

2003

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Stephanie Tse

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Citation Information

Tse, Stephanie. "Case Comment: Mack et al. v. Attorney General of Canada - Rethinking the Contemporary Conception of Judicial Discretion and Justice." *Journal of Law and Social Policy* 18. (2003): 159-170.
<https://digitalcommons.osgoode.yorku.ca/jlsp/vol18/iss1/8>

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CASE COMMENT

Mack et al. v. Attorney General of Canada – Rethinking the Contemporary Conception of Judicial Discretion and Justice

STEPHANIE TSE*

RÉSUMÉ

La Cour supérieure de justice et la Cour d'appel de l'Ontario ont rejeté à l'étape préliminaire la réclamation des plaignants dans l'affaire « Mack contre le Procureur général du Canada », au motif que les plaidoiries ne révélaient aucune cause raisonnable de poursuite. Le cas impliquait l'impôt controversé de capitation personnel, prélevé auprès des personnes d'origine chinoise au Canada, entre 1885 et 1923, et une série de règles d'exclusion en vigueur de 1923 à 1947. Dans le traitement de ces problèmes, les deux tribunaux ont favorisé l'approche juridique traditionnelle selon laquelle la déférence judiciaire à la législature et la règle de droit immuable sont les éléments clés. L'article suggère qu'une telle approche s'avère inadéquate pour aborder les sujets en jeu, c'est-à-dire l'attitude sociétale changeante envers le racisme, l'égalité, le respect pour la dignité humaine et l'obligation de rendre compte de faits antérieurs par l'État. On a rejeté, malgré sa pertinence, l'argumentation des plaignants à l'égard des questions en litige. Ceux-ci pressent les tribunaux de prendre en considération le mouvement en faveur du recours qui prévaut dans d'autres pays aux prises avec des problèmes semblables. L'auteure suggère que ce manque d'intervention judiciaire à l'égard de la prestation des recours appropriés contre le racisme d'État va à l'encontre des conceptions contemporaines de racisme et d'égalité qui prévalent dans la communauté internationale. La conclusion de ces remarques démontre qu'étant donné le raisonnement des tribunaux, le Canada se fera bientôt damer le pion par d'autres nations dans le domaine de la promotion des droits de l'homme.

* Stephanie Tse, LL.B., LL.M., is a member of the Law Society of Upper Canada and a lawyer working in the private sector. She was called to the bar in 1996.

The Ontario Court of Appeal (OCA), in its decision in *Mack v. Attorney General of Canada*,¹ affirmed the decision of the motion judge of the Superior Court of Justice to strike out the plaintiffs' claim on the grounds that the pleadings disclosed no reasonable cause of action.² The case involved the controversial head tax, levied on persons of Chinese origin in Canada from 1885 to 1923 and a series of exclusionary statutes in force from 1923 to 1947 which barred all but a select few Chinese people from immigrating to Canada.³ Together, these measures represent 62 years of legislated racism directed solely against the Chinese-Canadian community at the time when violation of minority rights, according to the lower court and the OCA, could not be redressed based on the contemporary legal standards. Despite that the case raised complex issues involving the constitutionality of the historic head tax laws, customary international law principles prohibiting racial discrimination and unjust enrichment, the plaintiffs' case was dismissed at a preliminary interlocutory stage based on the insufficiency of the pleadings filed. Although the OCA and the lower court were sympathetic with the plaintiffs' case, the courts clearly were not prepared to assume a pro-active approach to confronting the deficiency of our existing legal framework in redressing issues such as legislated racism. Nor were the courts prepared to articulate any useful principles on the legal recourse against state racism that are consistent with the modern thinking of equality. Not surprisingly, the courts favoured the traditional legalistic approach whereby judicial deference to the legislature and the application of black letter law are key. It is questionable whether such an approach is in fact appropriate or adequate in tackling issues such as the societal attitude towards racism, equality, respect for human dignity and, the state's accountability for past acts. All of these matters are constantly evolving and are key elements in the transformation of Canada into a fairer and better society. It is submitted that our judiciary, as a functional branch responsible for applying and interpreting the enactments of government must give due regard to the contemporary conception of these values in discharging its functions. In fact, as argued below, the refusal by the judiciary to give consideration to the redress movement prevailing in other countries in similar disputes, as advocated by the plaintiffs' counsel, has raised doubts about how quickly Canada as a democratic society is evolving. This lack of judicial intervention with respect to the remedying of state racism runs contrary to the contemporary conceptions of racism and equality prevailing in the international community.

On reading the decisions of both courts, it seems that their conclusions are based on the sound application of the strict principles of the law. Nevertheless, one needs to go beyond the courts' decisions to peruse the affidavits and memoranda of arguments

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1. (2002), 60 O.R. (3d) 737, 217 D.L.R. (4th) 583. A request for leave to appeal the Ontario Court of Appeal's decision to the Supreme Court of Canada was filed in mid November, 2002. The Supreme Court of Canada refused to grant leave in March 2003 at [2002] S.C.C.A. No. 476 (S.C.C.)(QL).
 2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21.01(1)(b).
 3. The plaintiffs were mostly the Chinese-Canadian descendants of those subject to the regime in question and they sought the return with interest of moneys paid as head tax, damages for pain and suffering, injury to dignity and loss of opportunity stemming from the impugned legislation and other relief.

filed by the parties in support of the plaintiffs' application for leave to appeal to the Supreme Court of Canada in order to have a full appreciation of the implications of the decisions and the attitude of the courts towards the issues. This paper will address these matters in light of the arguments submitted by the parties. The implications of the decisions will also be discussed.

THE FACTS

Pursuant to a series of *Chinese Immigration Acts* passed between 1885 and 1923, Parliament required persons of Chinese origin to pay a duty or head tax upon entering Canada.⁴ The tax, which increased progressively from \$50 in 1885 to \$500 in 1903, was meant to be prohibitive and effectively placed entry into Canada beyond the reach of many people. Based on the materials filed by the plaintiffs in support of the appeal to the Supreme Court of Canada,⁵ the imposition of the head tax was largely a product of anti-Chinese sentiment that arose following the first large-scale Chinese immigration to Canada during the gold rush and later during the construction of the Canadian Pacific Railway. Prior to 1885, the government of British Columbia had attempted to impose discriminatory provincial laws on Chinese immigrants with limited success and had put pressure on the Dominion government to restrict Chinese immigration. The federal government resisted due to concerns that restricting Chinese immigration could result in a labour shortage jeopardizing the completion of the Canadian Pacific Railway. The passage of the first *Chinese Immigration Act (Act)*⁶ in 1885 came shortly after the completion of the railroad.⁷

The purpose of the *Act* was not to raise revenue, but to discourage specifically Chinese immigration. Thus, when the number of Chinese immigrants did not decrease to an expected level following the imposition of the \$50 tax, the amount of the head tax was raised in 1900 to \$100 and in 1903 to \$500.⁸ The head tax was abolished in 1923 and replaced by legislation which for the next 24 years, until its repeal in 1947 after the Second World War, effectively barred all but a select few Chinese people from immigrating to Canada.⁹ The repeal of the *Act* in 1947 did not remove all anti-Chinese aspects of Canadian immigration law. Potential Chinese immigrants were still subject to Order-in-Council P.C. 2115, which restricted Chinese immigration to a citizen's wife and unmarried children under the age of 18. Accordingly, between 1947 and 1962,

4. *Supra* note 1 at 737. *The Chinese Immigration Act, 1885*, S.C. 1885, c. 71.

5. For the purpose of this case comment, the plaintiffs' materials filed include the Memorandum of Argument of the Applicant for Leave to Appeal dated November 15, 2002 (Applicant Memorandum) and Affidavit of Peter Li, sworn October 9, 2002 (Li Affidavit), Affidavit of Constance Backhouse, sworn November 3, 2002 and Affidavit of David Dyzenhaus, sworn November 15, 2002 and Affidavit of Jonathan Strug, sworn November 14, 2002 (Strug Affidavit).

6. *Supra* note 5.

7. Applicant Memorandum at para. 2 and Li Affidavit at paras. 5-16.

8. *Ibid.* at para. 3 and paras. 19-20 respectively.

9. *The Chinese Immigration Act, 1923*, S.C. 1923, c. 38, repealed by the *Immigration Act*, S.C. 1947, c. 19.

grown children, aged parents, siblings, nieces and nephews of Chinese Canadians continued to be excluded from entering Canada.¹⁰

The state-supported racism, which specifically targeted Chinese people through the various forms of the *Act* and other discriminatory measures, has had a devastating impact on those directly subject to the regime and on the Chinese Canadian community in general. This profound impact, as submitted by the Plaintiffs, continues to this day.¹¹ First, the stereotypical view that Chinese people were an inferior race was officially and legally reinforced. In fact, if one has had the opportunity to read the debates of the House of Commons prior to and during the enforcement of the *Act*, they were fraught with stereotypical attacks specifically leveled at the Chinese.¹² For example, in 1882, Prime Minister John A. Macdonald, who is still commemorated on today's Canadian \$10 bills, stated that "it is a matter of so great importance that it will engage our attention, and that of every public man in this House, to discover how we can admit Chinese labour without introducing a permanent evil to the country by allowing to come into it, in some respects, an inferior race, and at all events, a foreign and alien race".¹³ This prevailing negative sentiment at the time created a social stigma applicable to the Chinese as lower-class beings and unwelcome workers.¹⁴ Second, the single most devastating consequence of the various forms of the *Act* was the separation of families and the resulting impediment to the growth of the Chinese Canadian community generally. Due to the exclusions by the Canadian government, the Chinese Canadian family as an intact unit did not exist, except in very limited cases, prior to the repeal of the *Act* in 1947. Most of the Chinese immigrants who came to Canada between 1885 and 1923 were adult men who came to find work. Due to the onerous amount of the tax itself, finding additional funds necessary to pay the head tax for wives and children was virtually impossible. In any event, the outright exclusion of Chinese immigration during 1923 to 1947 made it legally impossible for wives or children in China to join their husbands in Canada.¹⁵ This prolonged separation of families often meant that most Chinese males living in Canada lived as married bachelors. Many died while working at constructing the railway in Canada

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10. *Supra* note 8 at para. 3 and paras. 19, 20 and 38 respectively. In fact, during the period from 1885 to 1947, various other anti-Chinese measures were in place which included a denial of the right to vote, barriers for Chinese immigrants to become citizens, the requirement that Chinese immigrants obtain certificates of registration upon entering Canada, subject to a fine or imprisonment if failing to do so, and the placing of a limit on how long a Chinese immigrant could be away from Canada and still be allowed to return without being subject to the head tax for a second time in order to gain re-entry into Canada (between 1885 and 1923) or being excluded outright from re-entry (between 1923 and 1947). See Li Affidavit, at paras. 17, 20 and 21 and Applicant Memorandum at para. 4.
 11. Applicant Memorandum at para. 5.
 12. *House of Commons Debates* (12 May 1882) at 1471-1477 (Mr. DeCosmos and Sir John A. Macdonald) and *Report of the Select Committee on Chinese Labour and Immigration* (Ottawa, Ont.: Journal of the House of Commons, 1879) at Appendix 4.
 13. See *House of Commons Debates* (12 May 1882) at 1477 (Sir John A. Macdonald).
 14. Li Affidavit at para. 26.
 15. Applicant Memorandum at para. 7 and Li Affidavit at paras. 28-31.

without ever being reunited with their wives and children. This resulted in a gender imbalance in the Chinese Canadian community which did not begin to approach equilibrium until 1981, thus causing a significant delay in the creation of a second generation of Chinese Canadians.¹⁶

The harm suffered by Chinese Canadians as a result of the *Act* was understandably compounded by the insult arising from the repeated refusal of the Canadian government to discuss the issue of redress with those seeking relief. This particular redress movement began in the 1980s when many individuals sought a political solution to the issue. They worked in coordination with other groups of redress seekers, including Japanese Canadians seeking compensation for the harms suffered as a result of anti-Japanese measures, such as internment, that were implemented by the Canadian government during the Second World War. In 1988, the Canadian government signed the Japanese Canadian Redress Order, providing reparations to Japanese Canadians who had been interned and apologizing to the Japanese Canadian community for the discrimination visited upon it by the government.¹⁷ As for the redress to head tax payers, Sheila Finestone, then Secretary of State, Multiculturalism and the Status of Women, made a statement in the House of Commons in 1994 to the effect that the Canadian government would not accommodate such requests:

In the past, Canada enforced some immigration practices that were at odds with our shared commitment to human justice. Canadians wish those episodes had never happened. We wish those practices had never occurred. We wish we could re-write history. We wish we could relive the past. We cannot. We can and must learn from the past. We must assure that future generations do not repeat the errors of the past.... The issue is whether the best way to this [heal the wounds] is to attempt to address the past or invest in the future. We believe our only choice lies in using limited government resources to create a more equitable society and a better future for generations to come.¹⁸

THE LEGAL ISSUES AND JUDICIAL DECISIONS

Given the Canadian government's refusal to resolve this matter, the plaintiffs brought an action claiming the following: (1) that the *Act* violated their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms (Charter)*; (2) that the legislation was at all times invalid and, therefore, of no force or effect, because it contravened a customary international law, by which Canada was legally bound, prohibiting racial discrimination; and (3) that the equitable principle of unjust enrichment (requiring proof of unjust enrichment, corresponding deprivation and the lack of juristic justification for such enrichment) required the Canadian government to disgorge the revenues raised under the head tax legislation. The Attorney General

16. Applicant Memorandum at para. 9 and Li Affidavit at paras. 30-33, 40. It was stated that as late as 1991, 73% of Chinese people living in Canada were not born in Canada.

17. Applicant Memorandum at paras. 10-12.

18. *House of Commons Debates*, 1505 (14 December 1994) at 9065-66 (Hon. Sheila Finestone). See also Applicant Memorandum at para. 12.

of Canada moved under rule 20.01(1)(b) of the *Rules of Civil Procedure*¹⁹ to have the claim struck out on the grounds that it disclosed no reasonable cause of action.

The claim was rejected at the lower court on the grounds that: (1) it involved an impermissible retroactive application of the *Charter* and international instruments; (2) international human rights law during the period of the *Acts*' application did not create a legal prohibition against the type of discrimination imposed by the *Act*; and (3) the Plaintiffs' unjust enrichment argument could not succeed because the *Act*, as a validly enacted statute, necessarily provided a juristic justification for the enrichment of the Canadian government and the corresponding deprivation of the head tax payers.

The OCA, in hearing an appeal to have the claim reinstated, stated that the *Act* was "one of the more notable stains on our minority rights tapestry."²⁰ With respect to the customary international law issue, the OCA agreed with the lower court's reasoning and, further found that, in any event, the explicit decision of the Canadian government to enact the discriminatory legislation had the effect of overriding any international law prohibition against it.²¹

With respect to the equality right issue under s. 15 of the *Charter*, the plaintiffs advanced three arguments. First, the legislation stigmatized people of Chinese origin because it deemed them to be less worthy than other people and that such stigma, it was argued, continues unabated to date as the government is unwilling to provide redress for the harm occasioned by the impugned legislation. The OCA rejected this argument finding that the *Charter* claim in this regard was retroactive (*i.e.*, that contemporary ethics cannot be applied to historic racism).

Second, the plaintiffs relied on the 1988 post-*Charter* agreement between the government of Canada and Japanese Canadians in which the government had provided redress for violating the human rights of Japanese Canadians during the Second World War. The plaintiffs argued that the government's failure to provide the Chinese Canadian community with similar redress was discriminatory because it promoted and perpetuated the idea that Chinese Canadians were less worthy of recognition and less valuable to society than the Japanese Canadians. The OCA dismissed this argument on the grounds that the groups were not sufficiently similar to give rise to a s. 15 claim and that sufficient factual details²² had not been pleaded in the statement of claim in

19. *Supra* note 2.

20. *Supra* note 1 at 740.

21. *Supra* note 1 at 750.

22. *Supra* note 1 at 745. The OCA stated that the Plaintiffs should have included in their statement of claim "facts as to a discrimination claim framed in the post-*Charter* period" and that the pleadings failed to allege facts capable of showing discrimination, namely, facts capable of showing that the *Redress Agreement* utilized the device of stereotype or that the exclusion of the appellants from said *Agreement* had the effect of demeaning their worth and dignity. See also *supra* note 1 at 744 and note 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 internment or relocation within

support of this argument. The OCA refused to grant the Plaintiffs leave to amend their statement of claim, despite the fact that they had submitted before the OCA a draft amended claim setting out the factual details regarding the similarity of the groups.²³ The OCA further reasoned that 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 identical redress to be given to another, unrelated group, in respect of their separate claim of discrimination.

Third, the Plaintiffs argued that the current international law norms supporting redress for past incidents of discrimination by governments could give rise to an independent right of redress under s. 15 of the *Charter*. The Plaintiffs drew interesting examples from decisions of German, British and other foreign courts to illustrate the prevailing recognition in the international community of the need to confront past incidents of officially sanctioned racism and to provide legal recourse. By contrast, however, Canadian courts have been silent in this regard. The OCA does not appear to have addressed this third *Charter* argument advanced by the Plaintiffs' counsel. Instead, in a six-line paragraph, it briefly stated that the foreign decisions cited were viewed as examples of foreign domestic law, not customary international law and thus not binding on Canada.²⁴ Effectively, the OCA avoided expressing any judicial view regarding the increasing recognition of historical wrongs and the availability of legal redress against past racism in the larger international community.

Regarding the issue of unjust enrichment, the OCA dismissed the appeal finding that the Plaintiffs' arguments in support of a lack of juristic justification as a criterion to succeed on this issue were based either on the *Charter* or international law. Since arguments on the *Charter* or international law failed, the Plaintiffs' arguments on the lack of juristic justification also were deemed to be invalid. The OCA did not address in its reasoning the Plaintiffs' arguments that in determining whether a discriminatory law provides a juristic reason, it is appropriate to consider how representative the legislature was at the time of the enactment.²⁵ The Plaintiffs argued that since the Parliament in question was unrepresentative, the principle of judicial deference to legislative decision-making therefore should not apply. They cited foreign decisions that addressed how a contemporary court should deal with the application of an extremely unjust, racist but validly enacted law, such as Nazi Decree 11 which stripped German Jewish emigres of their citizenship and proprietary rights. In these cases, the German courts and the House of Lords²⁶ had refused to defer absolutely to the

Canada, expulsion or deportation from Canada and deprivation of property, taken against certain Japanese Canadians during the Second World War under the *National Emergency Transitional Powers Act, 1945*, S.C. 1945, c. 25 and other transitional legislation.

23. Applicant Memorandum at paras. 83–86.

24. *Supra* note 1 at 749.

25. Applicant Memorandum at paras. 25 and 26.

26. Applicant Memorandum at para. 48, see *Oppenheimer v. Cattermole*, [1976] A.C. 249 at 278 (H.L.) *per* Lord Cross of Chelsea where it was stated that “to my mind a law (German citizenship law revoking the citizenship of Jews) of this sort constitutes so grave an infringement of human rights that

existence of positive law. The Plaintiffs further relied on several British Columbia cases from the 1800s,²⁷ at the time when the *Act* had been in force, in which the courts had refused to uphold racist provincial laws. Despite all of these important arguments and judicial decisions, the OCA, in a sweeping sentence found in a footnote at the end of its decision, stated that it was not concerned with “facially valid laws enacted by a totalitarian or other despotic regime.”²⁸

IMPLICATIONS OF THE JUDICIAL DECISIONS

Many questions deserve our attention. The way our judiciary has disposed of the issues raised in the *Mack* case is indicative of the contemporary judicial (and likely the ultimate societal) thinking towards the meaning of and practices concerning equality and racism in Canada. In a culturally diverse society such as ours, social solidarity is possible only if people’s rights to equality and human dignity are guaranteed and respected. The mere assertion and reiteration by the government or the courts that Canada values and respects these notions are not enough. In fact, this guarantee of human rights and equality has no significance if people are not secure in the knowledge that they are all recognized at law as human beings equally deserving of concern and respect. The recognition that Canada violated the rights of the Chinese people and other ethnic groups in the past is an important first step but it should never be the end to the issue. Since the societal attitude towards racism and respect for equality has a large cognitive component to it, it is the way of thinking of the general public that must be properly guided and shaped. We recognize that the societal awareness of the significance of racial equality and respect for human dignity does not always mature naturally and that the evolution of this societal awareness is often an on-going process. With the introduction of the *Charter*, the Canadian government and the Supreme Court of Canada have shown an open attitude towards defining what the contemporary conception of equality and human rights should be. Beverly McLachlin C.J.C. previously remarked as follows: “the first and arguably primary goal of modern equality law is to improve the situation of people belonging to groups that have traditionally suffered discrimination,”²⁹ “the ethos of ameliorative equality dominates recent thinking, Supreme Court of Canada decisions repeatedly assert that reversing the harmful effects of stereotypical discrimination is the central purpose of section 15,”³⁰ and “the state is obliged to promote the achievement of such equality by

the courts of this country ought to refuse to recognize it as a law at all.”

27. Such as *R. v. Gold Commissioner of Victoria District* (1886), 1 B.C.R. Pt II 260 at 262 (Div. Ct.) (*per* McCreight.), in which it was held that “ a tax was imposed falling unequally upon particular individuals in a class, and Chinese miners could not be singled out from a class of miners generally and be subjected to burden over and above those borne by others of the same class, such imposition being a lawless extraction not within the province of free governments.”
28. *Supra* note 1 at 755.
29. Beverly McLachlin C.J.C., “Equality: The Most Difficult Right” (2001) 14 Sup. Ct. L. Rev. (2d) 1 at 24.
30. *Ibid.* at 25.

legislative and other measures to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination which envisages remedial equality".³¹

The courts in handling the *Mack* case, however, did not move forward in the direction consistent with the stated purposes of s. 15. While recognizing the deplorable human rights history Canada has maintained vis-a-vis the Chinese in the past and the contemporary acknowledgement of the need to uphold equality, both courts proceeded to dismiss the Plaintiffs' claims based largely on a technical reading of the black letter law. What about the ideals of upholding the ethos of ameliorative equality that dominates recent thinking and remedial equality? None of these ideals was mentioned or seemed to have played any part in the courts' decisions in the *Mack* case. It is simply unconvincing for the courts to express their sympathy towards the Plaintiffs' cause while at the same time, ignoring the significance of the amelioration of the conditions of the disadvantaged group and refusing to deal with any possible redress that the courts are capable of providing in the form of legal recourse. This refusal of the courts to address the issue of legal recourse is at odds with the current Canadian understanding of the concept of equality. In effect, the decisions of the courts achieved nothing but rather, merely re-affirmed the Canadian government's position in 1994 as announced by the Honourable Sheila Finestone, the then Secretary of State, Multiculturalism and the Status of Women.³² In fact, Sheila Finestone's announcement is not without flaws. It provided that "the issue is whether the best way to this [heal the wounds] is to attempt to address the past or invest in the future. We believe our only choice lies in using limited government resources to create a more equitable society and a better future for generations to come." Arguably, economics seem to play a determinative role for the Canadian government in deciding whether or not to redress human rights infringements. The refusal of the Canadian government to confront swiftly and to properly redress its past wrongs is embarrassing. Furthermore, it would be dangerous for the government to send to the public the signal that blatantly racist governmental actions in the past were excusable in the present time, because of the prohibitive costs of remedying such. Such a message would inculcate in the minds of the public the notion that the upholding of human rights and equality and the righting of government racism is a relative concept dependent on the cost associated with such measures. With great respect, this is simply not the acceptable standard which Canadians should be taught to accept.

Reading the arguments of the Plaintiffs is educational for us because we learn that European courts, in contrast to the Canadian courts, have refused to defer absolutely to validly enacted law in those cases where such legislation is in reality unfair and at odds with the core values of the law. In particular, we understand that the German

31. *Ibid.* See also *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, [2000] S.C.J. No. 36 (S.C.C.) (QL) at para. 93 (QL) where Iacobucci, J stated that "...s. 15(2) provides a basis for the firm recognition that the equality right is to be understood in substantive rather than formalistic terms.... Having accepted the substantive approach, the Court has interpreted s. 15(1) not only to prevent discrimination, but also to play a role in promoting the amelioration of the condition of disadvantaged persons."

32. See *supra* note 18.

courts have frequently confronted the import of National Socialist laws (the laws in force during the former Nazi regime). Our government, on the other hand, is still standing by its position taken in 1994. We often expect that if government officials or politicians make mistakes or if they are caught in a mindset that is not conducive to creating a freer and more democratic environment in Canada, the solution to this can be simple: they will not be re-elected. As we know, however, the operation of the judiciary is different. Judges are appointed, not elected, in this country; judges are the custodians of rights and they are expected to apply the law so that justice is done and is seen to be done. In the *Mack* case, the courts could not be said to have performed these functions satisfactorily. It is not wrong for the courts to prefer the principle of judicial deference to the legislature and apply it. This approach simply fails to take into account the unique nature of the issues at hand. First, whenever equality or *Charter* issues are dealt with, the law requires that such issues be determined with the benefit of full factual records. This is missing in the *Mack* case as the OCA chose to refuse, at the preliminary stage, to grant leave to the Plaintiffs to amend the claim to incorporate fuller factual details in support of their arguments. Both courts dismissed the Plaintiffs' case at the interlocutory stage on the grounds that the pleadings disclosed no reasonable cause of action. This administration of justice in a cursory style significantly undermines the seriousness of the issues. Furthermore, the OCA's understatement of the importance of the current human rights movement and the increasing recognition by the European courts of the need to redress past racism (and incidentally the refusal of leave by the Supreme Court of Canada) has cast serious doubts on just how willing our courts will be to uphold the contemporary conception of justice, equality and respect for human dignity. The Canadian courts in the *Mack* case, in effect, are telling the public that they have no interest in the current developments with respect to human rights issues in the international community. This was clearly the position of the OCA when it footnoted in its decision that "we are not here concerned with facially valid laws enacted by a totalitarian or other despotic regime."³³ This indifference is particularly alarming as it came from our Ontario appellate court that is supposed to ensure that our law concerning state responsibility for human rights evolves in a proper way so that Canada will continue to be a better and safer place to live. Judicial indifference is also dangerous because it legitimizes the continuing evasion, by the government, of the issues at stake here. As noted, tackling racism starts with tackling the way the Canadian public thinks. It is arguable that it may take a century for the general public to overcome fully an old way of thinking or behaviour. Nevertheless, Canadians suffer, in this case, from the inertia of being comfortable with the *status quo*, *i.e.*, antiquated modes of thought. The risk associated with such inertia is that our country will soon fall behind other nations in the sphere of promoting human rights.

The Plaintiffs' materials filed in support of their application for leave to appeal to the Supreme Court of Canada raised the issue of reasonable apprehension of judicial bias. This issue merits discussion because it is important to the goal of improving the

33. *Supra* note 29.

societal awareness of and sensitivity to the perceived prejudicial effects associated with stereotypical thinking. The materials revealed certain troubling comments allegedly made by the Honourable Justice James MacPherson, who co-wrote the decision of the OCA, during the Plaintiffs' submissions regarding the argument of unjust enrichment. Based on the Strug Affidavit,³⁴ it was alleged that MacPherson J.A. had made comments to the effect that head tax payers had suffered no more than the average immigrant and less than many other groups, had received sufficient reward for what they paid for by being allowed to remain in Canada, and were now generally successful.³⁵ For example, it was alleged that MacPherson J.A. had stated that the payment of the head tax would seem worthwhile to a Chinese immigrant when they could see their grandchild play first string cello with the Toronto Symphony Orchestra.³⁶ It should be noted that these allegations are not proven in a court of law and there does not seem to have been any cross-examination of MacPherson J.A. under oath on these matters.³⁷ Assuming, however, that these questions were in fact posed by the presiding judge and were necessary in order for the OCA to further explore the strength of the Plaintiffs' case, these questions are nonetheless flawed and, arguably, reinforce the pre-existing, problematic thinking that Canada was home of the superior Caucasian race and that other racial groups wishing to come and stay in this country should be happy to be able to do so, regardless of the discrimination and other unjust governmental treatments they might have received in the past. These thoughts are also problematic because they trivialize and rationalize the significant damage caused by the head tax and by other racist measures Canada imposed on Chinese people and, possibly, other ethnic groups. In this regard, it should be noted that counsel for the Plaintiffs forcefully argued that "MacPherson J.A.'s comments demonstrated an acute insensitivity to the harm suffered by the Chinese Canadian community as a result of the Act",³⁸ that "the legal system has often been complicit in the enforcement and perpetuation of racist enactments"³⁹ and that "Canadian judges have not been immune from the stereotypical thinking that gave rise to the Act and other discriminatory measures."⁴⁰ It is unfortunate that in the current era, we still have to examine possible racist undertones in a judge's comments, delivered during the course of a judicial

34. Jonathan Strug, the deponent of the Strug Affidavit, was co-counsel for the Plaintiffs in the *Mack* case appearing at the OCA.

35. Exhibit A to the Strug Affidavit and Applicant Memorandum at paras. 29–31.

36. *Ibid.* at para. 31.

37. *Ibid.* at para. 32. Apparently, as a result of these comments, the Chinese Canadian National Council made a complaint to the Canadian Judicial Council and counsel for the Plaintiffs wrote to the Council, setting out an account of what had transpired during the hearing of the appeal of the *Mack* case. MacPherson J.A. addressed the complaint in writing, responding that he did not recall the precise wording of his comments, but recalled asking questions that related to some of the subjects set out in the complaint. The Judicial Council dismissed the complaint without addressing the specific allegations of the use of stereotypes, but referred to one of the comments by MacPherson, J.A. as "unnecessary".

38. *Ibid.* at para. 31.

39. *Ibid.* at para. 56.

40. *Ibid.* at para. 56.

hearing. No doubt, we are still looking forward to the day when our judges can be commended, without hesitation, for their unreserved and unequivocal appreciation of the graveness of the harm of historic governmental racism and for their commitment to eliminating the harmful effects thereof.

CONCLUSION

What have we learned from the courts' decisions in the *Mack* case? Simply put, the Canadian courts' attitude with respect to correcting a government's past racism has not yet evolved to a stage where they are willing to act in accordance with the current movement, prevailing in European courts. In this regard, the Canadian courts have preferred a traditional conservative approach of deferring the issue to the government. The Canadian government apparently is still standing by the non-recourse position. As a consequence of the two aforementioned factors, Canada has failed to give proper redress to those payers of the head tax and their descendants.

By contrast, countries such as New Zealand are taking a far more progressive and equitable approach to this matter. On February 12, 2002, the Prime Minister of New Zealand issued a formal letter of apology to the Chinese New Zealand community in which she committed the government to providing compensation to those who had paid the poll tax to the New Zealand government. The Rt. Honourable Helen Clark stated:

Today we also express our sorrow and regret that such practices were once considered appropriate. While the governments which passed these laws acted in a manner which was lawful at the time, their actions are seen by us today as unacceptable. We believe this act of reconciliation is required to ensure that full closure can be reached on this chapter in our nation's history. The Government's apology today is the formal beginning to a process of reconciliation. The Minister of Ethnic Affairs and I have been authorised to pursue with representatives of the families of the early settlers a form of reconciliation which would be appropriate to and of benefit to the Chinese community. To that end we wish to meet with key representatives of the descendants to discuss the next step in this process of reconciliation. The New Zealand Chinese Association, representing many of the descendants of the Chinese who paid the poll tax, has suggested that it may be appropriate for the government to make a contribution in the form of funds and resources for the purpose of restoring and maintaining the Chinese heritage, culture and language in New Zealand which was severely eroded as a result of the injustice of the poll tax and other discriminatory policies. The government looks forward to engaging further with the New Zealand Chinese Association and other descendants' representatives to discuss such proposals.

There are certain facts that are irrefutable: racism is like a cancer that will only spread and cause irreparable harm if detective and curative measures are not put in place in time; in order to ensure that Canada continues to be a free and healthy place to live, it is important for Canada to remedy historical wrongs resulting from racist policies and laws, thereby creating a more just and therefore, a truly civilized society.