THE SEARCH FOR SOCIAL JUSTICE IN THE CHINESE CANADIAN REDRESS CASE
The Limits of Jurisprudence

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Historical injustices pose a difficulty for civil society. On the one hand, such injustices defy the principle of equality and blemish the image of fairness of democratic society; on the other hand, redressing them requires invalidating past practices, often legal at the time, with current statutes and interpretations which prohibit or reject such practices. The case of Chinese head tax redress reflects such a dilemma for Canada. The Canadian courts took a narrowly framed approach to assess the technical legality of a racially discriminatory law to arrive at a decision to dismiss the Chinese redress. In doing so, Canada rejects the legal grounds for correcting past injustices deemed not in violation of the law at the time, even though the principles of equality and fairness have always been subsumed in civil society, and the moral basis of sustaining a discriminatory law has always been indefensible in a democratic society. The experience of the Chinese head tax case in Canada suggests that the political process, rather than the court, provides more flexibility in arriving at negotiated settlements of redress issues. The case also suggests that there are social merits in treating redress questions as issues of social inclusion open for negotiations, and not as legalistic disputes to be settled within the confines of the court.

HISTORY OF CHINESE IN CANADA

Chinese immigration to Canada began in 1859, after gold was discovered in the Fraser Valley of British Columbia. Initially, the Chinese came as gold miners from California. Shortly after, Chinese came directly from China to Canada, mainly as labourers, in response to labour shortages in railway construction and in other labour-intensive industries of the burgeoning west. At the height of railway construction in 1881 and 1882, over eleven thousand Chinese came by ship to Victoria from China directly. The

1. This section is primarily based on Li (1998).
2. About 2,000 Chinese arrived by ship in 1881, and another 8,000 in 1882. The numbers are based on arrivals of Chinese passengers on vessels entering the port of Victoria. See Royal Commission (1885, p. 397-399).
Chinese quickly became the target of racial discrimination in the late 19th and early 20th century. Many laws were passed to restrict Chinese immigration and to curtail the rights of those already in Canada.

Between their initial arrival in 1859 and the passage of the 1923 Chinese Immigration Act, the Chinese in Canada were frequent targets of discrimination and were subjected to many legislative controls. For example, as soon as the Canadian Pacific Railway was completed, the federal government imposed a head tax of $50 to virtually every Chinese entering the country. The head tax was raised to $100 in 1900 and then to $500 in 1903. Between 1886 and 1924, 86,000 Chinese entering Canada paid a total of $23 million in head tax. In addition, British Columbia passed numerous laws against the Chinese between 1875 and 1923, disallowing them to acquire Crown lands, preventing them to work in underground mines, excluding them from admission to the provincially established home for the aged and infirm, and prohibiting them from being hired on public works, as well as disqualifying them from voting.

The 1923 Chinese Immigration Act required every Chinese in Canada, regardless of citizenship, to register with the federal government within twelve months and to obtain a registration certificate, with a heavy penalty for failing to do so. Furthermore, every Chinese in Canada who intended to leave Canada temporarily had to file an official notice of departure and register with the government. Chinese leaving Canada for more than 24 months would forfeit the right to return even with the registration.

The 1923 Act also prohibited further Chinese immigration to Canada. As a result, many Chinese in Canada, mostly men, endured long periods of permanent separation from their family in China. Before 1923, financial hardship and social animosity discouraged the Chinese from bringing their family to Canada when it was legally possible to do so. The 1923 Act dashed any hope of the Chinese immigrants to bring their family, as virtually no Chinese were allowed to come to Canada between 1923 and 1947.

The exclusionary policies and discriminatory legislation against the Chinese effectively reduced them to second-class citizens. They were denied many of the basic rights, including the right to pursue a living in many occupations, the right to vote and the right to travel freely in and out of Canada. Chinese were frequent targets of political demagogy and social hostility. The unequal treatment of the Chinese further contributed to their marginal social status in Canadian society. The restriction on citizenship rights and their legal exclusion from higher-paying jobs forced the Chinese to seek refuge in service industries, notably the laundry and restaurant businesses. By 1931, about 40 per cent of the Chinese in Canada were servant, cooks, waiters, and laundry workers. The restaurant business was a survival haven for many Chinese before the Second World War, and it remained an important sector of employment and self-employment for Chinese after the war, even when opportunities in professional and technical occupations became available to them.

Another consequence of institutional racism was to retard the development of the Chinese-Canadian family. The Chinese-Canadian community remained a predominantly male society until decades after the Second World War. In 1911, among the 27,831 Chinese in Canada, the sex ratio was 2,800 men to 100 women; and in 1931, the sex ratio remained 1,240 men to 100 women among the 46,519 Chinese (Li, 1998, p. 67). Throughout all the census years before 1946, the imbalance in the sex ratio among the Chinese population was most severe among all ethnic groups in Canada. In the absence of Chinese women, many Chinese men in Canada maintained a “married bachelor” life - living as a bachelor in Canada separated from one's wife and children in China. For those who had the means, they would take a periodic trip to China for a sojourn with their families. The absence of Chinese women and conjugal family in Canada also meant the delay of a second generation in Canada. Many wives of Chinese Canadian men endured severe emotional and financial hardship in China, raising the children on their own. Throughout this period, the Chinese in Canada organized many voluntary associations as a means to answer community needs. These associations provided important functions, such as organizing social services, mediating internal disputes, sending remittances to China and dealing with external pressures of discrimination and segregation.

It was not until after the Second World War that the legally sanctioned discrimination and exclusion against the Chinese were removed. Further changes to the immigration regulations in the 1960s removed the remaining barriers of immigration for Chinese. However, it was not until 1967 when Canada adopted a universal point system of assessing potential immigrants that Chinese were admitted under the same criteria as others. The Chinese population increased substantially after 1967. In 1971, the Chinese-Canadian population was 124,600; by 1981 it had expanded to 285,800, and it further increased to 412,800 in 1986 and to 922,000 in 1996. About two-thirds of Chinese-Canadians now live in Vancouver and Toronto. Slightly over one-quarter of Chinese-Canadians was born in Canada; most foreign-born Chinese came to Canada after 1967.

3. See Statutes of Canada, 1885, c. 71, 1900, c. 32, and 1903, c. 8.
5. As a result of the 1923 Act, only four categories of Chinese were allowed to land in Canada: members of the diplomatic corps, children born in Canada of Chinese parents, merchants, and students. See Statutes of Canada, 1923, c. 38, s. 5.
It took the Chinese almost 90 years after their initial immigration to Canada before they were given franchise and other civil rights that other Canadians had long taken for granted. Throughout the 1950s and 1960s, despite the removal of legalized discrimination against them, the Chinese did not gain full social acceptance in Canadian society. Stereotypes of the Chinese race and Chinatowns have been deeply ingrained in the popular culture of Canada. The Chinese, irrespective of their nationality or political allegiance, are often equated with a foreign race with incompatible values and customs, and Chinatown remains an Oriental mystique and novelty in urban Canada. Canada's guarded post-war immigration policy towards the Chinese was in part influenced by historical stereotype and in part by Sinophobia during the Cold War of the 1950s. Even today, despite the financial and occupational achievement of Chinese-Canadians, segments of Canadian society have shown reluctance to accept them as full-fledged Canadians, and have branded them as belonging to a foreign race whose increased presence and implied cultural differences have allegedly upset the complacency and security of traditional Canada.

The new wave of Chinese immigrants who came after 1967 contributed to the growth of a new generation of Chinese-Canadians. They tended to be better educated, more cosmopolitan, and upwardly mobile. The arrival of these immigrants and the growth of native-born Chinese-Canadians helped to produce an emergent new Chinese middle class. They began to take up professional, technical, and managerial jobs which historically were denied of the Chinese. Further changes in the immigration policy in the mid-1980s in favour of business immigrants and the prospective return of Hong Kong to China in 1997 triggered another wave of Chinese immigrants to Canada. Many of the new immigrants brought substantial wealth and human capital to Canada; they came from Hong Kong, but also Taiwan and other parts of Asia that had experienced rapid economic growth in the 1970s and 1980s. By the late 1980s, there were many indicators that a new affluent class of Chinese-Canadians had emerged, and their spending power and investment capacity stimulated the expansion of a new "ethnic" consumer market. In turn, urban Canada went through many changes: middle-class Chinese-Canadians had moved to traditional white neighbourhoods, Chinese businesses flourished in suburban malls, and Canadian corporations and investment houses went after the fast-growing lucrative consumer market created by the new wealth of Chinese immigrants and the social mobility of middle-class Chinese-Canadians. Changes in economic and political conditions in Hong Kong and China in the 1980s and amendments to Canada's immigration policies in the 1990s to emphasize the immigration of economic-class immigrants further encouraged the immigration from Hong Kong and later Mainland China. As a result, the population of those of Chinese origin continued to grow, reaching 1,094,700 or about 3.7 per cent of Canada's population in 2001.

### The Chinese Head Tax Redress

By the 1980s, it was evident that a noticeable middle class had emerged in the Chinese-Canadian community (Li, 1990, 2001). The arrival of immigrants with professional credentials and the growth of second-generation Chinese-Canadians have changed the nature of the community and raised its political consciousness. In 1979, as a result of a protest movement in which Chinese across Canada organized to protest against the public affairs television program W5 for portraying an image of Chinese-looking students occupying precious university space, a national umbrella organization was formed (Li, 1998). Subsequently, the umbrella organization adopted the name Chinese Canadian National Council (CCNC) with the objective to promote the rights of all individuals, in particular those of Chinese Canadians, and to encourage their full and equal participation in Canadian society.

In 1983, a Chinese Canadian called Dak Leon Mark contacted the office of Margaret Mitchell, New Democratic Party MP for East Vancouver, expressing his desire to have the government refunding the $500 head tax he paid (Vancouver Sun, April 1993). Mr. Mark retained Tom Tao, a Vancouver lawyer, to represent his request for compensation (Globe and Mail, 1984). Shortly after, CCNC and its 29 member organizations began collecting head tax certificates from those who had paid the tax. In 1984, CCNC presented the government a list of 2,300 surviving Chinese who had paid a head tax of $500 to enter Canada. It stated in a position statement that the objective of CCNC's involvement is to "seek an all-party parliamentary resolution to properly acknowledge the injustice and racial discrimination in the Head Tax and the Chinese Immigration Act." (CCNC, 1984). A subsequent survey by CCNC indicates that of the 867 respondents who completed the questionnaire, 46 per cent were in favour of an official apology and a symbolic redress to individual victims, while 38 per cent also supported some form of community redress (CCNC, 1991).

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In 1990, CCNC successfully lobbied for the support of several politicians to endorse the Chinese head tax redress. On March 9, 1990, Prime Minister Brian Mulroney publically said that his government was "considering extending the principle of compensating victims of government heavy-handedness during World War II" and promised to deal with the various claims "in an expeditious and fair way" (CCNC, 1990, p. 7). Several meetings were held between officials and ministers of the federal government and representatives of CCNC. Meanwhile, in 1990, another group, called the Toronto Chinese Head Tax Action Committee, was formed. It wrote public letters to the Chinese media claiming that CCNC was not flexible enough on the question of redress, and the Committee wanted to represent the letters to the Chinese media claiming that CCNC was not flexible enough on the question of redress, and the Committee wanted to represent the Chinese community on the redress question (Globe and Mail, December 10, 1990, p. A3). There were confrontational public exchanges between CCNC and the Head Tax Action Committee, and the Chinese Canadian community was divided on the terms of redress and the right of representation. Undoubtedly, the schism weakened the bargaining position of Chinese Canadians and stalled the negotiation of a potential settlement with the federal government.

On May 18, 1993, shortly before the federal election, Gerry Weiner, minister in charge of multiculturalism, made a redress proposal to representatives of five groups, including the Chinese Canadians (Globe and Mail, 1993). The offer involved no financial compensation but included an "omnibus apology" by the Prime Minister Brian Mulroney and the offer to build a "Nation Builders Hall of Record" in the new national archives to commemorate the contribution of ethnic groups (Globe and Mail, 1993; Vancouver Sun, May 1993). The Chinese Canadians were also offered some elements of individual redress, including a medal for surviving head tax payers and a certificate for payers or their families (CCNC, 1993). It is widely believed that the offer was prompted by the upcoming federal election, and the Progressive Conservative government was desperate in trying to win the support of minority Canadians. However, the offer was rejected by Chinese Canadian groups in Vancouver, Toronto, and Montreal, and no resolution was reached before the defeat of the Progressive Conservative government in the 1993 federal election.

The Liberal government did not take any action towards settling the question of Chinese head tax redress after the 1993 election. In a letter to Dr. Alan Li, President of CCNC, Sheila Finestone, Secretary of State for Multiculturalism, said that six ethnocultural communities had requested redress and compensation for hundreds of millions of dollars, but the government would not grant financial compensation for the requests made. CCNC publicly condemned Sheila Finestone's announcement on redress and called it a betrayal of election promises (CCNC, 1994). The National Redress Committee of CCNC continued to press the government for a redress. In a newspaper article, Victor Wong, the chair of the Committee, explained the terms of redress requested: "There are four cornerstones to our position: a Parliamentary acknowledgement; an official apology; individual symbolic financial compensation, and the return of the head tax monies collected – some $23 million" (Wong, 1995). The article also complained that the government was not interested in individual compensation or in returning tax revenues.

On December 18, 2000, three Chinese Canadians, Shack Jang Mack, Quen Ying Lee, and Yew Lee, retained Mary Eberts as legal counsel and filed a statement of claim in a class action on behalf of head tax payers in the Ontario Superior Court, claiming a compensation of $320 million for 4,000 head tax payers and another $320 million for an anti-racism foundation (Toronto Sun, 2000). The court provided information on the background of the plaintiffs (55 Ontario Reports [3d] 2002) p. 117-118). The plaintiff Shack Jang Mack was born in China in 1907 and immigrated to Canada in 1922, paying $500 of head tax. In 1928, Mr. Mack went to China to marry Gat Nuy Na, but he could not bring her to Canada because of the 1923 Chinese Immigration Act. They lived in separation until Mr. Mack's wife and family joined him in Canada in 1950. Another plaintiff,

8. On March 8, 1990, Sheila Copps, candidate for the leadership of the Liberal Party, publicly said that Chinese Canadians deserved compensations for the head tax. On March 17, Alan Redway, a housing minister, said that "this government will go forward with a redress policy for all Canadians and that redress for the head tax will be part of the policy." Audrey McLaughlin, Leader of the New Democratic Party and NDP MP Margaret Mitchell were very supportive of the Chinese redress (CCNC, 1990). Margaret Mitchell raised the issue of Chinese head tax redress several times in the House of Commons, and other Members of Parliament either spoke in favour of redress or made private member motions in support of reimbursement of head tax (see House of Commons, 1990a, 1990b).

9. Margaret Mitchell posed the question to Gerry Weiner, Minister of Multiculturalism and Citizenship in the House of Commons in May, 1993: Since the Italian and Ukrainian Canadians who suffered unjust wartime internment also have refused the government's redress package, will the government also negotiate individually, and I say negotiate not just consult, a compromise redress settlement with these groups rather than attempt to impose a clearly unacceptable package at the 11th hour before an election? (House of Commons, 1993).

10. Letter from Honourable Sheila Finestone, Secretary of State for Multiculturalism, to Dr. Alan Li, President of CCNC, dated December 14, 1994.
Quen Yin Lee, was born in China in 1911 and married Guang Foo Lee in China in 1930. Guang Foo Lee was born in China in 1892 and immigrated to Canada in 1913 after paying $500 head tax. He died in 1967. The third plaintiff, Yew Lee, was the son of late Guang Foo Lee. Yew Lee, his mother, and two other children were unable to come to Canada until 1950. Quen Yin Lee and her children endured much suffering in China because communication and support from her husband Guang Foo Lee in Canada was disrupted for 13 years due to the Second World War and the subsequent civil war in China. The children did not know their father in their formative years. The plaintiffs claimed that the head tax and the Chinese Immigration Act had produced significant financial loss, hardship, emotional distress to the family, including long family separation, denial of companionship and injury to dignity.

Justice Cumming ruled on July 9, 2001 in favour of the defendant’s motion to strike out the plaintiffs’ statement of claim. On November 30, 2001, the lawyers representing the appellants filed an appeal to the Court of Appeal for Ontario. In their rulings released on September 12, 2002, the judges dismissed the appeal, and concurred with Justice Cumming that no cost should be awarded in this case. On November 18, 2002, the lawyers representing the head tax payers filed an application for leave to appeal to the Supreme Court of Canada, which eventually dismissed the application on April 24, 2003 without reason.

The judgments of the courts

The lawyers representing head tax payers in the Ontario Superior Court sought public apology, damages, and other remedies arising out the head tax from the federal government. They based their claim on international law as received in Canada through human rights legislation, the Charter of Rights and Freedom, and Canadian jurisprudence, as well as on the doctrine of unjust enrichment. Justice Cumming ruled that the Charter cannot be applied retroactively or retrospectively, it is impossible to declare the Charter of Canada, it was constitutional even though it was racist, and no international norms of the time could supersede the operation of validly enacted, albeit racist, domestic legislation. As the Charter cannot be applied retroactively or retrospectively, it is impossible to declare the Chinese Immigration Act, in its various forms, unconstitutional (ibid., p. 126-127).

Justice Cumming further ruled that even if the principles of equality and non-discrimination may have taken the status of international norms in the relevant time period, being 1885 to 1947, “it is problematic that such norms could supersede the operation of validly enacted, albeit racist, domestic legislation” (ibid., p. 127).

Thus, Justice Cumming concluded that since the Chinese Immigration Act was a legal statute of Canada, it was constitutional even though it was racist, and no international norms of the time could supersede the validity of a properly enacted “racist” Canadian statute. As a result, there was “a juristic reason for any enrichment and corresponding deprivation” (ibid., p. 127). The two contending arguments in front of the court are apparent. On the one hand, the lawyers representing the head tax payers argued that the laws upon which the head tax was based could not be legally defensible because they were racist and immoral; on the other hand, the defendants insisted that the very fact the Chinese Immigration Act existed clearly indicates that the actions towards the Chinese were legally based and constitutionally proper, even though the actions were racist.

The judges of the Court of Appeal for Ontario concurred with the judgment of Justice Cumming. In particular, they ruled that whatever customary international law may have existed during the relevant time frame, it cannot “render the impugned legislation invalid” (Mack v. Attorney General of Canada, Docket C36799, p. 13). The judges also accepted the argument that since the Chinese Immigration Act was properly enacted and therefore constitutional, its very existence also provided the juristic reason for unjust enrichment.

11. The principle of unjust enrichment implies that nobody should be made richer through loss or wrong to another. See Moran, 2001.
THE LIMITS OF JURISPRUDENCE IN REDRESS

The rulings of the Ontario Superior Court and the Court of Appeal for Ontario indicate there are severe limits as to what the court can do in redress cases. The court sees its role as interpreting the legality of the law, no matter how discriminatory or unjust the law may be, rather than ameliorating injustices done to individuals or groups. In concluding his ruling, Justice Cumming pointed out that the Chinese Immigration Act was both repugnant and reprehensible, and that he accepted the plaintiffs' argument that repealing a discriminatory law without repairing its discriminatory effects does not produce substantive equality. However, Justice Cumming also concluded that the court cannot usurp the power of Parliament which alone has the authority to provide redress for Chinese Canadians. In short, Justice Cumming was confining his judgment based on the technical legality of the Chinese Immigration Act, and reaffirming his understanding that the court only has the power to interpret the legality of the law irrespective of its injurious consequences to individuals and groups. According to him, since the Charter cannot be applied retroactively, the legality of the Chinese Immigration Act is unabated even though it was racist. As Justice Cumming put it, the role of the court "is to adjudicate claims based upon the legal merit within the framework of Canadian constitutional law" (55 Ontario Reports [3d] (2002), p. 128).

The Court of Appeal for Ontario also pointed out that historical treatment of people of Chinese origin represented "one of the more notable stains on our minority right tapestry", but at the same time, recognized the head tax laws to be "constitutional in domestic law terms and they did not violate any principles of customary international law" (Mack v. Attorney General of Canada, Docket C36799, p. 20). In short, the appeal court considered the legal basis of the laws to authorize the collection of the Chinese head tax, and found such basis to be constitutional even though the laws tarnished the history of Canada in its treatment of racial minorities. The Court of Appeal also recognized the limitation of the court in being able to apply the principle of equity. In their concluding statement, the judges said: "The doctrine of unjust enrichment is an equitable doctrine. However, even the broad purview of equity does not provide courts with the jurisdiction to use current Canadian constitutional law and international law to reach back almost a century and remedy the consequences of laws enacted by a democratic government that were valid at the time" (ibid., p. 13).

In short, in the case of the Chinese head tax redress, the courts have confined themselves to interpreting the legality of the 1923 Chinese Immigration Act and its previous versions, and have applied the test of retroactivity of the Charter by considering racial discrimination against the Chinese as based on a discrete act that ended with the 1947 repeal of the 1923 Chinese Immigration Act. This interpretation enables the judges to establish a temporal order of the Charter relative to the discrete discriminatory acts in history. Even within this narrow interpretation of the law, there are differences of opinions. In her analysis of the concept retroactivity, Baines (2002) points out that a key distinguishing feature to test retroactivity is to consider whether the facts constitute a discrete fact or an ongoing status. In the case of the Chinese head tax redress, Baines (2002) notes that the judges never considered the merit of the plaintiff's claim that discrimination against the Chinese was based on an ongoing feature, namely, the characteristics of the Chinese race, and the repeal of the Chinese Immigration Act did not obliterate the ongoing racial characteristic upon which discrimination against them was based.

CONCLUDING REMARKS

The case of the Chinese Head Tax redress shows how the principle of justice and equality often clashes with the technicality of the law. The lawyers representing the head tax payers in courts were basing their claim on the fact that pieces of the Chinese Immigration Act were unjust and racist, and as such, the Act could not be construed as properly constituted in a democratic society even in the absence of a formal charter of rights. The courts, however, took the position that the racist nature of the Act does not nullify its constitutionality and legality, since racist practice was not outlawed at the time.

The limit of jurisprudence in being able to correct injustices is evident in the ruling of Supreme Court of Canada in another case involving a Chinese Canadian in 1914. In that year, a Chinese restaurant owner in Moose Jaw, Saskatchewan, appealed to the Supreme Court of Canada claiming that his rights as a British subject were violated as a result of being charged in violation by a Saskatchewan law of 1912 that prohibited the hiring of white females by Chinese (Supreme Court of Canada, 1914). In dismissing the appeal, Justice Davis explained:

There is no doubt in my mind that the prohibition is a racial one. It extends and was intended to extend to all Chinamen as such, naturalized or aliens. The Chinaman prosecuted in this case was found to have been born in China and of Chinese parents and, although, at the date of the offence charged, he had become a naturalized British subject, and had changed his political allegiance, he had not ceased to be a Chinaman within the meaning of that word as used in the statute. The prohibition against the employment of white females was not aimed at
alien Chinamen simply or at Chinamen having any political affiliations but at Chinamen as men of a particular race or blood, and whether aliens or naturalized (Supreme Court of Canada, 1914, vol. 49, p. 449-50).

In its contradictory way, the Supreme Court of Canada in 1914 upheld the legality of a racist Saskatchewan law on the grounds that the discrimination against the Chinese was legal because the legally constituted law was intended to be discriminatory against all Chinese, British or not. Similarly, in the head tax redress rulings, the courts were not concerned with whether the Chinese Immigration Act was discriminatory or unjust to the Chinese, but merely confining its decisions on the question regarding the legality of the law at the time. Thus, even if the nature of the law is racist, as long as the government followed the proper legal procedures in enacting the law at the time, it remains, in the eyes of the court, a properly constituted law which also provides the juristic reason for enrichment at the expense of the victims.

The experience of Chinese head tax redress in Canada suggests that even though the courts have the authority to rule on the legality and constitutionality of legislatively-based injustices towards minorities, they are powerless in being able to resolve issues of redress due to legalized injustices. In short, the courts are highly capable in determining whether injustices are legal or not, but they have chosen not to involve in adjudicating the question of social injustice as long as such injustices were based on statutes legally constituted.

Finally, the case of Chinese head tax redress also suggests that even though the government has succeeded in dismissing the claims of the Chinese in court, it has failed to win the hearts and minds of racial minorities who continue to feel alienated and marginalized. If Canada as a democratic and open society is concerned about the inclusion of groups historically being mistreated, then it would have to resort to a political process that allows open dialogues and negotiated settlements with groups that feel that they were historically discriminated and are politically marginalized.

Bibliography


Census of Canada (2001). Ethnic Origin (232), Sex (3) and Single and Multiple Responses (3) for Population, for Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations.


Statutes of Canada (1885). An Act to restrict and regulate Chinese Immigration into Canada, c. 71.

Statutes of Canada (1900). An Act respecting and restricting Chinese Immigration, c. 32.


Supreme Court of Canada (1914). Quong-Wing v. The King. Reports of the Supreme Court of Canada, vol. 49.

News paper articles

Many thanks to Blake Evans for his assistance in the writing and preparation of this text.
Muriel Kitagawa wrote of the Japanese internment by the Canadian government that "time heals the details, but time cannot heal the fundamental wrong" (in Gruending, 2004, p. 156). Despite these very real open psychic wounds, neither modern society nor individuals are indifferent to the banality of evil. There are reasons why we always return to square one to wrestle with our individual demons and to shake hands with the collective devils that never leave us. This is not because we have some genetic code that says we can name and shame evils, but because the effects of trauma leave an open wound that festers until closure.

While it is always difficult for organized citizens to confront the darkest acts in their collective past, there has been a recognition about the need to confront the banality of evil and other collective forms of injustice. I think what is frustrating, of course, is that we cannot prevent them. We can only react after the fact, as Dallaire so powerfully depicts in his compassionate and haunting memoir of the Rwanda horrors (Dallaire, 2003).

States, like people, act according to many overlapping and sometimes conflicting considerations. Do states act according to ethical guidelines? How can we tell? And if our ethical compass is constantly evolving, how do we know if we’re making concrete progress? What grade would we give Canada, a middle power with a reputation as peacekeeper and advocate for human security, as an ethical actor? If Canada is to set a high standard with respect to human rights and the duty to protect, do its deeds measure up to its words?

**HUMAN RIGHTS ABUSES AND THE ETHICS OF STATE REMEMBERING**

Even a cursory examination of its behaviour in key areas, we can see that Canadian state policy doesn’t always live up to absolute ethical scrutiny. Ottawa didn’t send troops to Iraq, but the Canadian government stopped well short of criticizing American unilateralism. On the Maher Arar case, when Canadian intelligence services were complicit in sending a Canadian citizen back to Syria to face a year of torture and interrogation, Ottawa receives a D. The prime minister has been very eloquent on First Nations
their formative years. Nor has it lived up to its treaty obligations. Ottawa
the socio-psychological abuse of children separated from their parents during
their formative years. Not has it lived up to its treaty obligations. Ottawa
receives a failing grade (Wright, 1993).

Do Canadians believe that they have a compassionate and effective set
of policies regulating immigration? Ottawa accepts roughly 300,000 immi­
grants every year. As a major destination for immigration, Canada could do
much better. Political refugees are a strong ethical test of any country's poli­cy and compassion. Canada offers safe haven to between 25,000 and
40,000 persons needing protection every year. Not an insignificant number.
But the Bush revolution in foreign policy is going to reduce Canada's intake
and strain our responsibility to the UN Convention on Refugees. Canada
has signed the third-party agreement, which restricts Ottawa's safe haven for
Central American refugees (Drache, 2004). On gay and lesbian rights,
Canada is ahead of the pack for its recognition of same-sex marriage. On
poverty eradication, Canada, like many other countries from the global
North, spends less on global development today than it did a decade ago.

Is the gap between word and deed unique to Canada? The increase in
American human rights abuses at home and abroad has become an alarming
trend. The torture and abuse of prisoners at Guantanamo Bay and Abu
Ghraiab prison, its retention of the death sentence, and its massive black
population have earned the United States condemnation from global public
opinion (US Human Rights Network, 2005). Torture, human rights abuses,
execution, and the increase in political prisoners is on the rise in many
countries in the global North and South.

States that have some capacity and which accept international obliga­
tions are frequently laggards on ethical issues. Much has changed since the
days of Clausewitz, yet states are still driven above all by self-interest, power,
and a disregard for international law. They are allergic to the open dialogue
which would deliver basic and substantive justice to past victims of systemic
human rights violations.

No country readily confronts the dark and sordid history that has been
part of its nation-building. For example, I am not sure what we remember
about the Jews who were refused entry to Canada leading up to World War
II, and who were sent to their death in nazi concentration camps as a result
(Abella and Troper, 2000). The average Canadian's memory of the Japanese-
Canadians who were born here only to be forcibly removed from their
homes in BC and sent to internment camps thousands of miles away is

probably no better (Adachi, 1977). What lessons have Canadians learned from
the Doukhobours, who in the 1950s had their children stolen from their
parents and put in residential schools (Woodcock and Avakumovic, 1977)?

It would be comforting to believe that as a society, Canadians have
reached a consensus where one human rights abuse is one too many. Cana­dians
cannot be naive and ignore the fact that societal memory is frequently
partial and selective. What we remember is intensely political, and what we
selectively screen out is neither random nor irrational.

COUNTERPUBLICS, TRUTH, AND RECONCILIATION

And why is this? Because societal memory is just like individual memory
when confronted with past acts of guilt, wrongs, and shame. No one easily
owns up to their failure to act ethically, compassionately, and justly. Most
of us need to be pushed and prodded with an assortment of carrots and
sticks. Then, people often surprise themselves by taking crucial steps of
reconciliation towards their families, friends, colleagues, and neighbours
who have either wrongly or been wronged by them. Global counterpublics
and international law are the carrots and sticks that force states to engage
in truth and reconciliation (Held, 1997).

Most recently, the 1980s were an ethics-free zone, and few had second
thoughts about the social impact of global free trade. After the battle of
Seattle, Quebec, and the collapse of the WTO talks in Cancun, that is no
longer the case. Elites have lost control of the free trade agenda and are now
on the defensive. The WTO is in constant crisis and paralysis, and the global
South has become skeptical of the need for more trade liberalization.

A decade ago, few would have thought that global poverty eradication
would be an alternative to the policy goals and values of neoliberalism. Even
fewer would have predicted that "Another World Is Possible" would replace
TINA, There Is No Alternative. The new consensus is that strong democ­

racy, global governance, and accountability are the starting point for a fun­
damental reorientation. Behind the sea-change are global counterpublics
where anyone between 15 and 55 is as likely to be a skeptic, a radical
contrarian, or a battler as a conformist (Drache, Clifton and Froese, 2004).
The modern culture of dissent increasingly defines who we are and who we
want to be as active citizens (Todd, 2003).

Global and local publics in all their diversity are intent on holding
governments accountable in ways that did not exist a decade ago. These
cohalitions of actors, networks, and transnational groups have grown in influ­
ence and importance. They represent a voice of empowerment for social
justice and collective responsibility (Tarrow, 1994). So far, in the cycle of dissent, counterpublics have shown no sign of flagging, but their effectiveness could decline in the future.

These important changes in the constitutive social environment have created the foundation for a new relationship between ethics and state responsibility. Cycles of dissent are driven by anger and disillusionment with global free trade and its asymmetrical benefits. There is a lot of reason to be an activist, a skeptic, and a contrarian – global hunger, inequality, social exclusion, racism, and environmental degradation, to cite only a few, threaten human security and human rights on a global scale. Global public opinion is increasingly holding the elites to task.

We don’t have an adequate handle on the ampleur and magnitude of the global dissent movement. These normative communities of public activists have multiplied and sprung into prominence in the global North and also in the global South. Their presence and influence has been an effective brake on the One World template of Washington Consensus neoliberal policies that are organized around simple economic dictates to the detriment of social and cultural ones.

THE POLITICS OF FORGIVENESS

Creating a successful politics of inclusion is a high-maintenance, high-risk activity. Societies, as many experts recognize, have an equal capacity to be backsliders on ethical issues and to seek closure. The causal links between the politics of forgiveness and social justice are not easily forged. Each of these categories is so immense, each represents such different challenges, and all operate on such different levels. And if we think about it, societal memory is always in a race with itself. It forgets as much as it remembers of past wrongs and injuries, all the while continuing to cause contemporary harm.

It is important to recognize that wherever there are established hierarchies there are also counterpublics undermining them. When the leaders from the global North like Blair or Bush defend unilateral regime change, global free trade, and human rights abuses in Guantanamo Bay, the public is as likely as not to doubt their words and deeds.

This deep-rooted suspicion of public authority has fed a culture of dissent. Everywhere, public awareness no longer automatically follows official dictates. Global counterpublics are a constant reminder to the state that it no longer holds a monopoly on official remembering: global public opinion remembers what the elites would rather forget.

Bibliography