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Mack v. Canada (Attorney General)

PROCEEDING UNDER The Class Proceedings Act, 1992
Between
Shack Jang Mack, Quen Ying Lee and Yew Lee,
plaintiffs/responding party, and
The Attorney General of Canada, defendant/moving party

[2001] O.J. No. 2794

Court File No. 00-CV-202644

Also reported at: 55 O.R. (3d) 113

Ontario Superior Court of Justice

Cumming J.

Heard: April 24-25, 2001.
Judgment: July 9, 2001.

(57 paras.)

Counsel:

Mary Eberts and Avvy Yao-Yao Go, for the plaintiffs/responding party.
Paul Vickery, William Knights and Cynthia Koller, for the defendant/moving party.

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1 CUMMING J.:-- The defendant, the Attorney General of Canada, moves to strike out the plaintiffs' statement of claim pursuant to rule 21.01(1)(b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, on the ground that it discloses no reasonable cause of action. In the alternative, the defendant asks the court dismiss the action pursuant to rules 21.01(3)(d) or 25.11, on the ground that it is frivolous, vexatious, or an abuse of process.

2 This claim raises the controversial issue of the duty of governments to provide redress for historical wrongs. The plaintiffs seek a public apology, damages and other remedies arising out of moneys paid to the Government of Canada in respect of the so-called "Head Tax" and other effects

of the various Chinese Immigration Acts, enacted between 1885 and 1923. They bring this action on their own behalf and on behalf of a class comprising the surviving payers of the Head Tax and their surviving spouses and descendants.

Background

3 The first Chinese Immigration Act, 1885, S.C., c. 71, was enacted in 1885. Among other provisions, this Act levied a $50 charge upon each Chinese person entering Canada. The Head Tax was increased to $100 in 1900, and to $500 in 1903. In 1923, the levy was abolished and replaced with the final Chinese Immigration Act, 1923, R.S. 1923, c. 38. This final Act effectively prohibited all Chinese immigration to Canada. (The 1885 statute, the amending and replacing statutes, and the final 1923 statute are singularly and collectively referred to herein as the "Chinese Immigration Act".) The 1923 statute was repealed in 1947 by s. 4 of the Immigration Act, R.S. 1947, c. 19. It was only then that earlier Chinese immigrants who had paid the Head Tax became eligible for Canadian citizenship.

4 The plaintiff Shack Jang Mack, a retired businessman, resides in Toronto. He was born in China in 1907. Mr. Mack immigrated to Canada in 1922. He was obliged to pay the Head Tax of $500. At the time, this amounted to about two years' wages for a Chinese-Canadian worker.

5 Mr. Mack returned to China to marry Gat Nuy Na in 1928, but could not bring her to Canada because of the Chinese Immigration Act, 1923, even though he was a lawful resident of Canada. Hence, his only contact with his family was through periodic trips back to China. A visit to China of more than two years would result in losing the right to return to Canada. Each time he left Canada he would sell his café business, opening another upon his return to Canada. His wife and family were able to join him in Canada in 1950.

6 The plaintiff Quen Ying Lee resides in Ottawa. She was born in China in 1911, and is the widow of Guang Foo Lee, whom she married in China in 1930. Guang Foo Lee was born in China in 1892 and immigrated to Canada in 1913, paying a Head Tax of $500. He died in 1967.

7 The plaintiff Yew Lee is the son of the late Guang Foo Lee and the plaintiff Quen Ying Lee. He was born in China in 1949. Because of the Chinese Immigration Act, 1923, the plaintiffs Quen Ying Lee and Yew Lee were unable to enter Canada until after the repeal of that statute in 1947. They immigrated to Canada in 1950 together with two other children in the family.

8 Because of the Second World War and the civil war in China, Quen Ying Lee and her children were unable to communicate with Guang Foo Lee in Canada, and Mr. Lee was unable to send support for them for some 13 years. During this time, Ms. Lee and her family endured great privation in China. The children did not know their father during their formative years. Yew Lee was the third child in the family, born in China in 1949. Two more children were born in Canada in 1952 and 1954, after the family had been reunited.

9 The plaintiffs' statement of claim alleges that from 1885 to 1923, the Canadian government collected a total of $23 million from some 81,000 people under the various forms of the Chinese Immigration Act. The plaintiffs claim that the Acts were discriminatory on their face, being directed at members of a single race.

10 The plaintiffs say that in addition to imposing a discriminatory tax, the statutes have had profound and longstanding detrimental effects upon individuals and families in the Chinese Canadian community. These effects include the inability of Chinese Canadian families to form, develop and

live normally until the government lifted its prohibition on Chinese immigrants in 1947. The plaintiffs say that the discriminatory Head Tax and the exclusion from Canada of family members through the discriminatory Chinese Immigration Act, 1923 has meant significant financial loss, hardship, emotional distress, family separation, loss of companionship of spouse, child and parent, loss of opportunity and injury to dignity. Further, the statement of claim alleges that the racially discriminatory legislation has created profound and enduring racial prejudice against persons of Chinese descent in Canada.

The Test on a Motion to Strike

11 On a motion to strike out a pleading as disclosing no reasonable cause of action, a court must apply the following principles:

1. All material facts as pleaded are taken to be true, unless patently ridiculous or incapable of proof;
2. The court should not strike out a claim unless it is "plain and obvious" that the claim could not succeed; and
3. A claim's novelty is irrelevant to this determination.

See Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at 980; Nash v. Ontario (1995), 27 O.R. (3d) 1 (C.A.) at 5. The defendant also raises the defence of laches and the issue of whether the statement of claim is statute-barred by reason of s. 32 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 and ss. 2 and 45 of the Limitations Act, R.S.O. 1990, c. L.15. However, such asserted defences are not to be considered at this time. The motion at hand looks simply to the adequacy of the plaintiffs' pleading. Does the statement of claim disclose a reasonable cause of action?

12 The plaintiffs' claim is based upon two grounds. First, they have made a claim in international law, as it has been received into Canada through human rights legislation, the 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 (the "Charter"), and Canadian jurisprudence. Secondly, they argue the doctrine of unjust enrichment. I will deal with each of these arguments in turn.

The Charter and International Law Arguments

13 The plaintiffs first ground their claim in domestic constitutional law and international law. Specifically, they rely on sections 15 and 24 of the Charter, and various international documents, including the Charter of the United Nations, Can. T.S. 1945 No. 7, the Universal Declaration of Human Rights, G.A. Res. 217 A (III) ("the UDHR"), the International Covenant on Economic, Social and Cultural Rights, Can. T.S. 1976 No. 46 ("the ICESCR"), the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) ("the ICCPR"), the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), and the International Convention on the Elimination of All Forms of Racial Discrimination, Can. T.S. 1970 No. 28 (the "CERD"). They argue that by applying the Charter while using these international norms and covenants as an aid to interpretation, they can successfully make out a claim for redress.

14 Section 15 of the Charter guarantees the right to be equal before and under the law, and to the equal protection and benefit of the law without discrimination, inter alia, based on "race, national or ethnic origin." The purpose of the equality rights guarantee under s. 15 of the Charter is to prevent the violation of essential human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis

of merit, capacity or circumstance: Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at 530. Section 24 of the Charter confers a broad remedial jurisdiction upon the courts.

15 As a starting point, I note that the Charter cannot apply retroactively or retrospectively: Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358. In Benner, Iacobucci J. noted that there is no rigid test for determining whether a proposed application of the Charter is retrospective. However, he held at 383-84:

> 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 the 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.
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> 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?
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> 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. (emphasis added)

16 The plaintiffs argue that they are not asking the court to apply the Charter either retroactively or retrospectively. Rather, they contend that their present Charter rights are infringed as a result of the government's refusal to provide redress relating to the Head Tax. They argue that repealing the Chinese Immigration Act without remedying any of its resulting discriminatory effects violates the Charter section 15 right to equality.

17 Applying the test articulated in Benner, this court must ask how the plaintiffs' claim can best be characterized. Here, the claim is founded on a discrete act, that is, the levying of a fee on Chinese immigrants or the outright exclusion of Chinese immigrants under the Chinese Immigration Act in its various forms. It is this discrete act that predominates over the any of the Head Tax's continuing effects. It is impossible to say that the plaintiffs' claim is grounded in the "contemporary application" of a historical statute, repealed long before 1985, when s. 15 of the Charter came into force.

The offending law was repealed in 1947. There can be no contemporary application of a repealed law.

18 Rather, this claim seeks redress for events that took place over fifty years ago. Accepting all the facts as pleaded by the plaintiffs, the proposed application of the Charter is retrospective. Therefore, it cannot succeed.

19 It is not sufficient for the plaintiffs to plead that they continue to suffer from discriminatory legislation that existed, but was repealed, prior to the enactment of the Charter. As the court in Benner, supra, recognized at 388, quoting Létourneau J.A. in the Federal Court of Appeal below:

> 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.

20 The plaintiffs must find a foundation for their claim in the laws applicable to the time of the impugned actions of government. The direct and indirect consequences of acts of discrimination may well last a lifetime and extend beyond to subsequent generations. But the predominating act of discrimination itself ended with the repeal of the Chinese Immigration Act in 1947.

21 The plaintiffs also refer in their statement of claim to the 1988 agreement by Canada to provide redress for a violation of the human rights of Japanese Canadians because of their internment during the Second World War (the Japanese Canadian Redress Agreement, P.C. Order 1988-9/2552, dated October 31, 1988). The plaintiffs say that failure to extend redress to the Chinese-Canadian community for the historical wrongs seen with the Head Tax and the exclusionary treatment relating to immigration is a violation of s. 15 of the Charter.

22 This submission cannot succeed. To support an alleged violation of a s. 15 right with respect to the Japanese Canadian Redress Agreement, it is necessary that the plaintiffs plead supporting facts as to a discrimination claim framed in the post-Charter period. However, the only asserted facts relating to alleged discrimination in the statement of claim flow from the impugned historical legislation, not from the Japanese Canadian Redress Agreement.

23 Moreover, the fact that 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 separate claim of discrimination. The government had a purpose through the Japanese Canadian Redress Agreement that was consistent with s. 15 of the Charter, and the exclusion of non-Japanese Canadians from the agreement did not undermine this purpose or demean the claimants' human dignity. The Government had a targeted ameliorative program for a specific group, that being Japanese Canadians.

24 The plaintiffs in the case at hand allege that the Japanese Canadian Redress Agreement failed to deal with the disadvantages that Chinese Canadians have experienced, even though those disadvantages are unrelated to the discrimination addressed through the government's agreement with Japanese Canadians. However, exclusion from a specifically targeted group "is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society." See Lovelace v. Ontario, [2000] 1 S.C.R. 950 at 1000. The simple fact is that an "ex gratia payment to compensate certain members of the Japanese Canadian population is not discrimination pursuant to s. 15 of the Charter" in respect of other Canadians: R. v. Mayrhofer, [1993] 2 F.C. 157 (T.D.) at 175.

25 The plaintiffs further argue that their claim can be grounded in international law norms. To this end, they rely on various international covenants and treaties. The plaintiffs contend that the application of these various covenants and norms under international law can support a successful claim for redress.

26 The Charter of the United Nations sets forth the signatories' reaffirmation of faith in fundamental human rights and in the dignity and worth of the individual.

27 The Preamble to the Universal Declaration of Human Rights, adopted by resolution of the General Assembly on December 10, 1948, 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. The UDHR recognizes that human rights must be protected by the rule of law.

28 Article 1 of the UDHR 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 forth in the UDHR, without distinction of any kind, such as, inter alia, race or national origin. Article 7 states that all are equal before the law and entitled without discrimination to the 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.

29 The General Assembly of the United Nations adopted the International Covenant on Economic, Social and Cultural Rights on December 16, 1966. Article 10 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.

30 On December 16, 1966 the General Assembly also adopted the International Covenant on Civil and Political Rights. Article 2 states that each country will respect and ensure to all individuals within its territory the rights recognized by the ICCPR, 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 the equal protection of the law.

31 On November 20, 1963 the General Assembly adopted by resolution the Declaration on the Elimination of All Forms of Racial Discrimination. Article 1 proclaims 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 in the International Convention on the Elimination of All Forms of Racial Discrimination provides the right to seek just and adequate reparation or satisfaction for any damage suffered.

32 All Canadians should unreservedly subscribe to and support the values articulated in the above-mentioned international documents.

33 The July 2, 1993 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, now under continuing consideration at the United Nations, asserts as a proposed basic principle of international law that the violation of any human rights gives rise to a right of compensation for the victim, including the immediate family. As well, the report states that the prevailing principle should be that claims relating to reparations for gross violations of human rights shall not be subject to any statute of limitations. His discussion of a possible definition for gross violations would include "persecution on ... racial ... grounds in a systematic manner or on a mass scale."

34 However, once again there are problems with the plaintiffs' submission. Primarily, as the Government of Canada has correctly pointed out, international treaties and conventions do not form part of Canadian law unless they have been expressly implemented by statute: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at 861; R. v. Vincent (1993), 12 O.R. (3d) 427 at 438 (C.A.).

35 It is true, however, that international law norms can act as an aid to interpreting domestic law. See National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 at 1371; Baker v. Canada (Minister of Citizenship and Immigration), supra. Yet apart from the Charter, the plaintiffs have pointed to no other domestic law that could apply to their claim. Undoubtedly, the Charter gives effect to many of Canada's obligations under international law. The norms of international human rights law provide a relevant and important source for the interpretation of the provisions of the Charter. See Anne F. Bayefsky, "International Human Rights Law in Canadian Courts" in International Human Rights Law, Theory and Practice, I. Cotler and F. P. Eliadis, eds. (Montreal: Canadian Human Rights Foundation, 1992) at 128; Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 349. However, as I have already concluded, the Charter cannot be applied in the manner proposed by the plaintiffs. The Charter cannot be given retrospective or retroactive effect.

36 International law norms can also properly inform the development of the common law. The contemporary application of a common law doctrine, that by international standards is unjustly discriminatory, demands reconsideration by a court: Mabo v. Queensland (No. 2), 175 C.L.R. 1 (High Court of Australia) at 35. However, the situation at hand does not involve the common law, but rather federal statutes. Moreover, the legal regime created by these repealed statutes expired over a half a century ago.

37 Even accepting that the instruments cited by the plaintiffs could be applied domestically, it is unclear that there currently exists a principle of accepted international law such that governments owe a positive legal duty to provide redress for wrongs involving violations of international norms respecting human rights. The comprehensive review of Special Rapporteur van Boven suggests that there may now be an embryonic international norm in this regard.

38 The international documents and treaties cited by the plaintiffs evince a norm prohibiting racial discrimination. They may also demonstrate that states owe a positive legal duty to redress wrongs by states in this regard. However, to my mind, this is different from showing a positive legal duty to provide redress for historical wrongs that occurred prior to the development of the international norm.

39 On this point, I note that save for the Charter of the United Nations, signed June 26, 1945, the fundamental documents and conventions relied upon by the plaintiff did not come into existence until after 1947. None of these international norms existed when the final Chinese Immigration Act was repealed in 1947. Moreover, many of the international documents relied on by the plaintiffs, including the ICESCR, the ICCPR, and the CERD, were not ratified by Canada until after 1970. The crystallizing or predominating events that precipitate the plaintiffs' action were the payment of the Head Tax and the exclusion of Chinese immigrants under the various Chinese Immigration Acts.

40 The plaintiffs' proposed analysis of this issue would necessarily involve the application of norms and principles that did not exist at the material times. Even if the international documents referred to in the statement of claim were to have been incorporated into Canadian domestic law they would have no retroactive effect unless, by their terms, they so provided. Article 28 of the Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37 provides:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

41 For these reasons, I find that it is plain and obvious that the plaintiffs' submissions relating to the Charter and international law cannot succeed. The pleadings in this regard are therefore struck out.

42 I now turn to the plaintiffs' submissions concerning unjust enrichment.

The Unjust Enrichment Argument

43 The test for unjust enrichment, as set out by the Supreme Court in Pettkus v. Becker, [1980] 2 S.C.R. 834 at 848, and Peter v. Beblow, [1993] 1 S.C.R. 980, is a three part test:

1. The defendant has been enriched;
2. The plaintiff has suffered a corresponding deprivation; and
3. There is no juristic reason for the enrichment, that is, the circumstances are such that it would be unjust to permit the defendant to retain the benefit.

See also Maddaugh, P.D. and McCamus, J.D., The Law of Restitution (Aurora: Canada Law Book, 1990) at p. 21.

44 It is true that equitable principles can apply in situations where the plaintiff is alleging unjust enrichment against the Crown. On this point, I note Air Canada v. British Columbia, [1989] 1 S.C.R. 1161. In Air Canada, La Forest J. held at 1203 that:

> It is clear that the principles of unjust enrichment can operate against a government to ground restitutionary recovery, but in this kind of case, where the effect of an unconstitutional or ultra vires statute is in issue, I am of the opinion that special considerations operate to take this case out of the normal restitutionary framework, and require a rule responding to the specific underlying policy concerns in this area.

La Forest J. later noted at 1207 that this rule was an exceptional one, and that situations involving "the element of discrimination, oppression or abuse of authority" might well warrant recovery.

45 The first two requirements of the test to determine when there has been an unjust enrichment have been met in the case at hand. Through the payment of the Head Tax, the Canadian government was enriched at the expense of the plaintiffs. There was a corresponding deprivation on the part of the immigrant payers of the Head Tax.

46 The main issue in dispute is whether the impugned legislation can constitute a juristic reason. The starting point for this discussion is that it is generally accepted that a statutory provision constitutes a valid juristic reason for an enrichment and corresponding deprivation: see Peter v. Beblow, per Cory J., supra at 1018.

47 It is not disputed that throughout the time period that they were in force, the various forms of the Chinese Immigration Act were valid statutes. The defendant submits that the Chinese Immigration Act would thus necessarily constitute a juristic reason for the enrichment. However, the plaintiffs contend that racist and discriminatory laws cannot constitute a juristic reason.

48 At the time that the various Chinese Immigration Acts were in force, the modern principles and structure for international human rights protection had not yet come into being. There were, however, some early antecedents. Article 23(a) of the Covenant of the League of Nations, Treaty of Versailles, Part I, 28 June 1991, provided for principles of fair treatment to persons and this fostered a guarantee system for the protection of minorities. See also Minority Schools in Albania, [1935] P.C.I.J. ser. A/B No. 64 at p. 17. The International Labour Organization emerged after the First World War and its constitutional development, subscribed to by many states, enunciated principles for the fair and humane treatment of all peoples, irrespective of race, creed or sex. See Treaty of Versailles, Part XIII, s. 1; Declaration Concerning the Aims and Purposes of the International Labour Organization, Part II, contained in Annex 5 to the Report of the Canadian Government Delegates to the Twenty-Sixth Session of the International Labour Conference (Ottawa: Edmond Cloutier, 1944). See generally, R. Ago and N. Valticos, eds., The International Labour Organisation, (Dordrecht: Martinus Nijhoff Publishers, 1995) at p. 4.

49 The problem with the plaintiffs' submissions in this regard is much the same as their difficulties with respect to their Charter and international law arguments. To find that a statute does not constitute a juristic reason, it would be necessary to demonstrate that the legislation is unconstitutional or ultra vires. However, as already discussed above, this would entail the retrospective application of modern-day constitutional principles in respect of legislation that was repealed over fifty years ago. As the Charter cannot be applied retroactively or retrospectively, it is impossible to declare the Chinese Immigration Act, in its various forms, unconstitutional.

50 The plaintiffs further contend that international law norms also provide evidence that the Chinese Immigration Act could not constitute a juristic reason so as to defeat the claim of unjust enrichment. For the purposes of this argument, it is accepted that principles of equality and non-discrimination may have taken on the status of international law norms in the relevant time period, being 1885 to 1947. However, it is problematic that such norms could supersede the operation of validly enacted, albeit racist, domestic legislation. As noted above, even today, international law norms and conventions can ground an arguable right in domestic law in the face of an offending domestic statute, constitutionally enacted, only where such norms and conventions have been expressly incorporated into domestic legislation.

51 Since the impugned legislation cannot be challenged on either constitutional or international law grounds, I therefore find that it constitutes a juristic reason for any enrichment and corresponding deprivation. As a result, it is plain and obvious that the plaintiffs' claim with respect to unjust enrichment cannot succeed. For this reason, it is struck out.

Conclusion

52 These findings must not be taken as an acceptance of the actions of Canadian governments in creating and implementing the various forms of the Chinese Immigration Act. Quite clearly, these Acts, if enacted today, could not withstand Charter scrutiny. The legislation in its various forms was patently discriminatory against persons of Chinese origin. By contemporary Canadian morals and values, these pieces of legislation were both repugnant and reprehensible. The Chinese Immigration Act, 1885, and its successors have come to symbolize a period of Canadian history scarred by racial intolerance and prejudice.

53 One should always be mindful of the role that both legislatures and courts have sometimes played in institutionalizing and legitimizing intolerance. (A thorough examination of this historical time period is provided in John W. St. G. Walker, "Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies (Toronto: The Osgoode Society for Canadian Legal History, 1997.)) It is vital that Canadians acknowledge this regrettable legacy as we strive towards building a society that both celebrates diversity and protects every individual's right to equality. These are the principles upon which our modern Canadian values, as elucidated in the Charter and other international law norms and conventions, are premised. It is true that the final Chinese Immigration Act was repealed over fifty years ago. Yet discrimination, in its various forms, unfortunately remains an enduring element of Canadian society. True equality will only be possible if all Canadians take on the challenge of eradicating racism and other forms of intolerance.

54 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, of course, instances where the government has provided an apology and compensation for the wrong and unacceptable treatment of a minority group of Canadians: for example, as mentioned above, the Japanese Canadian Redress Agreement. I do not quarrel with the plaintiffs' basic submission that merely repealing a discriminatory law, without repairing its discriminatory effects, does not necessarily effectuate substantive equality for the disadvantaged group nor redress the negative effects of discriminatory treatment.

55 However, the court's function is not to usurp the power of Parliament. Rather, its role is to adjudicate claims based upon their legal merit within the framework of Canadian constitutional law.

Disposition

56 For the reasons set forth above, I find it plain and obvious that the plaintiffs' claim cannot succeed. The defendant's motion is granted pursuant to rule 21.01(b) for the reason that the statement of claim does not disclose a reasonable cause of action. Accordingly, the plaintiffs' statement of claim in its entirety is struck out.

57 In the given circumstances, there shall be no costs.

CUMMING J.

cp/d/ln/qlrme