summary deportation trials of anyone of Chinese origin believed to be in Canada illegally.¹⁴² Amendments in 1921 allowed registered Chinese persons to be absent from Canada for two years without penalty rather than just one,¹⁴³ and made evasion of the *Act* a summary conviction offence rather than an indictable offence.¹⁴⁴

This legislatively quiescent phase lasted through years of low Chinese immigration (just 89 people in 1916) and high Chinese immigration (7,445 in 1913),¹⁴⁵ so it might have been expected that the situation had stabilized and would continue indefinitely. The tension concerning the issue of Chinese immigration had not disappeared, however, and was actually exacerbated by post-war recession and high unemployment. By 1919, in fact, the situation had reached the point that the Chinese Consul in Vancouver called upon the Government of Canada to take action to ensure that “no more Chinese laborers be allowed to come at present, unless they are returning Chinese or bona fide exempted class.”¹⁴⁶ It was in this climate that the

¹³⁸ *An Act to Amend the Chinese Immigration Act*, S.C. 1908 (7-8 Edward VII), c. 14, s. 2.

¹³⁹ *Ibid.*, s. 3.

¹⁴⁰ *Ibid.*, s. 6.

¹⁴¹ *An Act to Amend the Chinese Immigration Act*, S.C. 1917 (7-8 George V), c. 7, s. 1.

¹⁴² *Ibid.*, s. 2.

¹⁴³ *An Act to Amend the Chinese Immigration Act*, S.C. 1921 (11-12 George V), c. 21, s. 4.

¹⁴⁴ *Ibid.*, s. 7.

¹⁴⁵ *Supra*, note 131.

¹⁴⁶ Quoted in *Portraits of a Challenge*, *supra*, note 73 at 131.

Government of Canada moved to pursue the course that some people had urged upon it decades earlier: the complete exclusion of Chinese immigrants.

4. The Chinese Immigration Act, 1923 and Its Aftermath

After almost four decades of trying to discourage Chinese immigration, the Government of Canada finally moved to ban it outright following the 1921 election of W.L. Mackenzie King as Prime Minister. King, it will be remembered, had conducted the 1908 Royal Commission into Asian immigration. In 1923, legislation confined the entry into Canada of persons of Chinese origin or descent “irrespective of allegiance or citizenship” to just four classes: members of the diplomatic corps and those accompanying them; children born in Canada; merchants; and students attending university or college.¹⁴⁷ For greater certainty, an additional fifteen categories of Chinese people were expressly prohibited, ranging from illiterates to those of “constitutional psychopathic inferiority”.¹⁴⁸ Those who legally resided in Canada faced additional restrictions, including loss of their rights if they were absent from Canada for more than two years.¹⁴⁹ The new legislation came into effect on July 1st, Canada’s national holiday.

The effect of the exclusion law on the Chinese community in Canada was very harsh. The ratio of males to females in the community in the early 1920s had been about fifteen to one.¹⁵⁰ Although most of the men had wives and families in China, the exclusion law meant that they could not bring them to Canada. Some did not see their

¹⁴⁷ *Chinese Immigration Act, 1923*, S.C. 1923 (13-14 George V), c. 38, s. 5.

¹⁴⁸ *Ibid.*, s. 8.

¹⁴⁹ *Ibid.*, s. 24.

¹⁵⁰ Peter S. Li, *Chinese in Canada*, Second Edition (Toronto: Oxford University Press, 1998), p. 67.

families for decades. While the Great Depression of the 1930s encouraged some to return to China, those who remained were doomed to grow old in a constrained and gradually diminishing society of “married bachelors”.

The legislation remained in place for almost a quarter of a century until its repeal shortly after World War II.¹⁵¹ By that time, the cessation of Chinese immigration and the aging of the remaining population had made it more difficult to inflame xenophobic fears. In addition, the relatively small number of second-generation Chinese who had grown up in Canada had begun to integrate into white society, eroding the foreignness that had made their parents easy targets for racism. Finally, China’s fight against Japan in World War II generated considerable sympathy, augmented by the participation of Chinese-Canadians in the Canadian military effort. By the time the war ended, many barriers to Chinese participation in Canadian society had fallen, and by 1947 they had become fully eligible for the electoral franchise, even in British Columbia.¹⁵² In that year, sixty years of anti-Chinese legislation finally came to an end with the repeal of the *Chinese Immigration Act*.

D. Provincial Legislation

Although the legally effective bars against Chinese immigration were statutes enacted by the Government of Canada, mention should be made of the repeated attempts made

¹⁵¹ *An Act to Amend the Immigration Act and to Repeal the Chinese Immigration Act*, S.C. 1947, c. 19

¹⁵² Jin Tan and Patricia E. Roy, *The Chinese in Canada* (Saint John: Canadian Historical Association, 1985), p. 14

by the Government of British Columbia to enact its own legislation, even once it had become clear that it largely lacked the constitutional ability to do so.¹⁵³

British Columbia legislation discriminating on the basis of race targeted both Chinese and Japanese immigrants. It included nine "Immigration Acts" as well as statutes discriminating in other ways, such as restrictions on employing Asians in some industries,¹⁵⁴ statutes incorporating private companies with clauses prohibiting the hiring of Asian labour,¹⁵⁵ legislation denying Asians the right to vote or hold public office,¹⁵⁶ and legislation imposing discriminatory taxation, licensing or regulatory requirements on Asians.¹⁵⁷ Some of these laws faced court challenges, and six were declared *ultra vires* the provincial government, in that they came within the exclusive legislative jurisdiction of the federal government.

¹⁵³ While the provinces were accorded concurrent jurisdiction with regard to immigration by the *Constitution Act, 1867*, their jurisdiction is subordinate to that of the federal government. Section 95 provides that:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

Other sections that buttress federal authority on this subject are s. 91(11), which allows Parliament to legislate health and medical standards for immigrants and aliens, and s. 91(25), which allows Parliament to legislate with regard to "naturalization and aliens." Further restrictions on the ability to legislate with regard to immigration now flow from the *Constitution Act, 1982*, most notably s. 6 (mobility rights) and s. 15 (equality rights). Although this chapter highlights federal-provincial disagreements concerning immigration, such disputes have actually been rare, since the provinces have seldom been interested in the topic of immigration. For a general overview, see Davies Bagambiire, *Canadian Immigration and Refugee Law* (Aurora: Canada Law Book, 1996), pp. 9-14.

¹⁵⁴ See, for example, *Labour Regulation Act, 1898*, S.B.C. 1898, chap. 28 (61 Vict.).

¹⁵⁵ See, for example, *Cariboo-Omineca Chartered Company (Incorporation) Act*, S.B.C. 1898, chap. 10 (61 Vict.), s. 30.

¹⁵⁶ See, for example, *Electorates, Electors and Elections Act*, R.S.B.C. 1897 (61 Vict.), chap. 67, s. 8: "No Chinaman, Japanese or Indian shall have his name placed on the Register of Voters for any Electoral District, or be entitled to vote at any election. Any Collector of Voters who shall insert the name of any Chinaman, Japanese, or Indian in any such register, shall, upon summary conviction thereof before any Justice of the Peace, be liable to a penalty not exceeding fifty dollars."

¹⁵⁷ For a comprehensive list of such provisions in the pre-1904 period, see the decision of Martin J. in *Re Coal Mines Regulation*, *supra* note 74, at 425-426.

In addition to court challenges, other means of dealing with objectionable legislation were possible under the *Constitution Act, 1867*, and these were also used.¹⁵⁸ The Lieutenant-Governor, the Queen's representative at the provincial level, has the power to reserve provincial bills "for the signification of pleasure" of the Governor-General, the Queen's representative at the federal level.¹⁵⁹ This power was used three times to prevent provincial anti-Chinese bills from becoming law. In addition, the Government of Canada has the power to disallow provincial legislation within approximately two years after it has received Royal assent.¹⁶⁰ Between 1878 and 1921, the Government of Canada used this power to disallow anti-Chinese legislation passed by the B.C. Legislature twenty-two times.¹⁶¹

The British Columbia Legislature first considered the issue of Chinese immigration in 1876, when it considered "the expediency of taking some steps towards preventing the country from being flooded with a Mongolian population, ruinous to the best interests of British Columbia, particularly her labouring classes" and resolved to do so "at as early a day as possible".¹⁶² The earliest attempt was the passage of the *Chinese Tax Act, 1878*,¹⁶³ which would have required that every Chinese person over twelve pay ten dollars every quarter for a licence.¹⁶⁴ Anyone not having such a licence would

¹⁵⁸ These provisions remain part of the constitution, and could, in theory, still be exercised today. Note, however, that they have not been exercised in many years, and that some argue that modern ideas of judicial review and democratic responsibility have left no room for the exercise of these powers: Peter Hogg, *Constitutional Law of Canada*, Looseleaf Edition (Toronto: Carswell), at 5.3(e).

¹⁵⁹ Section 90, in conjunction with s. 55, *Constitution Act, 1867*, R.S.C. 1985, Appendix II, No. 5.

¹⁶⁰ *Ibid.*, s. 90 in conjunction with s. 56.

¹⁶¹ Bruce Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909", *Osgoode Hall Law Journal* 29 (1991) 619. Ryder notes that there were more than one hundred anti-Asian statutes in British Columbia in total, more than can be considered in this paper.

¹⁶² British Columbia, *Legislative Journals* (1876) at 46.]

¹⁶³ S.B.C. 1878, c. 35

¹⁶⁴ *Ibid.*, s. 2.

have been required to work on the public roads, with the cost of wear and tear on their tools and a portion of their overseer's salary being added to their licence fee!¹⁶⁵ The statute was disallowed by the Government of Canada.¹⁶⁶

In 1883, the B.C. Legislature appointed a Select Committee on Chinese Labour and Immigration, which made recommendations that led to the passage in 1884 of three anti-Chinese statutes, one of which - *An Act to Prevent the Immigration of Chinese*¹⁶⁷ - was the first of nine attempts to prohibit Asian immigration. This was disallowed by the Government of Canada two months after its passage.¹⁶⁸ Eleven months later, B.C. re-enacted a virtually unchanged version of the statute.¹⁶⁹ This version was disallowed by the Government of Canada within a week of receiving a copy of it.¹⁷⁰

British Columbia's next attempt to prohibit Asian immigration was not until August 1900, though it did forward numerous resolutions to Ottawa asking for action in the meantime. The *Immigration Act*¹⁷¹ made it unlawful for anyone to immigrate to British Columbia who failed to write out and sign "in the characters of some language of Europe" an application for an exemption from the statute.¹⁷² This statute would seem to have been aimed solely at Japanese immigrants, however, since s. 2(f) provided that it did not apply to anyone whose terms of entry into Canada had been fixed by any Act of the Parliament of Canada (e.g. the federal *Chinese Immigration Act*). This statute was disallowed by the Government of Canada in September,

¹⁶⁵ *Ibid.*, s. 12.

¹⁶⁶ *Supra*, note 161, p. 646.

¹⁶⁷ S.B.C. 1884, c.3.

¹⁶⁸ *Supra*, note 161, p. 651.

¹⁶⁹ S.B.C. 1885, c. 13.

¹⁷⁰ *Supra*, note 161, p. 655

¹⁷¹ S.B.C. 1900, c. 11.

¹⁷² *Ibid.*, s. 3.

1901.¹⁷³ When a virtually identical *Immigration Act* was passed by the B.C. Legislature in June 1902,¹⁷⁴ the Government of Canada disallowed that version too. Similar versions were introduced in May 1903,¹⁷⁵ April 1904¹⁷⁶ and early in 1905¹⁷⁷ all of which were also disallowed. The Lieutenant-Governor reserved assent for a 1907 version.¹⁷⁸ A final attempt to pass legislation rendering Asian immigration unlawful was made in February 1908¹⁷⁹ with a version that removed the exemption for persons whose right of entry was regulated by Dominion legislation, thus purporting to make it effective against Chinese immigrants. This was held by the courts to be unenforceable first against Japanese subjects and later in its entirety¹⁸⁰ because of inconsistency with paramount federal legislation, and was finally disallowed in 1909.¹⁸¹

E. Judicial Decisions

The following chapter will consider modern attempts to seek redress for the Chinese head tax and exclusionary laws, including an attempt to pursue this aim through the courts. Before looking at that modern case law, however, it will be useful to consider some of the cases that were actually contemporaneous with the head tax and exclusionary laws, and in particular whether the courts were in any way sensitive to the human rights dimension of those laws. If so, it may be that the courts' judgments would be consistent with the theory of an "implied bill of rights" that originally was

¹⁷³ *Supra*, note 161, p. 660.

¹⁷⁴ S.B.C. 1902, c. 34.

¹⁷⁵ *British Columbia Immigration Act*, 1903, S.B.C. 1903, c. 12.

¹⁷⁶ S.B.C. 1904, c. 26.

¹⁷⁷ *British Columbia Immigration Act*, 1905, S.B.C. 1905, s. 28.

¹⁷⁸ *British Columbia Immigration Act*, 1907, S.B.C. 1907, c. 21A.

¹⁷⁹ *British Columbia Immigration Act*, 1908, S.B.C. 1908, c. 23.

¹⁸⁰ *Re Nakane and Okazake* (1908), 13 B.C.R. 370 (S.C.) and *Re Narain Singh et al.* (1908), 13 B.C.R. 477 (S.C.). See below.

¹⁸¹ *Supra*, note 161, p. 667

recognized by legal scholars and more recently has received recognition from the courts themselves.

Briefly, this theory stands in opposition to the conventional belief in the supremacy of Parliament, which would hold that in a federal state such as Canada (at least as it was prior to the adoption of the *Charter*), the only issue is which level of government has the constitutional authority to abridge an established right, not whether or not the right can be abridged at all. Those who professed to find an “implied bill of rights” in the *Constitution Act, 1867* suggested that even prior to the adoption of the *Charter*, however, there were some rights that could not be abridged by either level of government. Some early judicial decisions contained explicit statements supporting this view,¹⁸² while others seemed to embrace what might be termed a “surreptitious bill of rights”, purporting to recognize that any given piece of legislation adopted by one level of government is actually within the jurisdiction of the other level of government in order to invalidate laws that the courts believed should not have been enacted at all.¹⁸³

The notion of the implied bill of rights has been extremely controversial, with Canada’s most eminent constitutional scholars divided on the question of its existence

¹⁸² While not explicitly taking this position, the judgment of Duff C.J. respecting the *The Alberta Accurate News and Information Act* does suggest that the democratic system of government established by the *Constitution Act, 1867* requires the existence of free public debate, which leads to speculation about whether the institutions that foster that debate can legally be constrained by either level of government: *Re Alberta Statutes*, [1938] S.C.R. 100. For a more detailed explication of Duff’s dictum, see Gibson, “Constitutional Amendment and the Implied Bill of Rights” (1967) 12 *McGill L.J.* 497 at 497. In *Switzman v. Elbling*, [1957] S.C.R. 285, another case which considered restrictions on freedom of expression, Rand J. said “I am unable to agree that in our federal organization power absolute in such a sense resides in either legislature.” Abbott J. went further, saying that not only could the provincial legislature not abrogate the expression right as the impugned law purported to do, but “...the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate.”

¹⁸³ Paul Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23 *U. Toronto L.J.* 307 at 349 ff.

and appropriateness, with F.R. Scott and Dale Gibson, for example, in the “pro” camp and Bora Laskin, Paul Weiler and Peter Hogg in the “anti” camp.¹⁸⁴ Those who denied the existence of an implied bill of rights found support in the decision of Beetz J. in *Attorney General of Canada v. Dupond*,¹⁸⁵ to the effect that fundamental freedoms (a term to which Beetz J. objected as the sort of “loose language” that modern parlance had fostered) such as freedom of expression, were not guaranteed by the Canadian Constitution to the point of being beyond the reach of all legislation. More recently, however, the implied bill of rights seems to have received the blessing of the Supreme Court of Canada as an important aid to understanding the written elements of the constitution, which may also, in certain circumstances, give rise to substantive obligations. The Court has in particular affirmed the existence of certain “foundational principles” that constitute limitations on governments and the courts, with those foundational principles including federalism, democracy, constitutionalism and the rule of law, respect for minority rights, judicial independence, and respect for human rights and freedoms.¹⁸⁶ The possible existence of constitutional rights that exist independently of their inclusion in the *Charter* will be discussed further in subsequent chapters, in the context of considering how the courts can provide remedies for human rights violations that took place prior to the *Charter*’s enactment.

The jurisprudence concerning the Asian exclusion laws contains at least hints of judicial awareness that what made such laws objectionable was something more than

¹⁸⁴ For judicial summaries of the academic debate, see, for example, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at ¶ 317 and *R. v. Demers*, *supra*, note 20 at ¶ 80-86

¹⁸⁵ [1978] 2 S.C.R. 770 at 796-797.

¹⁸⁶ *R. v. Demers*, *supra*, note 20, at ¶ 83. For a discussion of the related topics of the rule of law and the “Ancient Constitution” in the context of the Chinese head tax, see John McLaren, “The Head Tax Case and the Rule of Law: The Historical Thread of Judicial Resistance to ‘Legalized’ Discrimination,” in David Dyzenhaus and Mayo Moran, *Calling Power to Account* (Toronto: University of Toronto Press, 2005), pp. 92-112.

their possible infringements of the federal-provincial division of powers. *Nakane*, for example, was a case in which a writ of *habeas corpus* was sought by Japanese individuals who had been detained under the *British Columbia Immigration Act, 1908*.¹⁸⁷ Hunter C.J. in the first instance and a three judge panel on appeal found that because the B.C. statute was inconsistent with the *Japanese Treaty Act*¹⁸⁸ passed by the federal government, it was invalid due to federal paramountcy in the field of immigration. Hunter C.J. was obviously sympathetic to the detained individuals, concluding his judgment by saying that:

They are peaceable and law-abiding subjects of the Japanese Empire, and as far I can see they have a good right of action against someone, but of course that is not before me now.¹⁸⁹

Morrison J. on appeal was cutting in his reasons for judgment, saying that the lawyer for the Province of British Columbia had “taken much higher ground than the nature and circumstances of this case justify.”¹⁹⁰ Posing the question of whether the *British Columbia Immigration Act* was “repugnant” to the federal legislation, he answered: “In my opinion, it is in every sense of the term.”¹⁹¹

Clement J. was equally blunt:

To my mind the case for the appellant Attorney-General is hopeless; so hopeless that I feel constrained to express my regret that it should ever have been thought proper to attempt to enforce the British Columbia Immigration Act, 1908, as against these respondents.¹⁹²

¹⁸⁷ *Supra*, note 180.

¹⁸⁸ (6 & 7 Edw. VII), c. 50.

¹⁸⁹ *Supra*, note 180, at 373.

¹⁹⁰ *Ibid.*, at 375.

¹⁹¹ *Ibid.*, at 376.

¹⁹² *Ibid.*

In *Re Narain Singh et al.*,¹⁹³ the case in which the *British Columbia Immigration Act* was held to be completely inoperative in the face of the federal legislation, neither the judge in the first instance nor the full Court on appeal were overtly critical of the provincial statute as had been the case in *Nakane*. The Court did, however, depart from the usual rule of that time of not awarding costs against the Crown, despite the vigorous objections of counsel for the provincial Attorney-General, which would seem indicative of judicial disapproval.¹⁹⁴

In *Woon v. Victoria*, Crease J. ruled on a case that he characterized as “test action to try whether China men have the same rights as other foreigners in landing here on their advent from China.”¹⁹⁵ He described the treatment that the plaintiff had received, supposedly on medical grounds, despite having already been examined and passed by both federal and provincial medical officers:

Disregarding the white men, who had come at the same time from the same place and in the same ship and presumably subject to some of the same unsanitary influences, though not to the same extent as the Chinese, without any reason for special suspicion, without inspecting or attempting to inspect a single man, (that had already been done individually by the Dominion Quarantine Officers) he orders them into the custody of his constables to be taken out to the suspect station at Ross Bay, there to be washed and disinfected and scrubbed. They, with their goods and chattels, were bundled into a common truck like so many cattle.

The court found in favour of the plaintiff and awarded nominal damages and costs.

¹⁹³ *Supra*, note 180.

¹⁹⁴ *Ibid.*, at 481.

¹⁹⁵ *Woon v. Victoria (City) (Medical Health Officer)*, (1894) 3 B.C.R. 318 (S.C.) at ¶ 1.

The case of *R. v. Chong*, which involved a conviction and \$20 fine imposed by a police magistrate pursuant to legislation, was also heard by Crease J. In finding the legislation *ultra vires* and overturning the conviction, the judge pointed out that a threat to the rights of one group also threatens the rights of all other groups:¹⁹⁶

In every prosecution under the Act the legal presumption of innocence until conviction is reversed; in every case the onus probandi, though in a Statute highly penal, is shifted from the informant on to the shoulders of the accused, and he a foreigner not knowing one word of the law, or even the language of the accuser. In other words, every Chinese is guilty until proved innocent -- a provision which fills one conversant with subjects with alarm; for if such a law can be tolerated as against Chinese, the precedent is set, and in time of any popular outcry can easily be acted on for putting any other foreigners or even special classes among ourselves, as coloured people, or French, Italians, Americans, or Germans, under equally the same law. That certainly is interfering with aliens.

In *R. v. Wah*,¹⁹⁷ Begbie J. set aside the conviction of the appellant for operating a laundry without a license and payment of the license fee purportedly authorized by a municipal by-law of the City of Victoria, which itself was claimed to be authorized by a provincial statute granting the municipality the power of “licensing and regulating washhouses and laundries.” Despite the fact that the by-law did not actually refer to Chinese people, Begbie held that discriminating against them was its intention. And although in referring to American cases on point, Begbie J. had conceded that they were not binding since they depended in part on the protections afforded by the American constitution, the following passage seems to suggest that in his view, similar protection was intended to be contained within the Canadian Constitution:¹⁹⁸

¹⁹⁶ *R. v. Chong* (1885), 1 B.C.R. (Pt. 2) 150 (S.C.) at ¶ 67.

¹⁹⁷ (1886), 3 B.C.R. 403 (Co. Ct.).

¹⁹⁸ *Ibid.* at ¶ 21. Note that the *Constitution Act, 1867* was formerly known as the *British North America* [“BNA”] Act.

I, for my part, cannot arrive at any other conclusion than that it is specially directed against Chinamen because they are Chinamen and for no other reason; to compel them to remove certain industries from the city or themselves from the Province. But the authorities already cited show that this effect cannot be attained directly, and what cannot be done directly will not be permitted to be done by a side wind.

Tiburcio Parrott's Case, pp. 1634; Cummings v. Missouri, 4 Wall 325.

"If we hold otherwise," said the learned Judge, in that case "no kind of oppression can be named against which the framers of (the B.N.A.

Act) intended to guard which may not be effected."

Begbie J. could have relied solely upon the *ultra vires* nature of a by-law preventing Chinese people from being licensed as pawnbrokers to declare an impugned by-law void in *R. v. Victoria (City)*. He went further, however, to imply that English people could find themselves subject to discrimination on the same grounds as Chinese people, and that in either case it would be equally objectionable as infringing personal liberty, equality and international rights.¹⁹⁹

It is not uninteresting to note the uniformity with which the same events result from the same principles, although in very different parts of the world. Victoria does not possess a monopoly of race jealousy. In the French colony of Cayenne, the Town Council recently handicapped the superior capacities of the Chinaman by imposing on merchants of that empire an extra tax of \$300 per annum, deeming it also expedient to handicap English and German traders by a surtax of \$200 on them. But on the appeal to the courts at Paris, all these impositions were declared null on the very same principles as those on which the Courts here insisted when they decided the cases above referred to, viz., as being infringements at once of personal liberty, and of the equality of all men before the law, and also negation of international rights.

There are other cases in which the hint of judicial disapproval is more ambiguous.

How much, for example, can be read into the following passage from the decision of Irving J. in *Re Coal Mines Regulation Act*, where, despite saying he did not wish to discuss the "policy or impolicy" of the impugned provisions, he noted:

¹⁹⁹ *R. v. Victoria (City)* (1888), 1 B.C.R. (Pt. 2) 331 (S.C.) at ¶ 5.

In the paragraph quoted, I can see no rule or regulation, established or sought to be established, by which the fitness of a Chinaman to properly perform the work of an underground miner can be tested. He may speak the English language perfectly, he may be a skilled mining engineer; but these points are immaterial. He is disbarred by reason of the fact that he is a Chinaman.²⁰⁰

In other anti-Chinese cases, it was only the dissenting minority that seemed to take issue with the underlying purpose of the impugned statutes. In *R. v. Quong-Wing*, for example, the majority of the Supreme Court of Canada were comforted by the fact that a Saskatchewan statute that forbade the employment or patronage of any Chinese-owned restaurant, laundry or other business was not aimed at those of Chinese nationality, but was aimed at those of Chinese race regardless of their citizenship. It was only Idington J. in dissent who mused that:

It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British modes of thinking and acting in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid.²⁰¹

He also said:

This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves.²⁰²

²⁰⁰ *Supra*, note 74, at 416-417.

²⁰¹ (1914), 49 S.C.R. 440 at 452.

²⁰² *Ibid.*

There are, of course, other cases in which the courts refrained from giving any indication of their views of the merits of anti-Chinese legislation whatsoever. Most notable in this regard were cases where appeals were taken from Canadian judgments to the Judicial Committee of the Privy Council. In *Bryden v. Union Colliery Co. of British Columbia*,²⁰³ for example, a case in which the provision of the *Coal Mines Regulation Act* forbidding the employment of Chinese was declared *ultra vires*, Lord Watson noted:

In so far as they possess legislative jurisdiction, the discretion committed to the Parliaments, whether of the Dominion or of the Provinces, is unfettered. It is the proper function of a Court of law to determine, what are the limits of the jurisdiction committed to them; but, when that point has been settled, Courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not.²⁰⁴

The Lord Chancellor's judgment was to the same effect in *Cunningham v. Tomey Homma*, a case in which the Judicial Committee of the Privy Council overruled the lower courts and held that the provisions of the British Columbia *Provincial Elections Act*²⁰⁵ excluding Chinese, Japanese and Indians from the electoral franchise were valid:

...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.²⁰⁶

²⁰³ [1899] A.C. 580 (J.C.P.C.).

²⁰⁴ *Ibid.*, at 585.

²⁰⁵ R.S.B.C. 1897, chap. 97.

²⁰⁶ *Cunningham v. Tomey Homma*, [1903] A.C. 151 at 155-156.

Generally, the courts did, in fact, refrain from commenting on the merits of anti-Chinese legislation. In *Brooks-Bidlake & Whittall v. B.C. (Attorney General)*, for example, the Judicial Committee of the Privy Council gave only a brief and closely-worded judgment upholding legislation prohibiting the employment of Chinese or Japanese in the forest industry, despite having struck down very similar provisions concerning the coal industry in *Bryden*. That body also made no criticism of British Columbia's attempt to validate a number of discriminatory provisions that must otherwise have seemed to be invalid by the passage of the *Oriental Orders in Council Validation Act*.²⁰⁷ Instead, it simply found that the statute could not stand in the face of the federal government's valid exercise of its power to enter into a treaty with Japan that allowed the citizens of each country full liberties in the territories of the other.²⁰⁸

Finally, there are some judgments that seem positively approving of anti-Chinese legislation. The dissenting judgment of Martin J., for example, in *Re Coal Mines Regulation Act* makes it clear that he would have upheld the legislation just as readily if it had applied to French-Canadians, Indians or Negroes.²⁰⁹

At most, then, what can be said is that while the majority of judges did not comment on the human rights aspect of the anti-Asian legislation upon which they ruled, some judges do appear to have disapproved of such legislation and to have made little effort to hide that disapproval while striking the legislation down. The exact grounds of such judicial disapproval are not always possible to discern. In some cases, it may have reflected a worldly distaste for the parochialism of their fellow colonialists.

²⁰⁷ S.B.C. 1921 (11 Geo. 5), chap. 49.

²⁰⁸ *Attorney General of British Columbia v. Attorney General of Canada*, [1924] A.C. 203 (J.C.P.C.).

²⁰⁹ *Supra*, note 74 at 419-422.

Alternatively, it may have been an indication that the judges' principal identification was with the Empire and Dominion governments rather than the provincial government. It might even be a product of public school notions of "fair play" that conflicted with the treatment that judges saw being accorded to Chinese immigrants. It is at least possible, however, to discern some judicial awareness of the existence of rights to which Chinese immigrants had some entitlement.

F. Conclusions

The preceding overview of the history of the legislative treatment of Chinese immigrants to Canada in the nineteenth and early twentieth centuries can leave little doubt that they were the victims of what in current times we would consider a human rights violation. They were subject to discrimination on the basis of race which was all the more extraordinary for the fact that they were the only one of all of the world's peoples to be singled out in this way. The fact that Canada was not the only country to discriminate against them may illustrate how widespread racism was at that time, but some of the remarks of judges and politicians quoted above indicate that even at that time, there were those who recognized the wrongness of what was being done. That the Government of Canada chose not to heed their views may, as will be discussed in Chapters V and VI, be one factor that could have been relevant in determining whether Canada should have later been held legally liable for the harm suffered by Chinese-Canadians. The next chapter, however, will reveal what was actually decided when the courts were given the opportunity to consider this issue in the 1990s.

Chapter III. Recent Attempts to Seek Redress

For decades after the repeal of the Chinese head tax and exclusion laws, the fact of having been the only ethnic group singled out for such discrimination continued to rankle within the Chinese-Canadian community. The sense of injustice which some Chinese-Canadians felt was, if anything, aggravated by the fact that another Asian ethnic group which was singled out for discrimination in the past – Japanese-Canadians - received recognition and a remedy from the Government of Canada in the 1980s, but that no such relief was forthcoming for Chinese-Canadians. Until recently, however, efforts to seek a remedy arising from the Chinese head tax and exclusion laws were unsuccessful. The difficulties faced during this period illuminate some of the problems that can be expected to arise in any similar situation.

This chapter will look at the unsuccessful attempts to pursue a remedy through both the courts and Parliament, as well as at the unexpected turn of events that put the issue on top of the political agenda and led to a remedy finally being provided in 2006. It will also look briefly at the few other cases in which the Government of Canada has provided some form of remedy arising from past human rights violations directed at other minorities, and recent signs of further progress. The principal focus, however, will be on an attempt to seek redress for Chinese-Canadians through the courts.

A. A Modern Legal Challenge: *Shack Jang Mack v. Attorney General of Canada*

Half-a-century after the *Chinese Immigration Act* was repealed, an attempt was made by a small group of Chinese-Canadians to seek legal redress through the courts in the

Province of Ontario. The decisions of the Ontario Superior Court of Justice²¹⁰ and the Court of Appeal for Ontario²¹¹ provide textbook illustrations of the shortcomings of the legal system as a vehicle for dealing with human rights violations, particularly those which have occurred in the distant past. As such, they also indicate the extent to which the courts would have to be prepared to adopt a flexible and innovative approach if they were to accept the responsibility for resolving outstanding human rights cases.

1. The Facts

Shack Jang Mack was born in China in 1907 and immigrated to Canada in 1922. He was required to pay the \$500 head tax. He returned to China in 1928 to marry, but because of the *Chinese Immigration Act*, he could not bring his wife, Gat Nuy Na, to Canada. Instead, he would make periodic trips to China to visit. Each time that he left Canada, he would sell his café and open another one upon his return. His wife and children were finally able to join him in Canada in 1950.

Quen Ying Lee and Yew Lee were the wife and son, respectively, of Guang Foo Lee. Guang Foo Lee had been born in China in 1892 and immigrated to Canada in 1913, paying the \$500 head tax. He married Quen Ying Lee in 1930, but was prevented from bringing her to Canada by the *Chinese Immigration Act*. Their third son Yew Lee was born in China in 1949. One result of the inability of Guang Foo Lee to bring his family to Canada was that they were forced to endure great privation in China because of the Second World War and the civil war.

²¹⁰ *Mack, supra*, note 130.

²¹¹ *Mack v. Canada (Attorney General)* (2002), 217 D.L.R. (4th) 583 (Ont. C.A.).

Shack Jang Mack, Quen Ying Lee and Yew Lee initiated litigation against the Attorney General of Canada on their own behalf and on behalf of a class comprising the surviving payers of the Head Tax and their surviving spouses and descendants. The remedies sought included a public apology and damages.

Prior to the litigation proceeding to trial, the defendant Attorney General of Canada brought a motion to strike out the statement of claim on the ground that it disclosed no reasonable cause of action or, in the alternative, that it was frivolous, vexatious or an abuse of process. In addition, the defendant raised defences of laches and that the statement of claim was statute-barred by reason of s. 32 of the *Crown Liability and Proceedings Act*²¹² and the *Limitations Act*,²¹³ though those defences were only to be considered if the matter proceeded to trial.²¹⁴

2. The Plaintiffs' Legal Arguments

The Plaintiffs' claim was based upon two grounds. The first of these grounds arose from international law and the *Charter*. The Plaintiffs relied upon sections 15 and 24 of the *Charter*, and on various international documents, including the Charter of the United Nations,²¹⁵ the Universal Declaration of Human Rights,²¹⁶ the International

²¹² R.S.C. 1985, c. C-50.

²¹³ R.S.O. 1990, c. L. 15.

²¹⁴ Had the matter proceeded to trial, these defences would have been significant impediments to the Plaintiffs' success. The Crown pointed out, for example, that it was only the introduction of the *Crown Liability Act* in 1954 which overcame the Crown's immunity at common law, and that statute explicitly provided that no proceeding could be taken against the Crown for anything that occurred before the *Act* received Royal assent: "Factum of the Moving Party, the Attorney General of Canada", ¶ 41-42.

²¹⁵ Can. T.S. 1945 No. 7, 59 Stat. 1031, UKTS 1946 No. 67, Cm 7015 (not published in the U.N.T.S.).

²¹⁶ G.A. Res. 217 A(III).

Covenant on Economic, Social and Cultural Rights,²¹⁷ the International Covenant on Civil and Political Rights,²¹⁸ the United Nations Declaration on the Elimination of All Forms of Racial Discrimination,²¹⁹ and the International Convention on the Elimination of All Forms of Racial Discrimination.²²⁰ They argued that the *Charter* should be applied while taking into account the norms found in those international covenants as an aid to interpretation, and that doing so would allow them to successfully claim redress.

The Plaintiffs relied upon two *Charter* provisions. Section 15(1) states that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Section 24(1) states that “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

The relevant provisions of the international documents relied upon and the propositions for which they were adduced were noted and summarized by the chambers judge approximately as follows.

The Charter of the United Nations sets out the signatory countries’ reaffirmation of faith in fundamental human rights and in the dignity and worth of the individual.

²¹⁷ 993 U.N.T.S. 3.

²¹⁸ 999 U.N.T.S. 171 (1966).

²¹⁹ G.A. Res. 1904 (XVIII)

²²⁰ 660 U.N.T.S. 195.

The Universal Declaration of Human Rights generally recognizes that human rights must be protected by the rule of law, and includes a number of specifically relevant provisions:

- The preamble provides that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;
- Article 1 states that all human beings are born free and equal in dignity and rights;
- Article 2 provides that every person is entitled to all the rights and freedoms set out in the Universal Declaration of Human Rights;
- Article 7 states that all are equal before the law and entitled without discrimination to equal protection of the law;
- Article 16 recognizes the family as the natural and fundamental group unit of society and that the family is entitled to protection by the state;
- Article 29 states that individuals exercising their rights and freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 10 of the International Covenant on Economic, Social and Cultural Rights recognizes that the widest possible protection and assistance should be accorded to the family, the natural and fundamental group unit in society, in particular, while it is responsible for the care and education of dependent children.

The International Covenant on Civil and Political Rights contains the following provisions:

- Article 2 states that each country will respect and ensure to all individuals within its territory the rights recognized in the Covenant itself without distinction based on race or national or social origin;
- Article 20 provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law;
- Article 23 affirms that the family is entitled to protection by the state;
- Article 26 states that all persons are equal before the law and are entitled to equal protection of the law.

The Declaration on the Elimination of All Forms of Racial Discrimination contains the following provisions:

- Article 1 states that discrimination on the ground of race, colour or ethnic origin is an offence to human dignity;
- Articles 2, 3 and 4 state that there shall not be any discrimination in matters of human rights and fundamental freedoms because of race, colour or ethnic origin and that efforts shall be made to prevent such discrimination, especially in respect of civil rights and access to citizenship.

Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination requires that parties to the Convention provide effective protection and remedies against acts of racial discrimination and the right to seek just and adequate

reparation or satisfaction for any damage suffered as a result of such discrimination before competent tribunals or other state bodies.

In addition to the international covenants and declarations referred to above, the Plaintiffs also cited a report for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities that asserted that as a proposed basic principle of international law that the violation of any human right should give rise to a right of compensation for the victim or the victim's immediate family and that there should be no limitation period for reparations for gross violations of human rights, including mass persecution on racial grounds.²²¹

The second main ground of argument was a claim of unjust enrichment. "Unjust enrichment" is a principle which the Supreme Court of Canada has said "lies at the heart of the constructive trust", stating that it has "played a role in Anglo-American legal writing for centuries".²²² The gist of this type of action is that a defendant has been enriched at the expense of a plaintiff in circumstances in which it would be unjust to permit the defendant to retain the benefit. The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and, (3) an absence of juristic reason for the enrichment.

²²¹ Final Report of Special Rapporteur Theo van Boven in respect of the Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations Commission on Human Rights, (E/CN.4/Sub.2/1993/8).

²²² *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at 847.

3. Disposition by the Chambers Judge

The judge applied the following test in considering the defendant's motion to strike out the pleadings as disclosing no reasonable cause of action:

1. All material facts pleaded were taken to be true, unless patently ridiculous or incapable of proof;
2. The claim should not be struck out unless it was "plain and obvious" that it could not succeed; and
3. Novelty should be irrelevant to the determination of the claim.

Even given this relatively lax standard, the Judge found that the claim had to be struck out.

On the Plaintiffs' first ground of argument, that which relied upon the *Charter* and international documents and treaties, the reasons for finding against the Plaintiffs essentially rested upon three points. First, the judge noted that the *Charter* cannot apply retroactively or retrospectively, citing the decision of the Supreme Court of Canada in *Benner* for that proposition:²²³

Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. It cannot, for example, be invoked to challenge a pre-*Charter* conviction: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Gamble, supra*. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

²²³ *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at ¶ 44-46. See further discussion of this case in Chapter V, circa note 317.

The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?

I realize that this distinction will not always be as clear as one might like, since many situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the *Charter* to a past event or simply to a current condition or status will involve determining whether, in all the circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and on the *Charter* right which the applicant seeks to apply.

No doubt anticipating this obstacle, the Plaintiffs had argued that they were not asking the court to apply the *Charter* either retroactively or retrospectively, but were seeking a remedy for the violation of their current *Charter* rights arising from the government's continuing refusal to provide redress; that is, that by repealing the *Chinese Immigration Act* without remedying any of its resulting discriminatory effects, the government created an ongoing violation of their s. 15 equality right. In the words of the passage quoted above, they claimed that the continuing effect of the head tax and exclusionary laws was "to impose an on-going discriminatory status or disability" almost half a century after the legislation had been repealed. The Defendant Government of Canada pointed out the length of time that had passed since the repeal of the legislation and argued that "There can be no contemporary

application of a repealed law,”²²⁴ an argument that the Court accepted and repeated verbatim in its judgment. The Court found that the proposed application of the *Charter* was indeed retrospective, and therefore could not succeed.

The second main point in the judgment on the Plaintiffs’ argument based upon the *Charter* and international documents issue was with regard to their argument concerning the Japanese Canadian Redress Agreement,²²⁵ namely that “Failure to extend redress to the Chinese-Canadian community, and to persons in the position of the plaintiffs herein, is, moreover, a violation of Section 15 of the *Charter of Rights*.”²²⁶ The Court found that the fact that the government gave redress through a voluntary agreement to one group of Canadians that had been subject to discrimination did not in itself provide a legal basis for the claim of another unrelated group. In doing so, it was able to cite judicial precedent on exactly the same point, namely *Mayrhofer v. Canada*,²²⁷ a case in which a German who had been interned in World War II unsuccessfully litigated a claim seeking, *inter alia*, compensation of \$21,000 on the basis that that amount had been awarded to similarly-interned Japanese.

The third main point in the judgment on the Plaintiffs’ argument based upon the *Charter* and international documents was that treaties and international conventions do not form part of Canadian law unless they have been expressly implemented by statute. The Court took note of Supreme Court of Canada jurisprudence on this point, while noting that that jurisprudence also established that international law norms can

²²⁴ Attorney General of Canada, “Factum of the Moving Party, the Attorney General of Canada”, at ¶ 25.

²²⁵ P.C. Order 1988-9/2552, October 31, 1988.

²²⁶ Shack Jang Mack *et al.*, “Statement of Claim”, at ¶ 36, quoted *supra.*, note 224 at ¶ 27.

²²⁷ *Mayrhofer v. Canada*, [1993] 2 F.C. 157 (T.D.) at p. 175.

act as an aid to interpreting domestic law.²²⁸ In *Baker*, for example, the Court had quoted *Driedger on the Interpretation of Statutes*²²⁹ for the point that:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

The only domestic law to which the Plaintiffs could point that was relevant to their claim, however, was the *Charter*, and since the Court had held that the *Charter* could not apply, there was no domestic statute to which the international documents and conventions could serve as an aid to interpretation. Furthermore, the judge found that even if the international instruments cited by the Plaintiffs could apply domestically, it was not clear that there existed an accepted principle of international law that governments owe a positive legal duty to provide redress for wrongs involving violation of international norms respecting human rights.

On the argument concerning unjust enrichment, the Court found that the first two parts of the three-part test for unjust enrichment had been met, in that the Defendant had been enriched and the Plaintiffs had suffered a corresponding deprivation. In addition, the Court specifically noted Supreme Court of Canada jurisprudence establishing that the principles of unjust enrichment can operate against a government to ground restitutionary recovery, and that situations involving “the element of

²²⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at p. 861, *National Corn Growers Association v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324 at p. 1371.

²²⁹ R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330, cited in *Baker*, *ibid.*, at p. 861.

discrimination, oppression or abuse of authority” might well warrant recovery.²³⁰ The Court found, however, that with respect to the third part of the test – namely, the absence of juristic reason for the enrichment – the Plaintiffs could not succeed, since it was not disputed that throughout the time period that they were in force, the statutes providing for the Chinese head tax and exclusion were valid statutes. While the Plaintiffs argued that racist or discriminatory laws could not constitute a juristic reason, the Court found that that argument could not succeed in the absence of a finding that the legislation was unconstitutional, and that once again this was not possible without a retroactive application of the *Charter*.

4. Disposition by the Appellate Courts

On appeal to the Court of Appeal for Ontario, the Appellants had to establish that the Chambers judge was “clearly wrong” in his decision to strike out their pleadings.²³¹

In making their arguments at the Court of Appeal, they framed them slightly differently than in the court below, saying that they rested upon three causes of action:

(1) that the impugned legislation had violated their equality rights under s. 15 of the *Charter*, by (a) deeming them to be less worthy than other people generally through the imposition of the head tax and exclusion laws and the failure to provide redress, and (b) by deeming them less worthy of recognition than Japanese Canadians through the failure to provide redress similar to that given to Japanese Canadians;

(2) that the impugned legislation was at all times invalid and of no force or effect because it contravened customary international law, by which Canada was legally bound, that prohibited racial discrimination;

²³⁰ *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1203 and 1207, cited in *Mack* at ¶ 44.

²³¹ *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, cited at “Factum of the Respondent, Attorney General of Canada”, at ¶ 15-17.

(3) that the government had been unjustly enriched at their expense.

On the *Charter* argument, the Court of Appeal closely followed the reasoning of the Chambers judge, both with regard to finding that the Appellants were impermissibly attempting to apply the *Charter* retroactively, and also with regard to finding that they could not use the redress provided to Japanese Canadians as a “springboard” from which to launch their claim.

With regard to the unjust enrichment claim, the Court of Appeal went somewhat further than the lower court in weighing the Appellants’ argument, in that it explicitly acknowledged that there are exceptions to the rule that a statute can provide a juristic reason for retention of a benefit, and that in an appropriate case a court may give effect to the principle of unjust enrichment despite the terms of a statute. The Court appeared to agree with the view of the Chambers judge, however, that it would only be where legislation was unconstitutional or *ultra vires* that it would not constitute a juristic reason.

It was the Appellants’ argument concerning international law that was most significantly different from their argument in the lower court, in its reliance upon what was asserted to be customary international law. The Appellants argued that the Chambers judge had failed to consider their customary international law argument and its impact on the viability of their claim, an argument that caused the Court of Appeal to dryly note:

To the extent that Cumming J. may have neglected the appellants’ customary international law argument, his oversight is understandable as the term “customary international law” is not mentioned in the claim

and it is questionable whether the pleadings even raise it as supporting a cause of action.

The Court of Appeal accepted a definition of customary international law as requiring: (1) a practice among states of sufficient duration, uniformity and generality; and (2) that states consider themselves legally bound by the practice.²³² In order to establish that there was pre-1947 customary international law prohibiting racial discrimination, the Appellants relied upon a number of sources, including:

- national and international judicial decisions;
- individual opinions expressed by some members of Parliament;
- Canada's membership in the League of Nations and its participation as a signatory to the Treaty of Versailles;
- Canada's participation as a signatory to various treaties regarding the abolition of slavery;
- the constitution of the International Labour Organization and declarations emanating from it; and
- writings of international law scholars.²³³

The Court of Appeal, however, cited with approval the writings of Francesco Capotorti as establishing that pre-1945 antecedents of the protection of the human person were pockets of enlightenment that should not be confused with a worldwide perspective on human rights, which was still totally absent at that time.²³⁴ According

²³² I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998), at 4 – 7, quoted in *Mack, supra*, note 211, at ¶ 22.

²³³ *Supra*, note 211, at ¶ 24. Note that the judgment refers to ILO declarations, but does not say which declaration were relied upon, or whether any ILO conventions were also relied upon.

²³⁴ F. Capotorti, "Human Rights, the Hard Road Towards Universality", in R. St. J. MacDonald and Douglas M. Johnston, eds., *The Structure and Process of International Law Essays in Legal*

to Capotorti, it was the creation of the United Nations in 1945 that resulted in the breakthrough in the field of human rights from a fragmentary perspective to a global aim. The Court of Appeal also cited John Humphrey for the proposition that human rights law as it emerged from the creation of the United Nations was “revolutionary”.

²³⁵ Scholarly opinion as cited by the Court of Appeal therefore did not support the Appellants’ claim that there existed a pre-1947 international custom prohibiting racial discrimination.

The Appellants’ attempt to establish the existence of such a custom by reference to case law was also unsuccessful, in that the domestic cases they cited in support of their argument were held not to be directly on point, while the decisions of foreign courts were held to be examples of foreign domestic law rather than customary international law. In addition, the Court held that the Canadian domestic cases must be read in light of *Cunningham v. Homma*,²³⁶ with that case standing for the proposition that a restricted entitlement to vote on the basis of race was both *intra vires* and a valid exercise of provincial power. The Court concluded that the Appellants were unable to prove the existence of a pre-1947 customary international law prohibiting racial discrimination. The Court went on to add, however, that even if it had decided that the Appellants could prove the existence of a pre-1947 customary international law prohibiting racism, it would have ruled that that customary international law had been ousted for domestic purposes by the Chinese head tax and exclusion legislation.

Philosophy, Doctrine and Theory (Dordrecht; Boston: Martinus Nijhoff, 1983) 977 at 978-79. Note the Court’s misspelling as “Capatorti.”

²³⁵ John Humphrey, “The Implementation of International Human Rights Law” (1978), 24 *New York Law School Law Review* 31 at 32-33.

²³⁶ *Supra*, note 206.

Following their defeat in the Court of Appeal for Ontario, the Plaintiffs sought leave to appeal to the Supreme Court of Canada. Their application for leave was dismissed without reasons, however, apparently bringing to an end the quest for a judicial remedy for the victims of the Chinese head tax and exclusion laws.²³⁷ While it would be possible for another action to be instituted in a different Canadian jurisdiction, there is no indication that this was ever considered.

It must be noted that the failure to achieve any remedy through the courts did not indicate a lack of sympathy on the part of the judges who heard the cases. On the contrary, the judges in both the Ontario Superior Court of Justice and the Ontario Court of Appeal were explicit in their condemnation of the legislation that had spawned the litigation. Cumming J. stated that “the legislation in its various forms was patently discriminatory against persons of Chinese origin” and that it was “repugnant and reprehensible”. He urged that “all Canadians take on the challenge of eradicating racism and other forms of intolerance” and suggested that Parliament should consider providing redress for Chinese Canadians who paid the head tax or were adversely affected by the exclusion laws.²³⁸ Moldaver and MacPherson JJ.A. referred to Canada’s treatment of Chinese immigrants during the period 1885 to 1947 as “one of the more notable stains on our minority rights tapestry”.²³⁹

The inability of the judges to translate their sympathy into a legal remedy is indicative of just how serious are the obstacles that face anyone attempting to use the courts to provide remedies for long-past human rights violations. If an attempt were to be made to list the lessons that can be drawn from *Mack*, this should undoubtedly be the

²³⁷ *Mack v. Canada*, [2002] S.C.C.A. No 476.

²³⁸ *Mack*, *supra* note 130, at ¶ 52-54.

²³⁹ *Mack*, *supra*, note 211, at ¶ 1.

first one, that even sympathetic judges who are certain that alleged human rights violations did in fact take place and were morally wrong may consider themselves unable to provide a legal remedy. And if one were to summarize the specific points arising in *Mack* that may lead judges to that conclusion, one would be that while international law prohibits racial discrimination and other types of human rights violations, it may not have legal force in domestic litigation. A second would be that neither international nor domestic instruments that guarantee human rights may be understood by the courts to apply to human rights violations that predate the creation of those instruments. A third is that a statute properly enacted by an elected legislature is likely to be accorded significant deference by the courts, even if they consider the effects of that statute to be repugnant, as was the case with the courts' finding that the Government of Canada could not have been unjustly enriched by the Chinese head tax when the tax was the product of the *Chinese Immigration Act*. A fourth is that judicial decisions that incorporate the values of earlier eras, such as the 1896 decision of the Judicial Committee of the Privy Council in *Homma*, may continue to have lasting and unfortunate legal effect long after the social milieu that spawned them has disappeared.

Despite these obstacles, it will be argued in the following chapters that, contrary to what the decisions in *Mack* might seem to suggest, it is possible for courts to provide remedies for long-past human rights violations. This does not mean that *Mack* was wrongly decided; judges are generally limited to accepting or rejecting the arguments that are made to them, and weaknesses in those particular arguments that the plaintiffs chose to make resulted in their loss. Other arguments are possible, however, as will be set out in Chapter V. First, however, it will be useful to consider the other means

by which a remedy might be provided to groups that have suffered past human rights violations, namely through legislative or governmental action.

B. Attempts At Governmental Redress

It is understandable that considerable time passed between the repeal of the Chinese exclusion law and any attempt to seek redress. After all, the fact that societal attitudes had changed sufficiently to result in the repeal of the law did not mean that they would have changed so much that there would be a willingness to acknowledge that what had been done was wrong, that it should result in any remedy, or even that its provisions might not be reimposed at a later date. Not only would it be unlikely that the views of government or the societal majority would have changed overnight, it would also be surprising if the Chinese minority that had been subject to legislated discrimination for sixty years were to immediately think that they might be entitled to some redress. Attitudes toward race and equality continued to evolve in the decades after World War II, however, and those years witnessed a number of governmental initiatives intended to reflect and promote racial equality, such as the *Bill of Rights*, federal and provincial human rights codes, and the *Canadian Charter of Rights and Freedoms*.

The passage of the latter instrument in 1982 led an elderly head tax payer, Leon Mark,²⁴⁰ to take his head tax receipt to his Member of Parliament, Margaret Mitchell, in 1984 and ask whether she could help him obtain repayment of the head tax monies.

²⁴⁰ Some accounts give his last name as "Mack" instead of "Mark", but he should not be confused with the plaintiff in the litigation discussed in this chapter. See Avvy Go, "Litigating Injustice", David Dyzenhaus and Mayo Moran, editors, *Calling Power to Account* (Toronto: University of Toronto Press, 2005), pp. 20-23, at 20.

Mitchell contacted the Chinese Canadian National Council, which began a national campaign for redress in 1984, registering over 4,000 affected individuals, including over 2,000 head tax payers, plus spouses and descendants of head tax payers. At that time, however, the Government of Canada refused to provide any redress.

The campaign to obtain redress continued sporadically during the succeeding decades. It was only in the latter part of that period, however, that it was manifested in any sort of legislative initiatives, and at first these were limited to unsuccessful bills and motions by opposition members. The first such attempt was the introduction of Bill C-333, "An Act to recognize the injustices done to Chinese immigrants by head taxes and exclusion legislation, to provide for recognition of the extraordinary contribution they made to Canada, and to provide for restitution which is to be applied to education on Chinese Canadian history and the promotion of racial harmony" on December 10, 2002. By this bill as originally drafted, the Parliament of Canada would have recognized and honoured the contribution of Chinese immigrants, particularly in the construction of Canadian railways, and would have acknowledged and apologized for their unjust treatment as a result of the head tax and exclusion laws. The bill would also have required the Ministers of Finance and Canadian Heritage to negotiate with the National Congress of Chinese Canadians a "suitable payment" in restitution for the head tax, with that money being applied to the establishment of an educational foundation that would develop materials on Chinese Canadian history and on racial harmony for use in schools and post-secondary institutions.

A later version of Bill C-333 was introduced in 2005. This version, "An Act to acknowledge that immigrants of Chinese origin were subject to head taxes and other

exclusionary measures and to provide for recognition of these actions”, took what might have been seen as a less ambitious and more achievable approach than the earlier version. It would not, for example, have constituted an apology for the head tax and exclusion legislation. It still provided for negotiation between the Government of Canada and the National Congress of Chinese Canadians, but measures resulting from those negotiations would explicitly “not be interpreted as constituting an admission by Her Majesty in right of Canada of the existence of any legal obligation of Her Majesty in right of Canada to any person.” The only specific measures mentioned in the bill were the installation of commemorative plaques at places where exclusionary acts had occurred, educational materials respecting the contributions of Chinese immigrants to the development of Canada, and a request to Canada Post Corporation to issue a set of commemorative postage stamps.

Response to Bill C-333 was sharply divided, both within Parliament and within Canada’s Chinese community. In Parliament, members of the Conservative Party and the Bloc Québécois spoke in its favour, while members of the New Democratic Party and the governing Liberal party spoke against it, one of the latter saying that it “asks the Parliament of Canada to focus on actions taken by a previous government as opposed to looking toward the future.”²⁴¹ A New Democratic Party Member of Parliament, Libby Davies, introduced Motion M-102, which provided that “in the opinion of this House, the government should negotiate with the individuals affected by the Chinese Head Tax and the Chinese Immigration (Exclusion) Act, as well as with their families and their representatives, a just and honourable resolution which includes the following framework: (a) a parliamentary acknowledgment of the

²⁴¹ *Hansard*, 38th Parliament, 1st Session, Number 061, Monday, February 21, 2005, p. 1200.

injustice of these measures; (b) an official apology by the government to the individuals and their families for the suffering and hardship caused; (c) individual financial compensation; and (d) a community-driven anti-racism advocacy and educational trust fund for initiatives to ensure that these and other historic injustices are not repeated.”²⁴²

The opposition of the New Democratic Party to the Conservative-sponsored Bill C-333 reflected the division within Chinese-Canadian communities on the bill, which turned principally upon the bill’s lack of any provision for individual compensation. The Member of Parliament who originally introduced Bill C-333, Inky Mark, justified the absence of any provisions for apology or financial compensation in the latter version of the bill on the ground that the removal of such provisions made it more likely that the bill might pass, stating, “If it’s a money bill, forget it; it ain’t going to happen.”²⁴³ The lack of a proposal for individual compensation was agreeable to the National Congress of Chinese Canadians, which had sought funding for Chinese-Canadian ethnic groups as part of a settlement package but had not favoured individual compensation.²⁴⁴ The Chinese Canadian National Council, on the other hand, insisted that individual compensation must be part of any settlement package, and a spokesperson dismissed Bill C-333 as a “stinker” for failing to provide for such compensation.²⁴⁵ Other groups, such as the Edmonton Chinese Canadian Head Tax & Exclusion Act Redress Committee, stated that neither the NCCC nor the CCNC were

²⁴² *Private Members’ Business: Items Outside the Order of Precedence*, Monday, November 14, 2005 (No. 149).

²⁴³ Cassandra Szklarski, “Federal apology, redress not in store for Chinese immigrants, group complains”, October 25, 2005, online <<http://www.recorder.ca/cp/national/051025/n102599A.html>>

²⁴⁴ Charlie Smith, “Head-Tax Payer Rejects MP’s Proposal for Apology”, *Georgia Straight*, November 18, 2004.

²⁴⁵ *Ibid.*

entitled to speak on behalf of Chinese Canadian communities or head tax payers, and claimed that the legitimate right to do so rested with itself and other groups centred in Canadian cities that were more directly connected with Chinese Canadian individuals.²⁴⁶

The bickering among Chinese-Canadian organizations illuminates a dilemma that may arise in any attempt to seek redress for long-past human rights violations and that will be discussed in a subsequent chapter of this paper: who, if anyone, other than the individual victims of the human rights violations themselves, can legitimately represent the interests of those whose human rights were violated? In the case of proposals for redress arising from the Chinese head tax and exclusion laws, the disagreement among competing organizations may have prevented Bill C-333 from moving ahead more expeditiously. As a result, proposals for legislative redress for a time seemed to have stalled, and the possibility of any sort of remedy whatsoever being provided appeared unlikely.

In November of 2005, however, Canada's thirty-eighth Parliament was dissolved, and an election date was set for January 23, 2006. The Liberal Party under Prime Minister Paul Martin had been in a minority government situation prior to that time, and by the first week of January in 2006, the Liberals were trailing the Conservative Party in the polls. In early December, Conservative Party leader Stephen Harper had reversed his own party's position and announced that he supported an apology for the Chinese head tax. With the Liberal Party in need of votes and seeing its traditional support among immigrants in danger of being eroded, the stage was set for an abrupt reversal

²⁴⁶ Kenda D. Gee, "Head-Tax Apology Isn't Good Enough", *Georgia Straight*, November 25, 2004.

of government policy. In a radio interview broadcast on January 4, 2006, Prime Minister Martin unexpectedly apologized for the Chinese head tax, despite his Multiculturalism Minister, Raymond Chan, having said as recently as that same morning that the government believed that an apology would be ill-advised because it would expose Canadian taxpayers to costly lawsuits.²⁴⁷ One month of a closely-fought election campaign had therefore resulted in gains that years of campaigning had previously failed to achieve; not only did the leaders of the two parties that were competing to form the next government suddenly perceive the necessity for an apology, one of them – the Prime Minister – had actually provided one, albeit in an impromptu and unofficial fashion.

With the dam broken on the provision of an apology and two weeks still to go in the election campaign, the issue of head tax redress had a new impetus and had become a major campaign issue. By the time the new government was formed under Prime Minister Harper, it therefore seemed likely that the government might go beyond simply the provision of an apology. On April 4, 2006, the throne speech included a statement that “Government will act in Parliament to offer an apology for the Chinese Head Tax.”²⁴⁸ One week later, news reports indicated that representatives of the Chinese Canadian National Council had been given assurances that the government would make a formal apology by July 1st – the date upon which Chinese immigration to Canada had been banned eighty-three years earlier – and that there would be

²⁴⁷ “PM apologizes for head tax in campaign trail reversal,” *Vancouver Sun*, Thursday, January 5, 2006, p. A1.

²⁴⁸ Government of Canada, “Speech From the Throne”, online <http://www.sft-ddt.gc.ca/default_e.htm#>.

financial compensation to surviving head tax payers or their surviving spouses.²⁴⁹

Finally, on June 22, 2006 in the House of Commons, the Prime Minister stated that:²⁵⁰

...on behalf of all Canadians and the Government of Canada, we offer a full apology to Chinese Canadians for the head tax and express our deepest sorrow for the subsequent exclusion of Chinese immigrants.

In addition, he announced that there would be “symbolic payments” to living head tax payers and their spouses, as well as the financing of community projects aimed at acknowledging the impact of past wartime measures and immigration restrictions on the Chinese Canadian community and other ethnocultural communities.

While there were some complaints that the scope of compensation did not extend to the descendants of non-surviving head tax payers,²⁵¹ and also that the application process for compensation payments was too bureaucratic for the elderly Chinese people at whom it was targeted, the general response to the apology and compensation announcement was overwhelmingly positive. On October 20, 2006, Heritage Minister Bev Oda personally distributed the first three \$20,000 cheques.²⁵² One hundred and twenty-one years after the head tax had first been imposed, a remedy had finally been provided to those who suffered its effects.

C. Japanese-Canadian Redress and Other Redress Measures

²⁴⁹ “Head-tax survivors will get compensated”, *Vancouver Sun*, Monday, April 10, 2006, p. B1.

²⁵⁰ Canada, 39th Parliament, 1st Session, *Hansard*, No. 046, Thursday, June 22, 2006, p. 1515, online <http://www.parl.gc.ca/39/1/parlbus/chambus/house/debates/046_2006-06-22/HAN046-E.htm#SOB-1619176>.

²⁵¹ Charlie Smith, “Head-tax redress incomplete,” *Georgia Straight*, Volume 40, Number 2033, December 7-14, 2006, p. 15.

²⁵² “Cabinet minister delivers head tax paybacks,” *Vancouver Sun*, Saturday, October 21, 2006, p. B8.

The apology and compensation to Chinese-Canadians was not without precedent. On February 12, 2002, in conjunction with the celebration of the lunar New Year, Prime Minister Helen Clark apologized for New Zealand's poll tax and other past restrictions, apparently on the basis of a need for reconciliation between New Zealand's Chinese community and the rest of New Zealand society.²⁵³

While the governments which passed these discriminatory laws acted in a manner which was lawful at the time, their actions are seen by us today as unacceptable. We believe an act of reconciliation is required to ensure that full closure can be reached on this chapter in our nation's history.

In Canada, there had been previous redress measures for other long-past violations of the rights of Canadian ethnic groups. This occurred most notably in 1988, when the Government of Canada and the National Association of Japanese Canadians reached an agreement for redress in recognition of the internment of Japanese Canadians during World War Two for the stated purpose of reaffirming and ensuring the principles of equality and justice.²⁵⁴ By the terms of the agreement, the Government of Canada committed to:²⁵⁵

1. acknowledge that the treatment of Japanese Canadians during and after World War II was unjust and violated principles of human rights as they are understood today;
2. pledge to ensure, to the full extent that its powers allow, that such events will not happen again; and
3. recognize, with great respect, the fortitude and determination of Japanese Canadians who, despite great stress and hardship, retain their commitment and

²⁵³ "NZ government apologises to Chinese community", on-line <
<http://www.executive.govt.nz/minister/hawkins/chinese/2.htm>>.

²⁵⁴ Government of Canada, "Redress Agreement--Terms of Agreement between the Government of Canada and the National Association of Japanese Canadians", online <
http://www.pch.gc.ca/progs/em-cr/eval/archive/2002_18/7_e.cfm>.

²⁵⁵ *Ibid.*

loyalty to Canada and contribute so richly to the development of the Canadian nation.

It might seem surprising that in the debate on redress for Chinese Canadians, the issue of whether or not there should be individual compensation was so contentious, given that the agreement between the Government of Canada and the National Association of Japanese Canadians had set the precedent for providing both individual compensation and a variety of other compensation measures. These eventually cost \$422 million to implement,²⁵⁶ divided among the following categories:²⁵⁷

- a. \$21,000 individual redress, subject to application by eligible persons of Japanese ancestry who, during this period, were subjected to internment, relocation, deportation, loss of property or otherwise deprived of the full enjoyment of fundamental rights and freedoms based solely on the fact that they were of Japanese ancestry; each payment would be made in a tax-free lump sum, as expeditiously as possible;
- b. \$12 million to the Japanese-Canadian community, through the National Association of Japanese Canadians, to undertake educational, social and cultural activities or programmes that contribute to the well-being of the community or that promote human rights;
- c. \$12 million, on behalf of Japanese Canadians and in commemoration of those who suffered these injustices, and matched by a further \$12 million from the Government of Canada, for the creation of a Canadian Race Relations Foundation that will foster racial harmony and cross-cultural understanding and help to eliminate racism.
- d. subject to application by eligible persons, to clear the names of persons of Japanese ancestry who were convicted of violations under the War Measures Act and the National Emergency Transitional Powers Act.
- e. subject to application by eligible persons, to grant Canadian citizenship to persons of Japanese ancestry still living who were expelled from Canada or had their citizenship revoked during the period 1941 to 1949, and to their living descendants;
- f. to provide, through contractual arrangements, up to \$3 million to the National Association of Japanese Canadians for their assistance, including community liaison, in administration of redress over the period of implementation.

²⁵⁶ *Hansard, supra*, note 241.

²⁵⁷ *Supra*, note 254.

Although the Government of Canada in announcing the settlement agreement stressed its uniqueness, other ethnic groups that had suffered past human rights violations perceived it as opening the door to their own claims for compensation. In addition to claims arising from the Chinese head tax and exclusion laws, other claims brought forward included those on behalf of Ukrainian, Italian and German ethnic groups on the basis of their internment during the two world wars, Indo-Canadians on the basis of a 1908 incident in which passengers on the ship Komagata Maru were not allowed to disembark in Canada, and Jewish Canadians on the basis of a 1939 incident in which passengers on the ship St. Louis were not allowed to disembark in Canada. The Government's response in 1994 was to adopt a policy on historical redress that reaffirmed the uniqueness of the Japanese Canadian Redress Agreement, confirmed that no financial compensation would be awarded to individuals or communities for historical events, committed to a forward looking agenda to ensure that such practices did not recur, and noted that federal resources would be used to create a more equitable society.²⁵⁸

By 2005, however, the Government seemed to be relenting somewhat in its refusal to deal with outstanding issues of human rights violations. The February 2005 budget included \$25 million earmarked for "commemorative and educational initiatives to highlight the contribution that ethnocultural groups have made to Canadian society and help build a better understanding among all Canadians."²⁵⁹ This money was to be spent over a three-year period, administered through a new "Acknowledgement,

²⁵⁸ *Ibid.*

²⁵⁹ Government of Canada, "Budget 2005: Securing Our Social Foundations", <<http://www.fin.gc.ca/budget05/pamph/pasoce.htm>>.

Commemoration, and Education (ACE) Program”, to be administered in turn by the Multiculturalism Program of the Department of Canadian Heritage.

The ACE Program resulted in agreements-in-principle between the Government of Canada and the representatives of two ethnic groups that were intended to acknowledge – though explicitly neither apologizing for or compensating for – past human rights violations. On August 24, 2005, the first of these was signed in recognition of Ukrainian internment during the Great War with the Ukrainian Canadian Community, as represented by the Ukrainian Canadian Foundation of Taras Shevchenko (“Shevchenko Foundation”), the Ukrainian Canadian Congress and the Ukrainian Canadian Civil Liberties Association. By its terms, the Government agreed to provide an initial amount of \$2.5 million for programs to commemorate Ukrainians’ historical experience and educate Canadians about these experiences, highlight and commemorate the contributions that the Ukrainian Canadian Community has made to Canada, and promote cross-cultural understanding and a shared sense of Canadian identity.²⁶⁰

On November 12, 2005, a second agreement-in-principle was signed with representatives of the National Congress of Italian Canadians, the National Federation of Canadian Italian Business and Professional Associations, the Order Sons of Italy of Canada, and *La Fondation communautaire canadienne italienne* for the acknowledgement, commemoration, and education of Canadians on the experiences of Italian Canadians impacted by the *War Measures Act* in Canada during the Second World War and in highlighting the contributions that Italian Canadians have made to

²⁶⁰ Government of Canada, “Agreement-in-Principle between the Government of Canada and the Ukrainian Canadian Community”, < http://www.pch.gc.ca/progs/multi/pubs/ukr/index_e.cfm >.

the building of Canada.²⁶¹ News reports on this agreement in principle indicated that the Government expected to announce similar agreements-in-principle at later dates to commemorate the internment of Croatian Canadians during the Great War, the turning back of the St. Louis, the turning back of the Komagata Maru, and the Chinese head tax and exclusion laws.²⁶²

D. Conclusions

If nothing else, the chronology of contemporary attempts to obtain redress for Canada's anti-Chinese legislation illustrates the unpredictability of politics. After the failure of attempts to use the courts and Parliament to compel the Government of Canada to provide some remedy in respect of the Chinese head tax and exclusion laws, it would have been reasonable to conclude that no remedy would be forthcoming. Despite that, Canada finally chose to provide a remedy anyway. That politicians dependent upon the popular will to govern concluded that popular will would support or require some form of remediation for a long-past violation of human rights is, of course, a good thing. And since the commitment to provide a remedy was made in the middle of an election campaign by a party which then went on to form the government, it may even be suggested that that party had been correct in its assessment of the public will, and that remediation of outstanding human rights violations is supported by the general populace.

²⁶¹ Government of Canada, "Agreement-in-Principle to Highlight Italian Canadians' Contribution to Building Canada", < http://www.pch.gc.ca/newsroom/news_e.cfm?Action=Display&code=5NO307E >.

²⁶² "Ottawa to Unveil Italian Redress Package", *Globe & Mail*, Saturday, November 12, 2005, p. 1.



What remains questionable, however, is whether remedies for past human rights violations should depend upon government largesse and the vagaries of public opinion rather than being compellable through the court system. The fact that Canadian governments have eventually provided redress in recognition of the Chinese head tax and exclusion laws, the Japanese-Canadian internment, the Italian-Canadian internment, the Ukrainian-Canadian internment, and other human rights violations that occurred decades previously cannot be attributed to mere whimsy on the part of governmental decision-makers. Instead, their recognition of the need to deal with these issues must be perceived as reflecting the persistence and power of unremedied injustices on the political agenda. This in turn provides support for the argument that effective and accessible mechanisms must be made available by which those who have suffered human rights violations in the past can pursue meaningful remedies. Given the demonstrated ability of governments to ignore such issues for many decades, this underlines the importance of empowering the judiciary to effectively address long-past human rights violations.

The next two chapters will therefore consider whether the courts are as powerless to provide a remedy in such situations as they believed themselves to be in *Mack*, or whether there are legal mechanisms that might support a more activist judiciary in the imposition of legal remedies for long-past human rights violations.

CHAPTER IV: OVERVIEW OF JUDICIAL REMEDIES FOR LONG-PAST HUMAN RIGHTS VIOLATIONS

The litigation of the claim in *Mack* was an important event in the history of Canada's anti-Chinese litigation and its aftermath. Despite the fact that the lawsuit was ultimately unsuccessful, it at least served to keep the head tax issue on the political agenda and to maintain the momentum that eventually led to governmental redress. The importance of the case goes beyond its impact on the Chinese-Canadian community, however, in that it illustrates the serious impediments that any group can encounter if it attempts to use the courts to obtain remedies for long-past violations of human rights. Not only will the same sorts of rules and principles that prevented recovery in *Mack* operate in similar cases, there are also additional obstacles which were not even canvassed in that case. Some of these are based in concerns about policy or fairness, others are rooted in substantive legal principles, and others are procedural. These obstacles are all undoubtedly rooted in legitimate notions of fairness, justice, and economy. Should they, however, prevent judges from providing remedies for acknowledged violations of human rights? That is, is it appropriate that a judge can, as happened in *Mack*, characterize a past human rights violation as "repugnant and reprehensible" but do nothing about it?

In some respects, these are not altogether new questions. It is hardly unknown for judges to "wash their hands" of the consequences of unjust but legally correct decisions.²⁶³ Neither is it new to suggest that it will not always be appropriate for them to do this. Thoreau, for example, writing about judges who did not find slavery to be unlawful, said that they were "merely the inspectors of a pick-lock and

²⁶³ Matthew 27:24.

murderer's tools, to tell him whether they are in working order or not, and there they think that their responsibility ends."²⁶⁴ There are, of course, others who would argue vehemently against "judicial activism," saying that unelected judges have no legitimate grounds for overruling the policy choices of duly elected governments. In this respect, Jefferson was just as given to colourful metaphor as Thoreau, referring to the judiciary as a "subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."²⁶⁵

It must be suggested, however, that arguments about judicial activism versus judicial restraint as comprehensive and abstract phenomena are not particularly useful, and often indicate merely the extent to which the ideological choices espoused by one commentator or another are currently being reflected by particular courts. Since very few would argue that courts should never provide remedies in cases where the executive or legislative branches of government have failed to do so, the proper question must be under what circumstances the courts can legitimately intervene. A later section of this paper answers that question in a very specific way with regard to long-past human rights violations in the Canadian legal environment, showing how a constitutional interpretation that is consistent with existing jurisprudence would permit judges to provide remedies in such cases, and suggesting criteria that could guide the courts in determining which cases merit their consideration. Before turning to the specific legal means by which remedies could be provided, however, it will be useful to first consider a more general rationale for their provision, and to anticipate

²⁶⁴ Henry David Thoreau, "Slavery in Massachusetts," in *The Writings of Henry David Thoreau*, vol. 4 (Boston: Houghton Mifflin, 1906), pp. 395-396.

²⁶⁵ Thomas Jefferson, Letter to Thomas Ritchie, Dec.25, 1820. *Jefferson's Works*, Second Edition, Thomas Jefferson Randolph, editor, Vol. IV (Boston: Gray & Bowen, 1830), letter CLVI <http://www.gutenberg.org/files/16784/16784-h/16784-h.htm#2H_4_0156>.

and respond to objections which might be raised in opposition to their proposed provision.

This chapter will therefore attempt to provide a broad overview of some of the factors that would inform any attempt at obtaining judicial remedies for long-past human rights violations. It will begin by considering why those whose rights have been violated are likely to wish to turn to the courts for redress. It will then attempt to anticipate objections which might be raised to the provision of judicial remedies for long-past human rights violations, both on broad grounds of principle or policy, as well as technical or legal issues, and respond to those objections.

A. Why Judicial Remedies?

Chapter I of this paper set out the historical antecedents of the modern concept of human rights and the post-World War II manifestation and guarantee of human rights, including the right to be free from racial discrimination, in both domestic statutes and international instruments. The fact that our current conception of human rights is relatively modern does not mean that those rights are new. If we accept that it is wrong to discriminate on the basis of race, then it can be confidently stated that it was just as wrong one hundred years ago – a time when Wilberforce in England, Douglas in the United States, and many others had already condemned it - as it is today. That is, if there is a “human right” to not be subject to racial discrimination, then racial discrimination must not be something that only became wrong because of the creation of some statutory obligation by government. This distinguishes it from, for example, exceeding a posted speed limit or failing to file an income tax return, in that it would

be nonsensical to claim that there was any legal or moral reason to comply with speed limit laws or tax laws before those laws were created. Racial discrimination, on the other hand, was and is wrong because of its moral or ethical unacceptability and its violation of what we now call "human rights," and did not become wrong only when governments formally recognized its wrongness and identified it as a human rights violation. Despite that, the Government of Canada chose to provide a statutory vehicle for racial discrimination. To the extent that Canada and other states chose to give such legal manifestation to racial discrimination in statutes such as the head tax and exclusion laws, it is not unreasonable for those who seek a remedy for such treatment to also expect that that remedy will have a legal manifestation.

This expectation is a legitimate factor to take into consideration. That is, in any state in which the legitimacy of the institutions of government rests upon the consent of the governed, there must at least be some broad correspondence between public demand for services and government provision of those services, including dispute resolution services. In western industrialized democracies, and considering in particular the common law jurisdictions, there are a variety of different institutions that might be considered to compose a system for providing remedies for legal grievances, including grievances arising from human rights violations. Reflecting, perhaps, the nature of the common law systems, these comprise a mixture of statutes, administrative bodies, tribunals, and legal concepts.

With respect to human rights complaints in particular, there are existing and accessible structures of elected representatives and specialized bureaucracies that citizens may turn to before resorting to the courts, particularly since these can usually

be accessed at little or no cost. In Canada, for example, the federal government and every province and territory except Yukon have their own human rights codes, generally accompanied by commissions that promote human rights and tribunals that adjudicate disputes over alleged human rights violations. These legislated human right codes are buttressed by other legislative instruments, such as the *Bill of Rights* and the *Canadian Charter of Rights and Freedoms*, plus British statutes such as the *Magna Carta* and the English *Bill of Rights* that were received with the common law, some or all of which are likely to apply to at least recent human rights violations. In addition to domestic legislation, there also exists a large body of international human rights instruments, including those instruments mentioned in the discussion of the *Mack* case above. All of these bodies and instruments will give even the most uninformed layperson some knowledge that they possess “rights” and some expectation that those rights can be given legal effect.

With regard to the last-mentioned of these, international human rights instruments, it might be presumed from the outcome in *Mack* that anyone hoping to rely upon the existence of such instruments would be disappointed, even in countries such as Canada which have ratified them, but this would not necessarily be correct. Such instruments can at least serve as guides to judicial interpretation, although the result of relying upon them in this way may be difficult to predict. An example of litigants attempting to rely upon international human rights instruments as in *Mack* but with a different outcome is *Lazarescu v. Canada*.²⁶⁶ In that case, the Appellants did not rely upon the *Charter*, instead making an argument that the requirement under the *Income Tax Act* that women must include in income the maintenance payments they receive

²⁶⁶ [1995] 1 C.T.C. 2313 (T.C.C.). Also see *supra*, note 228.

for the support of their children discriminates against women in contravention of the *Declaration on the Elimination of Discrimination against Women*, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *United Nations Declaration of the Rights of the Child*. The Appellants were successful in the event, though admittedly this was only because the judge considered himself bound by another case under which a higher court had already struck down the impugned provision of the *Income Tax Act* on *Charter* grounds. With regard to the purported reliance upon international instruments, however, the judge acknowledged that although they do not have the force of law in Canada unless implemented by statute, they may be useful guides to interpretation.

Note that just as international human rights instruments can be used in judicial interpretation, so can the *Charter* itself also serve as a guide to interpretation in situations where it does not apply directly. The common law, for example, must be interpreted in light of the *Charter*, as noted by Cory J. in *Hill v. Church of Scientology of Toronto*:²⁶⁷

Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

The *Bill of Rights* also purports to guide the proper interpretation of every "law of Canada." The scope of its application in this respect is narrower than that of the

²⁶⁷ [1995] 2 S.C.R. 1130, at ¶ 92.

Charter, since s. 5 of the *Bill of Rights* defines “law of Canada” to mean “an Act of the Parliament of Canada enacted before or after the coming of force of this Act.”²⁶⁸ And while it may be that legislated human rights codes, international instruments, the *Bill of Rights* and the *Charter* may all be too recent to be used in the interpretation of long-past human rights violations, let alone having direct application, they will certainly contribute to a public expectation that those whose human rights have been violated must have recourse to some sort of mechanisms or remedies.

When these systems fail to provide assistance, however, then those who are still seeking remedies will naturally contemplate whether there are any steps they can take themselves to obtain such remedies directly. Fortunately, they will find that a mechanism by which aggrieved members of the public can seek remedies for wrongs that have been done to them not only exists in common law jurisdictions, it has a pedigree which makes its legitimacy unquestionable. This is, of course, the tort system.

The tort system has been described as “a form of legalised self-help.”²⁶⁹ Victims of human rights violations are as likely as people victimized in any other matter to consider themselves victims of a “tort” in its literal meaning of a “wrong”. And if it is correct that “judgment that a particular loss deserves redress necessarily implies a finding of a breach of an obligation owed to the plaintiff by the tortfeasor,”²⁷⁰ then it will certainly be tempting to reason in reverse that since there can be no doubt that

²⁶⁸ *Authorson (Litigation Guardian of) v. Canada* 2003 SCC 39.

²⁶⁹ Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials*, Second Edition (Oxford: Oxford University Press, 2003), p. 1.

²⁷⁰ *Clerk & Lindsell on Torts*, Seventeenth Edition (London: Sweet & Maxwell, 1995), p. 3.

everyone is obliged not to violate the human rights of others, then a breach of that obligation deserves redress.

While there is no recognized tort of breaching human rights, this need not discourage potential litigants, if they recognize both that the categories of tort liability remain open²⁷¹ and that the harmful consequences suffered as a result of a human rights violation should – if the cloak of legitimacy provided by statutory authorization can be removed – ground recovery in well-established causes of action, such as the various forms of trespass to the person or wrongful interference with goods. While at one time, the Crown could not be held liable in tort, that immunity has been taken away in most jurisdictions by statute.²⁷² Linden, in fact, comments that it is “odd” that the use of tort law as a technique for reviewing government action is controversial.²⁷³

Furthermore, not only can litigants base their quest for judicial redress in a branch of the law that exists for the purpose of providing it, they can also rely upon fundamental legal principles that also aim at ensuring that those who are wronged are able to obtain remedies through the courts. Two of the best-known of these are embodied in the Latin maxims *ubi jus, ibi remedium* and *fiat justitia ruat coelum*.

²⁷¹ *Ibid.*, at pp. 2-3.

²⁷² In Britain, for example, the *British Crown Proceedings Act*, 10-11 Geo. VI, c.44 was passed in 1947, making the Crown liable in tort as if it were a person of full age and capacity, for torts committed by its agents or servants. In Canada, s. 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 states in part: “3. The Crown is liable for the damages for which, if it were a person, it would be liable...in respect of a tort committed by a servant of the Crown, or...a breach of duty attaching to the ownership, occupation, possession or control of property.”

²⁷³ Allen M. Linden, *Canadian Tort Law*, Seventh Edition (Markham: Butterworths, 2001), p. 612.

The maxim *ubi jus, ibi remedium* – where there is a right, there is a remedy²⁷⁴ - has survived from ancient times and been cited by courts and tribunals in various jurisdictions. It may most often be quoted in connection with tort law, since tort law is sometimes said to owe its existence to this principle,²⁷⁵ but it is not limited to that field. In *Doucet-Boudreau*, for example, the Supreme Court of Canada considered the case of a Francophone who was not given adequate access to services in French when he was stopped by an Anglophone police officer. The Court said:²⁷⁶

Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*Dunedin, supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

Although *Doucet* was a *Charter* case, the maxim obviously predates the *Charter* and therefore cannot be limited to cases that involve it. Arguably, then, it should be equally applicable to a full range of human rights cases, assuming that the term "human right" is not a misnomer, and that human rights are, indeed, rights. This belief underpins academic debate about, for example, the legacy of *Brown v. Board of Education* and its endorsement of affirmative remedial action to protect constitutional rights. In this context, Thomas argues that:

²⁷⁴ Although there are a number of common translations for the maxim, this one appears on the website of the Department of Justice of the Government of Canada, <http://canada.justice.gc.ca/en/dept/pub/trib/SCofC.html>, as well as in *Jowitt's Dictionary of English Law*, Second Edition, Vol. 2 (London: Sweet & Maxwell, 1977), p. 1823.

²⁷⁵ See, for example, Sir Arthur Underhill, *A Summary of the Law of Torts or Wrongs Independent of Contract*, Sixteenth Edition, (London: Butterworth, 1949), pp. 6 and 8.

²⁷⁶ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at ¶ 25.

...a remedy is more than a legal maxim. Rather,...the right to a meaningful remedy is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Stated simply: *Ubi jus, ibi remedium*. Where there's a right, there must be a remedy.²⁷⁷

The importance of providing a remedy in cases where constitutional rights have been infringed was stated by LeBel J. in *R. v. Demers*:²⁷⁸

... public law actions share a necessary commonality with private litigation: an individual or group is seeking to redress a wrong done to them. The larger public dimensions of a constitutional challenge piggyback on the claimant's pursuit of his or her own interests, particularly in criminal law cases. Courts should not lose sight of this symbiosis; they should not forget to provide a remedy to the party who brought the challenge. This is not a reward so much as a vindication of the particularized claim brought by this person in assertion of his or her rights. Corrective justice suggests that the successful applicant has a right to a remedy. [underlining in original]

Is the maxim literally true? While it is closer to the truth than the similar but less quoted *lex semper debet remedium* – the law will always give a remedy – it is still overbroad. If the *Mack* case was not wrongly decided, for example, the maxim could only have been true if one accepts the circular reasoning implicit in asserting that because the Plaintiffs did not succeed in obtaining a remedy that they must not have had a right, or by accepting that the Plaintiff had no right not to be discriminated against on racial grounds. Stated another way, the court in *Mack* would probably not have taken issue with the maxim, but would have stated that the Plaintiffs had no right and therefore had no remedy, since their “human rights” were created by positive law and therefore could not have predated the passage of the relevant statutory and

²⁷⁷ Tracy A. Thomas, “Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process”, 41 *San Diego L. Rev.* 1633-1645, at 1636.

²⁷⁸ *Supra*, note 20, at ¶ 101.

constitutional provisions. Despite that, the maxim is at least intended to be true, even if it is not always applied.

The second of the two maxims quoted above would serve as a retort to anyone who might suppose that practical difficulties or undesirable consequences should mitigate against providing remedies for long-past human rights violations. The maxim *fiat justitia, ruat coelum* highlights the principle that courts are not supposed to care about the effects of their judgments, only about ensuring that justice is done. The principle has been applied by many Canadian courts, including the Manitoba Court of Appeal:²⁷⁹

But, it may be argued, the consequences of the court's decision are entirely irrelevant. The court must decide the issue according to law and merit, no matter what the consequences might be. Dureault Co. Ct. J. was certainly of that view, and in support of his position he cited the classical words of Lord Mansfield in *Rex v. Wilkes* (1770), 4 Burr. 2527 at 2561, 98 E.R. 327 : "Fiat justitia, ruat coelum" (Let justice be done even though the heavens fall).

The maxim is sufficiently well-established that it has survived both a more colloquial translation by the Prince Edward Island Supreme Court²⁸⁰ – "Let the chips fall where they may" – and a re-translation into French by the New Brunswick Court of Appeal, which has stated "*Les conséquences d'une décision ne sont pas nécessairement pertinentes*".²⁸¹ The British Columbia Court of Appeal has referred to it as a "legal principle", despite simultaneously acknowledging that it is what "some might call a

²⁷⁹ *Forest v. Manitoba (Registrar of Court of Appeal)* (1977), 77 D.L.R. (3d) 445 (Man. C.A.) at ¶27.

²⁸⁰ *Honkoop v. Prince Edward Island (Tobacco Commodity Marketing Board)* (1984), 153 A.P.R. 156 at ¶14.

²⁸¹ *Robichaud c. Nouveau-Brunswick Commission scolaire no 39* (1989), 99 N.B.R. 2d 341 (C.A.) at ¶21.

mere pious sentiment.”²⁸² It may be that the difference between pious sentiment and legal principle in human rights cases rests upon the existence of judges who are, in fact, prepared to arrive at rulings without balancing the rights of wronged minorities against the inconvenience or cost of their judgements to societal majorities; to the extent that such judges might exist, their ability to ground their decisions on this principle would be a considerable advantage.

The disparate elements listed above – human rights codes, commissions and tribunals, the tort system, legal principles supporting the provision of remedies for those who have suffered wrongs – all of these combine in a legal system that is certainly capable of providing remedies for those who have suffered human rights violations, and is likely to do so for those whose human rights have been violated in the recent past. As was seen in *Mack*, however, the system has not proved to be so successful a vehicle in cases where human rights were violated in the more distant past. If legitimate legal systems should fulfill the legitimate expectations of those who fall under their jurisdiction, then this leads to the question of whether there is anything less legitimate in the demands for redress of those who complain about rights violations that took place in the more distant past rather than the more recent past. The answer must be no, that the policy grounds in favour of having formal and effective dispute resolution mechanisms will apply to past human rights violations as much as to more recent ones. Furthermore, anyone whose human rights have been violated will expect that remedies should be available through the legal system and every citizen supporting that system could legitimately expect such remedies to be available.

²⁸² *Mayer v. Mayer Estate* (1993), 106 D.L.R. (4th) 353 (B.C.C.A.) at ¶37, per Southin J.A., dissenting.

If it can be seen that the principles and institutions that comprise the legal system should favour the provision of remedies for long-past human rights, then the denial of such remedies should only occur if there exist countervailing objections to the provision of such remedies. This was a question that the judges in *Mack* did not really have to address, since specific legal flaws in the case as presented – e.g. that the plaintiffs could not rely upon rights that were thought to be created by the *Charter* for a case that predated the *Charter*, and that there could be no unjust enrichment that was specifically authorized by statute – meant that they did not have to consider the broader questions surrounding the plaintiff's case.

Given that, it will be prudent to attempt to identify whether there are any grounds for objecting to the proposed provision of remedies that might outweigh the presumption in favour of providing them, and to attempt to assess the validity of any such objections.

B. Objections to Judicial Remedies

Objections which might be anticipated to be raised to the provision of remedies for long-past human rights violations include both broad reasons of policy or fairness as well as narrow legal objections. As will be seen below, none of these objections can ultimately justify a failure to provide remedies for victims of past human rights violations.

1. Policy Issues: *Should Remedies Be Available for Human Rights Violations That Occurred in the Distant Past?*

A letter to the editor prompted by the Government of Canada's settlement package in respect of the Chinese head tax and exclusion laws drew attention to one of the policy problems raised by any attempt at settlement:

I have one question: As someone who is half Chinese and half WASP, do I have to pay reparations to myself?²⁸³

Even if the question was intended to be tongue-in-cheek, it nevertheless makes the point that attempting to provide remedies for past wrongs will undoubtedly involve difficulties and complexities. The following seven hypothetical objections, while perhaps not an exhaustive list, at least indicate some of the objections that might be raised to attempts to remedy past human rights violations, as well as demonstrating that none of these potential objections are overwhelming. Some of them could be raised against any remedy, whether judicial or legislative, while others would be specific to judicial remedies. And while it might be thought that courts would not be influenced by some of the objections that are more policy-related, it must be suggested that judges are not unaware of the political and cultural milieus within which they perform their functions, and that such factors may well enter into those calculations that result in their decisions.

²⁸³ Dan Scarrow, "Redress This", *Globe and Mail*, Thursday, November 17, 2005, p. A22.

a) Is It Unfair to Judge Past Events By Contemporary Standards?

The biblical query, “why beholdest thou the mote that is in thy brother’s eye, but perceivest not the beam that is in thine own eye”²⁸⁴ is one that should be kept in mind by anyone who might unthinkingly apply contemporary human rights standards to past eras. There is no shortage of examples of human rights violations in the modern era, and those of us who live in this era are often inured to them, or even blind to their existence. If few of us actively consider how we can promote the rights of those whose rights are invalidated by oppressive regimes or crushing poverty in other countries, it seems probable that even fewer pause to consider whether the fundamental rights of the most marginalized members of our own societies are being subverted. Fewer still seem likely to consider whether a drive to the store infringes the rights of citizens of Tuvalu, for example, by speeding the date when that country and other island states will disappear below the ocean because of anthropogenic climate change, or even if it infringes the rights of our own as-yet-unborn descendants by condemning them to a world of diminished environmental quality.

Although we can be slow to consider our own human rights records, we show little reluctance to judge the human rights records of individuals and societies of past eras. A striking example of this is offered by Thomas Jefferson and the issue of slavery. Despite being one of the most revered of American historical figures and an embodiment of Enlightenment virtues, Jefferson has been criticized as a hypocrite for having been a slave owner his entire life, having bought and sold slaves, having failed to provide for the manumission of his slaves upon his death, and having neglected to

²⁸⁴ See Luke 6:41 and Matthew 7:3.

attempt to achieve the abolition of slavery during his years in government, all while proclaiming the self-evident truths that all men are created equal with an unalienable right to liberty. His defenders are equally willing to judge him on this issue, despite reaching different conclusions, and point to his representation of slaves while still a practicing lawyer, his personal opposition to slavery, anti-slavery passages in the original draft of the Declaration of Independence, the achievement of at least limited reforms in Virginia and at the national level, and the considerable obstacles that prevented Jefferson from achieving more.²⁸⁵ Some defend him not only by judging that he achieved as much as he could, but by allowing that he and his Virginia contemporaries were successors to an era when “it was not yet clear to either merchants or planters that the traffic in human flesh violated the norms of civilized society,” and when a “primitive state of moral development” prevented perception of the evils of slavery.²⁸⁶

Jefferson is not the only historical personage to be found wanting when judged by contemporary standards, despite an otherwise laudatory record. Emily Murphy in Canada and Margaret Sanger in the United States, for example, are revered as early feminists but reviled by some as racists and advocates of eugenics.²⁸⁷ While their views on race and eugenics were not uncommon during their lifetimes and they had

²⁸⁵ See, for example, John Chester Miller, *The Wolf by the Ears: Thomas Jefferson and Slavery* (New York: The Free Press, 1977).

²⁸⁶ Ari Helo and Peter Onuf, “Jefferson, Morality, and the Problem of Slavery”, *The William and Mary Quarterly*, Vol. 60, No. 3, July 2003, <<http://www.historycooperative.org.ezphost.dur.ac.uk/journals/wm/60.3/helo.html>> (December 28, 2005).

²⁸⁷ For overviews respecting Sanger and Murphy respectively, see: “Margaret Sanger”, *Wikipedia* <http://en.wikipedia.org/wiki/Margaret_Sanger> (January 5, 2006); and “Murphy, Emily”, *The Canadian Encyclopedia* <<http://www.thecanadianencyclopedia.com/PrinterFriendly.cfm?Params=A1ARTA0005529>> (January 5, 2006).

little chance of seeing their views translated into government policy, this has not prevented them from being judged by modern standards and found wanting.

Is it unfair to judge Jefferson, Murphy, Sanger and others by modern standards? In a word, no. Admittedly, we should not succumb to the “historian’s fallacy” of judging historical actors on the basis of information that is available to us and was not available to them.²⁸⁸ In the cases listed above, however, as well as in the case of those legislators who passed Canada’s anti-Chinese legislation, the problem was not a lack of information, but an informed decision to sacrifice the human rights of others in favour of some preferred goal. This is, of course, typical not merely of historical figures but of contemporary ones as well. When an employer, for example, violates the human rights of an actual or prospective employee, they are likely to have grounds that seem to them very reasonable for doing so. Just as we judge such modern individuals against standards of what is or is not societally acceptable, so should we do with decision-makers of an earlier era.

b) Is It Unfair to Compel Contemporary Taxpayers to Pay for Wrongs Committed by Past Governments?

A well-known zen *koan* states that you cannot step into the same stream twice. The analogous argument that could be made against imposing any judicial remedy for past human rights violations is that the state that committed the human rights violation is not the same as the one that would be required to provide the remedy. In the case of the Chinese head tax and exclusion laws, for example, the “Canada” that eventually

²⁸⁸ David Hackett Fischer, *Historians’ Fallacies: Toward a Logic of Historical Thought* (New York: Harper Collins, 1970).

paid to provide redress to head-tax payers is not made up of the same citizens that constituted "Canada" in the late nineteenth and early twentieth centuries. Some might suggest that this makes it unfair to require contemporary taxpayers to provide recompense for wrongful acts committed by their great-grandparents' generation.

To lawyers, however, such an argument would be unpersuasive. Lawyers are accustomed to the concept of non-corporeal, non-human legal entities, whether they be governments, corporations or incorporated societies. The idea that a government should be able to evade liability because there has been a change in the composition of its citizens would seem as strange as the idea that a corporation should be able to evade liability on the ground that its shareholders have changed. Were it otherwise, then given that births and deaths change the composition of most states on a minute-by-minute basis, governments could never be held accountable for any of their actions.

c) Does Providing Benefits to One Group Undermine Societal Unity?

Where the victims of a human rights violation were members of a particular group defined by ethnicity, race, religion, or some other characteristic, it will obviously be the case that any remedy will be directed at that same group. Certain types of remedy, such as a monetary payment, may appear to non-recipients to simply be a benefit that is not being equitably distributed. This might particularly be expected to be the case if the remedy is targeted at family members or group representatives rather than at the individuals who directly suffered the original human rights violation. If this is so, some might argue that it would undermine societal unity.

It is already the case, however, that many governmental programs are targeted at specific groups and individuals, such as immigrants, corporations, farmers, the poor, arts organizations, and children. It would seem odd if the victims of human rights violations were the one special interest group that could not be targeted for special benefits.

d) Is the Impossibility of Righting All Past Wrongs Problematic?

The *in terrorem* argument - often expressed as a “floodgates” argument – is a popular courtroom device, and is not difficult to anticipate with regard to any proposed remedies for human rights violations of the distant past. If modern humans have existed for 130,000 years and “civilizations” for 5,000 years, then the number of past human rights violations that must have taken place is undoubtedly very large.

Throughout the passage of the millennia, the descendants of those whose human rights have been violated in these many incidents will have undoubtedly interbred with the descendants of those who violated their rights, and the states within which those violations took place will themselves have been destroyed and reconstituted under different names and with different boundaries and forms of government.

Trying to provide remedies for all human rights violations that ever took place would require an impossible attempt at unravelling this skein. Should this serve as an impediment to attempting to remedy any human rights violations of the distant past?

While it must, of course, be acknowledged that righting every wrong in history would be impossible, this is not what is proposed here. Rather than a dualistic “all or

nothing” approach, it is suggested that the reasoned application of a set of criteria set out later in this paper would make it possible and desirable to identify some human rights violations that took place in the distant past for which courts might justifiably be able to provide remedies.

e) Would it be Preferable to Consider the Future Rather than the Past?

The quote in the previous chapter from a Member of Parliament indicating that the Government of Canada preferred to “look to the future” rather than “focus on actions taken by a previous government” is easy to dismiss as a self-serving attempt at justification at a time when the Government was still opposed to any form of remedy for the Chinese head tax and exclusion laws. Is a more generous interpretation possible? Might it, for example, be argued in opposition to the provision of remedies for long-past human rights violations that governments have limited resources, that it is necessary to make choices in the allocation of those resources, and that other societal problems should be dealt with in preference to the remediation of outstanding human rights violations?

In fairness, it must be admitted that the first part of the hypothetical objection is true: governments do have limited resources and they do have to make choices in the allocation of those resources. This is a fact of which the courts are not unaware; if governments faced no budget constraints, then judges might never have to take overcrowding of prisons into account in making their sentencing decisions. It also cannot be denied that some anticipated future problems – the end of oil, pandemics, and global climate change, for example – are so momentous that governments could

certainly justify ignoring other issues to focus on them. In reality, however, governments do not focus on future problems to the exclusion of current and past problems. Instead, all issues compete for government attention and spending. The real issue, then, is whether outstanding human rights violations of the past should be handicapped in this competitive process, such as by virtue of courts finding that there are legal grounds that excuse governments from dealing with issues that might otherwise give rise to legal obligations. Put in this way, it can be perceived that it would be unfair and inappropriate for such issues to be accorded such differential treatment.

f) Are the Practical Difficulties Overwhelming?

The demand for monetary compensation for payers of the Chinese head tax provides an illustration of the practical difficulties that can arise even once a decision has been made to provide a remedy for a long-past human rights violation. No one knows exactly how many head tax payers are still alive,²⁸⁹ but since the tax was eliminated more than eighty years ago, it is clear that they are few in number. It might be thought, then, that repaying such a small group for the head tax collected from them would be relatively simple, and the formula actually adopted by the Government of Canada for compensating head tax payers and their spouses was, in fact, relatively simple. The questions that would have been considered by those responsible for deciding on the parameters of the compensation program, however, would have been complex. Should the compensation payment be a token amount, or a repayment of the actual amount paid? Should the repayment include interest? If so, calculated at

²⁸⁹ *Supra*, note 35.

what rate? Simple or compound? Should the spouses of deceased head tax payers receive compensation? How about their children? Grandchildren? Would concubines and their children by head tax payers be eligible, or only those linked by marriage?²⁹⁰ Since the provinces received half of the money collected pursuant to the head tax after 1903, should compensation be contingent upon a federal-provincial agreement?

Admittedly, providing an appropriate remedy for a human rights violation may not be simple; see, for example, Thomas' discussion of the many cases that followed after *Brown v. Board of Education* in an iterative process of seeking a judicial solution to racial segregation.²⁹¹ The situation is likely to be even more complicated if the rights of many people were violated and if a significant period of time has passed since that occurred. And it may also be true that the more difficult or complicated it is to provide a remedy for a human rights violation, the easier it will be to do nothing. In the case of surviving head tax payers, however, the Government of Canada was able to overcome the practical difficulties and arrive at a solution which, while not acceptable to everyone, was nevertheless widely perceived to be a good-faith attempt to resolve the issue. There is no reason to expect that such difficulties could not be similarly overcome in other cases, and neither is there any reason to presume that such difficulties provide a legitimate excuse for doing nothing.

²⁹⁰ Evidence that such issues are not fanciful emerged eight months after the Government's apology to Chinese-Canadians, when reporters obtained secret briefing notes to cabinet concerning the effect on the proposed settlement of polygamy in the Chinese-Canadian community: Peter O'Neil, "Polygamy Warning Issued on Head Tax," *Vancouver Sun*, Monday, February 12, 2007, p. A1.

²⁹¹ *Supra*, note 277.

g) Is the Court System the Right Body to Provide Redress?

While all of the preceding objections may be raised to any proposal to provide remedies for long-past human rights violations, in the final analysis they can be overcome by recognizing that human rights are important enough that societies should choose to enforce them and also that it is important to resolve lingering societal fractures caused by discontent over outstanding human rights violations. Even if the choice is made to seek to remediate outstanding human rights violations, however, there could be those who would say that this would not necessarily mean accepting that providing that remedy is an appropriate judicial function.²⁹²

This is because the healing of stresses within the polity may be less of a “legal” function than a political one. In western democratic societies, there is usually a division of responsibilities between the legislative, administrative and legal branches of government, with overtly “political” choices supposedly allocated to the legislative and administrative branches. Hogg suggests that judges are not, in fact, even qualified to deal with difficult political issues:²⁹³

[Judges] are not well suited to...policy-making....Their mandate to make decisions differs from that of other public officials in that judges are not accountable to any electorate or to any government for their decisions; on the contrary, they occupy a uniquely protected place in the system of government, which is designed to guarantee their independence from political or other influences. Their background is not broadly representative of the population; they are recruited exclusively from the small class of successful, middle-aged lawyers; they do not necessarily have much knowledge of or experience in public affairs, and after

²⁹² A caveat on any conclusion in this regard is the observation that “The judicial function is the hardest to distinguish of the three basic output functions of the political system.” Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System: Environment, Structure and Process* (Toronto: McGraw-Hill Ryerson, 1987), p. 183, citing W.R. Lederman, “The Independence of the Judiciary,” *Canadian Bar Review*, 1956, p. 769 ff.

²⁹³ Peter W. Hogg, *Constitutional Law of Canada*, looseleaf edition (Toronto: Carswell), p. 5-27.

appointment they are expected to remain aloof from most public issues. The resources available to the judges are limited by the practice and procedure of an Anglo-Canadian court: they are obliged to decide cases on the basis of the limited information presented to them in court; they have no power to initiate inquiries or research, no staff of investigators or researchers, and of course no power to enact a law in substitution for one declared invalid.

Or, as Manfredi more pithily put it with specific reference to the Supreme Court of Canada, "Elevation to a nation's highest court does not transform any individual into a moral philosopher."²⁹⁴

Even defenders of the courts may argue for limitations on judicial activism. Kelly, for example, says that the Supreme Court of Canada cannot function as the sole guardian of the constitution, but must participate in collective action with the legislatures and other institutions and individuals to protect fundamental rights.²⁹⁵

There is, in fact, a lively and voluminous academic debate in Canada about the extent and appropriateness of judicial intervention in "political" matters. One thread of this debate occurs between, on the one hand, those such as Morton who say that the courts intervene frequently in political decisions²⁹⁶ and those such as Manfredi who say that judicial activism has increased over time,²⁹⁷ and, on the other hand, those such as Choudhry and Hunter who provide statistical refutation of such claims.²⁹⁸ An

²⁹⁴ Christopher P. Manfredi, *Judicial Power and the Charter*, Second Edition (Don Mills: Oxford University Press, 2001), p. 195.

²⁹⁵ James B. Kelly, "Guarding the Constitution: Parliamentary and Judicial Roles Under the Charter", in J. Peter Meekison, Hamish Telford, and Harvey Lazar, *Reconsidering the Institutions of Canadian Federalism* (Kingston: McGill-Queen's University Press, 2002), pp. 77-110 at 104.

²⁹⁶ F.L. Morton and Rainer Knopff, eds., *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), at p. 13.

²⁹⁷ *Supra*, note 294, at p. 5.

²⁹⁸ Sujit Choudhry & Claire Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. NAPE", (2003) 48 *McGill L.J.* 525. See also the subsequent exchanges in Christopher P. Manfredi & James B. Kelly, "Misrepresenting the Supreme

interwoven thread of the debate is between the many authors who support judicial activism to protect minority rights and those, such as Morton, who condemn it.²⁹⁹

While this debate currently revolves around the courts' interpretation of the *Charter* so as to determine the legality of contemporary government legislation, the policy grounds that make "judicial activism" objectionable to some might also support an argument that the judiciary is not the right body to provide redress for long-past human rights violations.

Such an argument, however, would ignore both the traditional role of the courts and the reality of their current existence. As pointed out earlier in this chapter, members of the public are accustomed to bring their disputes and grievances to the courts, and the courts have always been obliged to consider their cases. While the nature of the cases may in some instances have changed over time, this does not mean that the courts are performing anything other than their accustomed role of adjudicating — rather than initiating — disputes. Furthermore, the fact that the courts are able to exercise their role in modern democratic states must ultimately be attributable to the consent of governments and the electorates that choose them. In Canada, it must be remembered in particular that the courts' responsibility to consider whether government actions comply with *Charter* standards is not one that the courts sought or even voluntarily accepted, but is one that was thrust upon them as a result of the decision by federal and provincial governments to introduce the *Charter*. Moreover, any government that asserts that courts are acting illegitimately is free to attempt to interfere with the courts' exercise of their mandate, and to discover whether the

Court's Record? A Comment on Sujit Choudhry and Claire E. Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49 *McGill L.J.* 741 and Sujit Choudhry & Claire Hunter, "Continuing the Conversation: A Reply to Manfredi and Kelly" (2004) 49 *McGill L.J.* 765.

²⁹⁹ *Supra*, note 296.

electorate supports it in doing so. It is also, of course, open to governments to preempt any judicial consideration of long-past human rights violations by dealing with them first; since by doing so, however, they expose their own decisions and handling of the matters to criticism, it may be that governments might actually prefer to let the courts be the ones to wrestle with the difficult issues these unresolved human rights complaints present.

2. Legal Issues: the Legal Obstacles to Remedies for Long-Past Human Rights Violations

While the preceding section attempts to elucidate objections to judicial remedies for long-past violations of human rights that are rooted in philosophical or policy grounds, there are also specific legal obstacles to the provision of such remedies. Their existence raises the question of whether or not the courts will actually be able to provide the remedies sought. That is, are prospective plaintiffs likely to be as disappointed as the plaintiffs in *Mack*? The answer must be ambiguous; if courts choose to find a way to ensure that long-past human rights violations do not go unaddressed, then such obstacles can undoubtedly be circumvented. If the courts remain diffident about dealing with such cases, however, then these legal objections may continue to present serious difficulties. For present purposes, it will be sufficient to identify the principal obstacles.

a) Laches and Limitation Periods

A fundamental obstacle to any attempt to seek redress for long-past human rights violations is what has been referred to as "the common law system's abhorrence of delay."³⁰⁰ This is manifested in statutory limitation periods, such as the two-year period within which civil claims must normally be brought in British Columbia,³⁰¹ and also in the common law doctrine of laches, defined as unreasonable delay or negligence in pursuing a right or claim - almost always an equitable one - in a way that prejudices the party against whom relief is sought.³⁰² The importance the legal system attaches to avoiding delay was summed up by the Supreme Court of Canada in *Blencoe*.³⁰³

The notion that justice delayed is justice denied reaches back to the mists of time. In *Magna Carta* in 1215, King John promised: "To none will we sell, to none will we deny, *or delay*, right or justice" (emphasis added). As La Forest J. put it, the right to a speedy trial has been "a right known to the common law ... for more than 750 years" (*R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), at p. 636). In criminal law cases, this Court had no difficulty determining in *R. v. Askov*, [1990] 2 S.C.R. 1199 (S.C.C.), at p. 1227, that "the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the *Charter*". Outside the criminal law context, legislators have devised limitation periods, and courts have developed equitable doctrines such as that of laches. For centuries, those working with our legal system have recognized that unnecessary delay strikes against its core values and have done everything within their powers to combat it, albeit not always with complete success.

Clearly, the value the legal system attaches to the speedy resolution of disputes and the bars it raises to those who have not proceeded expeditiously pose a serious

³⁰⁰ *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44 at ¶145.

³⁰¹ *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(2).

³⁰² *Black's Law Dictionary* (7th edition), cited in *Singh v. Kingsway General Insurance* (2003) CarswellOnt 5411 (F.S.T.).

³⁰³ *Supra*, note 300 at ¶146.

impediment to any attempt to seek remedies for human rights violations that occurred in the distant past. This bar is not, however, insurmountable in all cases. In some jurisdictions, neither criminal prosecutions nor actions for breach of a fiduciary duty are statute barred.³⁰⁴ Even for those actions for which statutory limitation periods exist, courts have sometimes found a way around them when fairness demanded it. In cases of childhood sexual abuse, for example, courts have held that limitation periods began to run not when a plaintiff was aware of having been wronged or even upon reaching the age of majority, but rather when the plaintiff discovered the nexus between the wrongful acts committed and the injuries suffered; that is, when through therapy or some other process the plaintiff has come to terms with the nature of the abuse, often many years later.³⁰⁵ The grounds that underlie common law and statutory limitations – granting repose to potential defendants, the problem of evidence becoming “stale”, and encouraging plaintiffs to act diligently – have been found unpersuasive in such cases, since there is no public interest in granting repose to abusers, evidence becoming stale is not a practical problem in such cases, and there are legitimate reasons why plaintiffs are unable to commence their actions more quickly.³⁰⁶

Could similar arguments be made in the case of human rights violations from the distant past? A parallel certainly exists, in that the victims in these cases are

³⁰⁴ While the Roman law-based jurisdictions of continental Europe and Latin America have always accepted time limits for bringing prosecutions, the common law jurisdictions of England and the common law have generally not recognized any time limit on commencing criminal prosecutions. Despite its common law background, however, the United States began applying limitations in criminal prosecutions as early as 1652 in Massachusetts. Wyoming is now the only state with no limitation period whatsoever on criminal prosecutions, while a handful of states lack limitation periods for felony prosecutions. See Daniel W. Shurman and Alexander McCall Smith, *Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological, and Moral Concerns* (Washington, D.C.: American Psychological Association, 2000), p. 56.

³⁰⁵ *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, at ¶14, 30.

³⁰⁶ *Ibid.*, at ¶22-24.

prevented from commencing their actions not because of the need for their own comprehension of the wrongs that were done to them to develop, but because of the need to wait for societal understanding to develop of the nature of those wrongs.

Another parallel could be drawn to the treatment of war criminals. Large scale immigration to Canada after World War II resulted in the admission of many individuals suspected of war crimes. A 1985 Commission of Inquiry on War Criminals led by Justice Jules Deschênes resulted in the names of 883 suspected war criminals living in Canada, and a recommendation that the Royal Canadian Mounted Police and the Department of Justice be given a mandate to investigate them. In 1987, more than twenty years after the end of World War II, the Government of Canada announced that those alleged to have been involved in the commission of war crimes or crimes against humanity would be subject to criminal prosecution or revocation of citizenship and deportation. The *Crimes Against Humanity and War Crimes Act*³⁰⁷ was eventually passed, and war criminals from World War II – as well as those from more recent conflicts – continue to be pursued, in some cases more than four decades after their crimes were committed.³⁰⁸

If concerns about laches and limitation periods can be overcome in cases involving sexual abuse and war crimes, there is no apparent reason why a similar approach could not be taken in cases of human rights violations.

³⁰⁷ S.C. 2000, c. 24.

³⁰⁸ Eight WWII citizenship revocation cases were reported as ongoing in the Eighth Annual Report 2004-2005 of Canada's Program on Crimes Against Humanity and War Crimes

b) Presumption Against Retroactivity

One of the weightiest³⁰⁹ tools of statutory interpretation is the presumption against retroactivity. Unless a provision is explicitly declared by statute to operate retroactively, it is presumed that it cannot do so.³¹⁰ The rationale and ambit for the rule was recently described in *Grand Rapids v. Graham*:³¹¹

Retroactive legislation reaches into the past and declares that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of the earlier date. Its effect has been described as "a serious violation of rule of law," and for that reason, a statute will not be construed to have a retroactive application unless such a construction is expressly or by necessary implication required by the wording of the statute (the presumption against retroactivity). And when an enactment has retroactive operation, the extent of the retroactivity will be limited, although the presumption against interference with antecedent rights is not nearly as weighty as the presumption against retroactivity.

Inherent in *Mack* is the judicial presumption that to give effect to human rights instruments prior to the date when those instruments were enacted would be to accord them retroactive application. This would obviously be correct if the rights only came into existence upon the passage of such instruments. Admittedly, this seems to be at odds with both the very notion of human rights – that is, that they are rights that accrue to all human beings simply by virtue of their humanity – and with the explicit wording of some of those human rights instruments.

The Royal Proclamation that brought the *Charter* into effect, for example, refers to “the recognition of certain fundamental rights and freedoms”, and s. 2 of the *Charter*

³⁰⁹ In *Cieciersky v. Fenning* (2005), 258 D.L.R. (4th) 103 (Man. C.A.), for example, it was held that the presumption against retroactivity outweighed the presumption against interference with vested rights.

³¹⁰ See, for example, *Bell Canada v. Canada* (Canadian Radio-television and Telecommunications Commission) [1989] 1 S.C.R. 1722 at ¶26.

³¹¹ 2004 MBCA 138 at ¶14.

says that “everyone has” certain rights and freedoms (underlining added), while s. 1 says that the *Charter* “guarantees” the rights and freedoms set out in it. Nowhere is there any suggestion that the *Charter* creates those rights, unless it is implicit in the fact that certain dates were set for the *Charter* provisions to come into effect. Despite that, the judicial approach to date seems to be consistent with that taken in *Mack*, namely to treat those rights guaranteed in the *Charter* as not having existed prior to the enactment of the *Charter*, rather than to consider Parliament to have being signalling to the courts by that enactment its intention to recognize and codify certain pre-existing rights.³¹²

If this approach were to persist, then combined with the strength of the presumption against retroactivity, it would be difficult for the courts to provide remedies for any human rights violations that predate the end of World War II and the era of human rights enactments that began at that time. Fortunately, however, this need not be the case. As will be discussed in the next chapter, Canadian case law permits an interpretation of the *Charter* as incorporating certain pre-existing rights. Such an interpretation obviates any need for further consideration of the difficulties posed by the presumption of retroactivity in such matters.

Despite that, two points may be raised in passing respecting whether it might not be the case that the presumption against retroactivity should not apply in such cases in any event. First, case law indicates that where the purpose of a statute is not to add to

³¹² Note that the interpretation of the Canadian *Bill of Rights* gave rise to a similar issue, but with a particularly peculiar twist. Because s. 1 said that the rights and freedoms declared in the Bill “have existed and shall continue to exist,” it was held that only those rights that could be shown to have existed in 1960 were protected. Capital punishment, for example, could not be forbidden by the Bill of Rights since it was lawful in 1960. For a critique, see Walter Tarnopolsky, “The Constitution and the Future of Canada,” [1978] LSUC *Special Lectures* 161 at 181-191.

the punishment of past misconduct, but to protect the public in the future, then the presumption against retroactivity should not apply.³¹³ This is consistent with the frequently-stated policy justification for the presumption against retroactivity, namely that existing rights should not be prejudicially affected.³¹⁴ Clearly, this suggests that legislated human rights instruments, including the *Charter*, should be permitted a retroactive interpretation. Second, although there appear to be no judicial decisions on this point, *quaere* whether the presumption against retroactivity should be less forceful in cases where the defendant is a state, given the obligation of states to implement human rights.

c) Personal Nature of Human Rights

As discussed in the introductory chapter, the theory and political history of human rights supports the notion that those rights attach to individuals rather than to groups. This largely holds true for legal practice as well, with the courts holding that individual rights generally take precedence over group rights, and noting that the Canadian constitution is specific in those exceptional instances where group rights take precedence, such as with education rights and language rights.³¹⁵

This poses a serious obstacle to the quest for redress in any case where those who directly suffered a human rights violation have died, and it is their descendants or community that seeks to commence litigation.³¹⁶ A recent case illustrating this is

³¹³ *Brosseau v. Alberta Securities Commission* (1989), 57 D.L.R. (4th) 458 at 472 (SCC). See also *R. v. Maxwell*, [1996] O.J. No. 4832 at ¶ 99 (Ont. Prov. Ct.).

³¹⁴ See, e.g., *Upper Canada College v. Smith* (1920) 57 D.L.R. 648 (SCC).

³¹⁵ See *Boyer v. R.*, [1986] 2 F.C. 393 (F.C.A.), per MacGuigan J. at ¶ 35.

³¹⁶ Note, however, that the Ontario Court of Appeal refused to allow the claims of "secondary" litigants - the children of those whose rights had been violated - to be struck out in *Bonaparte v. Canada*

British Columbia v. Gregoire, in which the British Columbia Human Rights Tribunal had ruled that it could proceed to hear a complaint despite the complainant having died, because – *inter alia* – the complaint raised systemic issues and there were strong public policy reasons for continuing.³¹⁷ The British Columbia Supreme Court set aside the Tribunal’s decision on the ground that human rights established by the British Columbia Human Rights Code are “personal” and abate on the death of the person whose human rights have been breached.³¹⁸ In arriving at that finding, the Court noted earlier jurisprudence establishing that *Charter* rights – including s. 15 specifically – are also personal rights and terminate upon the death of the individual.³¹⁹

It may be, then, that while the passage of time alone may not prevent the remediation of outstanding human rights violations, that the death of the victims of those rights violations may make it much more difficult to successfully advance a claim for a remedy. A proposal is made in the next chapter for a change to the judicial perspective regarding human rights complaints that would aim at addressing this problem.

d) Judicial Deference to Parliamentary Supremacy

In cases such as *Mack*, in which human rights violations took place as a result of apparently valid legislation at a time preceding any binding enactments guaranteeing those rights, courts are apt to defer to the concept of Parliamentary supremacy.

(*Attorney General*) (2003), 64 O.R. (3d) 1 (Ont.C.A.). In that case, however, the claim was based upon the alleged fiduciary duty of the Government of Canada toward Aboriginal peoples, rather than tort.

³¹⁷ 2005 BCSC 154 at ¶ 14.

³¹⁸ *Ibid.*, at ¶ 32.

³¹⁹ *Stinson Estate v. British Columbia* 1999 BCCA 761 at ¶ 11-13.

Perhaps most pithily encapsulated in Henry Herbert's sixteenth-century statement that "Parliament can do anything but make a man a woman and a woman a man", the concept was summed up by Dicey in stating that Parliament has:

...the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.³²⁰

Judicial recognition of the doctrine is implicit in many cases and explicit in some, such as *Madzimbamuto v. Lardner-Burke*:³²¹

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts would not hold the Act of Parliament invalid.

If Parliament is supreme and courts cling to the notion that they do not make law but only interpret the laws that Parliament has created, then it is understandable that the courts might be unwilling to provide remedies for human rights violations that predate legislation that would have made them contrary to statute. When those human rights violations were the deliberate and inevitable product of Parliament passing apparently valid legislation, then it is easy to understand how courts that embrace the notion of Parliamentary supremacy might be reluctant to go against the Parliamentary will.

³²⁰ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* Tenth Edition (London: MacMillan, 1959), pp. 39-40.

³²¹ [1969] 1 A.C. 645 at 723.

Even where human rights violations have been the result of policy rather than legislation, courts have generally been deferential. An example is the decision of the Supreme Court of Canada in *Blackwater v. Plint*, a tort case involving the residential schools to which Aboriginal children were forcibly relocated by churches and government in the mid-twentieth century, and where they were subject to a myriad of abuses:³²²

... to what extent is evidence of generalized policies toward Aboriginal children relevant? Can such evidence lighten the burden of proving specific fault and damage in individual cases? I conclude that general policies and practices may provide relevant context for assessing claims for damages in cases such as this. However, government policy by itself does not create a legally actionable wrong. For that, the law requires specific wrongful acts causally connected to damage suffered.

It must be recognized, however, that the presumption of Parliamentary supremacy is not as strong as it once was. In Canada, it has been undermined by the passage of the *Charter*, and even in the United Kingdom, both devolution and participation in the European Community have eroded the doctrine. It may be, therefore, that courts would no longer defer to Parliament in human rights matters in the way they would once have done. Furthermore, it could be argued that in giving primacy to those rights that Parliament chose to recognize in the *Charter*, the courts are promoting, rather than opposing, the Parliamentary will.

C. Conclusions

It is suggested above that people who have suffered human rights violations, including those that occurred in the distant past, will continue to turn to the courts in

³²² 2005 SCC 58 at ¶9.

the hopes of obtaining redress. It has also been suggested that it will be entirely legitimate for them to expect the courts to give meaningful consideration to their claims, and furthermore that the courts have, in fact, legal tools that are sufficient to allow them to discharge this function.

This is not to deny that serious impediments exist to the use of the courts in such situations. It can be seen, however, that neither the broad policy objections nor the narrow legal objections that have been canvassed above are insurmountable. Instead, these should be considered to be merely indicative of possible reasons for the failure of the legal system to properly give full effect to the protection of human rights, factors that should be noted only in order that they can be overcome.

It has been asserted above that the means by which difficulties such as those displayed in *Mack* can be overcome is by the judicial recognition of human rights as actual, enforceable rights, rights which do not owe their existence to those instruments – such as the *Charter* – in which they are formally manifested. Since it might seem questionable whether this novel approach would be compatible with existing jurisprudence, the following chapter will demonstrate that nothing in Canadian case law would preclude this course. In addition, a shift in perspective regarding individual rights will be proposed in the next chapter which might make it possible to avoid practical difficulties that arise when those who were the direct victims of human rights violations have died. Since arguing that the courts should provide remedies for long-past human rights violations in some cases does not mean that they should do so in every case, the next chapter will also provide some guidance as to how the courts

should exercise their discretion in distinguishing between those cases that might be brought before them.

Chapter V: Rethinking the Judicial Approach

If the assessment in the preceding chapter is correct – *i.e.* that the desirability of having courts provide remedies for long-past violations of human rights outweighs whatever objections might be raised, then is there any way of improving the courts' effectiveness in dealing with such cases? If there is, then it should not lie in a legislative expansion of the courts' powers, since it is legislative failure to act on the resolution of outstanding human rights grievances that will generally have resulted in the need for a judicial solution in the first place. What is required instead is a rethinking by the courts of their approach, one that results in a judicial perception of the appropriateness of their fulfillment of judicial responsibilities in such cases as well as an analytical framework that supports their role.

With regard to the latter, it is argued here that a rethought judicial approach should contain three elements, namely:

1. recognition that at least some human rights exist independently of the legislative instruments that have been created to protect them, and can be given judicial effect without recourse to those legislative instruments;
2. recognition that the policy grounds underpinning judicial remediation of human rights violations are essentially the same as those underpinning judicial remediation of criminal offences, and that the triggering of judicial action should therefore not be dependent upon the initiation and carriage of complaints by the very individuals who were the victims of the human rights violations.

3. development of a reasoned approach by which to weigh long-past human rights violations and distinguish between those for which the courts will provide remedies and those for which they will not.

A. Inherent Versus Created Human Rights

As discussed in the first chapter, “human rights” are rights to which everyone is entitled simply by virtue of their humanity and regardless of whether or not they are fortunate enough to live in jurisdictions that recognize and protect those human rights. If this is so, then they cannot be dependent upon their expression in legislative instruments such as the *Canadian Charter of Rights and Freedoms*. Instead, it must be the case that such legislative instruments merely recognize and guarantee those human rights that exist independently of them, with the consequence that there is no retroactivity involved in the judicial enforcement of rights with respect to the period before the *Charter* was enacted. That some of the rights in the *Charter* are not new is, in fact, what Prime Minister Pierre Trudeau told the public when the *Charter* was introduced:³²³

Most of the rights and freedoms we are enshrining in the Charter are not totally new and different. Indeed, Canadians have tended to take most of them for granted over the years.

Canadian courts, however, do not seem on first blush to have taken this view. Indeed, some have explicitly rejected it, while others seem to have simply failed to recognize it as an option, and have therefore adopted implicitly by default the position that

³²³ Canada, *The Charter of Rights and Freedoms: A Guide for Canadians* (Ottawa: Minister of Supply and Services, 1982), p. 1.

human rights must be grounded in legislative instruments. To comprehend the judicial viewpoint on this topic, it is necessary to examine those cases that have considered whether the rights protected in the *Charter* could be given retroactive or retrospective application. This is because the courts seemed to have presumed that the application of *Charter* rights to the pre-*Charter* era must necessarily involve retroactive or retrospective operation, so that all judicial discussion of whether rights contained in the *Charter* can apply prior to 1982 involves discussion of retroactive and retrospective operation, rather than of inherent versus created rights. As will therefore become apparent, in order to argue that the courts should be able to protect human rights even when positive law provides no guarantees of those rights, it will be necessary to give the existing jurisprudence on retroactive and retrospective application of the *Charter* a careful reading in order to perceive that the courts do indeed still have the ability to do this, and that they have not ruled out this possibility.

The judicial antipathy toward retroactive and retrospective application of statutes generally was discussed in the preceding chapter. If the rights set out in the *Charter* were actually conferred by the *Charter* – and clearly at least some of them were – then it might be expected that the courts' general reluctance to give statutes retroactive or retrospective application would carry over to their interpretation of the *Charter*; that is, to the extent that the *Charter* is considered by the courts to have created new law or given new rights, then the courts would be reluctant to give these new laws and rights retroactive or retrospective application. This is, in fact, what happened when the *Charter* came into effect, and the courts have, at least implicitly, assumed that the *Charter* created new rights and have accordingly been very reluctant to accord it even retrospective application, let alone retroactive application.

The date upon which the *Constitution Act, 1982* (and therefore the *Charter* as Part I of that statute) was to come into force was, pursuant to section 58 of the *Act*, a day to be fixed by proclamation. That proclamation was issued by the Queen at a ceremony in Ottawa on April 17, 1982, with that date fixed as the date upon which the *Act* was to come into effect.³²⁴ In the years immediately following the coming into force of the *Charter*, the courts often had to consider how, if at all, the *Charter* should apply to events that predated its existence.

If one were to evaluate the judicial record on this point only on recent pronouncements, the impression might be given that there had been consistent application of a straightforward rule. In the criminal context, for example, the court in *R. v. Cembella* made it seem as though the law on point could be briefly and comprehensively summarized:³²⁵

The authorities establish that the provisions of the Charter of Rights relating to substantive law do not apply retroactively to offences allegedly committed before it came into force. But the sections relating to procedural law are retroactive and do apply to the trial of such offences, where the trial occurs after April 17, 1982.

Hogg is similarly categorical in his overview:³²⁶

A statute (or regulation or by-law or other legislative instrument) which was enacted before April 17, 1982, and which is inconsistent with the Charter will be rendered "of no force or effect" by the supremacy clause of the Constitution, but only as from April 17, 1982.

³²⁴ *Supra*, note 293, p. 33-34. Note that pursuant to s. 32(2), s. 15, the equality rights section, did not come into effect until three years later.

³²⁵ (2002), 169 C.C.C. (3d) 293 at 298 (B.C.S.C.).

³²⁶ *Supra*, note 293, at 33-34.

...Action of an executive or administrative kind, such as search, seizure, arrest or detention, which was taken before April 17, 1982, cannot be a violation of the Charter, because the Charter was not in force at the time of the action. No remedy under s. 24(1) would be available in respect of action taken before April 17, 1982, because the remedy is available only to anyone whose rights or freedoms, "as guaranteed by this Charter", have been infringed or denied.

Closer examination of the case law, however, reveals that the courts had difficulty in considering these issues in the years following the adoption of the *Charter*, that appellate courts split in decisions that involved these issues, and that the courts' decisions are not always straightforward or convincing.

One of the earliest trial decisions on point was that of Borins Co. Ct. J. in *R. v.*

Dickson.³²⁷ In a decision that was later quoted by both the British Columbia Court of Appeal³²⁸ and the Supreme Court of Canada,³²⁹ he said:³³⁰

In my view, the proper question to ask relative to the present application is whether it was the intention of Parliament in enacting the Constitution Act, 1982, that it apply to criminal conduct engaged in and completed before the Constitution was proclaimed in force on April 17, 1982.

After posing that question, he confessed that:³³¹

In approaching the question I find it rather difficult to determine whether an affirmative answer would result in characterizing the Constitution as retroactive or retrospective legislation, as these words are defined by Driedger.... Indeed, it may be that the Constitution defies strict doctrinal characterization as either exclusively retroactive, retrospective or prospective legislation for, as I suggested in the preceding paragraph, different facts may produce different

³²⁷ *R. v. Dickson and Corman* (1982), 145 D.L.R. (3d) 164 (Ont. Ct. of G.S.).

³²⁸ *R. v. Thorburn* (1986), 26 C.C.C. (3d) 154 at 159-160 (B.C.C.A.).

³²⁹ *R. v. Stevens*, [1988] 1 S.C.R. 1153 at 1162-1163.

³³⁰ *Supra*, note 327, at 169.

³³¹ *Ibid.*, at 170.

interpretations. The operation of the Constitution in different cases will no doubt involve quite different considerations.

Although the Supreme Court of Canada considered the retrospective application of the *Charter* in a number of early decisions,³³² the topic was not “examined in depth” until *R. v. Stevens*³³³. The defendant in that case had been a fifteen-year old boy when he had consensual sex with a thirteen-year old girl. The provisions of s. 146(1) of the *Criminal Code* made this an absolute liability offence by the words “whether or not he believes that she is fourteen years of age or more”, an offence which carried a maximum punishment of life in prison. It was alleged that this effectively removed the requirement for a *mens rea* element and thereby violated s. 7 of the *Charter* as not being in accordance with the principles of fundamental justice. Although the trial took place after the *Charter* was in effect, the offence itself had not. Le Dain J. for the majority held that the criminal liability was imposed at the time the offence was committed and that to apply s. 7 would be to give it retrospective application, something which the majority seemed to take for granted could not be permitted.³³⁴ Quoting the judgment of Tarnopolsky J.A. in the Ontario Court of Appeal’s judgment

³³² Although the Court in *Dubois v. The Queen*, [1985] 2 S.C.R. held that testimony given before April 17, 1982 could not be used in a subsequent proceeding because it was precluded by s. 13 of the *Charter*, both the majority and the minority stated that this was not a retrospective application, since the right inured to the individual at the moment that the attempt was made to use the prior testimony. In *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, the Court expressed the view in *obiter dicta* that the procedures to be followed at a hearing are to be determined by the law as it existed at the time of the hearing. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson J. for the majority said that he could not see how the alleged abridgement of s. 15 by the Sunday shopping laws could have any bearing on the legality of their convictions or those laws prior to s. 15 coming into effect on April 17, 1985. In *Jack and Charlie v. The Queen*, [1985] 2 S.C.R. 332, the Court held that the accused could not attempt to justify their out of season deer hunting on the grounds of their s. 2(a) right to freedom of religion, since the *Charter* had not been enacted at the time of either the offence or the trial. In *R. v. James*, the Court gave a short oral judgment in affirming the judgment of the Ontario Court of Appeal that the *Charter* did not apply to conduct that took place prior to the *Charter* coming into force.

³³³ *Supra*, note 329.

³³⁴ *Ibid.*, p. 1159.

in *R. v. James*,³³⁵ Le Dain J. wrote that “it is important that actions be determined by the law, including the Constitution, in effect at the time of the action.”³³⁶ The minority, on the other hand, would have held that the defendant was not actually seeking a retrospective application of the *Charter* at all, but was instead seeking a prospective application to determine his rights at trial.

Subsequently, the Court continued to hold that retrospective application of the *Charter* was not allowed, but continued to disagree about whether or not the application of the *Charter* in particular circumstances would or would not be retrospective.³³⁷ In *R. v. Gamble*,³³⁸ the majority held that the conviction and sentencing of the accused under the wrong law for an offence committed in 1976 could be remedied pursuant to the *Charter*’s s. 7 guarantees of life, liberty and security of the person without retrospectively applying the *Charter*. The minority, however, held that the proposed remedy did involve retrospective application of the *Charter* and could therefore not be allowed.

Although *R. v. Stewart*³³⁹ was similar to *Gamble* on its facts, the Court ruled that the appellant’s detention under certain transitional provisions was lawful, noting that the constitutionality of those provisions could not be attacked because “that would have

³³⁵ *Supra*, note 332.

³³⁶ *Ibid.*, p. 1158.

³³⁷ *R. v. Milne*, [1987] 2 S.C.R. 512 involved discussion of whether or not the appellant’s dangerous offender status could be reviewed without retrospectively applying the *Charter*, but it was eventually found unnecessary to decide the question. Subsequently, however, the Court referred to its having “rightly refused to apply ‘existing law’ to a pre-*Charter* conviction and sentence”: *R. v. Gamble*, [1988] 2 S.C.R. 595 at 630.

³³⁸ *Ibid.*

³³⁹ [1991] 3 S.C.R. 324.

resulted in a retrospective application of the *Canadian Charter of Rights and Freedoms*.³⁴⁰

In its very brief judgment in *Re Workers' Compensation Act, 1983*,³⁴¹ the Court's answer to the question "Does s. 15(1) of the *Canadian Charter of Rights and Freedoms* (the '*Charter*') apply to causes of action arising prior to April 17, 1985?" was "No", with no further elaboration.³⁴²

Finally, in *Benner v. Canada*³⁴³ the Court had the opportunity to return to the topic more than a decade after it had first had to consider it. Benner had been born in 1962 in the U.S.A. to a Canadian mother and an American father. He applied for Canadian citizenship in 1988. Had it been his father who was Canadian, he would have been granted citizenship automatically. Since it was his mother who was Canadian, however, he was required to undergo a security check and to swear an oath. This resulted in the Registrar of Citizenship discovering his criminal record and rejecting his application, a decision that Benner challenged as a violation of his rights under the *Charter*, particularly his s. 15 equality rights.

The trial judge rejected his claim on the ground that citizenship legislation fixed the date of birth as the relevant date for the determination of citizenship status, and since Benner's date of birth was pre-*Charter*, any *Charter* application would have had to be retrospective, and therefore impermissible. The majority in the Federal Court of

³⁴⁰ *Ibid.*, at 325.

³⁴¹ [1989] 1 S.C.R. 924.

³⁴² *Ibid.*, at 925.

³⁴³ *Supra*, note 223.

Appeal agreed, with Letourneau J.A. explicitly dismissing any possibility that the *Charter* could be used to remediate past human rights violations:³⁴⁴

For section 15 to apply, there has to be an actual or an on-going discrimination which deprives one of equal protection and benefit of the law. It is not enough for one to say that one still suffers from a discriminatory event or legislation which took place or existed prior to the *Charter*. Otherwise, just about every instance of past discrimination since the turn of the century could be reviewed under section 15, provided the victims still suffer from that past discrimination.

When the case reached the Supreme Court of Canada, however, the Court held that it was not Benner's date of birth that was relevant to determining whether or not s. 15 would apply, but "the date on which he was confronted by a law which took his lack of citizenship into account."³⁴⁵ In its most comprehensive review of the questions of retroactive and retrospective application of the *Charter*, the Court stated that it had "rejected a rigid test for determining when a particular application of the *Charter* would be retrospective, preferring to weigh each case in its own factual and legal context, with attention to the nature of the particular *Charter* right at issue." The Court also quoted with approval its own earlier judgment in *Gamble*, that it is preferable "to avoid an all or nothing approach which artificially divides the chronology of events into the mutually exclusive categories of pre and post-*Charter*" and that the nature of the particular constitutional right alleged to have been violated will be a "crucial consideration."³⁴⁶

This emphasis on flexibility was, however, balanced by explicit statements that would hamper any attempt to use the *Charter* to redress old human rights violations. This

³⁴⁴ [1994] 1 F.C. 250 at 291.

³⁴⁵ *Supra.*, note 223 at 388.

³⁴⁶ *Ibid.*, at 382.

included confirmation that the *Charter* does not apply retroactively and cannot apply retrospectively,³⁴⁷ as well as an indication that courts should be sure that the situation to which a litigant is seeking to apply the *Charter* is not “really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated....”³⁴⁸

Given such explicit discouragement, is there any reason to believe that the jurisprudence might allow for courts to use the *Charter* in providing redress for long-past human rights violations? A close analysis reveals that both what can be found in the Court’s judgments as well as what is absent from those judgments would permit this, if courts were inclined to attempt it. With regard to the former, the decisions cited above clearly indicate the Court’s intention to require a flexible approach to the application of the *Charter* to past events, even to the point of finding in *Benner* that the concept of retrospectivity is itself not subject to a firm test. In addition, the recognition that the particular facts of a given case and the particular *Charter* right involved are to be considered in determining whether or not a particular *Charter* application would be considered retrospective opens the door to arguing in any novel case that it can be distinguished from previous cases where the *Charter* has been held not to apply. That the courts have so often differed in their findings on whether or not proposed *Charter* applications were retrospective, both between different levels of court and between majority and minority opinions on the appellate courts, suggests that just because a case may seem to involve retrospective elements does not mean that its judicial treatment can be reliably predicted. Finally, the fact that so many of the early *Charter* cases involving retrospective application were criminal cases could

³⁴⁷ *Ibid.*, at 381.

³⁴⁸ *Ibid.*, at 383.

suggest that courts were motivated to take a restrictive approach by a desire to avoid having to reconsider the convictions of large numbers of factually guilty criminals on procedural grounds; if so, then a more liberal approach might be acceptable to the judiciary in new, non-criminal cases, particularly in types of cases that would not be seen as opening the floodgates to large numbers of litigants.

Another reason for optimism is something which is absent from the decisions of the Supreme Court of Canada on this topic, namely an explicit finding that the rights guaranteed by the *Charter* were created by the *Charter*, as opposed to merely being guaranteed by it. That is, there is nothing in the Court's jurisprudence that explicitly rules out the possibility that at least some of the rights contained within the *Charter* could have existed before the creation of the *Charter* and that the *Charter* merely recognized those rights and acknowledged the ability of the courts to protect them. At most, there may be passing references in *obiter dicta* such as in the quote from *Benner* reproduced above that mention some *Charter* rights being "created".

Generally speaking, in fact, the Court seems to have been careful in its choice of language to refer to rights being "guaranteed" rather than "created" by the *Charter*. In *R. v. 974649*,³⁴⁹ for example, the Court said that the *Charter* "guaranteed new rights." In *R. v. Silveira*, the Court referred to s. 15 rights as being "guaranteed" by the *Charter*.³⁵⁰ In *R. v. Prosper*, the right to counsel was said to be "guaranteed" by s. 10(b) of the *Charter*.³⁵¹ In *Ford v. Quebec (Attorney General)*, on the other hand, the Court noted that "the minority language educational rights created by s. 23 ...[are] of

³⁴⁹ 2001 SCC 81 at ¶39.

³⁵⁰ [1995] 2 S.C.R. 297 at ¶93.

³⁵¹ [1994] 3 S.C.R. 236 at ¶45.

a very specific, special and limited nature, unlike the fundamental rights and freedoms guaranteed by other provisions [emphasis added]."³⁵²

If the Supreme Court of Canada has at least left open the possibility that some rights had constitutional status that was guaranteed rather than created by the *Charter*, lower courts have gone further. The majority of the British Columbia Court of Appeal, for example, in *John Carten Personal Law Corporation v. British Columbia (Attorney General)* said the following with regard to rights of access to the courts, the *Charter*, and the implied bill of rights:³⁵³

Some of the rights to which I have referred may be guaranteed, though not necessarily created, by the Canadian Charter of Rights and Freedoms. See *BCGEU v. B.C. (A.G.)* (1983), 48 B.C.L.R. 5 (B.C.S.C.); (1985), 64 B.C.L.R. 113 (B.C.C.A.); (1988), 31 B.C.L.R. (2d) 273 (S.C.C.). Others of those rights may be so fundamental that they may properly be regarded as having constitutional status. In this connection see the preamble to the Constitution Act, 1867 and the discussion in such cases as *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 at pp. 331, 353-4 and 373-4, *Switzman v. Elbling*, [1957] S.C.R. 285 at pp. 327-8, *Canada (Attorney General) and Dupond v. Montreal (City)*, [1978] 2 S.C.R. 770 at p. 796 and *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at p. 57. See also the lively and learned debate in the House of Lords on 14 July 1997 when Lord Ackner "rose to ask Her Majesty's Government what action they have taken or propose to take to protect the constitutional right of access of a litigant of modest means from the impact of new and increased court fees." Lord Irving of Lairg, the Lord Chancellor, gave particular emphasis in his speech to whether the right of access to the courts was a constitutional right in the sense of an absolute right.

In the course of argument on this appeal we indicated to counsel that we were so persuaded of the existence of those fundamental rights that we did not need to hear any argument to the effect that they were granted by Magna Carta of 1215, or by some later version of the Great Charter or, assuming that was so, that they derived any additional force in British Columbia from having that provenance.

³⁵² [1988] 2 S.C.R. 712 at ¶ 65.

³⁵³ (1997) 40 B.C.L.R. (3d) 181 at 188 (C.A.).

If the British Columbia Court of Appeal was correct to hold that a fundamental right to access the courts existed prior to the enactment of the *Charter* and independently of the *Magna Carta* or other instruments, then it is possible that other rights that are now enshrined in the *Charter* also existed prior to the *Charter*'s enactment. With regard to those particular rights, their enactment in the *Charter* would therefore not have signaled the creation of those rights, but merely their legislative recognition and a signaling to the courts of the Parliamentary willingness to see the courts recognize and protect them. Certainly there is nothing in the *Charter* itself that is inconsistent with this proposition. Section 26 of the *Charter*, in fact, explicitly states that:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

One effect of recognizing that some of the rights that were enshrined in the *Charter* - including in particular the s. 15 right to equality - existed prior to the *Charter*'s enactment is that this would provide a resolution to the debate about an implied bill of rights discussed in the preceding chapter.³⁵⁴ It would confirm that certain rights did indeed have constitutional status prior to the enactment of the *Charter*, as has been argued by the advocates of the theory of an implied bill of rights, and that the effect of the passage of the *Charter* was merely to transform the rights in question from implicit to explicit and combine them in a package with additional newly-created rights.

³⁵⁴ Chapter II, section E.

If the courts are prepared to recognize that some fundamental rights existed prior to their having been recognized in the *Charter* or other statutory instruments, then giving legal effect to those rights with respect to events that happened prior to 1982 would not raise a problem of retroactivity or retrospectivity. Instead, the courts would simply be enforcing rights that existed at that earlier time and were therefore capable of being violated. Surely this is preferable to the alternative of holding that there is no such thing as an inalienable “human right”, and that states are free to ignore the existence of any asserted rights whenever it is convenient for them to do so.

B. Human Rights Protection as Analogous to Criminal Law

The preceding proposal that courts recognize that human rights exist independently of the instruments that contain them is intended to eliminate an obstacle to the judicial recognition of the human rights being asserted by plaintiffs. This would not, however, address the related problem that in cases involving human rights cases from the distant past, the most appropriate plaintiffs – those who suffered the human rights violations directly – may all have died or have otherwise become unable to pursue redress. In such cases, it would sometimes be desirable if their cases could be advanced by others, such as members of their families or community organizations.

As discussed in Chapter 1, however, the post-World War II era saw serious disagreement about whether human rights could attach to groups or only to individuals, with the latter view generally achieving acceptance, at least in the western democracies (though see Kymlicka³⁵⁵ for an account of the arguments within liberal

³⁵⁵ *Supra*, note 32.

and socialist traditions that would suggest that that result was not a foregone conclusion). Concomitant with the notion that human rights attach to individuals seems to have been the idea that the responsibility for holding to account those who have violated the human rights of others must also attach to individuals, namely those whose human rights have been violated. While states may provide the mechanisms that allow human rights violators to be held to account – *e.g.* human rights codes, human rights commissions and tribunals, constitutionally entrenched bills of rights, judicial systems – they do not generally accept the responsibility for initiating human rights complaints or prosecutions, except in the most serious cases. Instead, those who have suffered human rights violations are expected to initiate complaints and take responsibility for seeing those cases through to their conclusions, a process which may bear a strong resemblance to the prosecution of a criminal offence.

While there may be disagreements about the underlying purposes of the criminal law – deterrence, retribution, incapacitation, rehabilitation, *etc.* – it is at least generally accepted that it exists for the benefit of society as a whole rather than just those individuals who have been targeted by criminals. For example, the Canadian Committee on Corrections wrote that:³⁵⁶

The basic purpose of criminal justice is to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct.

The courts have made similar statements, such as in *R. v. Whiteford*:³⁵⁷

³⁵⁶ Canada, Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections – Toward Unity: Criminal Justice and Corrections* (Queen's Printer, 1969), p. 11.

³⁵⁷ [1947] 1 W.W.R. 903 at 906 (B.C.S.C.)

A criminal offence is not an offence against an individual but is an offence against society as a whole.

Contrast this with statements that the main approach of human rights law “is not to punish the discriminator, but rather to provide relief to the victims of discrimination,”³⁵⁸ and that human rights law gives rise to individual rights.³⁵⁹ There is, of course, nothing wrong with recognizing that human rights law should take the interests of the victims of human rights violations into account and that its purpose should include restorative justice for those individuals. What is arguably missing, however, is explicit recognition that human rights law serves a broader purpose, just as criminal law does, and that addressing human rights violations serves the interests of society as a whole, not just the interests of those whose rights have been violated.

Just as the purposes of criminal law and human rights law are respectively seen as benefiting society as a whole versus individuals, so too is there a difference with regard to who has the responsibility for pursuing cases. With human rights law, responsibility for the initiation and carriage of a complaint generally rests with the individual who has suffered the human rights violation, with state agencies sometimes providing assistance. Because a criminal offence, on the other hand, is considered to be an offence against society as a whole, the individual is not expected – and in most cases is not allowed – to take responsibility for the investigation and prosecution of the offender. Indeed, a prosecution can proceed even where the victim of a crime is manifestly opposed to the prosecution proceeding, as is, for example, sometimes the case with spousal violence. This is because the responsibility for criminal prosecution

³⁵⁸ *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 547.

³⁵⁹ *CN v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1134.

is recognized as not resting with the victim of crime, but instead being the responsibility of the Crown.³⁶⁰

It is undeniable that the theory of our criminal law is that all persons should be prosecuted in the name of the Sovereign who is "the proper person to prosecute for all public offences and breaches of the peace, being a person injured in the eyes of the law...."

These distinctions seem curious given that there is no sharp divide between criminal law and human rights law. Hate propaganda, for example, clearly violates the human rights of its targets, but its dissemination is widely punishable under the provisions of criminal law.³⁶¹ It seems odd, therefore, that the legal view of human rights violations is so different from violations of that wide range of offences that are classified as "criminal".

Tarnopolsky points out that there were, in fact, attempts to use a quasi-criminal model in human rights statutes adopted by Canadian provinces in the World War II era, and that the approach was found to be unsatisfactory on a number of grounds. He cites among the reasons for the failure of a quasi-criminal model: reluctance on the part of the victim to initiate a criminal action; difficulties with proving the offence beyond a reasonable doubt; difficulties proving that access to services did not occur for some non-discriminatory reason; reluctance on the part of the judiciary to convict for something that was not really considered to be criminal; lack of awareness among the public of the existence of human rights legislation; scepticism on the part of minority

³⁶⁰ *R. v. Devereaux*, [1966] 4 C.C.C. 147 at 150 (Ont.C.A.).

³⁶¹ In *R. v. Andrews* [1990] 3 S.C.R. 870 at 880, Dickson C.J. referred to "the consensus in the international community that hate propaganda should be suppressed by the criminal law, a consensus evident in both international human rights conventions and the domestic law of many democratic societies."

groups that had a history of suffering discrimination; and the failure of the model to provide meaningful assistance to those whose rights had been violated, such as by helping them to obtain a job or service in a restaurant.³⁶²

While Tarnopolsky's observations might indicate that the use of a criminal model for resolving human rights issues could be problematic, this is not what is actually being proposed in this paper; instead it is a shift in judicial perspective that would result in human rights litigation being perceived as analogous or similar in some respects to a criminal prosecution, particularly in order to facilitate the carriage of complaints arising from those rights violations by groups or individuals other than those whose rights were directly violated. Accepting, therefore, that there may have been difficulties with the use of a quasi-criminal model of human rights legislation should not mean accepting that there would be no benefit to bringing a criminal law perspective to human rights law matters. By recognizing the seriousness of human rights violations and the harm they cause to society as a whole, the courts could consider them to be at least analogous to criminal offences, and treating them in some respects in the same manner as they treat criminal offences. This would be useful in at least two respects.

First, as discussed above, it is generally not the case that the victims of crime are expected to take responsibility for the prosecution of those who victimized them. By divorcing the roles of victim and prosecutor, the criminal law system presents a model that suggests that these roles could be similarly separated in the case of human rights law. If this is so, then this approach could eliminate the obstacle posed by the notion

³⁶² W.S. Tarnopolsky, J., *Discrimination and the Law*, rev. by William F. Pentney (Toronto: Carswell, 2004) (ongoing supplement) at p. 2-5.

that human rights reside only in the individual. If the state can take responsibility for carriage of a criminal law prosecution, then it is not a great leap to assert that the family or ethnic community of a human rights victim could take responsibility for the carriage of an action based upon the wrong they suffered.

Second, the common law has never regarded the passage of time as creating any bar to a criminal prosecution: *nullum tempus occurrit regi*.³⁶³ Some jurisdictions have, admittedly, created statutory limitation periods for criminal law prosecutions, such as the three year limitation period under Canada's *Criminal Code* for treason and the six month limitation period for summary conviction offences. To a large extent, however, common law jurisdictions do not view the effluxion of time as a bar to criminal prosecution for serious offences. International law is similar, in that it is generally agreed that there should be no statutory limitation for the prosecution of war crimes, crimes against humanity, and similar offences.³⁶⁴

The criminal law perspective on this subject would obviously be advantageous in terms of facilitating the courts' ability to deal with long-past violations of human rights. By recognizing that human rights violations are more similar to criminal acts than to civil wrongs, the courts would automatically accept that the mere effluxion of time should not automatically present an obstacle to providing remedies in such cases and should not outweigh the societal interest in addressing outstanding human rights violations.

³⁶³ Hon. R.E. Salhany, Q.C., *Canadian Criminal Procedure*, Sixth Edition, (Aurora: Canada Law Book, 2005 update).

³⁶⁴ See, for example, *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes*, Strasbourg, 25.I.1974, CETS No. 082.

C. A Reasoned Approach

The most attractive aspect of the courts' current failure to deal with long-past violations of human rights is its simplicity. By not dealing with any violations of human rights that predate the creation of legislated human rights schemes, the courts treat all victims of long-past human rights violations equally. If the courts were to adopt a perspective that permitted them to deal with at least some long-past violations of human rights, it would be necessary to distinguish between those human rights violations for which the courts would provide remedies and those for which they would not. The alternative would be that there would be no distinction between the most ancient of recorded human rights violations and those that have happened within living memory, or between those that have caused hurt feelings and inconvenience as opposed to those that resulted in the deaths of countless thousands of people

If judges were to believe that there is no meaningful legal distinction to be made between such divergent types of human rights violations, this might well result in judicial inertia such that they would be reluctant to take even the first step down a potentially slippery slope. It would therefore seem to be desirable to identify a framework that might be used to analyze the different cases that could come before the courts and to distinguish between those cases that the courts should deal with and those that they should not. Rather than simply adopting an arbitrary cut-off – *e.g.* that no human rights violations more than a century old will be considered – it should be possible to devise a more nuanced approach that provides a credible basis for balancing the demands of justice with those of practicality.

The following criteria are suggested as those which should be relevant to determining the appropriateness of judicial intervention.

1. Egregiousness of the Human Rights Violation

It is a well-known principle that the law does not deal with trivial matters: *de minimus non curat lex*. The principle that excuses the courts from having to deal with trivial matters does not, however, apply to human rights tribunals, which are apt to find themselves dealing with the sorts of disputes that provide fodder for right-wing commentators and cause average citizens to roll their eyes.

To say that the courts should only have to deal with more serious long-past human rights violations as opposed to less serious ones, however, only raises the question of what constitutes a serious or egregious violation of human rights. Several factors will be relevant to such a determination. First, there are certain rights the violation of which will inevitably have a more serious effect. The right to life is the most obvious of these. While it might be difficult to create a hierarchy of other rights, it may be possible to at least recognize that the loss of some rights, such as the loss of the right to freedom through enslavement, will be worse than others, such as the loss of the right to be free from discrimination in the receipt of services. Second, even with respect to any one particular right, it may be possible to distinguish some rights violations from others in terms of their seriousness. When someone is discriminated against on the basis of ethnicity for example, it will often be in the provision of some good or service. In such cases, the closer to the base of Maslow's hierarchy of

needs³⁶⁵ the denied good or service lies – with denial of water, shelter or food being more fundamental than denial of aesthetic needs – the more serious will be the human rights violation. Third, the number of people involved will also be significant. Given that the nineteenth and twentieth centuries provide no shortage of instances where the rights of thousands or even millions of people were violated, it will be easier to make the argument for dealing with such cases as opposed to those where only a single individual has suffered.

2. Relative Shortness of Time That Has Passed

To suggest that the effluxion of time should not be an absolute impediment to obtaining remedies for past human rights violations is not to assert that time is irrelevant. All of the reasons for the existence of limitation periods – the social value in litigating quickly, the promotion of personal and commercial certainty, the evidentiary problems that arise from aging witnesses and disappearing exhibits – are valid concerns. The passage of time is therefore one factor to weigh in considering whether the courts should accept a long-past human rights claim for adjudication, albeit not the only factor.

It will certainly be advantageous if a court case can be initiated within the lifespan of survivors of a human rights violation, for evidentiary reasons, in order for it to be possible to craft a remedy that directly benefits those survivors, and because there will be a greater sense of urgency in the pursuit of justice than would be the case after their deaths. Failing that, other benchmarks will apply: has the court case been

³⁶⁵ A.H. Maslow, (1943). *A Theory of Human Motivation*. *Psychological Review*, 50, 370-396.

initiated while those who have committed the human rights violation can still be held to account; is it within living memory, so that those who were present for the wrongful actions can also be witness to the remedy for those actions; are members of the immediate families of the victims still alive, who might have been affected by the wrongful actions, or could be potential beneficiaries of a remedy; were the wrongful events sufficiently contemporary that there are reliable records available?

3. Existence of Plaintiffs That Could Legitimately Claim to Assert the Rights of the Victims

As mentioned above, it may be that in some cases where victims of human rights violations are unable to seek remedies directly, members of their immediate families should be able to act on their behalf. Alternatively, there may be extended families, clans, indigenous governments or other bodies that can assert that their ties to the victims are sufficiently direct that they should be able to step into the shoes of the victims and act in their stead. One remove further would be non-governmental organizations that advocate for the interests of members of specific minority groups, as well as those which act in pursuit of specified ideals, rights or values, such as Amnesty International or the various civil liberties associations.

A problem that arises in such situations, however, is that different groups may have different views as to what should be done in respect of human rights violations. This was seen in the case of the Chinese head tax and exclusion laws, where one group advocated direct financial payment to head tax payers and their families, while another was opposed to any such proposal. Clearly, the further removed a group is

from those individuals who directly suffered a human rights violation, the more difficult it will be for it to assert that it legitimately represents the interests of those individuals, and the less persuasive its submissions will be to the courts.

4. Continuing Harm Caused By the Human Rights Violation

The attempt by the plaintiffs in the *Mack* case to assert that they were suffering continuing harm as a result of the Chinese head tax and exclusion laws was undoubtedly an attempt to bring themselves within the scope of jurisprudence that indicated that it would not be a retrospective application of the *Charter* to apply it to ongoing situations, even if the cause of those situations predated the *Charter*. That does not mean, however, that the Chinese head tax and exclusion laws did not have an ongoing effect, or that other human rights violations cannot have an effect that persists across generations. Empirical proof of such effects will be difficult to obtain, however, and prospective plaintiffs may be unable to demonstrate anything more than a lingering sense of resentment over past injustices. Certainly, the further in the past is the human rights violation, the more there will exist the possibility that other intervening factors have contributed to whatever harm is alleged to have resulted from it.

While it may be difficult to trace a causal connection between a human rights violation and, for example, the impoverishment, shame or alienation suffered by the descendants of the people who actually suffered it, it may be easier to identify ongoing harm suffered at the societal level. Where the demand for past human rights violations to be addressed persists despite the passage of time, it would be reasonable

to infer that at least some segment of society continues to feel aggrieved, and that this negatively affects societal unity. Awareness of an unresolved injustice may also undermine the legitimacy of state and societal institutions, both domestically and abroad. As Gladstone noted, “National injustice is the surest road to national downfall.”³⁶⁶

5. Ability to Craft an Appropriate Remedy

An earlier chapter discussed the principle that where there is a right there is also a remedy: *ubi jus, ibi remedium*. Realistically, however, it will be easier to craft effective remedies in some cases than in others. Cases that involve some form of economic loss, for example, should be amenable to the provision of pecuniary remedies. Where human rights violations have resulted in harm that is not easily monetizable, on the other hand, such as death or humiliation, then it may be difficult to perceive how the courts can fashion a remedy that will result in any meaningful resolution of the outstanding issues. While the symbolic value of a declaratory judgment should not be underestimated, a more compelling case can be made for judicial intervention in cases where there is at least the possibility of arriving at an outcome that could directly and effectively remediate long-standing grievances.

6. Proof That Ethical Standards Were Recognized but Disregarded

As discussed in an earlier chapter, the question of whether contemporary standards can fairly be applied to earlier times can be a difficult one. In looking at atrocities

³⁶⁶ William Ewart Gladstone, Speech at Plumstead [1878], quoted in John Bartlett, *Familiar Quotations*, 15th and 125th Anniversary Edition (Toronto: Little, Brown and Company, 1980), p. 517.

committed by European conquerors and colonialists in the Americas and elsewhere, for example, it is difficult to imagine what combination of self-interest, social conditioning, and religious dogma could have resulted in an attitude that allowed them to justify their actions. Some commentators have suggested that oppressors historically have attempted to dehumanize other people; by relegating them to the status of domesticated or wild animals, they eliminated any obligation to accord them the rights and respect that are owed to other humans.³⁶⁷ Even in recent decades in industrialized nations, the mentally ill and mentally handicapped have been treated in ways that seem incompatible with their human status and possession of human rights. Looking back in judgment upon past human rights violations, one wonders of those who committed them: did they not know or did they not care?

If courts are to be asked to provide remedies for past human rights violations, it will be useful if they can be shown evidence that was contemporaneous with those events to indicate awareness that what was being done was wrong, even if the expression of that awareness is couched in the language of morality rather than human rights. In the case of the Chinese head tax, for example, the remarks of Secretary of State Chapleau in 1885³⁶⁸ suggest that the tax was recognized from the outset as being a concession to prejudice and protectionism. It was not, of course, the case that this was universally recognized, or even recognized by a majority, and it would be unrealistic to look in the hope of finding such a standard. Instead, it should be sufficient to show that someone was expressing opposition to the measures that were taken, and that those who committed the human rights violations had had the option of heeding that opposition. In such cases, the courts can take comfort from knowing that they are

³⁶⁷ David Brion Davis, *Inhuman Bondage* (New York: Oxford University Press, 2006), pp. 2-54.

³⁶⁸ *Supra*, notes 92 and 94.

truly being asked to provide remedies for past wrongs rather than to engage in historical revisionism.

7. Failure by Government to Address the Problem

As noted in the introductory chapter, one of the questions that gives rise to this study is what happens to unresolved human rights issues with the passage of time. The fact that they are unresolved is indicative of a failure by the legislative and executive branches of government to address them. Arguably, the role that these governmental institutions play in representing the electorate, assessing its collective will and implementing its collective choices makes them the preferable bodies for bringing closure to such issues. That they have not done so would be a factor to be taken into account by the courts in deciding whether or not a judicial remedy would be appropriate in any given case.

The history of the Chinese head tax and exclusion laws does, however, demonstrate that even the passage of very long periods of time need not preclude the possibility of governmental action. When the Governor General of Canada announced in the Throne Speech that there would be a formal apology in Parliament, one hundred and twenty-one years had passed since the head tax was first introduced and fifty-nine years had passed since the *Chinese Immigration Act* had finally been repealed. Even if the courts should be able to provide remedies for long-past human rights violations, it is reassuring to be reminded that they will not always have to do so.

8. Government Was the Rights Violator

Human rights can be violated by any number of different actors. Landlords, restaurants, schools, employers, voluntary associations, and others can all be found listed as defendants in the reports of human rights cases. It must be suggested that the situation is different, however, when it is government, and particularly government at the senior rather than the local level, that is the violator of human rights, and that this difference should make courts more willing to deal with human rights violations that have been committed by governments.

Governments are both the guarantors of human rights and the embodiments of the collective public will. When governments commit human rights violations, their victims can claim to have suffered in a very particular way, knowing that their rights were violated by entities that should exist to protect them. For the rest of society as well, human rights violations committed by a government have a special importance, in that all citizens of a democratic state are culpable for the wrongs committed by the state and have an interest in their remediation. Courts must recognize that when governments fail in their human rights responsibilities, the judiciary has an important role to play in restoring them to an awareness of their roles and responsibilities, and that this should be weighed in the decision on whether or not to consider providing a remedy for a long-past human rights violation.

D. Application of the Criteria to the *Chinese Immigration Act*

Having advanced the preceding list of criteria as being relevant to a court's decision on whether to exercise its discretion with respect to long-past violations of human rights, it will be useful to consider what result would have obtained if those criteria had been applied to the case of Canada's *Chinese Immigration Act*. The fact that the Government of Canada did eventually decide to award compensation to head tax payers and their spouses would seem to be evidence that this was a case in which there was a pressing societal interest in providing a remedy. If the criteria suggested above are appropriate, then they should have led to the same result.

In fact, most of the criteria would have been likely to result in a judicial decision in favour of considering the case. The separation of family members, the large sum represented by the \$500 head tax at the time of its imposition, and the tens of thousands of people who were directly affected all indicate the egregiousness of the rights violation. The time since the incidents took place was short enough that at least a small minority of the victims were still alive. These individuals and the surviving spouses of other victims were a group that could legitimately have brought a claim before the courts. Because some of the harm caused – *i.e.* the head taxes levied – was directly monetizable, it would have been possible to craft an appropriate remedy, albeit one that would not have involved the remorse and acknowledgment of wrongdoing that was expressed in the remedy that was actually provided. As discussed earlier, it would have been possible to find evidence in the historical record that would have made it possible for the Government of Canada to recognize the wrongness of its action, even if popular sentiment supported it. There was certainly a

failure by government to address the problem, at least until its sudden and surprising reversal of position. Finally, it was, of course, the Government of Canada itself that was the rights violator.

The only one of the proposed criteria that it would have been difficult to demonstrate favoured judicial intervention would be that of whether there was continuing harm caused by the human rights violation. The extraordinary levels of Chinese immigration into Canada in recent decades, the degree of integration that has been achieved, the economic success and the social prominence of many Chinese-Canadians, all of these factors would probably have suggested that there was no continuing harm still lingering sixty years after the *Chinese Immigration Act* was repealed. On the other hand, the very fact of the continuing agitation for a remedy could be taken as indicative of some lingering resentment and fracturing of the Canadian polity, so perhaps a credible argument could have been advanced even on this point.

Had the courts made the decision to consider the case of victims of the *Chinese Immigration Act* on its merits, and had they adopted the other two changes proposed in this chapter – viewing human rights violations as being conceptually similar to criminal acts and recognizing that human rights exist independently of the *Charter* and other instruments – then it seems very likely that a remedy would ultimately have been awarded.

This chapter has suggested three ways in which the courts could rethink their approach to long-past violations of human rights in order to be able to more

effectively address them. Whether or not the courts would wish to do so, however, is another question. Floodgates, sleeping dogs, and other metaphors abound by which decisions to do nothing can be justified, whereas making a decision to grapple with big, difficult issues in innovative ways requires initiative and courage. At most, the approach suggested in this chapter can help to show that doing so is not too difficult, and is certainly not impossible.

Chapter VI: Conclusions

The introduction to this paper asked what the relationship is between human rights and time, and specifically whether the passage of enough time allows governments to evade accountability for human rights violations that they committed in the past.

With regard to the first question, this paper posited that there should be almost no relationship at all between human rights and time, in that the former exist independently of the latter and should be unaffected by it. The answer to the second question, however, as illustrated by an examination of the Chinese head tax and exclusion laws, seems to be that while governments may find it difficult to escape judicial scrutiny for actions taken in the post-World War II era of explicit human rights guarantees, they have been able to do so for human rights violations that they committed prior to this time. Of course, avoiding legal liability is not the same as actually resolving an issue, and the Chinese head tax and exclusion law issue also illustrates the point that failure to provide meaningful remedies for human rights violations can result in those issues remaining on the political agenda for a very long time. To quote from the title of one of Hans Christian Andersen's stories, "Delaying is Not Forgetting."

A surprising aspect of the Chinese head tax and exclusion issue was that it finally came to a "happy ending" long after any realistic hope that it might do so could have been abandoned. Although there may have been those in the Chinese-Canadian community who remained unhappy with the means by which it was resolved, the decision by the Government of Canada to make a formal apology and financial reparations while some of those who directly suffered because of its earlier policy and

legislation are still alive to accept that apology and the accompanying payments seems likely to have brought an end to a very long history.

What might be interpreted as an eventual triumph of parliamentary democracy, however, can also be interpreted as a failure of the judicial system. When individuals who had suffered as a result of the head tax and exclusion laws brought their demands for a remedy before the courts, their claims were rejected not because they were without merit, but because despite the clear judicial recognition of the wrong that had been committed, the courts believed themselves to be without the power to provide a legal remedy for that wrong. The result was an injustice, but regrettable as that is, the mere fact of it being an injustice is not what makes it most objectionable. Instead, it is that the decision negates the very concept of human rights.

As was shown in Chapter I, "human rights" is a modern term for a concept that can be traced back for thousands of years, namely that certain rights are fundamental and inherent and are based upon something other than positive law. This notion has resonated with political and legal thinkers and has figured in historical events that have helped to shape the nature of the nation-state. Modern states have endorsed the concept at the international level and have given it expression in statutory and regulatory protections at the domestic level. These positive law protections have governed the resolution of human rights disputes in recent years, so that it would be easy to assume that human rights are ineluctably bound up with the mechanisms set up by governments to protect them. An examination of the Chinese head tax and exclusion issue, however, has made it possible to separate one from the other; since the human rights violation in this case predated the creation of post-World War II

positive law protections for human rights, the latter could not apply, leaving the courts to grapple with human rights *simpliciter*. That is, not only has the Chinese head tax and exclusion issue proven worthy of consideration because of its importance to those who were harmed by the discriminatory measures and because of the light it shines upon the relationship between human rights and time, it has also provided a controlled situation in which to examine the judicial attitude toward human rights as they exist independently of their positive law protections. The *Mack* case offered the courts the opportunity to, in effect, either endorse the view expressed by academics and ringingly endorsed by international covenants that human rights simply exist, or to endorse the view that human rights only exist because governments have created them.

By finding that the human rights that are manifested in the *Charter* can only be given effect for events that took place after the *Charter's* passage, the courts found, in effect, that those human rights did not exist prior to its creation. That is, contrary to the concept discussed in the first chapter of this paper that human rights are rights possessed by everyone simply by virtue of their being human, the courts' judgments would have the effect that human rights are only possessed by those who live in a place and time where artificially-created rights are embodied within statutory or constitutional instruments. "Human rights" would thus be rendered a misnomer.

Courts, of course, at least in the adversarial system found in common law countries, are only supposed to weigh the arguments put before them, so the judges in *Mack* cannot fairly be faulted for not having considered that giving effect to the rights contained in the *Charter* would not necessarily mean giving the *Charter* retroactive

effect. If courts were to recognize in future, however, that human rights exist independently of the *Charter* and similar instruments, their decisions would be in better accord with the conceptual basis of human rights while still being in accord with existing case law. In addition, if the courts were to view human rights violations as being analogous to criminal acts, they might be prepared to exercise greater flexibility in order to permit outstanding human rights violations to be brought forward for redress, such as by allowing people other than those whose rights were directly violated to represent their interests.

It might, perhaps be questioned whether the relatively small number of outstanding human rights violations that both predate modern human rights instruments and are championed by groups or individuals that continue to press for remedies warrant the attention and conceptual shifts proposed in this paper. Obviously, those who were directly affected by such human rights violations would say that they do. It might be worth noting in this respect that the resolution of the Chinese head tax and exclusion issue has prompted renewed calls for government to address some of the other outstanding human rights violations from Canada's past that were mentioned earlier in this paper, such as the incidents involving Jewish and Sikh passengers respectively on the St. Louis and the Komagata Maru.³⁶⁹

It may also be, however, that the benefits of this approach would be more widely applicable in the future. That is, while this look at the resolution of an outstanding human rights complaint from the distant past is directly applicable to similar human rights complaints from such times, it has also been a means of isolating a human

³⁶⁹ See, for example, Fred Kunst Sr., "Other doomed passengers shouldn't be forgotten," *Vancouver Sun*, Monday, February 5, 2007, p. A10.

rights dispute from the current milieu of legislated human rights guarantees. It could therefore also apply if the courts some day have to consider a human rights violation in a situation in which the guarantees set out in the *Charter* do not apply for some reason other than the passage of time, perhaps even because some future government may have purported to repeal the *Charter*.

In such a situation, courts might choose to follow the reasoning exemplified by *Mack*, and accept that it is their proper function to uphold human rights only when legislative bodies have approved of their doing so. Alternatively, however, they might wish to recognize that certain human rights must be protected even – perhaps especially – in situations where governments deny the very existence of those rights. The approach advocated for the treatment of past human rights violations in this paper could provide a legal tool for courts that might choose to follow the latter course in such a hypothetical future situation.

While it is impossible to prejudge what might happen in future cases, this paper has suggested a change in perspective that could allow judges to provide remedies in future cases involving human rights violations. To suggest that they should be prepared to do so is really to do no more than to acknowledge that fundamental human rights do exist and that in cases where governments fail to uphold those rights, the task of doing so will fall to the courts.

Appendix A: Abbreviations Used in this Paper for Courts and Law Reports

Courts and Tribunals

Alta. S.C.A.D. – Alberta Supreme Court, Appeal Division
 B.C.C.A. – British Columbia Court of Appeal
 B.C.S.C. – British Columbia Supreme Court
 C.A. – Court of Appeal (of a province identifiable from the report series)
 Co. Ct. – County Court (of a province identifiable from the report series)
 F.C.A. – Federal Court (of Canada), Appeal Division
 F.S.T. – Financial Services Tribunal (Ontario)
 J.C.P.C. – Judicial Committee of the Privy Council
 Man.C.A. – Manitoba Court of Appeal
 N.B.C.A. – New Brunswick Court of Appeal
 Ont. C.A. – Ontario Court of Appeal
 Ont. Ct. of G.S. – Ontario Court of General Sessions of the Peace
 S.C. – Supreme Court (of a province identifiable from the report series)
 Sup. Ct. Jus. – Ontario Superior Court of Justice
 T.C.C. – Tax Court of Canada
 T.D. – Trial Division (of Federal Court or a province identifiable from the report series)

Law Reports

A.C. – Law Reports, Appeal Cases (U.K.)
 A.P.R. – Atlantic Provinces Reports
 BCCA – British Columbia Court of Appeal cases (neutral citation)
 B.C.L.R. – British Columbia Law Reports
 BCSC – British Columbia Supreme Court cases (neutral citation)
 B.C.R. – British Columbia Reports
 CarswellOnt – Carswell Ontario Cases (WestlaweCARSWELL)
 C.C.C. – Canadian Criminal Cases
 C.T.C. – Canada Tax Cases
 D.L.R. – Dominion Law Reports
 F.C. – Canada Federal Court Reports
 MBCA – Manitoba Court of Appeal (neutral citation)
 N.B.R. – New Brunswick Reports
 O.J. – Ontario Judgments (Quicklaw)
 O.R. – Ontario Reports
 SCC – Supreme Court of Canada cases (neutral citation)
 S.C.C.A. – Supreme Court of Canada Rulings on Applications for Leave to Appeal (Quicklaw)
 S.C.R. – Canada Law Reports: Supreme Court of Canada

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