SUBMISSION TO U.N. SPECIAL RAPPORTEUR
MR. DOUDOU DIÈNE

SUBMITTED BY:
Noah Novogrodsky
University of Toronto, Faculty of Law
International Human Rights Clinic
84 Queen's Park, Toronto, ON M5S 2C5

On the Brief:
Travis Granfar
Caroline Wawzonek
Sarah Perkins

DECEMBER 22, 2003

Table of Contents

EXECUTIVE SUMMARY

Chinese-Canadians are a racial, ethnic and cultural minority within Canada that has made an invaluable contribution to the building of the nation. However, Canada's recent history is scarred by the federal Government's institutionalized and racist policies toward Chinese and Chinese-Canadians. The *Chinese Immigration Act* and *Exclusion Act* are but two examples of the kind of discriminatory measures which have had a profound and damaging impact on the Chinese-Canadian community that continues to this day.

We submit that general principles of international law, affirmed in international treaties, human rights declarations and judicial decisions, demonstrate that the *Chinese Immigration Act* and the *Exclusion Act* violated international law as it existed at the time. In addition, the effects of those Acts represent a continuing harm to the Chinese-Canadian that is itself an on-going violation of international law. And whether or not Canada's policy represents legally compensable violations of international law, the families affected by the Head Tax and exclusionary immigration measures continue to suffer from generations of disjuncture and separation.

Canada has taken no measures – either as required by international law or as a matter of discretionary policy – to ensure the full social and cultural development of the Chinese-Canadian community. To the contrary, it has added to the humiliation and indignity of its past actions by denying the Chinese Canadian community in general, and the Head Tax payers and their families in particular, the reparations which it has provided to other groups. That the harm toward the Chinese Canadian community remains unacknowledged while Canada has provided justice and remedies to similarly situated groups amounts to "retraumatization." Moreover, Canada's refusal to provide reparations and its ongoing unequal treatment of Head Tax payers represents a continuing violation of international law and an enduring failure to respect international human rights principles.

We therefore call on the U.N. Special Rapporteur on Racism to highlight Canada's violations of international law against the Chinese Canadian community in his next report to the Commission on Human Rights, and ask that he recommend that the Canadian government provide a complete and appropriate remedy to the victims, including an official apology and, where practicable, individual reparations.

STATEMENT OF FACTS

A. History of Discriminatory Legislative Provisions

In 1885, the Canadian government implemented the Chinese Immigration Act ("Act"). The Act imposed a $50 Head Tax on all persons of Chinese origin entering Canada subject to a few exceptions. (Affidavit of Peter Li, sworn October 9, 2002 at para. 16 ["Li Affidavit"]. No other racial or cultural group seeking entry to Canada was subjected to the Head Tax.

The imposition of the Head Tax was largely the product of anti-Chinese sentiment that arose following the first large-scale Chinese immigration to Canada of 1800s and later during the construction of the Canadian Pacific Railway. Prior to 1885, the provincial government of British Columbia had attempted to impose discriminatory laws on Chinese immigrants with limited success and placed significant 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 in 1885 came shortly after the completion of the railroad. (Li Affidavit at paras. 5-16.)

The purpose of the Act was not to raise revenue, but to discourage Chinese immigration. Accordingly, when the number of Chinese immigrants did not decrease to a 'satisfactory' level following the imposition of the $50 tax, the Head Tax was raised in 1900 to $100 and in 1903 to $500. In all, the federal Government collected nearly $23 million in Head Taxes, a sum that was largely used to monitor immigration flows and to perpetuate the exclusion of Chinese immigrants. In 1923, the federal government amended the Act to restrict all Chinese immigration to Canada subject to a few narrow exceptions. This near absolute exclusion remained until the Chinese Immigration Act was repealed in 1947 following the end of the Second Word War. The repeal of the Act, however, did not remove all anti-Chinese aspects of Canadian immigration law. Until 1962, Chinese immigration was restricted to sponsored relatives of Chinese Canadians; potential Chinese immigrants were 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. Thus, between 1947 and 1962, grown children, aged parents, siblings, and nieces and nephews of Chinese Canadians continued to be excluded from entering Canada. (Li Affidavit at paras. 19, 20, 38.)

The Government of Canada also enacted additional anti-Chinese measures in this period, including the denial of the right to vote, barriers making it difficult for Chinese immigrants to become citizens, the requirement that Chinese immigrants obtain a certificate of registration upon entering Canada subject to penalty of fine or imprisonment, and the placing of a limit on how long a Chinese immigrant could leave Canada and still be allowed to return without being considered a new immigrant. This last restriction meant that a Chinese immigrant leaving Canada for more than two years would either have to pay the Head Tax for a second time to gain re-entry into Canada (between 1885 and 1923) or be excluded outright from re-entry (between 1923 and 1947). Li Affidavit, at paras. 17, 20, 21.

B. Impact on the Chinese Canadian Community

The institutional racism that was created and perpetuated by the various forms of the Chinese Immigration Act and other discriminatory legislative measures has had a profound and disruptive impact on the Chinese Canadian community that continues to this day.

At the time the Chinese Immigration Act came into force, Chinese immigrants suffered from low social standing in Canada due to widely held and actively propagated stereotypes that they were an inferior race to Europeans. Because Chinese immigrants were singled out in law for exclusion and segregation, these views were legally and authoritatively reinforced. "Over time, the social stigma attached to the Chinese as undesirable citizens and unwelcome workers became their defining characteristics." Li Affidavit at para. 26.

While the tax itself was onerous ($500 was equivalent to two years of wages at the time), the 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 as a whole. As a result of the restrictions and exclusions imposed 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. For those who were able to obtain sufficient funds to pay the Head Tax for their entry, finding additional funds necessary to pay the Head Tax for wives and children was virtually impossible. The imposition of the Head Tax created a boon for human traffickers and forced immigrants into a predictable form of bondage in order to reunite family members. And for the period of 1923 to 1947, regardless of resources, it was legally impossible for wives or children in China to join their husbands in Canada due to the outright exclusion of Chinese immigrants. (Li Affidavit at paras. 28-31.)

The separation of families meant that most Chinese males in Canada lived in a married bachelor society. Many of these men were separated from their wives and children for decades, while others lost contact with their families in China altogether. Many died in Canada without ever being reunited with their wives and children. (Li Affidavit at paras. 28, 35.)

The gender imbalance created by the Act's restrictions was so significant that even following the repeal of the Act in 1947, and the repeal of other immigration restrictions in 1962, the number of women in the Chinese Canadian community did not begin to approach equilibrium until 1981. As a result, there was a significant delay in the creation of a second generation of Chinese Canadians. As late as 1991, 73% of Chinese people living in Canada were not born in Canada. The disproportionate number of foreign born persons among the Chinese Canadian population has also hindered the development of the community's political participation in Canada.

In 2001, several Head Tax payers, their spouses and descendents filed a class suit in Ontario seeking redress from the Government of Canada for the harms resulting from the Chinese Immigration Act and Exclusion Act. The trial judge acknowledged the discriminatory nature of the legislation and the resulting deprivation to the immigrants who were forced to pay the Head Tax. Despite these findings, the court felt unable to provide restitution to the claimants on the basis that their claim of discrimination resulted predominantly from an act that had occurred before the enactment of the Canadian Charter of Rights and Freedoms and during an era when

there was insufficient evidence of existing customary international law prohibiting racial discrimination. The claimants then appealed to the Ontario Court of Appeal. In a judgement released on September 13, 2002 the Court of Appeal reiterated that the treatment of people of Chinese origin under the legislation was a "notable stain on our minority rights tapestry." (*Mack v. Canada (Attorney General*) (2001) 55 OR (3d) 113 Moldaver and MacPherson JJ.A. at para 1) The Court of Appeal otherwise upheld the trial decision dismissing the appeal. Having been denied leave to appeal to the Supreme Court of Canada, all domestic legal remedies have been effectively exhausted.

ARGUMENT 1: CANADIAN HEAD TAX LEGISLATION VIOLATED GENERAL PRINCIPLES OF INTERNATIONAL LAW

Introduction

Regardless of Canada's policy not to recognize international norms unless they are explicitly incorporated into domestic law, international treaties, human rights declarations and judicial decisions existing prior to 1947 make it clear that Canada violated international law by singling out a particular racial group for discrimination.

International Treaties

(a) Treatment of minorities

The following treaties prohibited discrimination against minorities:

Treaty of Westphalia (1648) – granting religious rights to Protestants in Germany.
Treaty of Olivia (1660) – protecting the rights of Catholics in Livonia, ceded to Sweden.
Treaty of Ryswick (1697) – protecting Catholics in territories ceded by France to Holland.
Treaty of Paris (1763) – protecting Catholics in Canadian territories ceded by France.
Royal Proclamation (1763) – Assurance of protection to First Nations peoples from Great Britain
Congress of Vienna (1815) – protecting racial and religious minorities in Europe.
Treaty Waitangi (1840) – recognizing the rights of indigenous peoples in New Zealand.
Treaty of Berlin (1878) – containing provisions in favour of the Turks under Bulgarian rule.
Convention of Constantinople (1881) – protecting Muslims in territories under Greek control.[1]

(b) Contemporaneous Commentary

That treatment of Chinese Canadians under the *Chinese Immigration Act* was was well known to politicians of the time who had ample information concerning the living conditions and restrictions placed on immigrants from China. One member of parliament from British Columbia stated: "We object to encouraging a class of men who are making money out of the…blood…of these poor Chinamen. We want that traffic in slavery abolished. We do not want the door of our province to be opened to herds of these poor dumb-driven cattle to be rushed as it may please these men, who want to get rich out of the fruits of Chinese labour in British Columbia."[2]

(c) The League of Nations

Canada was a signatory to the Treaty of Versailles (concluded on June 28, 1919) and an original member of the League of Nations. The Covenant of the League of Nations articulated the goals and obligations of the members in the construction of a formal international system. These

[1] Natan Lerner *Group Rights and Discrimination in International Law*. (2nd ed.) New York: Martinus Nijhoff Publishers, 2003. at p. 7-11.
[2] House of Commons Debate, 5th sess., 8th Parl., at p. 8181 (George Ritchie Maxwell- Liberal – Majority Government, 1900)

included the principles of fair treatment: "Members of the League…will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend…[3]

Concern for the human rights of minority populations was reflected in the League of Nations system of treaties which followed the territorial changes of World War I. The system included treaties with particular States ensuring protection of racial, linguistic and religious minorities (e.g. Poland, Treaty of Versailles; Czechoslovakia and Yugoslavia, Treaty of St-Germain-en-Laye; Hungary, Treaty of Trianon), minority rights provisions incorporated into general peace treaties (e.g. Bulgaria, Treaty of Neuilly; Turkey, Treaty of Lausanne) and declarations made by States as a condition for their admission into the League (e.g. Albania, 1921; Latvia, 1923).[4]

(d) International Labour Organisation

The International Labour Organisation ("ILO") also emerged from the Treaty of Versailles after the First World War. Its roots are traced to the ideological movement for international action to protect workers that gained prominence in the late 19th century, as evidenced by the International Congress on International Labour Legislation held in Brussels in 1897 and the International Association for Labour Legislation established in Basel in 1901.

The Constitution of the ILO contains principles for the fair and humane treatment of all peoples:

> *Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required: as, for example, by…protection of interest of workers when employed in countries other than their own…* [5]

The objectives and the purpose of the ILO were expanded in a new constitution following a 1944 conference culminating in the "Declaration of Philadelphia":

> *Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organization that lasting peace can be established only if it is based on social justice, the Conference affirms that: all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity of economic security and equal opportunity …*[6]

---

[3] Covenant of the League of Nations; Article 23(a).
[4] Natan Lerner *Group Rights and Discrimination in International Law*. (2nd ed.) New York: Martinus Nijhoff Publishers, 2003. at p. 11.
[5] *Treaty of Versailles, Part XIII, Section I.*
[6] 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).

(e) Charter of the United Nations

The Charter of the United Nations was adopted on June 26, 1945; Canada was a founding signatory. The preamble to the Charter states that "we the peoples of the united nations determined…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…" In addition, all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[7]

Judicial decisions

Under the League of Nations, a guarantee system was created for the protection of minorities. By the terms of many of the peace treaties concluded after the First World War, States agreed to provide equality of treatment to their inhabitants. Such agreements were subject to the supervision of the League of Nations Council and the Permanent Court of International Justice.

The Permanent Court of International Justice characterized the purpose of the guarantee system and the requirement for protecting minorities as follows:

> *The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary…The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.*[8]

Articulation of the principle that racial discrimination is inconsistent with international law can also be found in the decisions of numerous tribunals. See, for example *Spanish Zone of Morocco Claims (Great Britain v. Spain)*, Annual Digest of Public International Law Cases (1923-1924), case no. 85 (Arbitration – Huber (Rapporteur)), *Ex Parte Jackson* (1920), 263 Fed. III (U.S. Dist. Ct. – Montana), *Cantero Herrera v. Canevaro & Company*, Annual Digest of Public International Law Cases (1927-1928), case no. 149 (Supreme Court of Peru), *Ex Parte Larrea Y Fernandez*, Annual Digest of Public International Law Cases (1931-1932), case no. 145 (Cuba Supreme Court), *Re German Settlers in Poland*, Annual Digest of Public International Law Cases (1923-1924), case no. 123 (PCIJ), *Czechoslovak Language of Aliens Case*, Annual Digest of Public International Law Cases (1925-1926), case no. 215 (Supreme Administrative Court of

[7] Charter of the United Nations, Chapter IX, Articles 55 and 56.

[8] Minority Schools in Albania, [1935] P.C.I.J. ser. A/B, No. 64 at 17.

Czechoslovakia) and *Egyptian Government v. Nicolas Zintros*, Annual Digest of Public International Law Cases (1927-1928), case no. 227 (Egyptian Mixed Court of Appeal).

Conclusion

We submit that general principles of international law and human rights, affirmed in international treaties and judicial decisions, demonstrate that the *Chinese Immigration Act* was inconsistent with international law as it existed at the time. In addition, we reject the assertion made by Canadian courts that the explicit decision of the Canadian government to enact the discriminatory legislation had the effect of overriding any international law prohibition against it. This claim is at odds with non-discrimination principles in international law and lacks all moral substance. No nation can invalidate centuries of international law-making in a single act of domestic racism.

ARGUMENT 2: THE DESCENDANTS OF HEAD TAX PAYERS AND THEIR FAMILIES, AS WELL AS THE CHINESE-CANADIAN COMMUNITY CONTINUE TO SUFFER DISCRIMINATION AND OTHER HUMAN RIGHTS VIOLATIONS

Continuing Discrimination against Chinese-Canadians

> "Of course, everyone's freedom of action is limited by constraints inherited from the past, but the present generation should not be permitted to blame history for their own deficiencies." Michael Banton[9]

Racial discrimination is among the least controversial examples of *jus cogens*, a peremptory norm of international law from which no derogation is permissible.[10] As such, the principle of non-discrimination is articulated in numerous international and regional treaties and Covenants to which Canada is a party. These principles have been incorporated in domestic law by the Canadian Charter of Rights and Freedoms. The present Canadian government has failed to meet the basic requirements against discrimination in its treatment of Chinese-Canadian Head Tax payers and their families.

Chinese-Canadians are a racial, ethnic and cultural minority with a vibrant history and invaluable contribution to the building of Western Canada. Canada's relationship with this community is marked by a deep stain of officially sanctioned maltreatment and abuse that lasted over 50 years during the active years of the *Chinese Immigration Act* and *Exclusion Act*. These overtly prejudicial policies ended in 1949 but continue in the form of de facto discrimination.

Current human rights violations against the Chinese-Canadian community, in particular Head Tax payers and their descendents, can be categorized as follows:

- Discrimination by unequal treatment and denial of benefits for reasons based on group identity;
- Exclusion from political or social processes that would result in a settlement of the dispute and restore lost dignity;
- Failure to provide positive measures to combat discrimination and to foster full social and political inclusion for a racial minority that has suffered discrimination;
- Infringement over the right to protect and foster cultural identity and preserve group history;
- Infringements on rights to family life and the rights of children to a family life and perpetuation of cultural traditions.

Canada's failure to meet these obligations amounts to a violation of international law and an enduring injury. The suffering of Chinese-Canadians should be remedied and redress offered with a view to repairing the dignity of the community damaged by past policies. The goal of any program of reparations is to grant full membership to the Chinese Canadian community assuring its members of substantive equality within Canadian society by remedying past wrongs.

---

9 Michael Banton. *The causes of, and remedies for, racial discrimination*. Background paper for the United Nations Commission on Human Rights*, E/CN.4/1999/WG.1/BP.6 26 February 1999*

10 Ian Brownlie, *Principles of International Law* (1979) p. 513

Discrimination in Benefits and Exclusion from Political Negotiation

In 1988, an agreement was reached between the Federal Government of Canada and the National Association of Japanese Canadians (NAJC) resulting in an apology and compensation for victims of government internment during the Second World War. The Government's acknowledgment was an important step forward for Canadian race relations and a significant milestone for the community in confirming its belonging and acceptance within Canadian society. On its face, the agreement reinforced Canada's commitment to multiculturalism and the full and complete elimination of all forms of racial discrimination and segregation.

But few other groups have obtained redress. In December 2003, Canada's Acadian community received acknowledgement of the suffering visited upon their ancestors during the mid 1700s by the British. Parliament agreed to sign a Royal Proclamation acknowledging the history of the deportations and will also establish an annual day honouring all Acadians. However, the arbitrary application of redress for particular historical grievances benefits only narrow segments of the population to the great disadvantage of the full Canadian community and its constitutive minority groups. Rather than effectively addressing discrimination and acknowledging Canada's complete multicultural diversity, selective government action creates a hierarchy of minority groups and stereotypes the degree and nature of harms suffered by these communities. This has a very real and immediate impact on the dignity Chinese-Canadians whose suffering remains unacknowledged let alone redressed. The message that is being sent is that their harm, their suffering and their community are not yet worthy of recognition and redress. It took 250 years for the representative government to honour the sacrifices of Canada's Acadian community. Canada's obligations under modern international human rights law and principles should not allow another 250 years to pass before discriminatory harms perpetuated against Chinese-Canadians are resolved.

Article 1.4 of Convention on the Elimination of all Forms of Racial Discrimination (CERD), to which Canada is a signatory, explicitly calls for the provision of special measures that aid in the advancement of traditionally disadvantaged groups so long as, "such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups." In Article 2.2, CERD specifically contemplates the importance of "special and concrete measures" designed to ensure adequate protection and development of marginalized groups, while again drawing attention to the centrality of not creating unnecessary division and discriminatory effects as a result of such measures. Likewise, the International Covenant on Civil and Political Rights (ICCPR),(which Canada joined in 1976) explicitly prohibits discrimination and calls on states to, "guarantee all persons equal and effective protection against discrimination on any ground."[11]

Canada has failed to meet these obligations. The government's continued refusal to implement programs that would restore the dignity of the Head Tax payers and their families or assist in the development of the Chinese-Canadian community's identity and belonging within Canadian society serves a reminder of past wrongs. The arbitrary application of programs targeting other

[11] Covenant on Civil and Political Rights, Article 26, General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976

groups to the complete exclusion of Chinese-Canadians only creates division and exacerbates existing discrimination and distinctions.

The Government of Canada has at no time indicated that it cannot afford to provide a remedy for these harms or to provide positive measures to ensure the full equality of Chinese-Canadians. It has merely refused that it has any duty or obligation to do so.

Positive Obligations to Combat Discrimination

Article 27 of the ICCPR recognizes the existence of a right of all members of ethnic minorities to enjoy and express their culture, religion and language. In its general comment on the implementation of the right articulated under Article 27, the Human Rights Committee confirms that positive measures by States are necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language as a community.[12] The Human Rights Committee has also declared that the International Covenant on Economic, Social and Cultural Rights (CESCR) does more than impose negative obligations upon States Parties.[13] Under CESCR, non-discrimination is a core minimum obligation requiring immediate and full adherence.[14]

Positive obligations to combat and remedy discrimination are also found in CERD. Article 2(2) confirms the necessity of special measures to protect racial or ethnic groups and specifies that:

> "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." (CERD, Article 2(2))

Canada's refusal to acknowledge the history of Chinese-Canadians and their role in the formation of Western Canadian society fails to meet the standards articulated under the ICCPR, CESCR or CERD. Canada ought to recognize the status and history of Chinese-Canadians and ensure means and resources through which to express and commemorate the group's collective history and evolving identity.

Infringement on Cultural Traditions and History

By failing to acknowledge both the history and present circumstances of the Chinese-Canadian community, Canada has failed to include the history of a constitutive group of Canadians in the communal narrative and identity of Canada as a whole. The Chinese-Canadian community was a founding community in Western Canada and central to the building of the Canadian Pacific Railway. The lack of recognition of the history and suffering of these early Canadians is an infringement on the right of the community to its history and identity.

---

[12] Human Rights Committee, "CCPR General Comment 23" 50th Session, 1994.
[13] Karen Monaghan et al. *Race, Religion and Ethnicity Discrimination Using International Human Rights Law*. London: JUSTICE, 2003.
[14] International Covenant on Economic, Social and Cultural Rights, Article 2, (Entry into force 3 January 1976)

Article 7 of CERD requires states parties to, "adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among… racial or ethnical groups."

In 1978, the UN Educational, Scientific and Cultural Organization (UNESCO) unanimously adopted what has been described as the most comprehensive international instrument dealing with the protection of group identity.[15] The Declaration on Race and Racial Prejudice is not binding as international law but its wide support indicates the extent to which the principles it articulates have become accepted as an integral part of international human rights law. The Declaration emphasizes the need to protect the identity and full development of racial and ethnic groups and affirms the right to cultural identity. Article 6 provides that States should take steps by legislation, "particularly in the spheres of education, culture and communication," and undertake special programs, "to promote the advancement of disadvantaged groups."

Failure to acknowledge the first 50 years of a community's existence within Canada exacerbates prejudice and stereotypes against Chinese-Canadians and their origins in Canada. The Government of Canada must implement effective measures to integrate the history and origins of the Chinese-Canadian community and the existence of the Head Tax and Exclusion Act as part of the nation's past with a view to moving forward with greater understanding, sensitivity and cultural awareness**.**

Protection of Families and the Rights of the Child

The United Nations Treaty System has recognized the particular importance and centrality of the family and of children within all societies. The preamble to the Convention on the Rights of the Child (CRC) proclaims that, "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community." Children specifically should, "for the full and harmonious development of his or her personality …grow up in a family environment, in an atmosphere of happiness, love and understanding." Article 4 makes these principles binding on States Parties in so far as they must:

> "Undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources." (CRC, Article 4)

The importance of the family is also enshrined within several provisions of the CCPR, in particular Article 23.[16] Article 23 places a positive obligation on states parties to adopt legislative, administrative or other measures that will reflect the importance and need for protection of the family as the fundamental and natural group unit of society. By failing to assist the Chinese-

[15] Natan Lerner *Group Rights and Discrimination in International Law*. (2nd ed.) New York: Martinus Nijhoff Publishers, 2003. at p. 176

[16] United Nations Human Rights Committee, *General comment 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23)* . 27/07/90.

Canadian community to remedy the disjointed and disparate effects of Canada's historical discrimination against the group, the government has failed, and continues to fail, to perform its obligations under Article 23.

Chinese-Canadian families were disconnected for generations by the Exclusion Act. Husbands were separated from their wives and children for years at a time, often missing their children's entire youth. Although the discreet government acts took place before the CRC or CCPR were written, it is today's Chinese-Canadian community that exhibits characteristics of a first-generation immigrant community, notwithstanding its 150 year history in Canada. The effects of past legislation are only now being appreciated as these families are reunited and attempt to formulate a functioning community.

Canada has failed to take measures as required by international law to ensure the full social and cultural development of the Chinese-Canadian community. The families of this stunted community are still recovering from generations of disjuncture and separation. In its failure to remedy its own harms, the Canadian government allows the disparate effects of the Exclusion Act to continue in an unresolved manner. Canada remains under obligations to undertake appropriate measures to assist Chinese-Canadians affected by the Exclusion Acts and to restore their belonging, culture and traditions. The community seeks acknowledgment and an effective remedy to ensure that the present generation does not suffer lingering indignity and exclusion from the fold of the Canadian culture.

ARGUMENT 3: **CANADA HAS AN OBLIGATION TO MAKE REPARATIONS**

Right to Reparations

It is a well-established principle of international law that violations create an obligation to make reparations.[17] Similarly, when international human rights are violated, there exists an obligation to make reparations to the victims. The right to reparations for human rights abuses is evident in the decision of international bodies and tribunals, treaties, state practice, and *opinio juris*.

The Van Boven-Bassiouni Principles on the right to reparations

In 1989, Professor Theo Van Boven was appointed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to report on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights. M. Cherif Bassiouni has since joined Special Rapporteur Professor Van Boven in codifying the law with respect to reparations for human rights abuses. Their work has resulted in several draft *Basic Principles and Guidelines on the Right to Reparations for Victims of Human Rights Abuses* ("The Van Boven-Bassiouni Principles").[18]

The most recent draft of The Van Boven-Bassiouni Principles, completed in 2000, represents what the High Commission for Human Rights has termed a consolidation of existing norms as they have evolved with regards to human rights violations and reparations.[19] The Van Boven-Bassiouni Principles recognize that States have an obligation to respect and enforce international human rights law. When a State violates international human rights norms through an act or omission, the State is under an obligation to provide reparations to its victims.[20] The obligation to respect and enforce international human rights law gives rise to a State obligation to ensure that victims of human rights abuses receive equal and effective access to justice and appropriate remedies.

The facilitation or provision of reparations is key to ensuring that victims of human rights abuses are treated with compassion and dignity. Appropriate forms of reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Van-Boven Bassiouni Principles rightly stress that when victims attempt to pursue access to justice and reparations, it is important for the State to take special care to ensure that additional retraumatization does not result.[21]

For the reasons discussed in Sections II and III, the Chinese Head Tax violated the international human rights of Chinese-Canadian citizens. Canada's refusal to provide reparations to these victims constitutes a further violation of Canada's international obligation to provide reparations

---

[17] *Chorzow Factory* (*Germany* v. *Poland*) (1928), P.C.I.J. (Ser.A.) No. 17

[18] Final Report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, E/CN.4/2000/62, 18 Jan 2000.

[19] Note by the High Commission for Human Rights, E/CN.4/2003/63

[20] *Supra* note 21 at Principle 16, "In accordance with its domestic laws and international obligations, a State shall provide reparations to victims for its acts or omissions constituting violations of international human rights and humanitarian law norms".

[21] *Ibid.,* Principle 10

to victims of human rights abuses. Canada's refusal further undermines the dignity of its victims and perpetuates the injustice committed against them. As the Van-Boven-Bassiouni Principles recognize, reparations are critical to promoting justice because it is through reparations that violations are redressed.[22]

The right to reparations is recognized by international tribunals and decisions

The obligation to make reparation for harm as articulated in the Van Boven-Bassiouni Principles is an expression of existing customary international law. International tribunals such as the Inter-American Commission, the Inter-American Court of Human Rights, and the European Court of Human Rights, have all recognized the obligation on States to make reparations to victims of international human rights abuses.

In the *Velasquez Rodriguez Case*, the Inter-American Court held that States must "if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." [23] The European Court of Human Rights required similar reparations for unlawfully seized property in the *Case of Papamichalopoulos and others* v. *Greece* wherein the Court held, "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."[24] Recently, the European Court of Human Rights affirmed is recognition of the right to reparations when it demanded that the State pay restitution of property and damages in the case of *Beyeler* v. *Italy*.[25]

Similarly, both the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia include provisions allowing for reparations in the form of property restitution.[26] The International Criminal Court Statute has further codified this norm by including a provision for restitution of lost property, as well as a trust fund to provide compensation to victims of human rights abuses.[27]

The International Covenant on Civil and Political Rights,[28] the International Convention on the Elimination of All Forms of Racial Discrimination,[29] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[30] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[31] all recognize that violations of human rights norms gives rise to a corresponding obligation to make reparations.

---

[22] *Ibid*,. Principle 15
[23] *Velasquez Rodriguez Case* (1988), Inter-Am. Ct. H.R. (Ser.C.), No. 4 at 166
[24] *Case of Papamichalopoulos and others* v. *Greece;* Application No. 0014556189; 31 October 1995 at para. 34
[25] *Beyeler* v. *Italy;* Application No. 33202/96; 28 May 2002
[26] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, (As Amended 17 July 2003) IT/32/Re.28 at Rule 105; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (Adopted June 29, 1995) at Rule 105.
[27] Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9 at Art 77(2)(b) and Art. 79
[28] *Supra* note 14, at Article 2(3)(a) which provides for the right to an effective remedy
[29] Article 6 provides for the right to reparations and effective remedy
[30] Article 14 provides for the right to compensation
[31] *See* Article 41

State Practice

Many nations, including Canada, have independently awarded reparations to victims of human rights abuses. Canada's enactment of the Japanese Canadian Redress Agreement on September 22, 1988, which included reparations in the form of satisfaction, acknowledgment of the state's wrong, a recognition of the loyalty of Japanese Canadians to Canada, individual and community compensation, and a $ 24 million CAD endowment to the Canadian Race Relations Foundation,[32] is but one example. Canada also provided satisfaction to Canadian-Ukrainians mistreated in World War I, and most recently, Canada provided reparations in the form of satisfaction to the Canadian Acadian community.

Likewise, in 1988, the United States awarded massive reparations to Japanese Americans and to the Aleuts consisting of monetary damages and an apology for unlawfully taken property and hardship.[33] The United States has furthermore provided reparations in the form of an apology to native Hawaiians, and an apology to sub-Saharan Africa for U.S. involvement in the slave trade.

Similarly, Japanese corporations paid reparations to Korean "comfort women," and Germany provided reparations to Israel and to individual Holocaust survivors.

Canada has an international obligation to make reparations to the Chinese-Canadian Head Tax payers

Canada's provision of reparations to some human rights victims, but not to others, fails to respect the state's obligation to ensure **equal and effective access to justice and appropriate remedies**. The harms of the Chinese Canadian community remain unacknowledged, despite that fact that Canada has been willing to provide justice and remedies to other Canadian human rights victims. This unequal treatment has resulted in exactly the type of retraumatization that the Van Boven-Bassiouni Principles seek to avoid. Canada's unequal treatment suggests to Head Tax payers and their descendents that the wrongs they have suffered are less worthy of recognition than those of other groups. Providing equal treatment with respect to remedies for human rights abuses is one way that a state demonstrates its respect for international human rights. Canada's failure to provide reparations and its ongoing unequal treatment of Head Tax payers is a violation of international law and a derogation from international human rights principles.

[32] The Canadian Race Relations Foundation, "From Racism to Redress: The Japanese Canadian Experience", available at: www.crr.ca/EN/Publications/ePubHome.htm
[33] Civil Liberties Act, 50 U.S.C. app. § 1989-1989d (1994).

ACTION REQUESTED

To fulfill its moral and legal obligations, Canada should make reparations to the Chinese-Canadian Head Tax payers. These reparations should include:

a) **Restitution**:

The Head Tax resulted in the unlawful taking of $23 million CAD rightly belonging to the Chinese-Canadian Head Tax payers. Any obligation to make restitution includes the return of property unlawfully taken.[34] In this case, appropriate restitution would include restitution of the Head Tax payers property - the $23 million CAD collected under the Head Tax legislation, plus compound interest. The Van Boven-Bassiouni principles note that the "victim" of human rights abuses extends to dependents and immediate family members of the direct victim.[35] To compensate the family members and descendants of the Head Tax payers, as well as those surviving Head Tax payers, collective restitution of the $23 million should be distributed to the Chinese-Canadian community. The Van Boven-Bassiouni principles specifically recommend to States that they permit claims for collective reparations and collective receipt of reparations where appropriate;

AND

b) **Satisfaction, including:**

i) An official declaration restoring the dignity, reputation and social rights of the victims and those closely connected; and

ii) An apology including public acknowledgment of the facts giving rise to the violation, and acceptance of responsibility

[34] *Supra* note 21 at Principle 21
[35] *Ibid.,* at Principle 8

APPENDIX 1: AFFIDAVITS

STATUTORY DECLARATION OF SONG NOW QUAN

I, SONG NOW QUAN, of the City of Vancouver **MAKE OATH AND SAY** as follow:

1. My name is Song Now Quan. I am the affiant herein and as such I have knowledge of the matters deposed herein.

2. I was born in 1907 in the City of Hoi Ping, Guangdong Province, China.

3. My family was poor. When I was 15, I was sent to Canada in order to work and support my family back home. My uncle was living in Canada at the time, and he arranged for my passage to join him.

4. I boarded the Empress of Austria and embarked on my long journey to Canada. I remember the fare cost me Cdn$84.00.

5. At the time, all Chinese immigrants had to pay a $500 Head Tax before they would be allowed to enter Canada. Because I had no money, my uncle had to lend me the whole sum, with the understanding that I would repay the loan to him over time.

6. As soon as I arrived in Canada, I was put in the "pig house" along with other Chinese immigrants. It was a big house with a lot of bunk beds. We were fed three meals a day, but we were not allowed to go outside. I had no idea why they had to put us Chinese into these pig houses. I only know that as soon as my uncle paid the guard $100, I was allowed to leave after being locked up for two weeks.

7. After I came to Canada, I moved to Saskatchewan. For the first two years, I went to school. By the time I reached 17 I had to start working. For many years, I worked in restaurants washing dishes or cooking food. I made $30 a month. With that amount, I had to support

myself, send money back home, and repay my uncle. Life was very difficult. Every day, I started working at 8 o'clock in the morning and ended at 8 o'clock at night. I worked 7 days a week, 365 days a year. I did not have any holidays.

8. Yet despite all the hard work, it still took me several years to repay my uncle the $500 Head Tax.

9. In 1929, I returned to China to get married. My wife, Own Quan, was 19 at the time. I stayed in China for about a year. While I was in China, my wife gave birth to our first son. Not long after my son was born, I had to come back to Canada because I had no money left. By then, the Chinese Exclusion Act was already in place. I could not bring my family with me even if I had the funds to do so.

10. I did not return to China again until 1937, because I had to work to send money back home. In so doing, I could not save enough money for my trip back home. My second trip to China lasted a bit longer than my first. I stayed for almost 20 months, and saw my second child - a girl - being born. But once again, I had to come back to Canada to work, so I could not stay with my wife and children. As well, there was a two-year limit on how long Chinese immigrants were allowed to stay outside of Canada. If I had stayed beyond the two years period, I would have to pay the Head Tax all over again.

11. As the war broke out in China, I could not go back after 1939. It was difficult for me to even maintain communications with my family back home. I was worried about their safety, but there was nothing I could do to protect them.

12. In 1942, I moved to Vancouver. I started my own business as a grocery store operator. But I did not make any profit. I got into a partnership with some friends. But our business did not succeed either. In the end, I lost all my money and had to start all over again by working for other people.

13. In 1947, the Government of Canada repealed the Chinese Exclusion Act. Two years later,

my eldest son arrived in Canada. My wife and my daughter also joined us the following year. My wife and I were finally reunited twenty years after we became married. My wife gave birth to two more sons in the 1950's. In 1984, my wife passed away.

14. The Chinese Head Tax and Exclusion Act had a tremendous impact on the Chinese Canadian community as a whole. The Head Tax was discriminatory and caused me and my family grave financial hardship. In addition, my family was forcibly separated for over two decades as a result of the Chinese Exclusion Act. No other immigrants were subject to these racist laws. It was simply not fair.

15. Even though the Head Tax and Exclusion Act happened so long ago, I could never forget the humiliation and hardship that I went through as a result of the Canadian Government's racist policy towards the Chinese. The Canadian Government treated us like we were less than human. Without redress, I could never be at peace. Without redress, I would not feel equal to other citizens of a country that I have called home for the past eighty years of my life.

16. All I want is for the Canadian government to give me back the money I had paid them with appropriate interest. Nothing more and nothing less.

AND I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Sworn before me at the City)
)
of Vancouver)
)
this day of 20) _____

Song Now Quan

Notary Public

<u>Other Affidavits</u>

Mr. Shack Jang Mack

Mr. Shack Jang Mack was born in China in 1907, and immigrated to Canada in 1922. At the time of his entry to Canada, he was obligated to pay the $500 Head Tax.

In 1928, Mr. Mack returned to China from Canada to marry Gat Nuy Na, to whom he had been betrothed as a child. He could not bring his wife to Canada because of the *Exclusion Act*, even though he had legally landed in Canada and was lawfully resident there.

Mr. Mack lived a "married-bachelor" existence for decades in Canada. His only contact with his family occurred during trips back to China. Each time Mr. Mack left Canada, he would have to sell his café business, opening another upon his return. He did this five times in four decades. Mr. Mack's wife and family came to Canada early in 1950, after the repeal of the Exclusion Act.

Mr. Mack passed away in 2003 at the age of 94 without ever receiving any apology or compensation from the Canadian Government for the discrimination and suffering he endured.

Mrs. Quen Ying Lee

Mrs. Quen Ying Lee was born on October 18, 1911, in Hoi Ping, China. She is the widow of Mr. Guang Foo Lee, who was born on June 16, 1892, in Hoi Ping. Mr. Lee came to Canada on July 4, 1913 at the age of 21. Mrs. Lee's connection to Canada predated her marriage to Mr. Guang Foo Lee. Her father had come to Canada when she was 5 to work as an interpreter. Because he was unable to bring his family with him, he died alone in Canada.

When Mr. Guang Foo Lee first came to Canada, he was required to pay the $500 Head Tax. Mr. Lee secured money to pay the Head Tax by mortgaging seven pieces of property in China. He transferred title of his land to a money lender using the property as collateral. Altogether, it took Mr. Lee 16 years (from 1914 to 1930) to repay the debt incurred by the Head Tax payment.

In Canada, Mr. Lee worked in the laundry business. Subsequently, he worked in the restaurant business. Life was difficult and Mr. Lee often did not have enough money for food or shelter. At times, Mr. Lee resorted to picking food out of garbage cans and cooking food on the road. Sometimes, individuals walking by would kick his food away.

Mr. Lee returned to China sometime around 1929, where he stayed for two years. On April 13, 1930, Mr. Lee married Mrs. Lee. Mrs. Lee was 17 years his junior. After Mr. Lee repaid his loan for the Head Tax, he was left with little money and returned to Canada to work. He left China while his wife was still pregnant with their first child, a daughter who was born on January 29, 1932. Thereafter, Mr. Lee returned to China only twice: once on or around 1935, when he stayed for one year until his second child, a son, was born. Mr. Lee returned to Canada on June 1, 1936.

While in Canada, Mr. Lee sent money home. This money was not sufficient to support his family. In order to survive, Mrs. Lee worked on a farm in addition to raising their children as a single parent. Mrs. Lee also used the money that her husband sent to buy small pieces of farm land. With the land, Mrs. Lee grew bamboo and other food. The additional food enabled Mrs. Lee to support her husband's mother, with whom she lived, and her husband's cousin.

Shortly after Mr. Lee returned to Canada in 1936, the Second World War began and the Chinese civil war magnified. It was a time of crisis. Starvation and disease took the lives of thousands in China. Mrs. Lee endured grave hardship in order to survive. She started selling goods, often walking for miles to sell in various villages and towns. Like Mrs. Lee, many women in the Guangdong region had husbands who had gone abroad and could not return home or send money to China to support their families during this period. Many women in this situation survived by living with another man.

Mrs. Lee chose to stay in her marriage with Mr. Lee. It was a difficult choice to make since all communications with the outside world were cut off. For over 13 years, Mrs. Lee did not receive any news from her husband. Farmers who wanted Mrs. Lee to live with them told her that Mr. Lee would never return, but Mrs. Lee persevered.

It was not until 1949, four years after the end of the Second World War and the repeal of the *Exclusion Act*, that Mr. Lee finally went to China to see his family again. This was only his second trip since his marriage to Mrs. Lee. After learning what his family had gone through, Mr. Lee told his wife that she should not have waited for him.

The Lee family finally arrived in Canada in late December of 1950. By then, Mr. Lee had started his own restaurant in Sudbury. When she first came to Canada, Mrs. Lee helped clean dishes at the restaurant. Eventually, she took over the management of the business, working 18 hours a day. Altogether, Mr. and Mrs. Lee had five children: three born in China and two in Canada.

When Mr. Lee died, his younger children were still in their teenage years. Once again, Mrs. Lee was left to raise the children alone. Mrs. Lee believes her experiences are a direct result of the forced separation between her husband and herself imposed by the Head Tax and *Exclusion Act*. In many respects, Mrs. Lee feels she has suffered more than her husband as a result of the Head Tax and *Exclusion Act*. As such, Mrs. Lee wishes to seek redress in her own name, as well as in the name of her husband.

Mr. Yew Lee

Yew Lee is the son of Mr. Guang Foo Lee and Mrs. Quen Ying Lee. Mr. Lee came to Canada with his mother in 1950 when he was 1 year old.

Yew Lee remembers his father as the epitome of the immigrant work ethic. He worked tirelessly, diligently and stoically 18 hours a day and seven days a week in his restaurant business until his death.

When Yew Lee was 6 years old, his mother dug into a weathered steamer trunk and showed him a tattered copy of his father's Chinese Head Tax Certificate. Since then, she has repeatedly recounted to him the hardships and suffering they endured during the years of repayment.

Yew Lee often reflects upon the manner in which the Canadian Government treated individuals of Chinese origin who contributed so much to Canada's economic development and nation-building. Thousands of Chinese labourers were brought to Canada to build a transcontinental

railway through the Rocky Mountains and the treacherous Fraser Canyon, resulting in “one dead Chinaman for every mile of track laid."

Yew Lee also contemplates the discriminatory reasons that men, like his father, who spent most of their lives in Canada, were prevented from bringing their wives and children to Canada to be reunited as a family. Yew Lee's older brother and sister did not see their father for most of their formative years because they were not reunited as a family until 1950.

Yew Lee is a middle child and was 1 year old when he was brought to Canada. He grew up with two generations and two cultures of children in his family: an older brother and older sister who were born in China, and a younger brother and younger sister who were born in Canada. His oldest sister and his youngest brother are separated in age by 22 years.

Yew Lee has an 11 year old son. He has discussed the reasons for the Chinese Head Tax and Exclusion Act with his son, as well as the effects of this legislation on their family.