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The Lawyer's Daily

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CHINESE HEAD TAX

Arlene Chan

Upon the completion of the Canadian Pacific Railway (CPR), the national dream for a country that spanned from sea to sea, *A Mari usque ad Mare*, was realized and the promise to British Columbia (BC) for joining Confederation fulfilled. However, the driving of the last spike, as celebrated and historic as it is in the history books, dashed the dreams of the Chinese in Canada, most notably the 15,000 Chinese labourers without whom the CPR would not have been completed. Prime Minister John A. Macdonald and his Parliament passed the *Chinese Immigration Act* in 1885. In the same year, the electoral franchise act excluded persons belonging to the Chinese race. State-sanctioned, anti-Chinese discrimination was to prevail until the end of the Second World War.



Commissioners Sir Joseph-Adolphe Chapleau and John Hamilton recommended in the final report of the *Royal Commission on Chinese Immigration* [*Report of the Royal Commission on Chinese Immigration. Report and Evidence*, Ottawa, 1885] that the federal government impose a \$10 tax on every Chinese man, woman or child disembarking from a ship at a Canadian port. When the *Chinese Immigration Act* was assented on July 20, 1885, however, the \$10 tax in the report became a \$50 head tax. The intent was to place a financial burden on Chinese immigrants and discourage new arrivals. It was reported by the *Royal Commission* that the average Chinese worker saved a modest \$43 a year. Only a handful found exemption from the head tax, as cited below in s.4:

“ . . . every person of Chinese origin shall pay into the Consolidated Revenue Fund of Canada, on entering Canada, at the port or other place of entry, the sum of fifty dollars, except the following persons who shall be exempt from such payment, that is to say, first: the members of the Diplomatic Corps, or other Government representatives and their suite and their servants, consuls and consular agents; and second: tourists, merchants, men of science and students . . . ”



Head Tax Certificate issued to Chin Ng in 1918.
Doug Chin Collection

This was the first piece of legislation to exclude immigration on the basis of ethnic origin. [Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*. Toronto: University of Toronto Press, 1998, 107] No other group was ever required to pay a tax based on country of origin. Records about each person who paid the head tax or received an exemption were meticulously tracked in nineteen columns of the *General Registers of Chinese Immigration*. Head tax certificates, issued as proof of payment, served as identity documents that could still be challenged.

The *Chinese Immigration Act* was amended on several occasions, with significant changes in 1900, which doubled the head tax to \$100 and required the return of any Chinese travelling to China within a year.

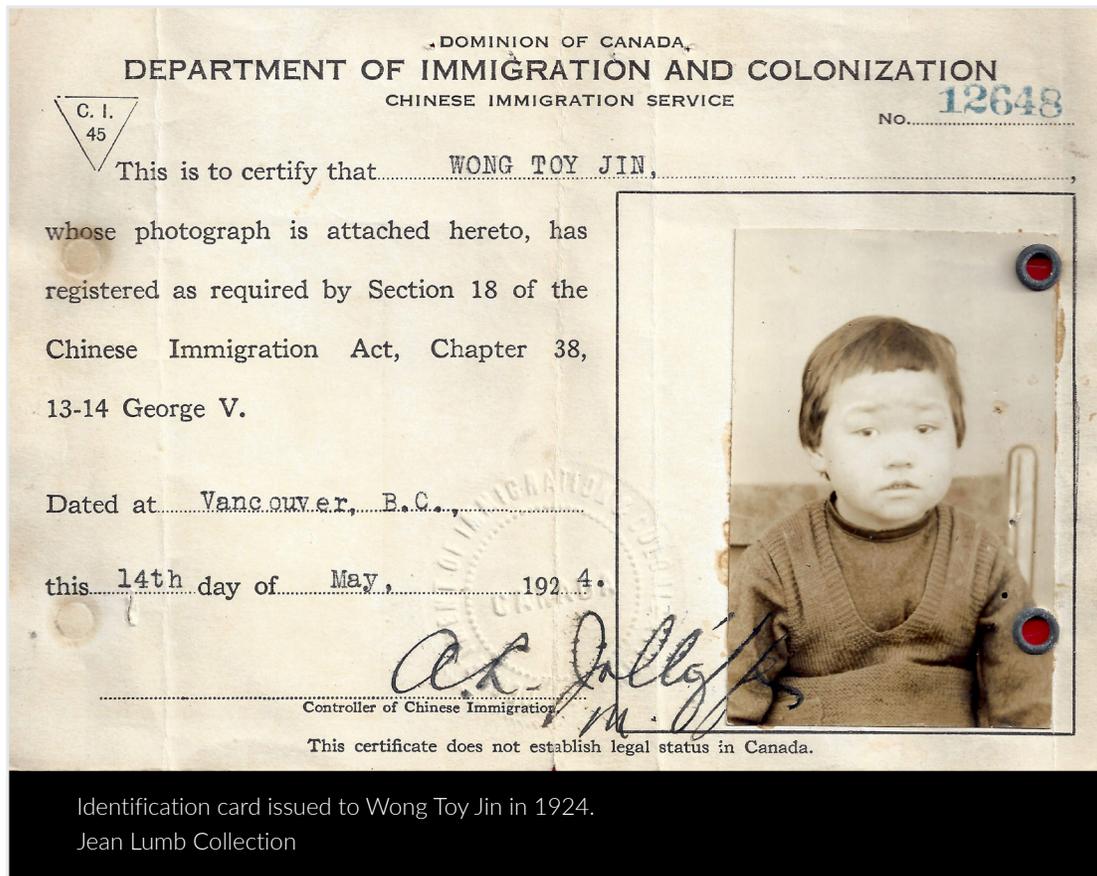
Despite this hefty increase and the government's deliberate effort to curb immigration, the Chinese continued arriving in large numbers.

“ In 1903, the Act was amended again and the head tax increased to \$500, an amount equivalent to two years' salary or the purchase of two homes. ”

Subsequent amendments to the *Chinese Immigration Act* added further restrictions. Only the “minor” children of merchants and clergymen were exempted. Students were no longer spared from the head tax. Stronger authority was granted for immigration officials to arrest without warrant any Chinese believed to be illegally in Canada. If anyone was absent from Canada for more than two years to visit their families or other purpose, another \$500 head tax would be required for re-entry.

The federal and provincial governments profited from the collection of head taxes that generated an estimated \$23 million, roughly the cost of building the BC portion of the CPR. However, the impact on the Chinese in Canada was severe. For years, head tax payers were burdened with debts of borrowed money. The Chinese communities were predominantly male, without wives and children in so-called bachelor societies. Most of the men were married but separated from their wives who had been left behind in China. At its worst, men outnumbered women by a ratio of twenty-eight to one, the gender imbalance being the highest among any other ethnic group.

Added to the institutional racism of the federal government was another layer of discrimination in the provinces. The most severe was in BC where there were 100 anti-Chinese policies and laws. [<https://news.gov.bc.ca/releases/2014PREM0047-000669>] The Chinese were not allowed to vote, become professionals, run for public office, purchase Crown lands, work in underground mines, live in provincially-funded homes for the aged, swim in public pools, hire white women, and seek employment in public work projects, like road-building. Such racism and hostility against the Chinese, as well as Japanese, South Asians, and Indigenous peoples, were fueled by the vision for a white man's country. [Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Towards Orientals in British Columbia*, Montreal; McGill-Queen's University Press, 2002].



All hopes and dreams for the Chinese to be reunited with their families came to an end in 1923. The *Chinese Immigration Act* was overhauled, the head tax abolished, and the outright exclusion of Chinese immigration enacted. The Act, more popularly referred to as the *Chinese Exclusion Act*, also required every Chinese in Canada, regardless of citizenship, to register for an identification certificate within twelve months. Travel to China was permitted; however, anyone who did not return within twenty-four months forfeited the right to re-enter Canada.

Although the *Chinese Immigration Act* was repealed in 1947, many barriers continued to stymie family reunification. Not until a complete overhaul of Canada's immigration policy in 1967 did skill and education, rather than race, become the main criteria for determining eligibility for entry.

Chinese Canadians rallied to seek acknowledgement and redress for the injustices and hardships resulting from the thirty-eight years of the head tax and twenty-four years of exclusion. After numerous appeals to four prime ministers, it was the newly-elected fifth one, Prime Minister Stephen Harper, who apologized in the House of Commons in 2006. The Government of Canada offered \$20,000 as a symbolic payment to surviving head tax payers or the spouses of deceased ones. Funds were also allocated for community (\$24 million) and national (\$10 million) historical recognition programs. Of the estimated 82,000 Chinese immigrants who had paid the head tax, less than fifty lived long enough for the apology and redress.

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BAR LAUDS NEW LIBERAL PLAN TO FIX MISCARRIAGES OF JUSTICE BUT SLAMS INACTION ON MANDATORY PENALTIES

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Lawyers are expressing disappointment that fixing mandatory minimum penalties (MMPs) is not on the federal government's new list of justice priorities, but they are also welcoming Liberal commitments to stump up more cash to hire judges and Crowns and to create an independent body to review allegedly wrongful convictions.

In a new mandate letter Justice Minister David Lametti received from Prime Minister Justin Trudeau Dec. 13, the McGill University property law professor was handed a lengthy to-do list, including establishing a U.K.-style Criminal Case Review Commission "to make it easier and faster" for those who claim they are wrongfully convicted to have their cases independently reviewed for alleged miscarriages of justice.

Toronto defence counsel James Lockyer, a prominent crusader against wrongful convictions who has been lobbying to create such a body, said he was very pleased to see the government finally move ahead with a commission.

Lockyer estimated the new body will cost (including new staff and members) about \$3 million more per year than what the government already spends under the ministerial review scheme in s. 696.1 of the *Criminal Code* (reviews are done by Department of Justice lawyers who advise the minister).



“It’s such a massive step in the right direction for the wrongly convicted,” enthused Lockyer who met with Lametti last February and provided him with a proposal for creating the commission.

“He seemed very open to the idea,” said Lockyer, who praised Lametti for jumping on the idea of an independent commission “really quickly.”

“It takes it out of the political [realm] of government and puts it into a new form of judicial arm, and what’s really nice about it is it’s more a European-style investigatory body at the end of our system – when everything up until then has been adversarial or inquisitorial,” he observed.

Lockyer said one critical question to be addressed is “what’s the test for a case to go back to the courts because ... [the commission] will decide on whether a case goes back to the court. It won’t make the ultimate decision as to whether it’s a wrongful conviction or not.” (He noted the test in the U.K. is whether there is “a real possibility” that the court will consider the conviction to be wrongful.)

The president of the Criminal Lawyers’ Association of Ontario, Toronto defence counsel John Struthers, said the pledge to create the commission “seems positive.” But Struthers also deplored the government’s decision not to make it a priority to reform MMPs – which disproportionately harm Indigenous and racialized offenders and are increasingly being struck down by judges as cruel and unusual punishment.

“We were very hopeful that the last Liberal government would act – they did not,” Struthers observed. “We don’t understand what they are afraid of, nor why they simply cannot confront these [Conservative] Harper-era laws. The courts and progressive defence lawyers will do it for them.”

The president of the Canadian Bar Association, Vivene Salmon of Toronto, told *The Lawyer’s Daily* “we are disappointed that eliminating mandatory minimums and implementing other effective sentencing options, like conditional sentencing orders, are not part of the mandate.”

However, Salmon also applauded the government’s expressed intention that it will divert certain people accused of drug offences to drug treatment courts. “An alternative approach for first-time, non-violent offenders charged with simple possession of drugs is a positive step,” she remarked, “so long as the proposed default option of drug treatment courts are more uniformly available across the country.”

Lametti, who last April told *The Lawyer’s Daily* that he hoped the government would introduce a bill to address MMPs if the Liberals were re-elected, said the government has not closed the door on change.

In an interview Dec. 16 he pointed to the prime minister’s letter which advises Lametti “you are encouraged to seek opportunities to work across Parliament in the fulfillment of these [platform] commitments and to identify additional priorities.”

“I don’t think [MMP reform] is off the table — it’s just not in a specific bullet,” Lametti said. “It’s not something that has been specifically targeted by the government, but it’s never off the table in the sense that I always have an obligation, as minister of Justice, to keep an eye on the criminal justice system.”

He added, “I’ve certainly said publicly that judicial discretion is the critically important part of our legal system, and our criminal justice system in particular. It’s part of the common law tradition and I feel very strongly about that, so let’s see how things play out across this upcoming parliamentary session.”

(Lametti told *The Lawyer’s Daily* previously that there continues to be “serious disagreement” about MMPs, both within and outside the Liberal caucus. His predecessor as Justice minister, Jody Wilson-Raybould, vowed to “advance change” on MMPs after courts struck down several penalties in 2018.)

Of his mandate letter priorities, Lametti said he is very pleased to be involved establishing an independent Criminal Case Review Commission. “I pushed hard to get this,” he remarked, citing as one influence former Supreme Court of Canada Justice Peter Cory, who wrote the Sophonow Inquiry report on wrongful convictions and for whom Lametti clerked.

“He said in a number of different places that he felt some kind of review commission was warranted,” Lametti noted. Former Liberal Justice Minister Irwin Cotler has also strongly supported such a move, he added. “It helps people who are obviously wrongly convicted and ... it’s not just the high-profile cases,” Lametti emphasized. “Arguably we have [a system] already in place that does deal with high-profile cases. But it’s been the experience in Great Britain, for example, where they have created a review commission, that other people with lower-profile cases who felt they were wrongfully convicted have a chance to be heard and it’s led to a higher number of applications for review, as well as a higher number of convictions that were overturned.

🗨️ So I think it is a good thing in the balance our criminal justice system has to effect, and I feel it’s quite a positive step moving forward to really put it into the hands of experts on an ongoing basis and take it out of the hands of the minister of Justice.”

Lametti was not immediately able to provide a timeline for achieving that, or any other of his assigned tasks, in part because “I’m going to have to negotiate every step of the way” both with this own House Leader and the other parties in the minority Parliament.

Most of the priorities on Lametti’s new justice agenda were part of the Liberals’ election platform in 2019 including: making drug treatment courts the default option for first-time non-violent offenders who are charged exclusively with simple possession of drugs; co-developing, and introducing by the end of 2020, legislation to implement the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP); working with the provinces and territories to provide free legal advice and support to survivors of sexual assault and intimate partner violence (i.e. “to make sure that they have access to quality, affordable legal representation,” according to the 2019 Liberal election platform); creating a new Director of Terrorism Prosecutions, in furtherance of the aim to better co-ordinate efforts “to prosecute terror suspects to the fullest extent of the law,” including Canadians who travel abroad to join terrorist organizations; and committing “additional support,” including an unspecified amount of cash, “to help reduce delays across the court system, including providing resources to hire new Crown prosecutors and new judges” (The Liberals’ 2019 election platform commits to providing “additional support to the provinces and territories to enable them to hire as many as 425 new Crown prosecutors, and 225 new judges to help reduce delays.”)

The ambitious legislative agenda handed to Lametti will require the minority Liberal government to keep up a snappy legislative pace – which may prove difficult in a fractured Parliament whose shelf life could be much shorter than the normal four years (even with a majority, the previous Liberal government often had trouble getting its bills through the Commons and Senate in a timely way).



Other legislative measures Lametti has been tasked with include: “developing proposals for reform” of the federal system of judicial governance and the inefficient and expensive system of federal judicial discipline (the Canadian Judicial Council, led by the chief justice of Canada, has been asking for judicial discipline reform and for judicial control over court budgets for several years); establishing new *Criminal Code* offences and penalties related to elder abuse; amending the *Criminal Code* to ban the practice of so-called “conversion therapy” aimed at changing the sexual orientation of people who are LGBTQ2, particularly its imposition on minors; and “developing options” for civil legal remedies for victims of hate speech. (The Liberal election platform also pledges the government to “move forward with new regulations for social media platforms, starting with a requirement that all platforms remove illegal content, including hate speech, within 24 hours or face significant financial penalties.)

Lametti will also assist with developing new policies and legislation to reduce organized crime and gang activity in Canada, including money laundering.

Other justice-related priorities for which Lametti is responsible, or partly responsible, include: working with the provinces and territories to come up with reforms to the medical-assistance-in-dying framework (the law’s “reasonably foreseeable death” requirement was struck down by a Quebec Court judge last September); helping to implement the Liberals’ pledge to crack down on gun crimes and ban “military-style assault rifles”; and working with the provinces and territories to establish a Community Justice Centres Program which puts “courts alongside other critical social services.”

Lametti is tasked with implementing all the recommendations made last June by former Liberal Justice minister Anne McLellan, in the wake of the SNC-Lavalin imbroglio. With a mind to preserving prosecutorial independence, McLellan reviewed the role and structure of the dual-hatted post of minister of Justice and Attorney General of Canada and recommended, among other things, that the attorney general develop a detailed protocol and clear rules – applicable to ministers, their staff, the Clerk of the Privy Council and the public service – about how “public interest consultations” in specific prosecutions could be conducted.

Lametti is expected to continue work on renewing the government’s relationship with Indigenous peoples, including contributing to building the National Action Plan on Missing and Murdered Indigenous Women and Girls, and “continuing progress” on implementing the Calls to Action by the Truth and Reconciliation Commission.

He is also required to collaborate with the ministers of Innovation, Science and Industry and Canadian Heritage to move forward with Canada’s Digital Charter, overseen and enforced by a Privacy Commissioner who will be given “enhanced powers.”

As described by the Liberals' 2019 election platform, the Digital Charter “establishes a new set of online rights, to help people feel more confident about and in control of their personal data, including the right to:

- data portability, so that people can take their data from platform to platform;
- withdraw, remove, and erase basic personal data from a platform;
- know how personal data is being used, including knowing who has access to it, supported by a national advertising registry where companies would have to report with whom your data is being shared or sold, with the ability to withdraw consent for sharing or sale at any time;
- review and challenge the amount of personal data that a company or government has collected;
- data security, compelling those who use personal data to take proactive steps to adequately protect it;
- be informed when personal data is breached, and to be compensated accordingly; and
- be free from discrimination online, including bias and harassment.”

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