Case Name:

Mack v. Canada (Attorney General)

Between
Shack Jang Mack, Quen Ying Lee and Yew Lee, plaintiffs (appellants), and
Attorney General of Canada, defendant (respondent)

[2002] O.J. No. 3488

Docket No. C36799

Also reported at: 60 O.R. (3d) 737

and 60 O.R. (3d) 756

Ontario Court of Appeal
Toronto, Ontario

Austin, Moldaver and MacPherson JJ.A.

Heard: June 10 and 11, 2002.
Judgment: September 13, 2002.

(54 paras.)

On appeal from the judgment of Justice Peter Cumming of the Superior Court of Justice dated July 9, 2002 reported at (2001), 55 O.R. (3d) 113.

Counsel:

Mary Eberts, Avvy Go and Jonathan Strug, for the appellants.
Paul Vickery and William Knights, for the respondent.

The judgment of the Court was delivered by

1 MOLDAVER and MacPHERSON JJ.A.:-- In the Quebec Secession Reference,[1] the Supreme Court of Canada observed that although the protection of minority rights has played an essential

part in the design of Canada's constitutional structure, our record for upholding such rights has by no means been spotless. In this regard, Canada's treatment of people of Chinese origin who sought to immigrate to this country between 1885 and 1947 represents one of the more notable stains on our minority rights tapestry. For the first 38 of those years, until 1923, Parliament passed a series of laws that required persons of Chinese origin to pay a duty or head tax' upon entering Canada.[2] The tax, which grew progressively from $50 in 1885 to $500 in 1903, was meant to be prohibitive and it placed Canada beyond the reach of many. But not enough, apparently, for the government of the day, which explains why the tax was abolished in 1923 and replaced by legislation that for the next 24 years, until its repeal in 1947, effectively barred all but a select few Chinese people from immigrating to Canada.[3]

2 The appellants represent a class of people who seek redress from the Government of Canada for the harm occasioned by the impugned legislation - legislation which they quite properly characterize as racist and discriminatory. The class includes some individuals who actually paid the head tax, but in the main it consists of their spouses and descendants.

3 Among other forms of relief, the appellants seek the return, with compound interest, of monies paid as head tax and damages for pain and suffering, injury to dignity and loss of opportunity stemming from the impugned legislation. For present purposes, it is agreed that the appellants base their claim on the following three causes of action:

(1) The impugned legislation is the source of two distinct violations of the appellants' equality rights under s. 15 of the Charter.
(2) The impugned legislation was at all times invalid and of no force or effect because it contravened a customary international law, by which Canada was legally bound, prohibiting racial discrimination.
(3) The equitable principle of unjust enrichment applies and it requires the government to disgorge the revenues raised under the head tax legislation.

4 After being served with the statement of claim (the "claim"), the Attorney General of Canada moved under rule 21.01(1)(b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, to have the claim struck out on the ground that it disclosed no reasonable cause of action. The motion was argued before Cumming J. of the Superior Court of Justice for two full days on April 24 and 25, 2001. On July 9, 2001, Cumming J. released comprehensive written reasons in which he allowed the motion and struck the claim.

5 The appellants appeal from that order and seek to have the claim reinstated. For reasons that follow, we are satisfied that Cumming J. came to the correct conclusion. Accordingly, we would dismiss the appeal.

Background

6 Cumming J.'s comprehensive reasons for allowing the motion to strike out the appellants' claim include a thorough review of the background facts and the test to be applied on a rule 21.01(1)(b) motion. Accordingly, we propose to move directly to the issues, commencing with the alleged infractions of the appellants' equality rights under s. 15 of the Charter.

Alleged Section 15 Charter Breaches

7 The appellants allege that the impugned legislation is the source of two separate and distinct violations of their equality rights under s. 15 of the Charter.

8 First, they submit that the legislation stigmatized people of Chinese origin because it deemed them to be less worthy than other people. That stigma, they contend, continues unabated to this day because of the government's unwillingness to refund the head tax and provide redress for the harm and suffering occasioned by 62 years of government-sponsored anti-Chinese legislation.

9 Second, the appellants point to the 1988 post-Charter agreement between the Government of Canada and Japanese Canadians in which the government provided redress for violating the human rights of Japanese Canadians during the Second World War. In the face of that agreement, they submit that the government's failure to provide the Chinese Canadian community with similar redress is discriminatory because it promotes and perpetuates the idea that Chinese Canadians are less worthy of recognition and less valuable to society than Japanese Canadians.

10 Cumming J. dealt with both issues in his reasons. With respect to the first, he referred to Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358, for the proposition that "the Charter cannot apply retroactively or retrospectively". He then quoted the relevant passages from Benner in which Iacobucci J. identified the test to be applied in determining whether a proposed application of the Charter is or is not retrospective. The passages quoted are found at pp. 383-84 of Benner and bear repetition:

> 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, [1988] 2 S.C.R. 595, supra. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from Charter review simply because it happened to be passed before April 17, 1985. It if 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.
>
> 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?
>
> ... 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.

11 Cumming J. then continued as follows:

> 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.
>
> 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 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.
>
> 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.
>
> 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.
>
> 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.

12 We agree with Cumming J.'s analysis and would only note that, unlike the present situation, Benner is a clear case where because of his status at birth (born abroad before February 15, 1977 to a Canadian mother and a non-Canadian father) Benner was prevented in 1988 (3 years after s. 15 of the Charter had come into effect) from being accorded the automatic right to citizenship granted to children of Canadian fathers. In other words, in 1988, Benner's status at birth was held against him and disentitled him to a benefit accorded to others because of certain provisions of the Citizenship

Act that the court found to be discriminatory. With respect, the appellants have not shown any such comparable disadvantage.

13 Cumming J. then turned to the Japanese Canadian Redress Agreement ("Redress Agreement") and the alleged breach of the appellants' s. 15 Charter rights stemming from the government's failure to extend similar redress to the Chinese Canadian community.[4] Cumming J. refused to allow the claim to proceed on this ground because, in his view, the pleadings were deficient in two respects.

14 First, the pleadings failed to include "facts as to a discrimination claim framed in the post-Charter period." Rather, as pleaded, the alleged discrimination flowed solely "from the impugned historical legislation, not from the Japanese Canadian Redress Agreement." The pleading in question reads as follows:

> The plaintiffs state that the Government of Canada has provided redress for its violation of the human rights of Japanese Canadians during the Second World War, by means of Order-in-Council P.C. 1988-89/2552 ("the Redress Order"). This Order, and other acts of redress by Canadian national and provincial governments, shows acceptance in this country of the right of redress for human rights violations based on international instruments as outlined above and on Canadian domestic human rights law. Failure to extend redress to the Chinese Canadian community, and to persons in the position of the plaintiffs herein is, moreover, a violation of section 15 of the Charter of Rights.

15 Second, the pleadings failed to allege facts capable of showing discrimination in accordance with the principles enunciated in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at 529, namely, facts capable of showing that the Redress Agreement functioned by device of stereotype or that the exclusion of the appellants from it had the effect of demeaning their worth and dignity. Cumming J.'s reasons in this regard are reproduced below:

> 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.
>
> 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.

16 We agree with Cumming J.'s analysis. In particular, we note that in their pleadings, the appellants do not suggest that the alleged differential treatment of Japanese Canadians under the Redress Agreement reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that they are less capable, or less worthy of recognition or value as human beings or members of Canadian society (see Law, supra, at p. 529).

17 Even if the pleadings, read generously, can be said to incorporate such an allegation, we agree with the Attorney General of Canada that for the purpose of resolving this appeal, it is irrelevant that discrimination in Canada against immigrants of Asian origin generally encompassed both Chinese and Japanese people. At issue here are the specific acts of alleged discrimination pleaded in the statement of claim, and because those acts are so completely different from the acts of discrimination giving rise to the Redress Agreement, it is plain and obvious that the appellants cannot use that agreement as a springboard from which to launch their s. 15 Charter claim. See Lovelace v. Ontario, [2000] 1 S.C.R. 950 at 994-98.

Cause of Action Based on Customary International Law

18 The appellants submit that their claim supports a cause of action based on customary international law. In particular, they argue that it is not plain and obvious that customary international law did not condemn racial discrimination during the period of the impugned legislation and, to the extent that it did, Canada was legally bound to abide by it and can be held accountable for failing to do so.

19 Cumming J. devoted a considerable amount of time in his reasons to the international law component of the pleadings. In the end, he concluded that the appellants could not ground their claim in conventional international law because the instruments upon which they were relying did not exist at the time of the impugned legislation and to the extent Canada has since incorporated them into its domestic law, they have not been given retroactive effect. With respect to any international norms against racial discrimination that may have existed during the relevant time frame, Cumming J. found, in accordance with general principles of international law, that absent adoption, such norms were not binding upon Canada.

20 The appellants do not disagree with Cumming J.'s analysis so far as it goes. They maintain, however, that he failed to consider their customary international law argument and its impact on the viability of their claim.

21 To the extent that Cumming J. may have neglected the appellants' customary international law argument, his oversight is understandable as the term customary international law' is not mentioned in the claim and it is questionable whether the pleadings even raise it as supporting a cause of action. That said, the Attorney General of Canada is not pressing the matter and invites us to address the issue on its merits.

22 The Attorney General of Canada submits, correctly in our view, that there are two required elements of customary international law. A proponent must establish:

> (1) a practice among States of sufficient duration, uniformity and generality; and
> (2) that States consider themselves legally bound by the practice.

(I. Brownlie, Principles of Public International Law, 5th ed. (Oxford: Clarendon Press, 1998) at 4-7).

23 In the same text, at p. 5, Professor Brownlie explains that the evidence needed to establish custom can come from various sources and includes the following:

> ... diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.

24 The appellants rely on a number of sources to establish the pre-1947 existence of a customary international law prohibiting racial discrimination. These include:

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

In addition, the appellants point to the Canadian Bill of Rights and the Charter, characterizing each as a codification of pre-existing rights, including the right to be free from racial discrimination.

25 The Attorney General of Canada submits that the source materials referred to by the appellants fall short of establishing a pre-1947 international custom prohibiting racial discrimination. According to the Attorney General, these materials, properly construed, represent pockets of enlightenment in an era when the protection of human rights did not figure prominently on the international scene. Support for this conclusion is found in the writings of leading international law scholars, such as Professor Francesco Capatorti. In his essay entitled "Human Rights, the Hard Road Toward Universality",[5] Professor Capatorti observes that although the "birth of an international system of regulation of human rights has constituted a form of evolution ... and not one of revolution", the year in which the United Nations was created, 1945, is recognized as:

> ... the starting point of world-wide international activity for the protection of human rights. Indeed, before that date no system of international rules intended to

> oblige the states to respect a full catalogue of human rights had ever been introduced. (at p. 979)

26 By way of elaboration, Professor Capatorti references certain "phenomena" in the late nineteenth century and first half of the twentieth century that, in his view, represented the "more significant antecedents of the protection of the human person." (at p. 979) At p. 980 however, he points out that these pockets of enlightenment should not be confused with a world-wide perspective on the protection of human rights:

> However, the fragmentary character of the clauses mentioned and their evident connection with situations peculiar to a restricted geographical area show that a world-wide perspective on protection of human rights was still totally absent.
>
> The same consideration applies to the minorities régime created on the basis of the Peace Treaties of 1919-1920; yet some considerable progress reached by such a régime cannot be denied.

27 As indicated, Professor Capatorti maintains that the breakthrough in the field of individual human rights from a fragmentary perspective to a global aim occurred in 1945, with the birth of the United Nations. At pp. 981-82 he notes:

> The birth of the United Nations introduced three great novelties into this evolution. In the first place, the shift from a fragmentary perspective to a global aim: no longer the mere defence of religious freedom, the protection of minorities or a more humane treatment of the workers, each of them considered in a different context, but the respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' (article 1, paragraph 2 of the Charter). Second, the adoption of this global aim among those of a universal organization, and therefore the ambition of establishing a level of protection common to all states (as the organization gradually achieves a real universality). Third, the creation of an organ intended for that purpose and called upon to work exclusively for it - namely the Commission for Human Rights - as well as the conferring of precise competences in the same field both on the Assembly and on the Economic and Social Council.

28 Other international law scholars, such as Professor John Humphrey, describe the adoption of the U.N. Charter in 1945 as a revolutionary' foundation for the development of international human rights. In his article entitled "The Implementation of International Human Rights Law", (1978) 24 New York Law School Review 31 at 32-33, Professor Humphrey writes:

> Customary law has the great advantage over treaty law in that it is binding on all states. Thus the law governing the international responsibility of states for the treatment of aliens is binding on all states by virtue of their membership in the international community. This law, as already indicated, has recently undergone significant changes. For the traditional minimum objective international standard (which was sometimes higher than national standards) has been replaced by a new standard under which foreigners and nationals are entitled to the

> same treatment. This new standard is set forth in the Universal Declaration of Human Rights which, whatever its drafters may have intended in 1948, is now part of the customary law of nations - not because it was adopted as a resolution of the General Assembly but because of juridical consensus resulting from its invocation as law on countless occasions since 1948 both within and outside the United Nations. The Universal Declaration of Human Rights has now become the authentic interpretation of the human rights provisions of the Charter which neither catalogues nor defines the human rights to which it refers.
>
> This human rights law, whether based on treaty or on custom, is not only new, it is revolutionary in the sense that it is radically different from traditional international law which was only concerned with relations between states.

29 To the extent that national judicial decisions from the pre-1947 era are relevant, the cases relied upon by the appellants, such as Regina v. Corporation of Victoria (1888), 1 B.C.R. Pt. II 331 (S.C.); Regina v. Mee Wah (1886) 3 B.C.R. 403 (Cty. Ct.); Tai Sing v. Macguire (1878) 1 B.C.R. Pt. I 101 (S.C.) and R. v. Gold Commissioner of Victoria District (1886), 1 B.C.R. Pt. II 260 (Div. Ct.), are of limited assistance since they do not address the issue at hand but relate instead to the separation of powers under ss. 91 and 92 of the Constitution Act, 1867. In any event, they must be read in light of Cunningham v. Tomey Homma, [1903] A.C. 151 (P.C.), a more recent decision and one of higher authority in which the Privy Council held that a statute which restricted entitlement to vote on the basis of race was both intra vires and a valid exercise of provincial power. Notably, speaking for the court, the Lord Chancellor observed at pp. 155-56 that "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider." As the Attorney General of Canada points out, Cunningham, a decision of the final appellate court of the day, stands in stark contradiction to the appellants' assertion that a customary international law prohibiting racial discrimination existed in that era.

30 As for the foreign decisions cited by the appellants in support of their customary international law argument, we view them as examples of foreign domestic law, not customary international law and thus not binding on Canada. In any event, the appellants do not suggest that Canada adopted those decisions or the principles enunciated in them during the relevant time frame.

31 In sum, based on the evidence presented, it is plain and obvious that the appellants cannot succeed in establishing the existence of a pre-1947 customary international law prohibiting racial discrimination that would render the impugned legislation invalid. For that reason alone, the customary international law pleading must fail.

32 Even if we had decided that the evidence presented by the appellants was capable of passing the threshold test, we would nonetheless have halted the action because of the well-established principle that customary international law may be ousted for domestic purposes by contrary domestic legislation.[6] Professor Brownlie states the principle succinctly in his article entitled Principles of Public International Law, supra, at p. 42:

> The dominant principle, normally characterized as the doctrine of incorporation, is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is

> not inconsistent with Acts of parliament or prior judicial decisions of final authority [citations omitted].

See also Suresh v. Canada (Minister of Citizenship and Immigration) (2000), 183 D.L.R. (4th) 629 (F.C.A.) at 659, reversed for other reasons at, 2002 SCC 1; R. v. Gordon, [1980] B.C.J. No. 381 (S.C.) at para. 7; and Chung Chi Cheung v. The King, [1939] A.C. 160 at 167-68.

33 Applying that principle to this case, to the extent any customary international law prohibiting racial discrimination may have existed during the relevant time frame, it was clearly ousted by the impugned legislation. Accordingly, for that reason as well, the customary international law aspect of the claim must fail.

Unjust Enrichment

34 The appellants contend that the equitable principle of unjust enrichment applies in the circumstances of this case and that it requires the Government of Canada to disgorge the revenues raised under the head tax laws. The recipients would be the surviving payors of the tax (a very small number) or their surviving spouses (also a small number) and direct descendants.

35 The three elements of the principle of unjust enrichment are settled. A claim for unjust enrichment requires the claimant to establish "an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment": see Pettkus v. Becker, [1980] 2 S.C.R. 834 at 848 per Dickson J.; see also Rathwell v. Rathwell, [1978] 2 S.C.R. 436 ("Rathwell"); Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario, [1992] 3 S.C.R. 762 ("Peel"); and Peter v. Beblow, [1993] 1 S.C.R. 980.

36 In the present case, Cumming J. held, and the Attorney General of Canada concedes, that the appellants have established the first two branches of the test - the head tax enriched the Government of Canada and constituted a corresponding deprivation to the immigrants who paid it. For purposes of this appeal, we accept Cumming J.'s decision and the respondent's concession on these matters. We also note that it is not disputed that the principle of unjust enrichment "can operate against a government to ground restitutionary recovery": see Air Canada v. British Columbia, [1989] 1 S.C.R. 1161 at 1203 per La Forest J.

37 The resolution of the unjust enrichment issue in this appeal turns on the third branch of the test - the absence of a juristic reason for permitting the government of Canada to retain the revenues raised during the 38 year history of the head tax laws.

38 The Attorney General of Canada contends that there is an obvious and conclusive juristic reason supporting retention in this case - the head tax laws themselves.

39 There is considerable force in this submission. In one of the leading cases, indeed the case in which the three branch test for unjust enrichment was initially set out, namely Rathwell, supra, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (at p. 455). It would seem obvious that a statute falls within the category of a disposition of law. In a second leading case, Peter v. Beblow, supra, Cory J. expressly stated that a statute can provide a juristic reason for retention of a benefit (at p. 1018). See also Attorney General of Canada v. Confederation Life Insurance Company (1995), 24 O.R. (3d) 717 at 780 (Gen. Div.), aff'd (1997), 32 O.R. (3d) 102 (C.A.).

40 In the leading Canadian text, The Law of Restitution (Aurora: Canada Law Book Inc., 1990), the learned authors, Professor John McCamus and Peter Maddaugh, devote a section to the topic

Unjust Retention: No Juristic Reason for Enrichment. In their discussion of the phrase "disposition of law" from Rathwell, they state, at p. 46:

> Although the principal example of another "disposition of law" is no doubt the making of a gift, it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law. The payment of validly imposed taxes may be considered unjust by some, but their payment gives rise to no restitutionary right of recovery.

41 The appellants attempt to overcome these authorities with the submission that not every statute can constitute a juristic reason for retaining a payment. The head tax laws, the appellants contend, should be regarded as an exception to the general rule.

42 It is true that there are exceptions to the general rule that a statute can provide a juristic reason for retention of a benefit. For example, in Central Guaranty Trust v. Dixdale (1994), 24 O.R. (3d) 506, this court held that a first mortgagee who had mistakenly discharged a mortgage was entitled to priority over a second mortgagee despite the provisions of the Registry Act which appeared to require a contrary result. Laskin J.A. said, at pp. 515-16:

> But, in my opinion, the statute alone is not dispositive of this appeal. In an appropriate case a court may give effect to the principle of unjust enrichment despite the terms of a statute.

See also Deglman v. Brunet Estate, [1954] S.C.R. 725, where the court allowed the plaintiff to recover in quantum meruit even though the Statute of Frauds rendered unenforceable the oral agreement on which he had sued.

43 Central Guaranty Trust and Deglman are private law cases. However, the possibility of some exceptions to the general rule that a statute provides a juristic reason for retention of a benefit has also been raised in public law cases, including cases involving the retention by governments of revenues obtained pursuant to taxation statutes. For example, in Reference re Goods and Services Tax (GST) (Can.), [1992] 2 S.C.R. 445, a minor issue was whether suppliers had a right to be reimbursed by the federal government for the expenses they incurred in collecting the GST. One of the arguments made on their behalf was unjust enrichment. The court rejected this argument. Lamer C.J.C. stated the general proposition linking a statute and juristic reason in strong language; however, he did so without excluding the possibility of exceptions and, indeed, suggested one possible exception. He said, at p. 477:

> Under the GST Act the expenses involved in collecting and remitting the GST are borne by registered suppliers. This certainly constitutes a burden to these suppliers and a benefit to the federal government. However, this is precisely the burden contemplated by the statute. Hence, a juridical reason for the retention of the benefit by the federal government exists unless the statute itself is ultra vires.

44 Against the backdrop of these authorities, we do not conclude that it is plain and obvious that the appellants' argument on the third branch of the test of unjust enrichment - namely, that in some cases a statute will not provide a juristic reason for retention by a government of revenues received

under a tax - cannot succeed. Accordingly, we proceed to a consideration of the substance of the appellants' argument on this issue.

45 At the start of her oral argument, counsel for the appellants submitted that a "moral balancing" is permitted in the analysis of juristic reason and that both the principles of international law and the provisions of the Charter would assist in this exercise. The appellants made the same link between juristic reason and international law and the Charter in their factum:

> 72. It is respectfully submitted that to the extent the Chinese Immigration Act is contrary to customary international law, it cannot provide a juristic reason for the enrichment of the defendant at the expense of the plaintiff.
> 73. If the appellants meet the plain and obvious' test with respect to the customary international prohibition on racial discrimination, it is respectfully submitted that they clearly meet the plain and obvious' test in regard to the Act failing to provide a juristic reason for the enrichment of the Canadian government at the expense of the Head Tax payers.
>
> ...
>
> 78. The principle that the law ought to develop in accordance with the Charter is applicable to both equity and the common law. Accordingly, wherever possible, the doctrine of unjust enrichment should be construed to maximize consistency with Charter values.

46 The problem with these submissions is that they are not independent of the appellants' submissions relating to their customary international law and Charter claims. Indeed, as the above paragraphs make clear, the appellants' juristic reason argument is explicitly and inextricably linked to these two arguments.

47 A similar situation arose in Reference re Goods and Services Tax, supra. The Canadian Federation of Independent Business ("CFIB"), an intervener, argued that suppliers had a right to be reimbursed by the federal government for the expenses they incurred in collecting the GST. As noted above, the Supreme Court of Canada rejected the CFIB's unjust enrichment argument in support of this position. In doing so, Lamer C.J.C. succinctly identified, at p. 477, the duplicative quality, and the concomitant irrelevance, of the CFIB's argument:

> The CFIB's argument thus involves it in the following dilemma: If the GST Act is ultra vires, then registered suppliers cannot be compelled to collect the tax, and it is not necessary to consider the extent of any restitutionary claim this group might have against the federal government. If, on the other hand, the GST Act is intra vires, then the statute itself constitutes a valid juristic reason for the retention of the benefit the federal government receives by being able to rely upon registered suppliers to collect the tax at their own expense. In neither case is the outcome urged upon us by the CFIB supportable.

48 In the present case, Cumming J. identified a similar dilemma in the appellants' submissions relating to juristic reason:

> 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.

He then continued by summarizing, and applying, his reasoning on the Charter and international law arguments. The Charter cannot be used to attack the head tax laws because it cannot be applied retroactively or retrospectively. Customary international law principles relating to non-discrimination, even if they existed during the life of the head tax laws, are superseded by domestic legislation, which includes the head tax laws.

49 Cumming J. then reached his conclusion on the unjust enrichment issue:

> 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.

50 We agree with this conclusion. In short, the appellants' submissions relating to juristic reason cover precisely the same ground as their submissions on the Charter and customary international law issues. Rejection of the latter necessarily entails rejection of the former.

51 We make one final observation on the unjust enrichment issue in this appeal. Throughout their argument, the appellants make reference to concepts, notions and values, including "moral balancing", "good conscience" and "injustice". We agree with the proposition that these factors are part of the foundation of the equitable doctrine of unjust enrichment. However, it is important to recognize that there are limits to the doctrine. In Peel, supra, McLachlin J. articulated, at pp. 802-803, a caution which we think bears repeating in this appeal:

> The Argument on Injustice
>
> The municipality is reduced in the final analysis to the contention that it should recover the payments which it made from the federal and provincial governments because this is what the dictates of justice and fairness require; stated otherwise, it would be unjust for the federal and provincial governments to escape these payments. This argument raises two questions. First, where the legal tests for recovery are clearly not met, can recovery be awarded on the basis of justice or fairness alone? Second, if courts can grant judgment on the basis on justice alone, does justice so require in this case?
>
> On my review of the authorities, the first question must be answered in the negative. The courts' concern to strike an appropriate balance between predictability in the law and justice in the individual case has led them in this area, as in others, to choose a middle course between the extremes of inflexible rules and case by case "palm tree" justice. The middle course consists in adhering to legal principles, but recognizing that those principles must be sufficiently flexible to permit recovery where justice so requires having regard to the reasonable expectations of the parties in all the circumstances of the case as well as to public policy. Such

> flexibility is found in the three-part test for recovery enunciated by this Court in cases such as Pettkus v. Becker, supra. Thus recovery cannot be predicated on the bare assertion that fairness so requires. A general congruence with accepted principle must be demonstrated as well.
>
> This is not to say that the concepts of justice and equity play no role in determining whether recovery lies. It is rather to say that the law defines what is so unjust as to require disgorgement in terms of benefit, corresponding detriment and absence of juristic reason for retention. Such definition is required to preserve a measure of certainty in the law, as well as to ensure due consideration of factors such as the legitimate expectation of the parties, the right of parties to order their affairs by contract, and the right of legislators in a federal system to act in accordance with their best judgment without fear of unforeseen future liabilities.

52 In the first paragraph of these reasons, we said: "Canada's treatment of people of Chinese origin who sought to immigrate to this country between 1885 and 1947 represents one of the more notable stains on our minority rights tapestry." We say that again. However, the head tax laws ceased to operate 79 years ago, in 1923. During their life, they were constitutional in domestic law terms and they did not violate any principles of customary international law.

53 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.[7]

Disposition

54 We would dismiss the appeal. Like Cumming J., we do not regard this as a case in which costs should be awarded.

MOLDAVER J.A.
MacPHERSON J.A.
AUSTIN J.A. -- I agree.

cp/e/nc/qlgkw/qlkjg

1 Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at p. 262.

2 The Chinese Immigration Act 1885, S.C. 1885, c.71 as amended.

3 The Chinese Immigration Act 1923, S.C. 1923, c.38, repealed by The Immigration Act, S.C. 1947, c.19.

4 The Japanese Canadian Redress Agreement, P.C. 1988-9/2552, dated October 31, 1998, stemmed from a policy decision on the part of the government of the day, under the leadership of the Rt. Hon. Brian Mulroney, to provide redress for government actions, including in-

ternment or relocation within Canada, expulsion or deportation from Canada and deprivation of property, taken against certain Japanese Canadians during the Second World War under the War Measures Act, the National Emergency Transitional Powers Act 1945 and other transitional legislation.

5 F. Capatorti "Human Rights, the Hard Road Towards Universality", in R. St. J. MacDonald and Douglas M. Johnston, eds., The Structure and Process of International Law Essays in Legal Philosophy, Doctrine and Theory, (The Hague: Martinus Nijhoff Publishers, (1983) 977 at 978-79).

6 The appellants suggested in oral argument that the prohibition against racial discrimination during the relevant time frame was so well recognized that it qualified as "an established peremptory norm of customary international law, or jus cogens". The evidence relied upon by the appellants does not meet the jus cogens test.

7 We are not here concerned with facially valid laws enacted by a totalitarian or other despotic regime.