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How Should Canada Redress Historical Injustice? Lessons of the Chinese Head Tax

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Redressing Historical Injustice: Canada and the wider context

Proposals to redress historical injustices caused by government policy have been raised in Canada and elsewhere since the 1980s. Historical injustices represent cruel and discriminatory, if not illegal, policies committed by states and their institutions or agents against groups of people. Officially sanctioned policies aimed at, or resulting in injustices against, peoples are now being dealt with across the globe. Re-examinations of past policy and the relations between ethnic and religious groups within and among states are underway in Europe, the Americas and Asia (Brookes 1999). The political and social forces for redress challenge current analytical and policy frameworks. This challenge has been reflected reconsideration of legal doctrines about responsibility and compensation, historical understanding as well as public policy pertaining to group rights and past injustices. Among the most influential Canadian works are those by political theorists, Charles Taylor (1994) and Will Kymlicka (1995, 1998). Their writings on the “politics of recognition” and “communitarian” liberalism reflect primarily on the rights claims of Quebeckers and aboriginal peoples in Charter Canada. They have made major claims for the recognition of collective rights and attendant changes in public policy as well as supporting the notion that group rights should challenge individual rights. But their framework does not evaluate specific redress claims from smaller groups aggrieved by particular, historical state policies. The legal scholar, Roy Brookes, a long-time student of

redress, has pointed out that claims for redress include not only themes such as interracial justice and apology but also concepts of restorative justice. He distinguishes between, on one hand, the broad public policy of recognition and apology that may include reparations for general past injustices and, on the other, the narrow and legalistic practice of compensation for specific wrongs against specific collectivities for specific grievances (Brookes 1999). Deciding how a particular historical case fits the two kinds of approaches, however, is not easy, as recent Canadian experience may show.

This essay examines the particular circumstances of the so-called Chinese Head Tax, by setting concern over historical injustices in Canada within the broader global context and by examining the broad public policy literature on compensation for specific collective redress.

In his important book, *The Guilt of Nations* (2000), historian Elazar Barkan has made a broad survey of what he calls “restitution” for historical injustices. Barkan discusses the direction of the policy debates surrounding specific cases as well as their broad intellectual impact on scholarship. He notes that the redress movement developed in two ways. He calls one the “residues” of the Second World War; and the other, the “aftermath” of colonialism. The “residues” begin with German atonement for the Holocaust but have come to be associated with German and Russian plunder as well as racial mass murder. The original point of contemporary concern with historical redress, Barkan argues, began with the post-Holocaust claims by Jewish survivors, and eventually Jews as a people against Germany. These claims occurred as far back as the late 40s and early 50s and culminated in West Germany’s unprecedented reparations policy towards both individuals and the state of Israel that began in 1952. The residues of War also led to

widespread discussion from the 60s to 80s of Japan's war-time invasions and outrages, notably its policies against Korea, the Philippines and China, and specifically the programme of forced mass prostitution of females by the invading Japanese Army. In the United States, the residues led, during the 1980s, to restitution over the US government's wartime internment and suspension of citizenship rights of Japanese Americans.

The second of Barkan's theatres of redress is the colonial legacy in Africa and the Americas. It is recently seen most prominently in South Africa with its Truth and Reconciliation Commission. The Commission spent the years between 1995 and 2002 investigating the purveyors of Apartheid after the fall of the supremacist state in 1994. The result was a major public inquiry that provided an historical survey and investigation of abuses and led to recommendations for reparations, rehabilitation and amnesty (South Africa 2002). Currently, an academic if not a public debate has flared up again about how, and whether, the United States should contemplate redress for chattel slavery (Winbush 2003).

Past injustices in Canada have also been re-examined and these too reflect to some extent the broad types of redress identified by Barkan. Considerable attention has been paid to the colonial legacy as seen in programmes and policies used by the Canadian government and Christian churches to assimilate aboriginal peoples. These past injustices have also been examined in terms of more general policies such as the broader cultural assimilation programmes waged against aboriginal people by the government of Canada, and the religious conversion goals and practices of the Christian churches. In the specific case of education policy manifested in the so-called Indian Residential Schools, and the more general ones of cultural assimilation and forced religious conversion, legal

convolutions and moral perplexity remain very much before the Canadian people as the courts, churches and politicians examine the history of Residential School policies and their effects (Milloy 1999).

The single notable and successful Canadian case of redress for historical injustice concerns one aftermath of the Second World War that affected a racial minority. It was raised by Japanese Canadians during the 1980s over Canada's wartime policy of internment, relocation, property confiscation and forced labour. The result was the "redress settlement" of 1989 that had the key characteristics of "restitution"; that is, an apology that admits guilt for past injustice, in addition to payments that symbolically represent compensation. (See Miki & Kobayashi 1991; Kobayashi 1992; Omatsu 1992)

Two lesser-known but unresolved cases of redress after wartime also emerged during the 1980s. One case, still simmering in the public arena, involves Ukrainian Canadian claims over imprisonments during the First World War (see Luciuk 1987; Kordan 1993; Kordan & Mahovsky 2004). The other --- the subject of this essay --- concerns Chinese Canadians seeking redress for the Head Tax imposed during Canada's era of transcontinental expansion from the 1880s to 1920s. While injustice in the Chinese Head Tax case may be less obvious than the instances pertaining to state actions during wartime, it is nonetheless a fascinating one, not only because some Chinese Canadians persist in demanding redress but also because of the specific circumstances and the lessons drawn so far. Like all cases of redress, it is challenging because it also raises questions about the place of academic understanding and research in understanding the claims for redress.

The organization of a redress or restitution claim for the Head Tax has percolated among Chinese Canadians since the 1980s. But it was a Canadian ethno-cultural rights organization, the Chinese Canadian National Council (CCNC), which supported a legal challenge and gained a hearing in the Ontario Superior Court and the Ontario Supreme Court in July 2002. The CCNC also called press conferences and held small demonstrations over the past few years drawing attention to the claim. These tactics followed earlier low-level lobbying of provincial and federal politicians during the 1980s and 1990s that gained some limited voiced “sympathy” from provincial and federal politicians but no action (James 2004). Thus, by 2003, the Chief Justice of the Supreme Court of Canada, Beverley McLachlin, in a formal public lecture, identified and sympathized with the historical injustice done to the Chinese through the Head Tax. However, she framed the treatment of the Chinese as part of a history of “exclusion and discrimination” that required constitutional remedies since the Second World War in order to affect the “recognition” of “difference” (McLaughlin 2003). She did not comment on legal restitution as one of these remedies. The CCNC campaign took a more legalistic direction, in contrast to the Japanese Canadian political protest, and indeed, virtually all the other campaigns in Canada for restitution or redress.¹ Its lessons for public policy are instructive.

The Chinese Head Tax: History and Background

¹ The role and politics within ethnic groups is beyond the scope of the present paper, but the issue of who speaks for the historically injured, and with what moral authority is no small matter. The Chinese in Canada have one of the highest ratios of immigrant to non-immigrants, and there is often tension and disagreement among various Chinese organizations. For recent discussion of community governance and leadership among Canada’s ethnic communities, including the Chinese, see Jedwab (2001). See James (2004) for discussion of event leading up to court challenge.

To appreciate the claim for redress for the Chinese Head Tax, it is necessary to outline the historical context and highlight certain dimensions of Canadian policy that explain its continuing resonance.² The Head Tax refers to the main provision of the Chinese Immigration Act (CIA), first passed by Canada in 1885. The Act imposed a so-called “capitation” or entry tax of \$50, rising to \$100 and then \$500, upon certain classifications of Chinese entering Canada for the purpose of immigration. Between 1885 and 1923 almost all Chinese had to pay this tax in order to enter the Canadian labour force. Exempt from the tax were higher-status individuals such as merchants, teachers, clergy, artistic performers and diplomats (Chan 1983; Ryder 1991). Over 80,000 people paid nearly \$19 million between 1885 and 1923 (Ferguson 1994).³ After 1923, the Chinese were not allowed into Canada at all, a situation that continued until 1947 when the Act was abolished.

This Chinese Immigration Act, then, is a stark example of racial and class bias as well as state fiscal and legal ruthlessness. Although probably not the most extreme example of racism or historical injustice, it is significant that it was based on well documented, neatly-recorded and contentious national policy and administrative practices. The mere outline of the CIA may not in itself be sufficient to appreciate the sense of cumulative injustice, and it is necessary to consider four additional factors to understand the sense of outrage. These are (1) the policy-making context of the Act, (2)

² The authors have done detailed work on the administration of the Chinese population and the place of the Chinese in the labour market during this era; our characterization is based on that research as well as an effort to frame a discussion of how redress might be understood.

³ Using the Bank of Canada’s inflation calculator, \$19 million in 1923 would be approximately \$317 million today.

the tax burden of the Act, (3) its public administrative peculiarities and (4) its social and political effects.

Briefly, Canada enacted the Chinese Immigration Act as the simultaneous result of the national government's response to persistent British Columbia efforts to limit or prevent Chinese immigration, and to British and American political pressure to control the international movement of Chinese labour. Canada's reaction to BC's legislation was part of a protracted federal-provincial conflict (the ever present leitmotif of Canadian politics) over the balance of constitutional power in the federation. Gaining control over Chinese immigration was a key aspect of Ottawa's war of attrition to centralize the federation. The British imperial inspiration of the Canadian legislation is to be found in the similar wording of New Zealand and Australian "state" regulations passed during the 1880s (Huttenback 1976, Ferguson 1994, Ferguson & Hum 2001). In these ways, the Chinese were very much pawns in a larger Canadian and imperial constitutional chess game.

The specific taxation mechanism of the Act, too, represents a peculiar institutional practice, and one that has been overlooked by both activists and historians. In effect, the CIA was not only just an entry tax, but also a kind of "performance bond" or "permit to work" put up by Chinese (or, more often, on their behalf) migrating to Canada. This function is shown by the odd fact that the tax was, on hundreds and hundreds of occasions, returned to individuals, either because it was found they were unable to work in Canada after paying the tax or, more common, because they had decided to relinquish their right of residency and return to China. This was a "tax", then, that was refunded to those who could not, or could no longer, work in Canada. In this way, the head tax was a

“work permit” or “performance bond”, one that was even refunded (Ferguson 1994, Ferguson & Hum 1999). Taxes may be “certain”, but the Head Tax was certainly not permanent for all.

Public administration of the CIA was seldom immune to political controversy from the majority population, especially in BC. Charges of corruption and incompetence were continuous from its inception but it took the government of Canada twenty-five years to examine the specific charges of corruption. The ensuing Royal Commission of 1910 identified haphazard administration even by the pre-reformed civil service standards of the day. The Royal Commissioner, Judge Dennis Murphy, found, that not only were some of the officers of the Chinese Immigration service less than diligent in their duties, it was the very structure of the service itself that was flawed. Briefly, the CIA had immigration officers at only two ports of entry, Victoria and Vancouver, with an occasional staffer at the third, and probably most important port, the coal station at Union Bay, while having no specific officers at any of the other ports visited by vessels engaged in the trans-Pacific trade. Any pretence to control the movement of Chinese into or out of BC ports is denied by the absence of Chinese Immigration officers in most ports. Thus the capacity of the CI Service to control Chinese migration was virtually by design very weak. This is not to suggest that the Chinese population swelled beyond the official entrants, but only that the mechanisms of control were so flawed as to denigrate the administration of the Chinese Immigration Act by virtually inviting non-compliance (Ferguson & Hum 2001).

The effect of the Chinese Immigration Act, then, was to define the Chinese as a group that required a separate bureaucracy to implement controls over their movement in

and out of Canada, and to scrutinize their community organizations. Much like the aboriginal peoples designated under the Indian Act as special wards of the Canadian state, the Chinese were separately administered by the national government. Defined as a racial and class minority on the basis of their terms of entry, the Chinese constituted a category of “convenient” labour rather than a settlement group. Additionally, a host of provincial enactments in such areas as employment law and franchise legislation meant that they were further denied most of the range of “citizens rights” throughout the period from the 1880s to 1940s. In effect, the Chinese who paid the Head Tax were, like aboriginal peoples, denied the enjoyment of most aspects of economic, political and social life, including family life and mobility rights.⁴

Compensation and Redress: Necessary Distinctions

The plaintiffs in *Mack v. Canada* sought compensation for past wrongs. The CCNC continues to press for redress. Yet the distinction between compensation and redress has important consequences, and it is necessary to note some of the more important ones. Many writing about compensation or reparations distinguish “forward-looking” from “backward-looking” principles (e.g., Boxill, 1972). A forward-looking principle is designed to achieve some future good. Its only aim is to improve the present situation; it is blind to how the present situation actually came about. A backward-looking principle, on the other hand, demands a course of action because of some historical event, not because of any future benefit. For example, it is a backward-looking principle that we ought to keep our promises, and we normally think that promises should be kept even if doing so would have bad consequences (within limits).

⁴ For a review of anti-Chinese legislation pertaining to work conditions see Lee (1992).

Some authors advance forward-looking justifications for reparations (Waldron 1992), while others consider backward-looking justifications (Morris 1984, Sher 1977, 1979, 1981, Amdur 1979). For example, according to Sher (1979), “compensation” must restore to the victim some good or level of well-being that she would have had absent an injustice. Some writers employ the terms reparation, redress, restitution or compensation more or less as synonyms while others make fine distinctions.⁵ For Boxill (1972), the difference is that compensation is forward-looking while reparation, restitution, or redress is backward-looking. Compensation is forward looking because its aim is to restore equality of opportunity. When an individual suffers a substantial loss, she may be rendered unable to participate equally in various social arenas. It is part of a community’s tacit agreement (or principles) that such individuals be compensated adequately to re-enter the competition. However, this is true regardless whether or not the individual’s loss was caused by an historical injustice. In contrast, reparation necessarily involves injustice and seeks to restore to the victim the loss of well being occasioned by the historical injustice. Unlike compensation, reparation or restitution is backward looking; it constitutes acknowledgment of past injury. It is informed by the premise that “every person is equal in worth and dignity” (Boxhill 1972, 118), since failure to give the reparation implies a belief that the victim deserved her treatment (MacCormick 1978).

⁵ Barkan prefers the term “restitution” for the movement by which states undertake a broad admission of injustice, and seek atonement through “material recompense” for wrongs that cannot be quantified, such as loss of life or warping of individuals and communities. Like Brookes, he distinguishes acknowledgement of or payment for generalized wrongs (restitution or reparation) from specific, quantified payment for individual wrongs (recompense or compensation).

Valls (1999) distinguishes between compensation and rectification based on Nozick's well-known entitlement theory.⁶ Compensation is strictly a transfer from the original violator of rights to the person whose rights were violated. Reparation is a transfer between individuals whose holdings were shaped by past violations of rights, even if neither of the individuals were directly involved. It does not purport to be as precise as compensation, requiring only some reasonable transfer from the winners to the losers. The aim is to restore the distribution of resources as closely as possible to the distribution that would have obtained had the rights violation not occurred.

Legal Perspectives on Reparations

In the absence of a cooperative legislature and public sympathy, the question of reparations may be somewhat moot. The question that then arises is whether the government's hand can best be forced through the judicial system. The frustration of some members of the Canadian Chinese community no doubt explains, in part, the legal claim initiated by CCNC. Notwithstanding the particular disposition of *Mack v. Attorney General of Canada* (considered below), a brief look at the legal literature offers general insight as to the promise of legal strategies.

⁶ According to Nozick (1974), A is entitled to a holding if acquired in accordance with the principles of *justice in acquisition* and *justice in transfer*. The principle of justice in acquisition tells us how individuals may appropriate unheld resources, and the principle of justice in transfer tells us how they may acquire resources from other individuals who were entitled to them. No one is entitled to a holding unless it was acquired by repeated applications of these two principles. When one is not entitled to holdings, the individual may owe *rectification* to the rightful owner. Nozick does not claim to provide a complete theory of rectification. However, he does say that rectification would make use of our best estimate of the distribution of holdings that would obtain if the principles of justice in acquisition and justice in transfer had not been violated. Insofar as the actual distribution differs, it must be adjusted to resemble the just distribution. A detailed account of Nozick's theory is beyond the scope of this paper.

Levitt (1997) and Ozer (1998) examine some possible grounds for reparations from the United States government to American blacks. Levitt believes that the reparations given to Japanese Americans (due to the Japanese internment during WWII) establish a precedent for black reparations. Claims could be filed under a number of domestic laws or under certain international laws, such as the Universal Declaration of Human Rights. Ozer (1998) cites the 13th and 14th amendments to the U.S. Constitution, congressional legislation guaranteeing equal rights under the law and property rights for citizens, and the UN Charter, which, he argues, requires the U.S. government to eliminate any racial inequalities for which it is responsible. In addition, Ozer advances several arguments based on common law, such as a restitution claim for the “unjust enrichment” of non-blacks and a new tort claim that he dubs “racial assault.” Many of the above possibilities would not carry over to the Chinese Head Tax situation, but a claim for restitution based on unjust enrichment seems applicable, and was, indeed, a major argument advanced by the plaintiffs in *Mack v Canada*.

Perell (1995) relates the development of the Canadian law of restitution from the government perspective. Prior to 1989, government was liable in cases of “mistake of fact” but generally not liable in cases of “mistake of law.”⁷ That is, restitution was available when payment had been the result of some factual confusion but not when it had resulted from confusion over the existence or legitimacy of law. However, the line between mistakes of fact and law is fuzzy at best, since the existence and legitimacy of laws *are* a kind of fact. Two 1989 decisions by the Supreme Court of Canada—*Air*

⁷ The government appears liable in two cases of mistake of law: when the plaintiff made payment under compulsion (but see above) and when the government was more blameworthy for the mistake.

Canada v British Columbia and *Canadian Pacific Airlines Ltd v British Columbia*—abolished the fact/law distinction and placed restitution under the principle of unjust enrichment. On this principle, the plaintiff has a legal right to restitution if three conditions are fulfilled: 1) the defendant was enriched by the receipt of a benefit; 2) the defendant was enriched at the plaintiff's expense; and 3) there is no juristic reason for the enrichment, such as a contract or a disposition of law.

Wells (1994) compares the law of restitution in Canada and Australia. Under Australian case law, *A* has the right to recover her payment to *B* if *A* mistakenly believed that she had a legal obligation to pay. This raises the possibility of recovering taxes paid to the government under an invalid law.⁸ However, the judiciary has made this difficult in practice. At least two hurdles were established in *Air Canada v British Columbia*, a 1989 decision by the Supreme Court of Canada. First, Justice LaForest ruled that the plaintiff must show that the taxes were not passed on to third parties. In the *Air Canada* case, the government claimed that the airline had already recovered its payment by raising prices. Secondly, Justice LaForest ruled that the impact on government finances precludes restitution of all payments made under an invalid law. Plaintiffs would retain a right to recover if their payment had been compelled; but compulsion does not include payment in response to a statutory demand. These restrictions may bar most claims for restitution from the Crown. All would concede that the Chinese immigrants who paid the head tax did not “pass on” the tax by extracting higher wages from their employers ---the mine owners, the fish canneries, or railway contractors (Ferguson and Hum 1991, 2001)

⁸ Of course, it would remain to show that the Head Tax was invalid, but that is a separate issue.

Canadian law respecting restitution is formulated somewhat differently from Anglo-Australian law (McInnes 1999). In Britain and Australia, recovery under the principle of unjust enrichment is available if (i) the defendant was enriched by the receipt of a benefit; (ii) the enrichment was gained at the plaintiff's expense; and (iii) the enrichment was gained as the result of an "unjust factor." There are minor differences between the Canadian and Anglo-Australian treatments of conditions (i) and (ii); in particular, the Canadian law limits restitution to the plaintiff's loss, while the Anglo-Australian law does not. However, the most obvious difference between the Canadian and Anglo-Australian formulations is in condition (iii). On the surface, the Canadian principle puts the burden of proof on the defendant to show evidence of a juristic reason for the enrichment. In the Anglo-Australian formulation, the burden of proof is on the plaintiff to show evidence of an unjust factor. (Possible unjust factors might include the plaintiff not intending the defendant to receive payment, the defendant acquiring enrichment unconscientiously, or policy considerations that demand relief.) In practice, however, Canadian judges have required positive reasons for restitution. Thus the main difference, according to McInnes, is that Canadian law exhibits relatively less concern with principles and more concern with just results in each particular case. This would make it difficult to predict the outcome of any particular case in advance.

Gertner and Levine (1995) and Lester (2000) point out that all legal suits against the government, including a claim for historical redress, face a particular hurdle. Under common law, the doctrine of sovereign immunity provides full immunity to the Crown.⁹

⁹ The ethics of sovereign immunity is the subject of considerable controversy. Mayer (1992) notes four possible justifications for sovereign immunity, all of which he believes

This immunity has been partly but not completely abolished by statute. In Canada, the Crown Liability and Proceedings Act opened the government to liability for certain torts, while the Federal Court Act allowed claims against the government for contracts, injurious affection and, most important for our purposes, restitution. Although the Canadian government is no longer immune from restitution claims, suits must be initiated within a limited period of time. In general, the limitation period is governed by the legislation of the province in which the cause of action occurred. Where the cause of action did not occur in any particular province, a six-year limitation period applies. Regardless, the historical injustices under consideration here would seem to fall outside of any limitation period, making legal claims for restitution difficult at best.

Levitt (1997) and Yamamoto (1998) note a number of other defences available to government under United States law. According to the doctrine of proximate cause, the wrongs of the past must be the direct cause of present harms. This may be difficult to establish when the original victims are deceased, although the task is comparatively easy in the Head Tax case because the victims' loss took the form of monetary payments. The doctrine of *laches* is another hurdle in cases of historical injustice; it acts as a bar to

fail. The original justification rested on the divine right of kings, today regarded as an absurdity. The Hobbesian contract, in which individuals place an absolute sovereign above them in order to prevent anarchy, does better. Nevertheless, Mayer argues that this justification was undermined by Locke, who held that the sovereign can be removed for breaches of natural law. A third possibility, based on Kant's deontological ethics, is similarly rejected by Mayer. Finally, some utilitarians make a case for sovereign immunity based on the preservation of treasuries, the conservation of judicial resources, and the maintenance of order and discipline among certain public servants. But Mayer notes that any public savings from sovereign immunity are exactly equalled by private losses. In addition, he argues that the utilitarian argument for sovereign immunity ignores the possible cost of the public's loss of faith in the government. For Mayer, this is the principal disadvantage of sovereign immunity, which "perpetuates a model of conduct...based on power rather than reason or justice" (p. 428).

recovery where the plaintiffs have ignored their legal rights for a long period of time. Again, the lack of individual (living) perpetrators may pose a problem if the injustice did not primarily occur through an institution, since there would then be no one to name as defendant. Reparations to American blacks for the costs of slavery could encounter this difficulty since the original slave owners are dead. Finally, some cases may suffer from the indeterminacy of compensation awards. It may be impossible to attach a figure to an injustice, either from lack of information or because the harm is fundamentally non-monetary. The Chinese Head Tax escapes this problem because detailed records exist for the most part.¹⁰

Some of the legal objections to restitution for historical wrongs can be evaded if we consider restitution between groups rather than individuals.¹¹ Most national and international law contains little recognition of collective rights; however, a number of judicial and legislative decisions indicate that acceptance is growing (Sanders 1991). The Quebec law mandating the prominence of French on commercial signs can be interpreted as placing the collective rights of the French-speaking community above the liberties of individual citizens. Gender discriminatory rules for membership in Aboriginal nations have been upheld by the Supreme Court of Canada. The courts have also upheld the collective rights of religious groups. The Supreme Court agreed that a Catholic school

¹⁰ The authors have assembled detailed records from archival sources, including Orders in Council granting refunds, and the like.

¹¹ The formulation in terms of groups rather than individuals, as well as the issue of time limits, is the subject of other research underway, and is not developed here for space reasons. The plaintiffs in *Mack v Canada* was not the community of Chinese Canadians now living in Canada but specific individuals who paid the tax and their relatives and descendants. In other words, unlike other claims of historical injustice in which a particular ethnic-cultural community seeks redress, the Mack claim was posed in terms of individuals harmed, perhaps as a legal necessity.

board could fire a teacher who married a divorced person, contrary to Catholic doctrine. Similarly, Ontario Mennonites are allowed to sell milk outside the quota system. All of these examples show an increasing willingness to frame legal issues in terms of groups, an advantage for those seeking restitution for historical wrongs. The plaintiffs in *Mack v. Canada* brought their action on behalf of specific individuals, as well as the class of surviving payers and their relatives and descendants (therefore technically, not all presently living Chinese Canadians.)¹² All in all, the legal case for reparations seems difficult but not impossible to make.

Perhaps the best evidence is empirical—the outcomes of past attempts to seek reparations for historical wrongs through legal recourse. Unfortunately, there is little discussion of legal attempts in the public policy literature, precisely because so few attempts have been made. Tang (1988), however, describes the progress of the American Japanese community's suit to seek reparations for the WWII internment. (Prior to the U.S. government's decision to grant reparations, the Japanese community had sought relief from the courts (Maeda 2002)). The suit was filed as a class action against the United States. The original district court dismissed the case on the grounds of sovereign immunity and the statutes of limitations. This decision was upheld by the court of appeals, with one exception: the court of appeals held that the plaintiffs could seek compensation for the expropriation of property, since the government had implicitly waived sovereign immunity for such claims. Moreover, the court held the statutes of limitations did not begin to toll until 1980, when it was first revealed that the internment

¹² The plaintiffs in *Mack v. Canada* also sought a public apology from the government of Canada for the Chinese Head Tax. The legal difficulties of institutional apologies for historical injustice are not discussed in this paper.

was not a military necessity. At the time of Tang's writing, the U.S. Supreme Court had remanded the case to the federal circuit on a jurisdictional issue, and it remains speculation whether other courts would have agree with the court of appeals.

Nevertheless, even this partial account shows both the difficulties in seeking reparations for historical wrongs and the type of reasoning that can allow such claims to proceed.

Lesson from the Chinese Head Tax: Not a Legal Story

On September 13, 2002, the Ontario Court of Appeal upheld Cummings J. in *Mack et al. v The Attorney General of Canada* (decision July 9, 2001). The plaintiffs had sought redress from the federal government for harm caused by the Chinese Immigration Act, including the return of monies paid as Head Tax between 1885 and 1923, damages for pain and suffering, and a public apology. The plaintiffs based their claim on s. 15 of the Charter of Rights and Freedoms, international law norms, and a claim of unjust enrichment.¹³ Mr Justice Cumming dismissed the claim for the following reasons: (1) The Charter of Rights cannot apply retroactively to a claim founded on a "discrete act" -- the Chinese Immigration Act --- that has since been repealed, (2) international law norms, while helpful for interpretation, have no standing unless adopted by domestic legislation, and (3) the argument of unjust enrichment has no merit.¹⁴ The decision also recommended a Parliamentary review in order to assess the claims for redress.

¹³ The plaintiffs also referred to the 1988 Japanese Canadian Redress Agreement, arguing that failure to extend redress to the Chinese for historical wrongs of the head tax also violated the Charter. The court ruled that government redress to one group does not in itself "provide a legal basis for another, unrelated group in respect of their separate claim of discrimination". *Mack v Canada* , p. 8

¹⁴ The test for unjust enrichment as set out by the Supreme Court is a three-part test: The government has been enriched, the Chinese have been deprived, and there is no juristic basis for the enrichment. Accepting the first two of these conditions, the court found the Chinese immigration Act to be valid statutes; that is, neither unconstitutional

What lessons ought one to draw from this Chinese Head Tax episode? Did it fail as a specific case of historical injustice on its particulars? Are legal challenges effective in advancing public policy in cases of historical injustice (cf. Baines 2002)? Given the breadth of the issues, the Chinese Head Tax must be treated as a specific example of historical injustice but, at the same time, reflective of general issues of historical redress.

The Chinese Head Tax is particularly instructive for a variety of reasons. First, the case has some advantages, since it is, perhaps, less emotionally and politically charged than some other historical injustice claims now being pursued in Canada, most of which are based on breaches of law, administration or treaties. The Head Tax was a carefully constructed policy of Canadian government, not an emergency reaction or temporary measure (Chan 1983, Ward 1990). Second, the circumstances under which the *Chinese Immigration Acts* were passed are public knowledge, recorded in Parliamentary debates as well as private governmental correspondence and in the press. There is considerable documentary and historical evidence, including a great deal of quantitative data not available in other cases. The government of Canada recorded taxes collected and individual taxpayers in a systematic fashion (Ferguson 1994, Ferguson & Hum 2001). Provincial and federal labour law and regulations imposed upon the Chinese were all inscribed upon the statutes and codes of governments. Moreover, the very fact that the Head Tax took the form of monetary payment makes a claim for compensation in monetary terms intuitively appealing if not convincing.

nor *ultra vires*. And as the Charter cannot be applied retroactively, the Act constitutes a juristic reason for any enrichment. See Ontario Court of Appeal (2002).

Yet, it is important to view the Chinese Head Tax within the context of historical grievances in which special circumstances have a crucial bearing. While claims for redress share the broader argument that descendants of the perpetrators of the injustice owe restitution to those who suffered, a distinction is necessary between the case in which the injured are still alive, and the situation in which descendants put the claim forward. This important distinction gives rise to many thorny issues, including: time limits, collective responsibility, and the role of apology. These issues were not considered in this essay. Rather, we concentrated on the specific case of the Chinese Head Tax and whether legal strategies were effective.

In dismissing the motion, Justice Cumming noted in his concluding remarks that the "... Chinese Immigration Act, if enacted today, could not withstand Charter scrutiny."(Para. 52) Describing this legislation as "repugnant and reprehensible" by "contemporary Canadian morals and values", he acknowledged that "the Chinese Immigration Act, 1885 and its successors have come to symbolize a period of Canadian history scarred by racial intolerance and prejudice". He also remarks that "it may very well be that Parliament should consider providing redress for Chinese Canadians who paid the Head Tax or were adversely affected by the various Chinese Immigration Acts. There are ...instances where the government has provided an apology and compensation for the wrong and unacceptable treatment of a minority group of Canadians..." (Para. 54)

The Chinese Head tax, in common with other claims for redress for historical injustice, has its own set of historical circumstances. Yet it is hard to resist the conclusion that a strategy of redress based upon litigation is unlikely to be fruitful in cases of historical injustice. Leaving aside the inapplicability of the Charter on a

retroactive basis, or the lack of legal standing of international norms, or even that the contested historical material facts might be taken to be true, the sole recourse of the Chinese Head Tax claim would appear to rest on the “unjust enrichment” argument. Given that the Chinese Exclusion Act was abolished, and that the Chinese Immigration Act itself was constitutionally valid, and that the claim was framed in terms of individuals who paid the head tax and their descendants (as opposed to a formulation of a collective community -- the Chinese in Canada), it is difficult to be optimistic about further legal appeals to “unjust treatment” as examined by courts.

Whatever one may believe is the best way to secure satisfaction for historical injustice, the Chinese Head Tax Redress is, most likely, not a legal story. Its lessons are instructive and other instances of historical injustice will face different challenges and meet different results. There is no *vade mecum* for redressing all historical injustices.

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