# The Stakes of Inclusion: Chinese Canadian Head Tax Redress

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Between 1885 and 1923 Canada imposed a discriminatory head tax on Chinese immigrants.[1] Responding to this historical injustice, on June 22, 2006, the Canadian prime minister, Stephen Harper, apologized to all Chinese Canadians and pledged to implement a material redress program (Harper, 2006). Effective August 29, 2006, Canada's program combines payments to individual head tax payers (or, if the payer is deceased, to their spouses) with funding for educative and commemorative programs. Nevertheless, on February 21, 2007, the National Anti-Racism Council of Canada (NARCC) submitted a report to the UN Committee on the Elimination of All Forms of Racial Discrimination which demanded the expansion of the individual payment element of the redress program to include first generation survivors of deceased head tax payers and their spouses (National Anti-Racism Council of Canada, 2007).

This "more inclusive" claim for redress charges Canada with a rectificatory failure but the normative grounds for inclusive redress differ from those currently accepted by the Canada state. Inclusive redress demands a novel conceptual apparatus extending the ambit of justifiable redress. Interestingly, this novelty may not be broadly recognized. The claim submitted to the UN committee simply asks for more "inclusive" redress, implying the grounds for redress remain unchanged. Secretary for Multiculturalism, Jason Kenney, did not demur when responding that cabinet simply needs to "draw the line somewhere" (Siddiqui, 2007). This study analyzes the current program's intergenerational aspects, compar-

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ing it with both international and domestic precedents, and with the inclusive claim's requirements. I suggest that the call for inclusive redress marks a political *cum* conceptual struggle over both Canada's history and its current moral status, with implications that extend beyond the immediate case (cf. Tully, 1988: 13).[2] In this context, the conflict concerns the conceptual limits of Canada's current redress program, that is, Canada's publicly expressed understanding of a valid redress claim.

The conceptual potential of the inclusive redress claim provides insight into the accepted boundaries of Canada's redress responsibilities. As yet, there have been no rigorous attempts by either the Canadian state or inclusive advocates to provide clear justifications for either the current program's structure or for the more inclusive claim. This study attempts to fill these justificatory gaps through conceptual analysis and, in doing so, highlights how the current program is more restrictive in scope than certain precedents. Interesting in itself, this discussion garners broader significance in the context of further political redress agreements. Just as the current program has been built on previous templates, the demarcations expressed in the current head tax settlement are likely to find future analogues. In essence, the stakes are those of validity—what is acceptable as a valid redress claim.

For reasons both political and normative, past understandings (often embodied in previous settlements) constrain future agreements. However, at the same time, this discursive background offers conceptual resources for more expansive understandings, including possibilities for an inclusive claim with a basis in *dignitary harm*, *inheritance*, and *material harm*.[3] This study examines the potential of these resources and indicates the points at which an inclusive redress claim meets with conceptual resistance. In other words, the study attempts to capture why and how the Chinese Canadian claim for inclusive redress presses for conceptual modification. Large-scale historical redress is a relatively novel and dynamic phenomenon. As Canada considers its response to the claims of other communities (including the Ukrainian, Jewish, Italian, African, and First Nations)[4] who have experienced historical injustice, it is important to consider how the theoretical "framing" of redress, in terms of both claims and responses, imposes limits which may not, in all cases, facilitate just relations.

One final preliminary: rather than addressing specific questions regarding the empirical conditions for a successful redress campaign, the study's argument is analytic.[5] Although its conceptual discussion gives rise to prescriptive implications, these are not pursued. This neglect is deliberate; a key sub-theme is the suggestion that "pure" normative argument only goes so far in these issues. Claims like those for inclusive redress push at the boundaries of what is currently accepted as justifiable, but theoretical development is not the only source of innovation.

**Abstract.** Between 1885 and 1923 Canada imposed a discriminatory head-tax on Chinese immigrants. In 2006 Canada implemented a material redress program intended to resolve this historical injustice, but aspects of this program have been subjected to vigorous criticism by those seeking greater inclusivity. Paying particular attention to the program's intergenerational aspects, this study explores how the current program's conceptualization of a valid redress claim is situated with respect to both its critics and to domestic and international precedents. Recognizing the dynamic potentiality of redress, the study explores aspects of why and how Canada's understandings of historical redress are politically implicated.

**Résumé.** Entre 1885 et 1923 le Canada a imposé un impôt discriminatoire aux immigrés chinois. En 2006, le Canada a mis en oeuvre un programme de réparation afin de redresser cette injustice historique, mais certains aspects de ce programme sont vivement critiqués par les partisans d'une plus grande inclusivité. Se concentrant en particulier sur les aspects intergénérationnels du programme, cette étude analyse la manière dont le programme actuel situe la conceptualisation d'une demande légitime de réparation en fonction à la fois de ses détracteurs et de précédents nationaux et internationaux. Prenant en compte le potentiel dynamique de la réparation, cette étude analyse les implications politiques de la démarche canadienne de redressement historique.

Just as conceptual refinement can impel political action, political action itself can provide the grounds for normative conceptual change.[6]

## Background

Numerous questions of political rectification, both international and domestic, have spurred the development of a significant interdisciplinary discourse.[7] Prominent topics include Germany's post-Holocaust obligations, the 1988 Japanese American settlement and claims for American slavery reparations. This background provides the discursive context for political redress; it supplies the normative and conceptual framework in which the current head tax program and its challenges can be both justified and understood. In this background, the 1988 settlement for Japanese Canadians is particularly influential. Provided by Canada for discriminatory internment, dispossession and expulsion of Japanese Canadians in the context of the Second World War, this agreement served as a template for the Chinese Canadian head tax redress program (O'Neil, 2007).

### *Japanese Canadian Redress*

The Japanese Canadian settlement was forged during the initial phases of the 1988 federal election campaign; when the National Association of Japanese Canadians (NAJC) used the recent American agreement to pressure the incumbent Mulroney government into agreeing to a similar settlement (Kobayashi, 1992; Torpey, 2006: 78–106). On September 22, 1988, Brian Mulroney and the president of the NAJC, Art Miki, signed the relevant *Terms of Agreement* to widespread approval—effectively end-

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ing political discussion of the Japanese Canadian claim. These *Terms* specified a "symbolic" redress settlement consisting in individual payments in the amount of $21,000; $12 million to the Japanese Canadian community for educational, social and cultural activities; $24 million for creating the Canadian Race Relations Foundation; the vacating of relevant unjust convictions; Canadian citizenships for persons of Japanese ancestry who were expelled from Canada or had their citizenship revoked; and $3 million to the NAJC for implementation. In addition to this content, the restrictions found in the final paragraph of the *Terms* are very interesting. Only persons alive on the date of the signing (September 22, 1988) would be entitled to individual payments, the vacating of convictions and citizenship, though the citizenship provisions would also apply to descendants living at that date (Canada. Canadian Heritage. Corporate Review Branch, 1988).

### *Chinese Canadian Redress*

It is now common knowledge that Chinese immigrants played a large role in building the western portion of Canada's trans-national rail line. When its completion ended this justification for importing Chinese labour, the federal government imposed discriminatory conditions on Chinese immigrants. Initially the 1885 *Act to Restrict and Regulate Chinese Immigration into Canada* required $50 for right of entry. In 1901, the government raised the amount to $100 and then to $500 in 1903, two years' wages for an average labourer (James, 2004: 889). Contemporary arguments for imposing the tax were unabashedly racist. Supporting the 1903 rise, Prime Minister Wilfrid Laurier told the House of Commons, "In my opinion there is not much room for the Chinaman in Canada". During its lifetime, the head tax derived about $23 million (unadjusted figures) from approximately 81,000 Chinese immigrants (Dyzenhaus and Moran, 2005: 7). In 1923, the federal government rescinded the head tax policy and replaced it with the *Chinese Immigration Act*—prohibiting nearly all Chinese immigration until 1947.

Not only did the tax burden individual payers and their families financially, racist immigration legislation communicated a status of ethnic undesirability. Arguably, both the racist head tax and the subsequent immigration prohibition created a supportive legislative framework for coercively indentured labour, divided Chinese Canadian families and, as a consequence, inhibited the growth of the indigenous Chinese Canadian community. Moreover, immigration law was only part of the discrimination Chinese Canadians faced.[8] In many ways, the claim for redress demands that Canada reassess and acknowledge a larger history of ongoing racial discrimination, for which the head tax serves as a synecdochical symbolic reference.

Before the 2006 redress announcement, the head tax redress campaign went through several phases (James, 2004; Go, 2005). Originally, advocates targeted Parliament, seeking the support of MPs in the legislature. Meeting with resistance, the campaign shifted to national and international judicial forums. The best-known case, *Mack vs. Canada (Attorney General)*, failed at the Ontario Court of Appeal (2002) and in 2003 was refused appeal to the Supreme Court of Canada. Undeterred, advocates returned to the political arena, and were ultimately, like the Japanese Canadian precedent, beneficiaries of electoral politics. *Mack* had raised awareness of the head tax issue among Chinese Canadians voters in key urban ridings. In the context of the 2006 federal election campaign, advocates used this leverage to push most of the main parties into making pledges supporting redress (Chinese Canadian National Council, 2007b).

The incoming Conservative government announced the current redress program in June 2006. The program pays $20,000 to individuals who meet certain conditions. Eligible applicants for individual payments include head tax payers who paid, or on whose behalf, the tax was paid, who were alive on February 6, 2006, and who apply for the monies with the necessary documentation. If a payer is deceased, the head tax payer's spouse can apply for the payment, if the spouse is alive on February 6. If the qualified applicant (either payer or spouse) dies after making the application, payment will be made to the beneficiary specified on the application form. (Canada. Canadian Heritage, 2006a; Canada. Canadian Heritage, 2006b). As of December 2007 posthumous applications remain inadmissible and, if no beneficiary is specified, payment will not be made to an estate. Data collected in June 2007 indicated that 42 head tax payers and 178 spouses had received individual payments (Chinese Canadian National Council, 2007c). The portion of the program involving individual payments is *ex gratia*, that is, voluntary and non-compensatory, as is clearly indicated on the claim forms and related materials. In addition, Canada is financing a $24 million Community Historical Recognition Program and a $10 million National Historical Recognition Program. These programs will promote awareness of the head tax's effects on Chinese immigrants along with similar discriminatory measures taken against other ethnic groups (Canada. Canadian Heritage, 2006c).

Inclusive redress denies the adequacy of these measures (Chinese Canadian National Council, 2006a, 2006b, 2006c, 2007b). Espousing a principle of "one certificate, one payment" (requiring the rectificatory redemption of every certificate the state issued to confirm head tax payment), inclusive redress demands payments for a further estimated 3000 families on the basis of "a tax being paid," not a basis in extant "head tax payers" (Chinese Canadian National Council, 2007c). Yet the demand for extension of the individual payments to include first generation children is not really a simple "inclusion" of other harmed individ-

uals within Canada's accepted ambit of moral responsibility. Instead, the claim depends upon a quite different conceptualization of the redress claim.

## Dignitary Harm

> The head tax families who were excluded from the June 22 redress announcement continue to press for inclusive redress to restore dignity to all head tax families including those where the head tax payer and spouse have both passed away. (National Anti-Racism Council of Canada, 2007: 31)

NARCC's submission argues that persisting dignitary harm underpins inclusive redress (cf. Chinese Canadian National Council, 2007a). Dignitary harms "treat people as less worthy than the offender, subordinate to the offender. These harms are a kind of 'moral injury' to their status as moral agents" (McGregor, 2006: 444). The inclusive redress claim is therefore a claim by those excluded to be recognized as having equal dignity, to be treated the same as the group from which they were unjustly excluded. Fundamentally, the state's continuing exclusion of first generation survivors of unrequited head tax payers (henceforth "inclusive claimants") engenders its failure to accomplish just redress.

A dignitary claim is apposite: the head tax both constituted and exemplified Canada's subordinating treatment of Chinese Canadian immigrants. However, the June 22 announcement did not exclude inclusive claimants. On that day, Canada apologized to *all* Chinese Canadians. Of course, a merely verbal apology can be insufficient. Plausibly, when speaking of a public entity, restoring dignity to the claimant requires the offender to acknowledge wrongdoing materially. But, there is a good claim that Canada has done that, in the first instance, by offering $20,000 to head tax payers and their surviving spouses. Further, the inclusive character of the apology is cemented by $34 million for recognition programs. Of this, the government dedicated $10 million to "educating all Canadians, in particular youth, about the discrimination and hardship faced by the Chinese and other communities impacted by wartime measures and or immigration restrictions" (Canada. Canadian Heritage, 2006c). The additional $24 million, replacing a previous program, will "offer grant and contribution funding for community projects linked to wartime measures and immigration restrictions" (Treasury Board of Canada, 2006). It is easy to read these programs as good faith attempts to provide the material grounds for the restoration of dignity.[9]

Furthermore, the exclusion argument downplays a larger context of dignity-restoring performances. BC's education curriculum contains material on Chinese Canadian history,[10] including the head tax, and public museums have displays containing relevant content.[11] Throughout the past

decade, Canadian governments have renamed a number of offensively designated geographical features to reflect Chinese Canadian history. For example, in 1998 the Albertan government re-designated Chinaman's Peak in Kananaskis Park as Ha Ling Peak in honour of its 1896 solo climber. Finally, apart from specific apologies,[12] and a significant position in public discourse,[13] the shameful status of Canada's discriminatory history has been emphasized by state representatives in public forums. These include those judges who denied *Mack* and the prime minister in his 2007 Chinese New Year speech (Harper, 2007). With all this dignity-affirmation and the potential for further growth in this area, why is $20,000 to inclusive claimants important to restoring their dignity?

Inclusive claimants have an obvious reply to this line of argument. A failure to receive the monies harms an inclusive claimant's dignity just because *she does not have that to which justice entitles her*. Rectificatory justice concerns relations of respect, wherein redress confirms a resumption of respectful relations (Cane, 2001; Coleman, 2003). Valid redress claims have a basis in a wrongful setback to a person's interests (Feinberg, 1984; Winter, 2006). A redress transfer recognizes the offender's failure to adhere to a morally binding norm and, moreover, reaffirms that norm. This reaffirmation grounds redress: by undoing his wrong, the offender "makes good" on his transgression and recognizes the dignity of the claimant. The obverse of the disrespect accorded by the denial of a person's entitlement is the dignity of its receipt.

On this theory, a redress claim persists if and only if it is true that the appropriate rectification has not occurred. Accepting this theory (the final part of the next section discusses the potential of rejection) leaves the inclusive redress claim with two options. The first choice persists with the claim that $20,000 is necessary to the dignity of inclusive claimants because the state has not provided sufficient redress for past discrimination. So long as the claim stays on the collective level, the reason for failure is likely to be that the current programs are insufficient to achieving inter-community reconciliation. This argument would be difficult to maintain in support of individual payments; it would appear more appropriate to push for greater community-level rectification. The alternative shifts the justification to individual grounds and explores how Canada's denial of inclusive claimants' entitlements entails individual dignitary harm. This option is a substantive theoretical shift because it deploys a different understanding of the claim's "grounding relationship." Rather than claimants suffering wrongful dignitary harm and therefore being entitled to redress, this conceptualization holds that inclusive claimants suffer dignitary harm because they are wrongfully denied their just entitlements.

## Inheriting Harm

The persistence of a valid redress claim depends on a lack of appropriate redress of that claim. In demanding redress on the basis of a tax being paid, inclusive redress holds it is only in cases (and these are a large majority) where no individual payment has been made that the family continues to present an inclusive claim. The claim's limitation to head tax families "possessing" an unrequited tax payment lends support to an understanding of inclusive redress as an inherited right. Until requited, heirs continue to "own" the same right of redress that was originally that of the payer's. Emphasizing the wrong done by the tax payment, this section explores the possibility of inheriting a redress claim.

The possibility of inheriting a right to redress is distinct from the claim, considered in the next section, that other patterns of intergenerational transference, traceable to discriminatory legislation, have generated income inequalities or insufficiencies. Moreover, there is a temptation to criticize any inheritance understanding by targeting the justification of inheritance itself. This study puts this suggestion aside. Inheritance arguments for inclusive redress make the simple and plausible ad hominem demand that Canada act consistently with regard to both property and redress claims. However, the inheritance conceptualization's appeal to consistency depends upon the existence of relevant similarities between inheritance conventions and redress obligations that provide pressure for conceptual innovation. This pressure lessens if inheritance conventions can consistently exclude inclusive redress. But before exploring this question, it is worthwhile to review some of the reasons favouring an inheritance approach.

### *Advantages of the Inheritance Strategy*

Its initial simplicity provides an inheritance-based conceptualization with intuitive plausibility. This conceptualization suggests justifying inheriting redress claims in terms of reciprocally obligating institutions (Thompson, 2002: 113–15) and points to plausible analogies with the transfer of debts (Boxill, 2003: 68). If these suggestions and analogies are appropriate, the first advantage of the inheritance strategy is its simple straightforwardness.

An inheritance understanding offers a second advantage: its power vis-à-vis the supersession thesis popularized by Jeremy Waldron (1992: 25–27). Waldron argues that redress claims may be superseded by present considerations. In particular, the supersession thesis suggests that after a time an injury loses its significance to victims. As victims habituate themselves to the event of the wrong, the moral justification for disadvantaging others in pursuit of remedying historical injustice fades. In reply, Janna

Thompson proposes that the supersession thesis is less powerful when a desire to bequeath is particularly significant (2001: 131; 2002: 122–25). Following Thompson, it is plausible that head tax paying Chinese Canadians had a significant interest in posthumous redress that underpins an enduring claim. Although this suggestion would (problematically) require deceased Chinese Canadians to have a significant ante-mortem desire to bequeath the result of a process, the content of which they could not have known: if descendents are making reasonable claims to very meaningful and specific items, the state ought to treat these claims seriously.

An inheritance understanding has a proven practical efficacy, particularly in redress programs designed in response to state-sponsored murder. In the Argentinean program initiated in 1984[14] and in several post-Holocaust programs, survivors could obtain redress if they were heirs to those who died in the context of state wrongdoing. Also, in certain early Holocaust settlements (for example, the German programs of 1952 and 1956) survivors could claim redress as heirs to victims who died after the Holocaust but prior to receiving some particular reparative settlement (De Greiff, 2006: 886–964). Furthermore, while the Canadian head tax program specifically rejects the possibility of inheriting a claim, it does allow eligible applicants to designate a beneficiary. Perhaps we might see this beneficiary provision as recognition, albeit limited, of an inherited redress claim.

### *Inheriting Moral Claims*

Precedents such as these indicate the practical application of an inheritance strategy to redress cases. However, apart from cases wherein a state is implicated in murderous wrongdoing, redress programs tend to be more restrictive. Usually, the inheritance of claims emerges only in respect to the real or chattel property these programs re-recognize or create. For example, the East German and Czech programs for post-communist redistribution confined inheritance to those claimants whose predecessors had conventionally recognized property rights, rights that were held to have persisted through an interval of non-recognition (Posner and Vermeule, 2003: 700). In the 1988 American settlement, only eligible Japanese Americans who were alive on August 10, 1988, could give rise to a heritable right to individual redress payments (United States of America, Judicial Administration, 1988). Furthermore, even Holocaust redress agreements may be becoming more restrictive. The 2001 Austrian General Settlement Fund only permits heritable claims for real and chattel property seized, damaged or destroyed during the National Socialist era (Lessing et al., 2006: 101–02). The same principle applies to Germany's 2000 *Law on the Creation of a Foundation for Remembrance, Responsibility and the Future* which allows claims for individual payments by immediate

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descendants, provided the original victims died on or after February 16, 1999 (Authers, 2006: 435).[15] Finally, the recent Canadian Indian Residential Schools Settlement makes payments to estates if the claimant died on or after May 30, 2005 (Canada. Service Canada, 2007). In all these cases, if a claimant died before the specified date her descendents receive nothing. Either the inheritance provisions depend on property rights that are held to have persisted, or the settlement itself creates an entitlement which is then subject to the state's inheritance practices.

In cases of state-sponsored murder, broader inheritance provisions may well serve as a proxy for wrongful death claims. In non-murderous wrongdoing, the common suggestion, supported by the above examples, is that conventional practices of inheritance concern only property. This understanding conforms to current Canadian inheritance legislation (for example, Province of Ontario, 2006 (amended): §20.2) and is the likely underpinning for the Canadian program's heritability restrictions. A transformation became possible on the date of the program's implementation (August 29, 2006). Up to that date, head tax payers had a moral claim against Canada regarding their wrongfully discriminatory treatment. This claim is not akin to a property claim because it does not have institutional efficacy; it is not determinate because not effective. As of August 29, the moral claim is met by the possibility of its transformation into property by virtue of the sovereign power of the Canadian state.

It will be useful to explore the consequences of this understanding more thoroughly, as the conceptual structure regarding inheritance has significant future political implications. Further, the current Chinese Canadian program may implicitly motivate, without fulfilling, conceptualizations that could permit a greater "inclusion" than Canada presently admits. Currently, the redress settlement admits no inheritance provision, apart from specified beneficiaries. Yet, under Canadian law, both chattel and real property descend; therefore, if the state would have created a class of chattel property claims within head tax payers and their spouses extant as of February 6, there would be room to expand the heritability of redress to include descendents of eligible potential applicants alive as of that date. This would widen the sphere of redress in a manner analogous to the Japanese Canadian settlement but still fail to satisfy the inclusive redress claim.

Canada's head tax redress does not create or recognize this expansive scope of property claims. The current program denies the descent of payments to the heirs of eligible potential applicants extant as of February 6, 2006, by holding that a property claim is only created upon a valid application for redress. This parallels the language of the Japanese Canadian agreement, but it is much more restrictive in practice (Japanese Canadian Redress Secretariat [Canada], c.1988). In the 1988 Japanese Canadian program, the 2007 Indian Residential Schools Settlement, the 1988 Jap-

anese American and the 2000 German program, the estates of potentially eligible persons can/could apply for monies, so long as the deceased was alive on a specified date.[16] In all of these agreements, only a valid application creates property; however, only the Chinese Canadian program requires as a precondition of validity that the application is made with respect to a living person. The understandings that only a valid application creates property and that a valid application requires both an extant applicant and an effective application procedure provide a good explanation of the program's current structure. But these understandings are problematic.

Consider a hypothetical case in which two applications (A and B) are filed without specifying beneficiaries and the state awards payment in both cases. In A the applicant dies after having been awarded payment but before possessing it. (Perhaps A dies while the cheque is in the mail). In B, the applicant dies the day before the application is processed and the subsequent posting of the cheque. My intuition regarding both cases invests the monies in the deceased persons' estates and eventually with the heirs. Canada's current head tax program might award to monies to A's estate, but would certainly exclude B. Only a valid application creates property and a precondition of validity is that the application refers to a living person. Now, as a further conceptual fine-tuning, the state might accommodate the intuition by treating both A and B as valid applications, holding that a necessary condition of validity is the applicant's vitality at the time of the application's filing, which subsequent death does not invalidate. This fine-tuning is not reflected in the head tax program. Currently, if an applicant dies after submission without specifying a beneficiary, no payment will be made.

The hypothetical case highlights how the dependence of validity on an applicant's non-deceased status makes normative distinctions regarding redress claims merely on the basis of when an application is completed, posted, received or processed. Such considerations appear arbitrary. Further, if a property claim is only created upon a valid application and a valid application requires a living applicant, what is the justification for making payments to designated beneficiaries? Why does the fact of designation make such a difference? Considering inheritance more generally, Canada does not require designated beneficiaries; there is statutory provision for the intestate deceased. Returning to the hypothetical case, supposing it seems reasonable not to recall a payment to a now-deceased applicant who fails to specify a beneficiary, this claim to reasonableness may motivate the understanding that the state ought to have created a determinate heritable power to effect a property claim within head tax payers and their spouses extant as of February 6. This understanding is supported both by the beneficiary provision and by precedent, both international and domestic and, if it is a better understanding,

then it would be reasonable to both devolve payments to estates and to include claims by those who would have been eligible *if* they had applied but who failed to apply and died before the eligibility period closes.[17]

Perhaps the analysis offered by the last few paragraphs appears overly fine-grained. However, it is important to accurately define Canada's current relatively restrictive ambit of responsibility—that is, the scope of validity—in the face of future settlements. The analysis raises three important points. First, the current head tax program is, as it currently stands, inconsistent with comparative redress settlements. Second, the current program may contain elements providing grounds for claims beyond the currently accepted ambit. Third, the state can avail itself of an understanding of its accepted redress responsibilities in which it need not admit the "full" inclusive redress demand on the grounds of inheritance. *Pace* Secretary of State Kenney, Canada's position need not be merely pragmatic—a requirement to draw a line somewhere. Instead, by restricting heritability to determinate property claims, the state could apply a coherent and principled understanding that denies the full inclusive redress claim.

### *Alternative Arguments*

The previous section outlined how Canada's exclusion of inclusive claimants rests on conceptual restrictions to heritability. However, inclusive redress claims might challenge heritability's restriction to property. As counterexamples, some tort actions are not extinguished upon the death of the claimant but persist in the estate, and an interest in the outcome of a tort action is at the margin of what is called "property" (Miller, 2004: 13–14).[18] However, the restrictions on the kind of damages that can be sought may temper the appeal of this argument. Saskatchewan puts these succinctly, "Only those damages that resulted in actual pecuniary loss to the deceased or the deceased's estate are recoverable" (Province of Saskatchewan, 2004 [amended]: §6).

The limitation on damages provides information about foundational conceptualizations. Many harms, including dignitary harms, do not directly concern real or chattel property. Instead, they concern the moral worth or status of the individual. In these cases, when the law awards damages it does so in order to give expression to the dignity of the individual. But, "if the purpose of using monetized damages is to (however incompletely) communicate to the victim that the wrong they have suffered has been identified and corrected, then the point ... of awarding damages seems lost when the victim is dead" (Sebok, 2005: 1440). The reasoning behind the survival of pecuniary damage is clear; heirs have a pecuniary interest in the estate. On the other hand, where the action is not for material harm and the purpose of tort recovery is to give expression to the

worth of the individual, this expressive character excludes the transfer of the claim to another person.

Although the study discusses this possibility below, it is not necessary to suggest that head tax redress is for material harm. When redress has an overtly expressive character—a characterization borne out in Canada's characterization of the current head tax payments as symbolic—it is coherent, in a manner similar to that of tort law, to exclude "inherited" redress claims. If descendents are not injured, they are not owed redress. A descendent claiming the redress owed to their forebears is akin to a daughter claiming an apology owed to her mother. Of course, relatives often accept apologies on behalf of victims and the law supports claims resulting from interest setbacks to third parties (wrongful death torts are an example), but this is not to say that the relative is entitled to the discharge of the obligation that was owed to the victim. There is a significant difference. This understanding raises a serious conceptual obstacle to heritable rights of redress that accords with the property restriction outlined in the previous section. Canada's exclusion of inclusive redress is internally consistent if an inherited redress claim fails to conform neither to an appropriate characterization of redress or the state-sanctioned practice of inheriting tortuous pecuniary claims.

Consider one final option for an inheritance conceptualization. This option rejects an expressive characterization of redress, embraces the property restriction on heritability and holds that the head tax was the kind of injury that gave rise to a property claim against an undefined but substantial subset of Canada's assets (cf. Boxill, 2003: 74; Simmons, 2001: 232). Those injured are owed redress and this obligation is a duty to recognize a property claim that currently remains unrecognized. This conceptualization posits the redress claim as property and then demands this property be treated in a manner consistent with Canada's inheritance practices.

Accepting this line of thought requires seriously modifying the expressive theory of redress advanced above. But suppose *arguendo* that there is a good alternative theory wherein a redress claim is simply property. In this supposition, an inclusive redress structure could demand either that the heir receives that which she would have otherwise possessed (through inheritance) had the head tax not been imposed or that the heir receives compensatory redress for the ongoing failure to fulfil this claim.[19] A reduction or insufficiency in property holdings grounds the claim: inclusive claimants are owed redress just because they do not have that to which justice entitles them. The argument can be summarized as follows:

(1) Redress claims are a form of property in an offender's assets.
(2) Property claims are heritable.
(3) Therefore, redress claims are heritable.

As a brief commentary, not all redress claims invest property claims in the victim; commemorative and educative acts can appear rectificatory without providing ownership. Even supposing this challenge can be met, it is not obviously true that all property claims can be inherited. Further, the first premise may trade on an equivocation between "are for" and "are." Rectificatory justice claims may sometimes be "for" property ownership, but that does not mean they must be treated *as* property ownership. There may be relevant differences between "consummated" and "unconsummated" redress relationships. Mixing blue and yellow may give you green, but that does not mean that two unmixed cans of blue and yellow paint should be treated as green.

### *Concluding Inheritance*

Understanding the conceptual underpinnings of Chinese Canadian redress is important in the context of future Canadian settlements. In this regard, it is important to emphasize how the current program's intergenerational aspects are substantially narrower in scope than several comparative settlements. Regarding the specific potentiality of inclusive redress, the analysis indicates significant conceptual obstacles to inheriting redress claims. To summarize the primary challenges, an inheritance-based understanding of the inclusive redress claim depends upon an argument from consistency, but inclusive redress claims are inconsistent with conventional models of inheritance at several points. In previous agreements, redress claims to tend only be heritable after the claim has been determined as a form of real or chattel property. If undetermined claims to inherit redress contrast with rectificatory justice's expressive character, there are powerful barriers to an inclusive innovation. Finally, loosening or dispensing with this understanding by construing rectification as compensatory exposes significant further impediments. Shifting tack, the next section considers whether the inclusive claim for property-based compensation could dispense with the inheritance apparatus.

## Injuring Families

> Head tax payers and their families experienced poverty, family separation, lost opportunity and discrimination, .... Failure to include the families where the head tax payer and spouse are both deceased overlooks the impact of the historic wrong. (National Anti-Racism Council of Canada, 2006)

Inclusive redress demands the payment of $20,000 to the children of head tax families. As NARCC's statement indicates, the explicitly material character of the inclusive claim derives at least some support from allegations of specific material harm. Further, a material-based conception explains

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the inclusion of non-paying widowed spouses in the present redress program. The obvious justification for non-paying spousal inclusion is that the head tax and subsequent discriminatory immigrant legislation caused harm to spouses. If this is admitted, Canada's redress program is already responding to "knock-on" harmful effects to persons other than those directly wronged. Once Canada admits the possibility of a knock-on effect to spouses, why not extend the program to include affected children?

This approach seems particularly credible if material adversity has a disproportionate influence on children. The remainder of this section outlines two options for supporting inclusive redress by way of a claim for material harm. The first option argues that inclusive claimants grew up with fewer resources than they would have had in the absence of the head tax and its appropriate redress. A second option concerns parental responsibilities. This powerful conceptualization attends not only to the reduction of financial resources available to Chinese Canadian parents, but also to the effect of the head tax in terms of wrongful interference with parenting. Often Chinese men preceded their wives and children to Canada, effectively removing their ability to parent. It would then be necessary for these men to arrange payment of the head tax for their children and wives. Through debt or sponsorship, often entailing indentured labour, this involved Chinese Canadian families with serious ongoing financial burdens. Further, the 1923–1947 ban on Chinese immigration essentially halted family reunification in the context of Canadian immigration.

In a claim to direct material injury, the first step in a political argument would establish a significant disparity in material well-being between Chinese Canadians and the average Canadian family. Suppose that Chinese Canadians are, on average, significantly less wealthy than European Canadians. This is suggestive, but not sufficient, evidence of harm. Previous or current injustice may taint benefits accruing to dominant groups or perhaps Chinese Canadians have relatively less as a result of an irrelevant factor. Chinese Canadians are not wronged simply because they are comparatively deprived. Consequently, a significant disparity in material well-being is only the first step in an argument.

Redress claims must go beyond comparison and assess the substantive responsibility of "offenders" (Winter, 2006). Particular interest setbacks must be both foreseeable and not the responsibility of an agent other than the offender. This assessment depends on finding particular wrongfully setback interests of inclusive claimants and linking these with the discriminatory immigration policy. Perhaps this is possible. Or perhaps Canada's capitalistic vicissitudes have exhausted its substantive moral responsibilities for the negative effects of policies that concluded in either 1923 or 1947 (depending on the argument). The study does not prejudge this investigation but rather suggests that this claim will need to marry robust empirical foundations with convincing normative arguments.

The second option addresses the harm resultant from an impediment to parental responsibilities.[20] Since it was clearly foreseeable that discriminatory immigration law would adversely affect the family structure of Chinese Canadians, this understanding has significant appeal. In the labour market of the time, male immigrants were more likely than female immigrants to acquire sponsorship (James, 2006: 226). Further, the subsequent ban on Chinese immigration, and consequently on family reunification, had foreseeable negative consequences for the family structure of Chinese Canadian immigrants. Suppose we find that these parenting impediments resulted in Chinese Canadian children having less than their entitlement to material goods. This provides powerful conceptual impetus for the inclusive redress claim, a claim grounded in the parenting hardships Canada's racist legislation inflicted upon generations of Chinese Canadians.

This section concludes by raising three problems. First, as above, the claim depends on robust empirical grounds that both the originating wrong and the subsequent failure to pay redress to parents have caused material harm to inclusive claimants. The interest setbacks which these robust empirical claims will advance as evidence of material harm will either need to fall within conventional boundaries of substantive redress responsibility or will need to extend those boundaries. The difficulties confronted by writers in the American slavery reparations discourse demonstrate the degree of complication posed in this area (cf. Brophy, 2003; Winbush, 2003; Winter, 2007).

Second, the current redress program is not compensatory and its *ex gratia* character indicates that Canada does not accept the legitimacy of a harm-based head tax claim. Therefore, grounding an argument for inclusive redress on facts of material harm will raise further questions about (and encounter resistance in expanding) the nature and extent of Canada's rectificatory moral responsibility. In other words, the claim implicitly criticizes the *ex gratia* character of the current program and consequently confronts the state's concerns regarding further liability. Indeed, a critique of the problematic use of this legal device would be a welcome addition to the historical justice literature. Observers will note a trend in the use of *ex gratia* payments as an instrumental response to liability proliferation. Recent Canadian examples include veterans subjected to chemical testing (Veteran Affairs Canada, 2004) and nurses denied equal pay for equal work (Province of Newfoundland and Labrador, 2006b). A claim based on material harm is a challenge to the adequacy of these responses. It is, in effect, an argument that the current conceptual apparatus underpinning the redress program is inadequate. Consequently the inclusive redress claim demands the replacement of the *ex gratia* conceptualization with a tort-like compensatory framework.

Third, much of the head tax literature emphasizes the primacy of dignitary harm. These writings stress how a lack of just redress main-

tained an unhealed breach in Canadian society. Responding to this argument, Canada has now made a significant attempt at redress. This attempt combines apologies with public recognition, individual payments and collective community funding. If inclusive redress accepts that there has been such a response, but (merely) holds that response to be insufficient on material grounds, it risks engendering a conceptual discordance. If inclusive redress depends on pecuniary grounds, it may fail to give due accord to conceptualizations of the redress claim as concerned with inter- and intra-community healing; there has been no pretence that $20,000 reflects the material harm imposed by the head tax. Recall that a material harm understanding demands a substantive shift in the grounds for the claim. Instead of grounding the redress claim on dignitary harm, a material understanding argues that claimants suffer an unjust indignity because they are denied their entitlements. Rather than explicating a dignitary claim, a claim for material harm potentially competes with that understanding. Writings in favour of inclusive redress present the claim as a "natural" inclusion of all those who ought to have been accorded individual payments. Indeed, it is notable that there have not yet been any sophisticated attempts to use empirical data to underpin a claim based in individual material harm. It may be that a material conceptualization of individual harm, by shifting the ground from that of respectful community relations, would create normative discord within elements of the claim's conceptual framework.

In sum, a materially based claim would demand substantial, but perhaps not insurmountable, conceptual adjustment. The current inclusion of non-head tax paying spouses may provide a point of leverage, if the inclusive redress claim is analogous. Ultimately, a material-based understanding depends on widening the accepted ambit of Canada's substantive moral responsibility. It is likely that this widening would encounter resistance from a state with concerns regarding future claims. A material understanding demands that inclusive redress confront the state with the charge that symbolic and *ex gratia* payments are simply inadequate. Moreover, this argument requires material evidence. By encompassing a more pecuniary emphasis on material harm, bringing this evidence to bear will modify the primarily dignitary character of the present discourse. It is possible that, unless that empirical evidence indicates significant harm, such a shift will not add to the claim's normative force.

## Conclusion

As I said at the outset, my purpose is analytic, not prescriptive. The study does not argue for or against the inclusive redress claim, but rather seeks to portray its normative situation. This study analyzes certain potential

grounds for the claim and points out a series of conceptual challenges arising from its analysis of Canada's currently accepted redress responsibilities. I will not review these here but instead reiterate the study's overall concern. This has been to explicate why, and in some ways how, Canada's understandings of political redress are implicated in a political *cum* conceptual struggle. The claim for inclusive redress may succeed or fail, but either way it will do so in terms of a context of justification. Moreover, its success or failure will set parameters for future redress claims; just as the Japanese Canadian settlement helped establish the current conceptual paradigm for Chinese head tax redress.

I will offer three concluding thoughts. First, the history of large-scale historical claims is one of conceptual modification. The initial 1950s Holocaust settlements were the first time a modern state accepted a large-scale substantive moral responsibility to individuals in terms of rectificatory justice (Pross, 1998). In a similar manner, Canada's current head tax redress program contains novel elements. Perhaps the most original is the rationale for the program itself; Canada now accepts that its racist immigration laws give rise to redress claims. This is precedent setting and is likely to be followed by similar claims (cf. Canadian Jewish Congress, 2006). Moreover, the current program contains elements, such as the spousal and beneficiary provisions, that appear inconsistent with the program's current boundaries. These may serve, in the future, to aid in expanding Canada's accepted ambit of moral responsibility. At the same time, by completely excluding deceased claimants, head tax redress rests on a relatively restrictive conceptualization as regards the conditions of a valid application. Finally, pressure from the inclusive redress claim may focus welcome attention on the problematic *ex gratia* character of the individual payments. In essence, the short history of historical redress claims is one of conceptual innovation, and it is not impossible that this dynamism may one day incorporate inclusive redress.

Second, the study suggests that the head tax serves as a synecdoche for a larger realm of racial discrimination, some of which would have been directly experienced by inclusive claimants. It may be that the use of the head tax to symbolize this larger experience inappropriately confines the present discourse and that the current motivation for inclusive redress draws on broader justifications. If so, future redress claims might focus directly on larger, but more nebulous, harmful experiences. The limits of synecdoche may serve as a lesson. The hard focus provided by discrete wrongful events such as residential schools, wartime internment and dispossession, and the head tax are valuable rhetorical locations for organizing campaigns but may have disadvantages that mirror their advantages. The discrete character created by these focal points may deny justice to those unable to fit clearly within the specified boundaries.

The argument for inclusive redress pushes at the boundaries both of who is accepted as having the right to make a claim and what constitutes a valid claim. This raises a third point. The inclusion or exclusion of a claim on the basis of conceptual analysis assumes that a claim's validity depends on an objective and general normative structure possessing theoretical priority. However, the real world of politics permits and perhaps encourages the development of ex post facto justifications. It is notable that both the Japanese and Chinese redress claims were eventually accepted by politicians seeking electoral advantage. It may well be that claims akin to inclusive redress, if they can find the electoral heft, will find acceptance in a more thoroughly political context. In such a context, rather than prohibit or promote, the apparatus of normative justification might be called upon to explain.

## Notes

1 From 1906–1949 Chinese immigrants to Newfoundland paid $300; they are included in the Canadian redress program.
2 For broader discussions of historical injustice see Ivison (2006); Torpey, (2001; 2006).
3 Reasons of space prevent a substantial examination of an unjust enrichment claim's potential. Briefly, a restitutive claim in unjust enrichment depends on the claimant being (or representing) the agent who was wronged. Arguably, since surviving claimants were not directly subjected to the wrongful tax, a restitutive claim for inclusive redress presupposes a tort-like claim in rectificatory justice and consequently cannot to serve as an alternative foundation. An advocate of inclusive redress within the bounds of restitution alone will either need to dispense with the "having been wronged" requirement for restitutive claim, or will, prior to any restitution claim, need to substantiate how surviving claimants are wronged by the head tax. Both tasks appear formidable.
4 At the time of writing, the Canadian government is involved in negotiations with representatives from all of these groups (Aubry, 2007). The processes for negotiation with First Nations peoples are obviously quite different from the others.
5 For interventions into the historical justice literature with a social movements emphasis, see Howard-Hassmann (2004); James (2006); Torpey (2006). For more general discussion of the relationship between historical identity and social movements see, among others, Tilly (2002).
6 I assume that if inclusive redress is justifiable, it must be, in principle, justifiable in individual terms. The efficiency requirements of actual redress settlements often preclude individual assessments of claim, but a redress program is not simply public policy (Falk, 2006: 494–95). Individualistic justifications in terms of rectification underpin its "redress" character.
7 For example, Brooks (1999); Barkan (2000); de Greiff (2006); Miller and Kumar (2007).
8 As an example, in 1872 British Columbia denied Chinese Canadians the vote.
9 Perhaps these programs aren't sufficient because they are not devoted to Chinese Canadians exclusively? A rather pointed reply holds it sufficient if they appropriately include Chinese Canadians. Further, the 1988 Japanese Canadian settlement laid the foundation for the inclusive Canadian Race Relations Foundation.

10 The BC Ministry of Education requires that Grade 10 students be able to, "describe significant events and trends effecting immigration to Canada from 1815 to 1914 (e.g., the Chinese Head Tax)" (The BC Ministry of Education, 2006: 25).
11 The Royal British Columbia Museum has a permanent display that includes information about the head tax (Hammond, 2007). The Canadian Museum of Civilization has a temporary exhibition called "Acres of Dreams: Settling the Canadian Prairies," including a section on the head tax. This will be displayed for nine months and then is scheduled to travel to 10 venues across Canada, 2008–2011 (Cook, 2007).
12 On June 28, 2006, the Premier of Newfoundland apologized for Newfoundland's head tax (Province of Newfoundland and Labrador, 2006a).
13 As evidence, Matt James found a large number of "hits" for the term "Chinese Head Tax" using a Google search (2006: 244).
14 The current Argentinean laws (24.043 and 24.411) settle payment upon assignees, not heirs. For discussion, see Armstrong (2006: 253).
15 The relevant text in the *Foundation Law* is found in section 11.
16 Respectively, the specified dates are September 22, 1988, August 10, 1988, and February 16, 1999.
17 Underscoring the reasonable character of this suggestion, in a private communication received September 28, 2007, Kristi Farrier, Acting Manager of the Department of Canadian Heritage's Chinese Head Tax Head Unit, stated that there will be provision for posthumous applications. As of December 2007, this provision remained unimplemented.
18 For a relevant example of Canadian legislation see Province of Ontario (2006 [amended]: §20.2).
19 This argument is suggested by Ridge (2003: 41); Matsuda, (1987: 390–91); Butt (2004: 230).
20 Cf. similar discussions in the American slavery reparations discourse (for example, Winter, 2007).

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