

**Courts of last resort:  
The judicialization of Asian Canadian politics 1878 to 1913**

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**Abstract**

The last 60 years have seen a world-wide increase in both the use of judicial systems for the resolution of political disputes as well as the importation of judicial methods and language into the realm of politics. In many countries, including Canada, this judicialization of politics extends to the most fundamental matters of the state, such as the nature of the state's collective identity. Current scholarship suggests that the rise of judicialized politics in Canada began either with the emergence of a dedicated human rights community in the 1960s or with the adoption of the Charter of Rights and Freedoms in 1982. There are, however, several prior instances in which the courts were used to resolve political disputes pertaining to the rights of citizens from ethnic minority groups. This paper utilizes one such instance, the efforts to fight legal discrimination against Asian Canadians in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, to demonstrate that the judicialization of politics in Canada actually began much earlier than is typically accepted. Moreover, the paper will show that this judicialization, which dealt with the mega-political issues of whether Asians (including naturalized citizens) had the right to reside, work, and vote in Canada, occurred because the courts were the only remaining channel through which persons from these communities were able to make claims on the state. In so doing, the paper suggests a new set of conditions that can lead to judicialization.

## 1.0 Introduction

Most academics generally agree that the post-war era has witnessed a global trend towards the judicialization of politics, which is characterized by the increased involvement of the judicial system in the resolution of political disputes and the making of public policy (Vallinder, 1994: 91). In several countries this judicial involvement is now seen to extend to the most fundamental or “mega-political” issues dealt with in a state, such as questions of collective identity (Hirschl, 2008: 123-30). In Canada, the judicialization of politics is thought to have resulted from either the emergence of a human rights community in the 1960s (Epp, 1998) or the adoption of the Charter of Rights and Freedoms in 1982 (Morton and Knopff, 2000).

Yet is the judicialization of politics truly new a development? In fact there appears to be several instances in Canada’s past where the courts were not only called upon to review serious political questions regarding the rights of minorities, but also served as the sole medium through which minority groups were able advance their claims on the state. While not denying that the judicialization of politics in Canada has increased in the post-war era, this paper examines the history of efforts to fight legal discrimination against one minority group, Asian Canadians,<sup>1</sup> to explore three specific questions: Did the judicialization of politics (and mega-politics) take place in Canada prior to the post-war era? And if yes, why did it occur, and what are the implications for current concerns regarding the influence of the courts?

Ultimately, the paper demonstrates that the judicialization of politics was clearly evident in Canada at least from the late 1800s onwards. In particular, the courts were deeply involved in shaping government policies on the mega-political issue of what rights and freedoms should be provided to persons of Asian descent. Several factors identified in the contemporary literature, such as constitutional provisions permitting the judicial review of legislative decisions and the existence of a support structure for legal mobilization, can provide partial explanations as to why this judicialization occur. However, the paper will show that this contemporary literature does not take into account how the deliberate disenfranchisement of Asian Canadians caused their relationship with the state to become fundamentally judicialized. It was not that Asian Canadians chose to advance their rights through the courts; it was that the judicial system was the *only* method they had available to influence the legal framework affecting their lives.

The paper next examines the existing literature on the judicialization of politics and its causes. It then presents a series of court decisions regarding the status and rights of Asians within Canada, and particularly British Columbia (BC). The extent of judicialization evidenced in the cases is then explored, followed by a consideration of whether the issues dealt with are in fact mega-political. Finally, the paper examines what factors facilitated judicialization in these cases.

## 2.0 The judicialization of politics: definition and origins

According to Vallinder (1994: 91) the judicialization of politics can refer to either:

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<sup>1</sup> Please note that in this paper the term Asian Canadians refers to all persons of Japanese or Chinese descent living in Canada regardless of their citizenship status. This usage reflects the fact that the laws examined were applied based on racial heritage without regard to citizenship through either naturalization or birth.

- (1) The expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts, or, at least;
- (2) the spread of judicial decision-making methods outside the judicial province proper.

Similarly, Hirschl argues that judicialization consists of three elements: the spread of judicial terminology and methodologies into the political system and the bureaucracy; an increased role for the courts in making decisions on public policy, primarily through judicial review; and the use of the courts to resolve mega-political issues, which are “core political controversies that define (and often divide) whole polities” (2008: 121-3). This paper focuses only on the increased role of the courts in making political (and mega-political) decisions. These developments are seen to involve a significant change in the role of the judiciary from that of reaching principled decisions on disputes under existing legislation to that of making new legislation and policy choices or even establishing new rights (Ferejohn, 2002: 50). In Canada, such judicialization can be seen in the many instances where the courts have reviewed legislation or other government actions. The many instances include when the Supreme Court of Canada struck down sections of the federal Criminal Code governing abortion (SCC, *R. v. Morgentaler*, 1988) and Quebec legislation limiting access to private health insurance (SCC, *Chaoulli v. Quebec*, 2005).

The distinction between the judicialization of politics and “mega-politics” is inherently subjective, and rests on the political significance of the issue (Hirschl, 2008: 123). Hirschl identifies six situations that typically meet the distinction. The first four involve judicial review of key state activities or government decisions, including election outcomes (e.g. *Bush v. Gore*), macroeconomic policies, national security policies, or regime changes (e.g. the Pakistani Supreme Court’s legitimation of the country’s 1999 coup). The final two occur when the courts are involved in restorative justice initiatives (e.g. judicial sanction for South Africa’s Truth and Reconciliation Commission), or deciding “fundamental questions of formative collective identity, nation-building processes and struggles over the very definition – or *raison d’être* – of the polity as such” (2008: 123-30). Within Canada, an example of the last category can be seen in the Supreme Court’s judgement in the *Reference re Secession of Quebec*, in which the court determined the conditions under which the province of Quebec could separate from Canada (Hirschl, 2008: 128).<sup>2</sup>

The judicialization of politics is generally viewed as a comparatively recent development. Ferejohn (2002: 66) describes how “Since World War II, there has been a profound shift in power away from legislatures towards courts and other legal institutions around the world,” a claim echoed by Vallinder (1994: 94). Two explanations are usually provided for this development. First, the rise of judicialization is typically linked to the global post-war trend of countries abandoning the concept of parliamentary sovereignty, under which any measure passed by parliament is considered to be legal, and adopting a system of constitutional supremacy, in which a constitution empowers the country’s judiciary to review legislation and government

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<sup>2</sup> The historical revisionism involved in the Court’s claim that the respect for minority rights is a foundation of the constitution will become clear as the paper progresses.

actions to ensure that they respect the principles contained in a constitutionally entrenched bill of rights (Hirschl, 2004: 1-2; 31-2). Canada became part of this international trend in 1982 when it amended its constitution to adopt the Charter of Rights and Freedoms, which included the power of judicial review (Epp, 1998: 161-2).

This move towards constitutional supremacy is seen to have facilitated the judicialization of politics in three ways. First, judicial review has given the courts, including those in Canada, the ultimate power to determine the legitimacy of all political decisions and policy choices. While Ferejohn points out that court decisions on such matters are “never expressed in partisan terms” he also stresses that these decisions are “nonetheless political,” since the courts must ultimately choose “one rule or interpretation over another” (2002: 52). Second, the rise of judicial review has also brought judicial discourse into politics as governments attempt to anticipate judicial reactions and structure new legislation in a manner that is likely to survive judicial review (Ferejohn, 2002: 42). Third, the presence of entrenched bills of rights and a judiciary charged with enforcing them is believed to have caused some social groups to bypass the political system and bring their claims directly to the courts in the hope of achieving legislative or policy changes that would be much more difficult to obtain through conventional politics (Morton and Knopff, 2000: 25). Such direct appeals are seen to further involve the judiciary in the process of political decision-making.

However, this focus on the rise of constitutional supremacy cannot explain cases such as Israel where judicialization has taken place in the absence of formal provisions for judicial review (Morton and Knopff, 2000: 24). Epp contends that that the judicialization of politics does not result from the emergence of an entrenched bill of rights or judicial review, but rather the development of a “support structure for legal mobilization” that enables civil society groups to mount prolonged campaigns to obtain policy and legislative change through the courts (1998: 11-12). This support structure is seen to consist of three key components: formal organizations advocating for rights; skilled rights advocacy lawyers; and financial support for the mounting of cases (Epp, 1998: 17-19). While not denying that a receptive judiciary and entrenched rights can facilitate efforts to obtain policy change through the courts (1998: 5), Epp contends that these factors are insufficient to cause the widespread judicialization since judges can only intervene if they have a significant number of appropriate cases to rule on. Since most individuals lack both the resources for sustained legal challenges and knowledge of legal strategy, it is unlikely that substantial judicial involvement in political decision making could occur without a support structure for legal mobilization in place.

Epp applied his theory to Canada and found the number of statutes struck down by the Supreme Court increased markedly after 1965, with the bulk of the increase occurring in the pre-Charter period (1998: 172-3). He also found that the number of third-party interveners in cases before the Supreme Court, which is seen to indicate the extent to which a court is politicized, also increased from 1965 onwards, again before the passage of the Charter (1998: 175-6). Turning to civil society, Epp found that a number of rights advocacy groups, such as the Canadian Civil Liberties Association, had emerged in the 1960s and begun actively intervening in the courts in the 1970s (1998: 181-2). Ultimately, Epp concluded that the Supreme Court’s involvement in Canadian politics had begun well before the adoption of the Charter in 1982 as the result of increased pressure from organized legal advocacy groups.

While constitutional supremacy and the development of a support structure for legal mobilization are seen to explain why judicialization has emerged in the post-war era, several other factors have been identified as contributing to variations in the level of judicialization found in different jurisdictions around the world. In terms of institutions, Hirschl argues that judicialization is facilitated by the presence of an entrenched bill of rights; the ability of governments to refer legislation or other measures to the courts for consideration; the decentralization of constitutional review to lower courts; and liberal rules for standing before the courts (2008: 129-134). Similarly, Ferejohn contends that the judicialization of politics will be greater when political power is fragmented among different actors, as in federal systems (2002: 55-58). As for actor-related factors, Hirschl notes that politicians may seek to involve the courts in policy-making to increase the legitimacy of a certain policy choice or to deflect potential blame (2008: 135-6). He also points out that citizens who lack confidence in government institutions may be more likely to engage in the judicialization of politics out of the desire to reduce the power of the state. As could be expected, Epp stresses that judicialization depends on the presence of an effective support structure of activist organizations (1998: 19).

The final group of actors seen to have the potential to facilitate judicialization are the judges themselves. Those studying judicialization of politics stress that even when judges are able to preside over political disputes, the actual level of judicialization “depends to a large extent upon judicial willingness to engage in public policy-making” (2008: 132). In this regard, judges can be seen as political actors whose behaviour is shaped by a range of factors, including “adherence to national meta-narratives, responsiveness to public opinion, personal ideological preferences,... prevalent attitudes within the legal profession, or strategic considerations vis-a-vis other national decision making bodies” (Hirschl, 2008: 133). The relative impact of these forces will change with the situation, such that the choices made by judges can be seen as “a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do” (Gibson, 1983 quoted in Segal, 2008: 19). Thus a judge who opposes a policy under review may still rule to uphold it if he or she thinks that the policy has very strong public support, or that the government would ignore a verdict striking it down.

This section has illustrated that the judicialization of politics is seen to be a recent development, both in Canada and globally. It is also seen to be the result of one of two recent phenomena: the spread of constitutional supremacy or the emergence of a support structure for legal mobilization. With this framework established, the following section lays out the details of the various court cases that sought to challenge discriminatory legislation targeting persons of Asian descent.

### **3.0 Efforts by Asian Canadians to overturn discriminatory legislation**

#### **3.1 Introduction**

From the 1870s until the late 1940s numerous pieces of legislation were passed in Canada both to prevent the immigration of Asian persons and to limit the economic and political rights of those who did arrive. While such measures were adopted both federally and provincially, the majority appear to have been passed by the British Columbia (BC) legislature, the province where Canada’s Asian community was initially concentrated (Walker, 1997: 57). Rather than

accept these laws, Asian Canadians repeatedly fought the measures in the courts, both individually and through collective action. Drawing heavily from the work of McLaren (1991), the next section describes five successful cases between 1878 and 1888 in which provincial courts in BC not only struck down the measures in question, but highlighted their discriminatory nature. However, these victories did not continue. The following section outlines the events surrounding the regulation of Chinese workers in BC coal mines, which witnessed the provincial courts rule in favour of racist measures. These provincial rulings were overturned on appeal to the Judicial Committee of the Privy Council (JCPC). Yet the JCPC itself upheld the disenfranchisement of Japanese Canadians in *Cunningham v. Tomey Homma*, which is discussed in the third subsection. The final section examines *Quong Wing v. R.* which saw the further erosion of Asian Canadians' economic rights.

### 3.2 Initial success in BC courts

The first significant Asian immigration to Canada began with the arrival of Chinese migrants during the 1850s gold-rush on Vancouver Island (Ryder, 1991: 645). This arrival set off a growing struggle within BC's elite between what Grove and Lamberston refer to as the "exclusionists" and the "exploiters" (1994: 12-3). The former group wanted to exclude Asians from the province based on general racism and the belief that they suppressed the wages of white workers. The latter group saw Asians as a valuable source of low-cost labour that helped to reduce wage demands from white workers. Both camps were represented in the legislature.

In 1872, during the legislature's first session following BC's admission to Canada, a law was passed to disenfranchise all Chinese persons, including those who became British citizens (Walker, 1997: 70). The *Chinese Taxation Act*, which required all Chinese persons in BC to pay a quarterly fee of \$10, was passed in 1878 (McLaren, 1991: 111-2). This law was challenged that year in *Tai Sing v. Maguire* on the grounds that the law was beyond the powers of the province (Walker, 1997: 72). The BC Supreme Court agreed with Mr. Sing, finding the Act *ultra vires* based on ss. 91 and 132 of the *British North America (BNA) Act*, which, respectively, gives the federal parliament full jurisdiction over "naturalization and aliens" and exclusive authority to implement international treaties (the British government had a treaty with China allowing its citizens free movement in the Empire) (SCBC, *Tai Sing v. Maguire*, 1878: 104). Judge Gray also highlighted the legislation's discriminatory nature, noting that "From an examination of the enacting clauses, it is plain [the Act] was not intended to collect revenue, but to drive the Chinese from the country" (SCBC, *Tai Sing v. Maguire*, 1878: 112). He further rebuked the legislature for its passage, writing "Social ostracism the Local Legislature has no power to enforce. The Act has over-reached itself."

More attempts to restrict immigration came in the 1880s when many Chinese migrants arrived to work on the construction of the national railway (Walker, 1997: 57). Chinese workers were particularly sought after since they were paid substantially less than white labourers (Walker, 1997: 61-4). In 1884 the BC legislature passed the *Chinese Regulations Act* which imposed an annual license fee of \$10 on all Chinese persons in the province (Walker, 1997: 73). The Act was challenged in court in *R. v. Wing Chong*, where it was found to be *ultra vires* the province's authority (McLaren, 2005: 97). Moreover, Judge Crease further stressed the discriminatory nature of the Act, arguing that it introduced "unheard of provisions" and warning

that “if such a law can be tolerated against Chinese, the precedent is set, and in time of any popular outcry can easily be acted on for putting any other foreigners or even special classes among ourselves... equally under the same law” (SCBC. *R. v. Wing Chong*, 1885: 162-3). Subsequent attempts by the BC legislature to ban Chinese immigration in 1884 and 1885 were disallowed by the federal government under s. 90 of the *BNA Act* as being *ultra vires* the province’s authority (Ryder 1991: 641-54).

Asian Canadians were also initially successful in challenging limits on their economic freedom. In *R. v. Gold Commissioner of Victoria District*, 1886, the court drew on *R. v. Wing Chong* to strike down as *ultra vires* a section of the *Chinese Regulation Act, 1884* that had required Chinese persons to pay an additional \$10 fee to acquire a miner’s certificate. As in that case, Justice McCreight stressed that the singling out of Chinese miners to pay an additional fee was “a lawless extraction not within the province of free governments” (BCDC, *R. v. Gold Commissioner of Victoria District*, 1886: 262). This denunciation of the provincial government was even more explicit in *R. v. Mee Wah*, which contested the laundry business license fee of \$75 imposed under section 11 of BC’s *Municipal Amendment Act, 1885* (McLaren, 1991: 116). In addition to finding that the taxation of laundries was likely outside of provincial jurisdiction under s. 92 of the *BNA Act*, Justice Begbie ruled s. 11 of the *Municipal Amendment Act* was invalid since it was not enacted for the “purpose of raising revenue, but as a restriction on the Chinese” (VCC, *R. v. Mee Wah*, 1886: 403).

Begbie also presided over the 1888 case of *R. v. Corporation of Victoria*, which was launched by several plaintiffs after the City ordered its staff not to issue licenses to Chinese pawnbrokers. The city had contended the province could prevent certain “nationalities or individuals” from receiving such licenses and had delegated such authority to the City Council (SCBC, *R. v. Corporation of Victoria*, 1888: 331). However, Begbie pointed out that the verdicts in *Tai Sing*, *Wing Chong*, and *Mee Wah* had all found that the province had no such power to discriminate against certain nationalities, and that no appeal had ever been launched against these cases. He further found that the provincial *Municipal Act* gave the city no discretion with which to refuse to issue a license and asserted that “Prima facie, every person living under the protection of British law has a right at once to exercise his industry and ability in any trade or calling he may select” (SCBC, *R. v. Corporation of Victoria*, 1888: 332). Finally, as an aside Begbie noted that “Victoria does not possess a monopoly on race jealousy,” with similar discriminatory measures having been enacted against Chinese merchants in the French colony of Cayenne. However, those regulations had been overturned by courts in Paris “as being infringements at once of personal liberty, and of the equality of all men before the law.”

Together this case and the previous four demonstrate that the question of the rights of persons of Chinese ancestry was repeatedly before the courts in the late 1800s. Moreover, the judges involved were not only willing to combat the will of the legislature or municipal council, but also to highlight the specific discriminatory intent of their actions.

### 3.3 *The regulation of Chinese workers in BC coal mines*

Despite these initial successes, efforts to defend the rights of Asians in Canada soon faced a series of setbacks. Notwithstanding the verdicts in *Tai Sing* and *Wing Chong*, and its

disallowance of two subsequent attempts by BC to ban Chinese immigration, in 1885 the federal government passed its own *Chinese Immigration Act* which instituted a \$50 “head tax” on all Chinese immigrants (Kelley and Trebilcock, 1998: 97). This change resulted from completion of the Canadian Pacific Railway, which was seen to reduce the need for low-cost labour. The federal *Electoral Franchise Act, 1885* also disenfranchised all Chinese persons, including those born in Canada and naturalized citizens (Kelley and Trebilcock, 1998: 97). Prime Minister Macdonald justified the Act on the grounds that Chinese persons were “sojourners” who would not stay in Canada, and who had “no British instincts or British feelings or aspirations and therefore ought not to vote” (Hansard 4 May 1885, quoted in Walker, 1997: 70).

However, even with these federal measures in place, the “exclusionists” in the BC legislature sought to impose still further limits on Asians in the province. Between 1884 and 1899 the legislature passed at least 18 Acts that restricted the economic opportunities available to Asians. These included measures preventing them from owning crown land, working in certain professions or being employed by companies providing public works (SCBC, *Re: The Coal Mines... Act, 1903*, 1904: 422-6). Several statutes incorporating private companies also had clauses added to prevent them from employing Chinese workers (McLaren, 2005: 91).

At first the “exploiters” were in the legislature were able to resist the efforts to prevent Chinese persons from working in coal mines.<sup>3</sup> But when “coal baron” and member of the legislative assembly (MLA) Robert Dunsmuir died in 1899, his elected successor Andrew Haslam was much more sympathetic to the exclusionist cause (Grove and Lambertson, 1994: 11; 17). In 1890 following a petition by the Miners’ and Mine Labourers’ Protective Association, which represented white workers, Haslam introduced *The Coal Mines Regulation Amendment Act* (CMRAA) which added “Chinamen” alongside women and children as those prohibited from working underground in coal mines. The move was justified on grounds of worker safety. However, the CMRA initially proved unenforceable as no penalty was prescribed (Grove and Lambertson, 1994: 19).

The exploiters, led by Robert Dunsmuir’s son James, regrouped and for the next several years held off further legislative action to add a penalty clause. The situation began to shift following the 1894 election, which brought more exclusionists into the legislature. In 1896 the MLA William Walkem asked the government to submit a reference to the Supreme Court of BC to determine whether the CMRAA was constitutional (Grove and Lambertson, 1994: 23; Walker, 1997: 74-5). The court replied that the law was *intra vires* the province’s authority since “the object of the Act... is to regulate the workings of coal mines, and not to define the rights or disabilities of aliens” (SCBC, *Re The Coal Mines Regulation Amendment Act, 1890*, 1896: 316). This change from past rulings that supported the rights of Asian Canadians reflected the views of new court member who were less sympathetic to issues of discrimination (1991: 145 note 135). Key among them was Montague Drake, a former exclusionist MLA, and George Walkem, who was both the brother of MLA William Walkem and also a former premier whose government had passed discriminatory legislation (Grove and Lambertson, 1994: 23). James Dunsmuir subsequently attempted to appeal the reference verdict in *Union Colliery Company v. The*

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<sup>3</sup> See Grove and Lambertson, 1994 for an excellent account of the political developments leading up to the *Union Colliery* case.

*Attorney General of BC, 1897*, but was denied by the federal court on the grounds that it had no jurisdiction to overturn a reference (Grove and Lambertson, 1994: 25).

While supporting the exclusionist cause, the court's ruling that the CMRAA was *intra vires* did not change the lack of penalty in the Act. This challenge was overcome when a new clause was covertly added to *The Coal Mines Regulations Act* during the drafting of the revised statutes of British Columbia (Grove and Lambertson, 1994: 24). The drafting was undertaken by a commission that included Justices Walkem and Drake, and the new measure was ultimately passed in May of 1897. Early in 1898 the BC government began enforcing the CMRAA and by June had laid 11 charges against Frank Little, manager of the Dunsmuir-owned Union Colliery. Yet rather than fight the charges directly, John Bryden, who was not only an MLA, but also a shareholder of Union Colliery and the brother-in-law of James Dunsmuir, asked the Supreme Court of BC for an injunction to force the company to stop violating the CMRAA (Walker, 1997: 75). This action was part of a deliberate strategy to create the opportunity to have the law overturned (Grove and Lambertson, 1994: 26). Given this threat, the BC government applied to be an intervener in support of the legislation (Walker, 1997:75).

In the case, known as *Union Colliery Co. v. Bryden*, the company posited that the CMRAA unjustly interfered with the rights of aliens by preventing Chinese persons from earning a living "for no other reason than that of their origin" (581). It also pointed out that several other BC laws restricting Chinese immigration had already been ruled *ultra vires* or disallowed by the federal government. The province defended the Act on the grounds that many of the Chinese persons employed in the mine were not aliens but naturalized British citizens, reducing the conflict with federal jurisdiction (JCPC, *Union Colliery Co. v. Bryden*, 1899: 582). It also contended that employment regulations fell within provincial jurisdiction over "property and civil rights." Given the findings of the reference case, the Supreme Court of BC unsurprisingly found that the measure fell within provincial jurisdiction.

The case was ultimately appealed to the Judicial Committee of the Privy Council (JCPC), which overturned the decision, ruling that the Act's prohibition on Chinese miners was *ultra vires* since it had no effect other than to limit the rights of Chinese persons who are aliens or naturalized citizens, and so interfered with the federal parliament's authority over immigration and naturalization (*Union Colliery Co. v. Bryden*, 1899: 587). In particular, the JCPC noted that the power of naturalization includes "the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized" (586). In 1903, the BC government attempted to reinstate the prohibition against Chinese miners, but in a reference case the BC Supreme Court found it to be *ultra vires* based on the precedent from *Union Colliery (Re: The Coal Mines Regulations Act and Amendment Act, 1903, 1904)*. As Grove and Lambertson describe, while the exploitationists "had lost [their] ability to dominate the British Columbia legislature, the shareholders of Union Colliery had retained their right to exploit cheap Asian labour" (1994: 31).

### 3.4 *The case of Cunningham v. Tomey Homma*

While obtained by a resource firm intent on exploiting low-cost Asian labour, the verdict in *Union Colliery Co. v. Bryden* initially appeared to offer hope for ending other discrimination

against Asian Canadians. This included persons of Japanese descent, who had increasingly become the target of the exclusionists as restrictions on Chinese workers led some employers to turn to Japanese migrants instead (Gove and Lambertson, 1994: 21). In 1900, Tomey Homma, a naturalized Japanese immigrant, filed suit against the Vancouver Collector of Votes (Mr. Cunningham) after Mr. Homma was unable to add his name to the register of electors (Walker, 1997:76). Since 1895, BC's *Provincial Elections Act* had prevented citizens of Japanese descent from registering to vote at the provincial level, a limitation that also disenfranchised them at the federal level since the ability to vote in the latter was based on the former (Walker, 1997: 25). Importantly, Mr. Homma's action was a test case for BC's Japanese community, which respected his leadership and sought to avoid the expense of multiple lawsuits (Geiger-Adams, 2003: 2). When the case was heard, Mr. Homma's attorney argued that the precedent from *Union Colliery* should prohibit the province from denying naturalized British subjects the same rights as those who were British born (SCBC, *Re the Provincial Elections Act...*, 1900: 369). The Judge agreed and struck down the law, as did the full BC Supreme Court when the case was appealed (Walker, 1997: 77).

However, in 1902 the BC government appealed the case to the JCPC. It contended that s. 91 of the *BNA Act* only gave the federal government authority over the "mode in which naturalization is to be conferred, not the rights which may or may not follow according to the electoral law of the district" (JCPC, *Cunningham v. Tomey Homma*, 1902: 154). Homma relied on the argument that the *Provincial Elections Act* was *ultra vires* for treading on federal jurisdiction over naturalization. In its judgment, the JCPC found that the Act did not necessarily have implications on naturalization since its restrictions applied to all persons of Japanese race, regardless of their citizenship (156). Moreover, it contended that the term "political rights" used in the *Canadian Naturalization Act* was too broad and could not be seen to include the automatic right to vote in a province. It also noted that there was historical precedent in Britain of denying persons the right to vote based on a certain trait, such as their religion, without revoking their citizenship. Based on this line of reasoning, the JCPC agreed with BC that while the federal government had full jurisdiction over the granting of naturalization, it did not control the "consequences" or "privileges attached to it" (157). To reconcile this verdict with *Union Colliery*, the JCPC stressed that its finding in that case was based on the fact that the *Coal Mines Act* sought to "deny the Chinese... of the ordinary rights of the inhabitants of British Columbia" and to drive them from the province by denying them the ability to earn a living (157).

It has been widely noted that the judgment in *Cunningham* appears to fully contradict that from *Union Colliery*, where just four years earlier the JCPC found that the federal government had "exclusive authority" over the rights of naturalized persons. In their study of the history of Canadian immigration policy Kelley and Trebilcock went so far as to declare that "the two cases are impossible to reconcile" and that both judgments are generally "unpersuasive" in their reasoning (1998: 142).

### 3.4 *The case of Quong Wing v. R*

In 1912, the Saskatchewan legislature passed *An Act to Prevent the Employment of Female Labour in Certain Capacities*, which prohibited "white women" from being employed in any business owned or managed by an "Oriental person" (Backhouse, 1999: 136). The Act

officially sought to protect white women from moral corruption by Asian employers, who were seen as being likely to lead them into drug use and prostitution (Walker, 1997:85). However, it also reduced the competitiveness of Chinese owned businesses since women could be paid less than men and since immigration policies prevented Chinese women from coming to Canada (Backhouse, 1999: 138-9). Reflecting this dual impact, the *Female Labour Act* was not only supported by the Saskatchewan Moral Reform Council, but also by the associations representing white businesses and workers (Walker, 1997: 85-6). Notably, the province had disenfranchised its Chinese residents in 1908 (Walker, 1997: 70).

Saskatchewan's Chinese community met shortly after the Act's passage and decided to challenge the measure in a test case (Walker, 1997: 70). Within two months of the Bill's passage, charges of employing white women were filed against Quong Wing, a restaurateur, and Quong Sing, who owned both a restaurant and a rooming house (Walker, 1997: 90-91). Both were naturalized British citizens. At their trial before a magistrate, the lawyer for the pair challenged the use of the term "Chinese" within the *Female Labour Act* as being too vague failing to specify whether it indicated race, origin or nationality (Backhouse, 1999: 147-8). He also cast doubt on whether the employees were white (Walker, 1997: 96). However, the magistrate confirmed that both men were in fact Chinese and found them guilty.

The verdict was appealed to the Saskatchewan Supreme Court on a number of grounds, including whether the law applied to British citizens and was *ultra vires* the province's authority (Walker, 1997: 97-8). On the latter point, Mr. Wing's lawyer argued that the *Female Labour Act* interfered with the federal naturalization power, meaning that the precedent from *Union Colliery* should be applied (SSC, *R. v. Quong Wing*, 1913: 658). Unsurprisingly, the Saskatchewan government pointed to *Cunningham v. Tomey Homma* to support its case that the Act was valid. The court sided with the government, finding that while the *Female Labour Act* did impact on the ability of Chinese persons to operate their businesses, the Act's aim was to protect white women and it would not result in Chinese persons being driven from the country (SSC, *R. v. Quong Wing*, 1913: 664-6). It therefore applied the precedent from *Cunningham* and found the Act to be within provincial jurisdiction (Walker, 1997: 98-9). However, Chief Justice Haultain registered a dissenting opinion, arguing that the Act was aimed at "denying the Chinese, whether naturalized or not, of the ordinary rights of the inhabitants of Saskatchewan" (SSC, *R.v. Quong Wing*, 1913: 660). As such, he felt that the *Union Colliery* precedent should apply and that the Act should be declared *ultra vires*.

Mr. Wing appealed to the Supreme Court of Canada, a move that was supported by the Chinese Consolidated Benevolent Association (CCBA). The CCBA had been founded in BC in 1884 to help the Chinese community to better protect its interests (Walker, 1997: 89). Over time it became the primary organization defending Chinese Canadians against discrimination not only in BC, but across Canada. The CCBA's nation-wide appeal for Mr. Wing raised \$1,175 (Walker, 1997: 100). Nevertheless the initiative proved to be unsuccessful, with the Court finding that the *Female Labour Act* did not interfere with the naturalization of Chinese persons since there is no right to employ white women and the law did not prevent Chinese persons from operating a business (Walker, 1997: 102-3). It also stressed that the Act did not distinguish between Chinese people based on their immigration status. Consequently, the Court ruled that the Act dealt solely with the protection of women and workers, which were within provincial jurisdiction over civil

and property rights, and therefore applied the precedent from *Cummingham*, not *Union Colliery* (SCC, *Quong Wing v. R.*, 1913).

However, the Supreme Court verdict again came with a dissenting opinion, with Judge Iddington arguing that the Act's true purpose was to "curtail or restrict the rights of Chinamen" and that the law should not be applied to Wing since he was a naturalized British citizen (SCC, *Quong Wing v. R.*, 1913). While accepting that the political rights of naturalized citizens differed based on provincial laws, he challenged whether the "other rights" conferred by naturalization could be limited by provinces on the basis of class or race. As he stated:

It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British mode of thinking and acting in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality is not to be taken away unless and until forfeited for causes which civilized men recognize as valid (SCC, *Quong Wing v. R.*, 1913).

Iddington further suggested that the federal government could veto the Act in order to "insist upon the preservation of this equality of freedom and opportunity" (SCC, *Quong Wing v. R.*, 1913). No such veto occurred. Instead, measures restricting the employment of white women by Chinese persons were passed in Ontario and BC (Walker, 1997: 55).

#### **4.0 Efforts to fight legal discrimination against Asian Canadians as a case of the judicialization of politics**

Taken together, the cases described above clearly demonstrate that the judicialization of politics was occurring in Canada between 1878 and 1913. Policy questions surrounding the rights of Asian Canadians were not only brought before the courts, but were actively decided by the judges involved. As described by McLaren, each of the judges in the initial five cases "went further than deciding the straight constitutional issue, and examined and criticized the discriminatory character of the enactment in question." (1991: 108). Furthermore, these rulings were motivated by the judges' desire to do "what they thought was right by law – affording equal protection of the law and equal treatment by the law to all who lived under British rule" (McLaren, 1991: 108). Based on these actions, McLaren concludes that "Patently, the Court was out to trim the wings of the provincial legislature on the race issue because of the tendency of the latter to cater to popular extremism" against Asian Canadians (1991: 129).

Similarly, Grove and Lambertson (1994) stress that the courts were also deeply involved in making policies regarding the employment of Chinese workers in BC's coal mines. Despite being passed in 1890, it was not until 1896 that the BC legislature referred the *CMRAA* to the province's Supreme Court. This delay coincided with personnel changes on the court so that "exclusionist" justices were in control by the time the case was heard. The court's approval of the Act's discriminatory measures paved the way for its enforcement following the covert insertion of the penalty clause, a change that itself reflected the declining legislative power of the "exploitationist" camp. Bryden was a sitting MLA when he launched the *Union Colliery* case in

order to challenge the *CMRAA*, a move that he undertook in collusion with James Dunsmuir, the *Colliery's* owner, who was also an MLA. As such, Grove and Lambertson contend that *Union Colliery* should not be seen as an independent legal action but rather “the continuation of political warfare by other means” (1994: 5).

This judicialization of Asian rights (and the matching politicalization of the judiciary), did not stop with the provincial courts, but also continued at the JCPC. Although one could argue that its verdict in *Union Colliery* was based on an impartial reading of the constitution, this characterization is only possible if one ignores the remarkable inconsistencies between the JCPC's judgment in that case as its decision regarding voting rights in *Cunningham*. Instead, given the strong language that JCPC used to defend the federal government's authority over naturalization and its consequences in *Union Colliery*, its nearly complete reversal of that decision in *Cunningham* is difficult to explain without analyzing what political motives may have been behind its behavior.

Some guidance can be found in examining the impact of the decisions. While the *Union Colliery* verdict increased the economic freedoms of Asian Canadians, the judgment's primary beneficiary was actually the mining firm itself, which secured the ability to employ low-wage Asian workers. In contrast, defending federal authority in *Cunningham* would only have benefitted the Asian community itself. These outcomes closely reflect the views of federal government, which saw Asian workers as essential to the country's initial economic development, but did not view them as permanent residents. Between 1878 and 1921 the federal government disallowed twenty-two pieces of BC legislation that would have prevented Asians from entering or working in the province (Ryder, 1991: 620). There is also some debate that the federal government would have disallowed the *CMRAA*, but was not notified of its passage (Grove and Lambertson, 1994: 17-18). Yet as mentioned above, the federal government had already disenfranchised Chinese Canadians on the grounds that they lacked “British instincts.” Furthermore, “whenever this federal [disallowance] power was exercised to protect ‘the traditional rights and liberties of British subjects,’ it was the rights of the white subjects that were upheld... Any protection that the Chinese derived from Ottawa was purely incidental to its pursuit of some other goal” (Grove and Lambertson, 1994: 15). The JCPC's decision to support the disenfranchisement of Japanese Canadians therefore suggests that its original *Union Colliery* verdict was primarily aimed at advancing the interests of white-owned businesses, not protecting the rights of Asian Canadians (Kelley and Trebilcock, 1998: 141-2).

Compared with the JCPC, the Supreme Courts of Saskatchewan and Canada which heard the case of *Quong Wing* can be partially excused for upholding discrimination against Asian Canadians since they were bound to follow the rather arbitrary precedent set out in *Cunningham*. However, the dissenting opinions from Justices Haultain and Iddington indicate that the courts could have reached a more favourable decision had they wished to apply the *Union Colliery* precedent instead. Moreover, Justice Iddington's reference to “the highly prized gifts of equal freedom and equal opportunity before the law” suggests a willingness to base his judgment on unwritten constitutional principles, a possibility that would become reality in later court rulings.

Ultimately, it can be safely said that the issue of rights for persons of Asian descent was judicialized in the period from 1878 to 1913. The courts served not only as the venue for the

discussions, but were active in making policy decisions on both sides of the issue. As Ryder succinctly argues, the final outcome of this process was that:

The judiciary and the Dominion executive fashioned a series of constitutional doctrines that had the effect of preventing BC from interfering with the rights of Japanese and Chinese Canadians to enter the province and work in low paying, low status jobs. Other forms of discrimination against Asians pursued by BC did not concern the Dominion government or the courts, or led to sporadic intervention at best (1991: 676).

## 5.0 Was it mega-political?

As discussed above, the distinction between politics and mega-politics rests on the significance of the issue being addressed. Seen from the perspective of Canada as a whole, it could be argued that the rights of persons of Asian origin was a largely insignificant issue given the community's relatively small size at the time. However, focusing only on the number of persons affected ignores the symbolic significance of the court decisions examined above and what they stated about the "fundamental questions of formative collective identity, nation-building processes and struggles over the very definition – or *raison d'être* – of the polity," which Hirschl has identified as one of the key mega-political questions now being addressed by the courts.

The large number of anti-Asian measures passed during the period would seem to make it clear that the majority of Canadian politicians at the time did not consider Asian Canadians to have a permanent place within Canadian society. Instead they were viewed only as sources of cheap labour to be used when required. This view was most plainly expressed in Prime Minister Macdonald's comments about Chinese Canadians being "sojourners" without "British Instincts." A study of the legislation challenged in the cases examined above is also instructive. Based on the measures they contain, it would appear that persons of Asian descent were held to be so undesirable that they should be denied the right to work and be excluded completely from the democratic process. Moreover, Asian Canadians were regarded as such a threat to public morality that women needed to be forbidden from working in their employ. If one accepts the premise that the law is a reflection of the values of the community, then it appears that during this period persons of Asian descent were viewed at best as second-class citizens and at worst as a social problem needing to be fixed. As once again eloquently stated by Ryder:

Both federal and provincial politicians subscribed to a racist ideology that stressed the inherent, natural superiority of European (white) people over non-European people. Legislation ensured that elected officials were exclusively white male British subjects who were accountable to an electorate composed, equally exclusively, of their own gender and race (1991: 621).

By challenging discriminatory laws on behalf of their communities, Tomey Homma and Quong Wing, both of whom were naturalized citizens, were not only seeking to gain the immediate benefits of the right to vote and to continue employing white women, but also to be

recognized as equal members of Canadian society. By the same token, in upholding these discriminatory laws the courts gave official sanction to the idea that Canadians of Asian origin were second-class citizens who possessed fewer rights than whites, no matter whether they were naturalized or even native-born. Importantly, in his dissenting opinion in *Quong Wing*, Justice Iddington noted that the Saskatchewan *Female Labour Act* would in fact lead to racially differentiated citizenship (McLaren, 2005: 103). He then asked that if the legislature could restrict the rights of naturalized Canadians to employ white women,

is it competent for a legislature to create a system of slavery and, above all, such a system as applied to naturalized British subjects? This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves (SCC, *Quong Wing v. R.*, 1913).

The use of the courts to make policies regarding the rights of Asian Canadians should be considered as a case of the judicialization of mega-politics since the decisions made ultimately determined whether Canada's collective identity and the full rights of citizenship extended to persons of Asian ancestry.

## **6.0 What facilitated the judicialization of anti-discrimination efforts?**

The judicialization of the rights of Asian Canadians appears to have resulted from many of the same factors that are identified in the modern literature. On the institutional side, the applicants benefitted from the fragmentation of power within the Canadian political system. While there was no entrenched bill of rights, the presence of a written constitution with an explicit division of powers between the different levels of government provided the plaintiffs with grounds on which to challenge the various measures. These actions were also facilitated by the decentralized nature of judicial review within the Canadian legal system, which permits all courts to rule on the constitutional validity of a law. Had the rules regarding the launching of constitutional challenges been more stringent, or judicial review limited to higher courts, it is unclear whether any of the cases would have occurred, except perhaps *Union Colliery*.

Besides these institutional factors, both *Cunningham* and *Quong Wing* were facilitated by the presence of a support structure for legal mobilization consisting at the very least of financial support. Given the expense involved with protracted appeals, it is unlikely that either of the cases would have proceeded as far as they did had Mistert Homma and Wing been acting on their own. Moreover, while more research is needed to determine if the CCBA provided legal strategy as well as funding in *Quong Wing*, it is significant that there was a pan-Canadian organization defending the Chinese community against legal discrimination nearly 100 years ago. It is also notable that both *Cunningham* and *Quong Wing* were launched as test cases, suggesting that a deliberate legal strategy was being employed in both instances. Some collaboration and mutual support may also have been present amongst the pawn brokers who launched *R. v. Corporation of Victoria*. The complex strategy employed by the Dunsmuir camp in *Union Colliery* and their other legal actions demonstrated the sophistication that can develop from repeat engagements with the courts.

Nevertheless, while the modern literature provides some explanation as to why the political debate over the rights of Asian Canadians was judicialized, it does not offer any mechanisms for analyzing how these cases were affected by the fact that Asian Canadians had been politically disenfranchised at both the federal and provincial levels. Therefore, unlike many of the plaintiffs analysed in the current literature, those in the cases examined here had no ability to influence government policy choices through any other democratic means. However, no Canadian legislature appears to have ever attempted to prevent persons of Asian descent from accessing the judiciary. In this situation of limited, judicialized citizenship, the use of the courts became the only formal way for Asian Canadians' to influence political outcomes and challenge new discriminatory measures. This use of the judicial system to pursue political change was certainly facilitated by the institutional factors identified in the contemporary literature. However, further study of the judicialization of politics will need to examine whether there is a difference in the behaviour of those for whom the courts provide one option for influencing political outcomes, and those from whom it is the only option available.

## **7.0 Conclusion**

Despite the general consensus that the global trend towards the judicialization of politics has emerged only in the post-war era, this paper has demonstrated that such judicialization can in fact be found between 1878 and 1913 in the efforts to fight legislative measures that discriminated against Canadians of Asian origin. The cases studied show a clear example of the courts not only being the site of political conflict, but also political actors in their own right. Moreover, the issues dealt with in these cases, including the definition of Canada's body politic and the rights of minorities, met the threshold of being mega-political. While this judicialization appears to have been facilitated by many of the same factors cited in the contemporary literature, more research is needed to determine if the complete exclusion of Asian Canadians from the democratic process altered their approach to judicial action as compared to groups with at least some access to the political system.

The finding that Asian Canadians' relationship with the state was inherently judicialized also may raise questions for those who argue that the use of courts by minority groups seeking to achieve political change is both new and potentially undemocratic (e.g. Morton and Knopff, 2000). In particular, it would appear that so-called "judicial activism" is not necessarily a new phenomenon and is not always limited to those seeking to expand rights for minorities. It is hoped that further study of the judicialization of mega-politics in Canada prior to 1948 will not only shed light on how disenfranchised groups acted to challenge their exclusion from the body politic, but also produce insights into the ways in which these groups are using the courts today.

**Appendix I: Court cases involving federal or provincial legislation discriminating against persons of Asian descent in Canada, 1878 – 1913**

Year	Case	Court <sup>4</sup>	Issue	Verdict and reasoning	Rights supported?
1878	<i>Tai Sing v. Maguire</i>	SCBC	Nonpayment of a tax as required by BC's <i>Chinese Tax Act, 1878</i>	The Act was <i>ultra vires</i> the province's authority since it was "not intended to collect revenue, but to drive the Chinese from the country, thus interfering" with federal jurisdiction over aliens and trade and commerce as well as British treaties.	Yes
1885	<i>R. v. Wing Chong</i>	SCBC	Failure to have a license as required by the <i>Chinese regulation Act, 1884</i> .	The Act was <i>ultra vires</i> the power of the legislature because 1) it interfered with the rights of aliens; 2) it interfered with the operation of trade and commerce; 3) it violated treaties with China; and 4) it imposed "unequal taxation"	Yes
1886	<i>R. v. Mee Wah</i>	VCC	Operating a public laundry without a license as required by a by-law of the City of Victoria under authority from the <i>BC Municipal Amendment Act, 1885</i> .	The licensing section of the <i>Municipal Act</i> is <i>ultra vires</i> the power of the legislature. Also, the tax does not appear to be " <i>bonna fide</i> " but was created to discriminate against the Chinese.	Yes
1886	<i>R. v. Gold Commissioner of Victoria District</i>	BCDC	Imposition of an extra \$10 fee on Chinese persons applying for a "free miner's certificate" according to sec. 14 of the <i>Chinese Regulation Act, 1884</i> .	Sec. 14 of the Act "was an attempt to impose a differential tax on the Chinese and therefore <i>ultra vires</i> of the Provincial Legislature."	Yes
1888	<i>R. v. Corporation of Victoria</i>	SCBC	Failure to issue a pawnbroker's license to a Chinese person.	Neither the province nor a municipality has the authority to prevent "particular nationalities or individuals of the capacity to take out municipal trade licenses."	Yes
1896	<i>Re The Coal Mines Regulation Amendment Act, 1890</i>	SCBC	The provincial government asked the court to rule whether it had the jurisdiction to pass the Act, which prevented Chinese persons from working underground in a mine.	The Act is does not interfere with the rights of aliens and is instead only a measure to regulate coal mines.	No
1899	<i>Union Colliery Co. v. Bryden</i>	JCPC	Employment of Chinese persons underground in a mine in violation of BC's <i>Coal Mines Regulations Amendment Act, 1890</i> .	The law has no application except to Chinese persons, whether alien or naturalized, and so is <i>ultra vires</i> for infringing on federal jurisdiction.	Yes
1902	<i>Cunningham v. Tomey Homma</i>	JCPC	Validity of sec. 8 of the BC's Provincial Elections Act, 1897 which prohibits persons of Japanese origin, including British citizens by birth or naturalization, from being placed on the register of voters.	The Act is not <i>ultra vires</i> since it applies to all persons of Japanese descent, regardless of their citizenship and therefore does not deal with the rights of aliens or naturalized persons. The Act does not prevent Japanese persons from living and working in BC as was the case in <i>Union Colliery v. Bryden</i> .	No

<sup>4</sup> BCCA = British Columbia Court of Appeal; BCDC = British Columbia Divisional Court; JCPC = Judicial Committee of the Privy Council; SCBC = Supreme Court of British Columbia; SCC = Supreme Court of Canada; SCKB = Saskatchewan Court of Queen's Bench; VCC = Victoria County Court;

### Appendix I continued

Year	Case	Court	Issue	Verdict and reasoning	Rights supported?
1904	<i>Re The Coal Mines Regulations Act and Amendment Act, 1903</i>	SCBC	Validity of sec. 82(34) of BC's <i>Coal Mines Regulations Act, 1903</i> which prohibited Chinese persons from holding positions of authority or from working underground at coal mines.	The clause is <i>ultra vires</i> the provincial legislature based on the precedent established in <i>Union Colliery v. Bryden</i> .	Yes
1913	<i>Quong Wing v. R.</i>	SCC	Employment of white women by Chinese men in violation of a 1912 Saskatchewan law entitled <i>An Act to Prevent the Employment of Female Labour in Certain Capacities</i> .	The Act is not <i>ultra vires</i> since it does not prevent Chinese persons from living in the province. The Act also applies equally to all Chinese persons regardless of their status in Canada. In addition, the protection of women is within provincial jurisdiction.	No

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