The Chinese Head Tax Class Action: No Legal Basis

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In 1929, a Canadian religious writer, Dr. S.S. Osterhout, wrote in his generally patronizing history, *Orientals in Canada*, that the "iniquitous" Chinese head tax had not only been "utterly ineffective" in curbing immigration from China, but (not surprisingly) it had also proven to be "exceedingly distasteful" to the Chinese, "inasmuch as the regulation singled them out as a specifically undesirable race, imposing on them a demand and a burden which was not imposed upon any other race" (p. 22). Although by present-day standards this polemical church historian was far from enlightened, he managed to draw a conclusion about the effect of the head tax legislation (only six years after its repeal) that for its time was both liberal and prescient: "It will take long years, perhaps generations, if indeed it is ever possible, to remove from the minds of the Chinese people the bitter feelings caused by this unequal treatment and race discrimination." This bitterness and desire for public recognition of the significant harm caused by the Chinese head tax has led to a recent class action, *Shack Jang Mack et al* v. *Attorney General (Canada)*, seeking on behalf of those throughout Canada who were forced to pay the tax, as well as their surviving family members, a public apology, damages in excess of a billion dollars, and other remedies. The action was launched after years of unsuccessful negotiations between the Chinese Canadian community and the Canadian government. On July 9, 2001, Mr. Justice Cumming of the Ontario Superior Court of Justice struck out the intended class action as disclosing no reasonable cause of action.

The Canadian government passed its first *Canadian Immigration Act* in 1885, at the time of the completion of the transcontinental Canadian Pacific Railway, which had been built in British Columbia with the help of thousands of Chinese labourers, many of whom had died in the process. The 1885 *Act* imposed a $50 tax on every Chinese entering Canada; in 1900 the tax was increased to $100 and in 1903 to $500. In 1923 the head tax legislation was replaced by the *Chinese Immigration Act* of 1923 that effectively prohibited all Chinese immigration to Canada. It was not until 1947 that the 1923 *Act* was repealed.

Despite the plainly discriminatory nature of this legislation, Mr. Justice Cumming found that the Plaintiffs' case lacked merit for the following main reasons:

- the Canadian *Charter of Rights* (1982) does not apply retrospectively;

- the claim was founded on a "discrete act" -- the levying of the head tax or the outright exclusion of Chinese -- and that fact "predominates over any of the head tax's continuing effects." Thus Mr. Justice Cumming rejected the Plaintiffs' argument that their "present *Charter* rights are infringed as a result of the government's refusal to provide redress relating to the Head Tax";

- while international law norms can aid in the interpretation of domestic law, the only relevant law was the *Charter* and his Lordship again emphasized that it could not be applied retrospectively;

- even if the international law norms cited by the Court had been adopted by domestic legislation, and thus become part of Canadian law (which has *not* been the case), the Court

doubted that they would have yielded "a positive legal duty to provide redress for historical wrongs that occurred *prior to* the development of the international norm";

- the Plaintiffs' argument based on unjust enrichment was lacking in merit since a constitutional statute, however racist and discriminatory, constitutes a "juristic reason" for the enrichment: even if international law norms between 1885 to 1947 *had* accepted the principles of equality and non-discrimination, such norms could not supersede "the operation of validly enacted, albeit racist, domestic legislation."

Moreover, the Court had no difficulty in rejecting the submission that it was discriminatory of the Canadian government to refuse to compensate Chinese Canadians for the harms they suffered as a result of the head tax, when (as a result of a 1998 agreement) it had provided some compensation to Japanese Canadians for their internment during the Second World War. Mr. Justice Cumming held that "the fact the government gives redress to one group of Canadians in respect of their claim of discrimination through a voluntary agreement does not in itself provide a legal basis for another, unrelated group in respect of their claim of discrimination."

The reasons for judgment conclude on a note of strong sympathy for those adversely affected by the various *Chinese Immigration Acts*. Indeed, Mr. Justice Cumming was willing to opine that "It may very well be that Parliament should consider providing redress ... ." However, redress could not be obtained from the courts, whose "function is not to usurp the power of Parliament," but rather "to adjudicate claims based upon their legal merit within the framework of Canadian constitutional law."

The Court's decision that the "claim belongs in the political area" was quickly endorsed by the Toronto *Globe & Mail*, which suggested that an *ex gratia* payment of about $5400 -- an estimate of what $500 in 1923 would now represent, adjusted for inflation but without accumulated interest -- "might be about right." At the same time, the *Globe & Mail* cited the Canadian Immigration Minister as stating that the door was firmly closed on any compensation whatsoever: "The courts have spoken and I think it's time to move on." Although an appeal has been launched, a hearing date has not been fixed as yet.

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