The Early British Columbia Supreme Court and the "Chinese Question": Echoes of the Rule of Law

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The soundest legislation in a free country is that which is based on the highest moral principles, at the same time recognizes the existence of frailties and errors of mankind, and so frames its enactment that it will accomplish the greatest good attainable for the greatest number though it may not be the good that might be desired. You cannot straitlace a free nation.[1]

I. INTRODUCTION

BETWEEN 1878 AND THE LATE 1880S the Legislature of British Columbia enacted or approved a series of discriminatory measures designed either to bar the entry of Chinese into the Province or to make life intolerable for those already resident.

This pattern of racist legislation and regulation enjoyed significant support within the white community, especially but not exclusively among the working class. Resistance to it at a political level came largely from the captains of industry, in particular those involved in the coal mining and fish canning sectors, and the promoters of large public works project, for example railway construction, who were adverse to any moves which denied them access to a cheap and readily available source of labour.

Another group which reacted unfavourably to these legislative and regulatory initiatives were the earliest appointees to the Province's Supreme Court. In five reported cases between 1878 and 1886 members of the Court struck down anti-Chinese provincial statutes or

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[1] *Report and Evidence of the Royal Commission on Chinese Immigration* (Ottawa: Queen's Printer) (Commissioner: Justice J.H. Gray) lv.

municipal by-laws as unconstitutional.[2] In each case the judges went further than deciding the straight constitutional issue, and examined and criticized the discriminatory character of the enactment in question. In the process they either expressly or by implication indicated that they disapproved of at least some aspects of the racist policies embodied in the legislation. The decisions clearly ran against the political grain in the Province and in some instances were a focus for public criticism of the judges. None of this seems to have diverted the latter from doing 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.

This article examines these decisions in the broader context of racist sentiment and action in B.C. during the period. By relating the opinions of the judges to other evidence of their thinking on the "Chinese question" it seeks to expose and explain the ideological positions from which they proceeded, and to evaluate the significance of their dissent from the popular opinion of the period.

II. WEST COAST SINOPHOBIA AND ITS REFLECTION IN THE LAW

ANTIPATHY AGAINST CHINESE IMMIGRANTS did not take long to surface amongst the white population of Britain's north west Pacific colonies. The first Chinese began arriving from California in Victoria, the capital of the colony of Vancouver's Island, *en route* to the gold rush in the newly formed mainland colony of British Columbia, in 1858. They were soon followed by others from China itself.[3] Although the majority of these early immigrants were interested in panning for gold, others were retained as domestics in middle class Victoria households lacking access to a pool of white female servants.[4] To these were added Chinese who established businesses to service the needs of their countrymen.

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[2] *Tai Sing* v. *Maguire* (1878), 1 B.C.R. Pt. I 101 (S.C.); *R.* v. *Wing Chong* (1885), 1 B.C.R. Pt. II 150 (S.C.); *R.* v. *Mee Wah* (1886), 3 B.C.R. 403 (Cty. Ct.); *R.* v. *Gold Commissioner of Victoria District* (1886), 1 B.C.R. Pt. II 260 (Div. Ct.); *R.* v. *Corporation of Victoria* (1888), 1 B.C.R. Pt. II 331 (S.C.).

[3] W.P. Ward, *White Canada Forever* (Montreal: McGill-Queen's University Press, 1978) 23; P. Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants 1858-1914* (Vancouver: University of British Columbia Press, 1989) 4-5.

[4] Ward, *supra*, note 3 at 23-26.

Although the official policy of the Governor of the two colonies, James Douglas, and the first professional judge on the west coast, Matthew Baillie Begbie, was that the Chinese were entitled to the equal protection of and treatment by the law as long as they lived under the British flag, there is evidence that their presence was not appreciated by some white miners, and that they were subjected to harassment and violence in the gold fields.[5] There were anti-Chinese rumblings in Victoria as well. In 1860, at a public meeting in that community a proposal was debated, probably inspired by legislation already passed in several Australian colonies, that a $100 head tax should be imposed on all members of that nationality entering the colony of Vancouver's Island.[6]

For the moment the remote location of many of the Chinese migrants, the widespread feeling in the white community that they were mere temporary sojourners in the colonies, and the view of the leaders of the community that they were a useful and cheap source of labour for domestic service and public works, were sufficient to induce most white settlers to 'suffer' their presence.[7] As the gold rush died down through the early 1860s and former miners, both white and Chinese, sought jobs in other sectors during a period of economic depression, anti-Chinese animosity began to grow, both in Victoria to which many of the former gold miners headed, and in Nanaimo on the east coast of the Island, which was beginning to flourish as a coal mining centre.[8]

Anti-Chinese sentiment struck a responsive chord among a diminutive and scattered white population, lured to the region by the expectation of opportunity and prosperity but disappointed at the

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[5] *Ibid.* at 26-29. On the position of Douglas and Begbie and their commitment to bringing British conceptions of law and justice to the frontier, see B. Gough, "Keeping British Columbia British: The Law and Order Question on a Gold Mining Frontier" (1975) 38 Huntingdon Library Quarterly 269.

[6] *Victoria Daily Colonist* (6 March 1860).

[7] Roy, *supra*, note 3 at 6-8. See the comments of A. de Cosmos, the editor of the *Victoria Daily Colonist* (10 May 1860). De Cosmos, who within two years was expressing grave doubts about the wisdom of Chinese immigration, looked forward in this editorial to the involvement of Chinese labourers in the building of a transcontinental railway.

[8] Ward, *supra*, note 3 at 29-30. Animosity by white coal miners in Nanaimo towards the Chinese was fuelled by the fact that the latter were originally introduced as strike breakers by the Vancouver Coal Mining & Land Company between 1865 and 1867: L. Bowen, *Three Dollar Dreams* (Lantzville, B.C.: Oolichan Press, 1987) at 125-26.

results, uncertain of its social and economic future, and lacking any strong sense of communal identity. This negative attitude was strengthened by the alarmist rhetoric of both politicians and populist opinion-makers, especially newspaper editors, sensitive to the need to play to the biases and concerns of their constituents and readership, who saw in the "Chinese question" an increasingly powerful catalyst for drawing the white community together. The proposal to impose a head tax of $100 was revived in 1865, this time in the Colonial Legislature of Vancouver's Island by G.E. Dennes of Saltspring Island.[9] Although the resolution was decisively defeated, its appearance suggested that there were local politicians who were ready to espouse the anti-Chinese cause at other than the level of rhetoric. In fact this attempt was to be the first in a growing campaign both inside and outside the legislature in Victoria for legislation to ban or at least restrict Chinese immigration to British Columbia and to force the departure of those already settled. At the level of public opinion formation the campaign was to receive strong support from the press, especially the *Victoria Daily Colonist* and its flamboyant editor and member of the Legislative Assembly, Amor de Cosmos.[10]

The growing concerns voiced by white labour about oriental competition in the workplace, together with the combination of scientific racism and incipient social Darwinism which informed the thinking of men like De Cosmos, was in time to create a climate favourable to renewed moves to legislate the Chinese out of British Columbia. While the Chinese were not the only non-whites to come in for discrimination, their alleged inability to assimilate socially or religiously, their supposed immorality in importing prostitutes and indulging in gambling and opium smoking, and their ostensibly insanitary practices, especially those related to sending the bones of their dead back to China, exposed them in particular to charges of being the source of both moral and physical contagion. This, together with the reputation attributed to them of unfairly competing in the

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[9] Ward, *supra*, note 3 at 30. It should be noted that there was an element in the Legislative Assembly who were of the contrary opinion, such as Dr. John Helmcken, who considered the Chinese an asset and capable of being "elevated" to the white standards and values.

[10] See Ward, *supra*, note 3 at 27 for an account of the conversion of de Cosmos to an active policy of anti-orientalism. The importance of newspapers as opinion formers in colonial frontier societies is discussed in R. Evans, K. Saunders, & K. Cronyn, *Exclusion, Exploitation and Extermination: Race Relations in Colonial Queensland* (Sydney: Australia & N.Z. Books, 1976) 15-16.

labour market, failing to contribute to the economy of B.C. and evading the payment of taxes, meant that they were the target for the most virulent forms of racial discrimination and harassment.[11]

In the last session of the old Colonial Legislature of Vancouver's Island, the member for Nanaimo, Arthur Bunster, a Victoria brewer, sensitive no doubt to the concerns of his miner constituents, proposed again that a head tax be imposed on the Chinese.[12] In the process of fulminating against the Chinese for dodging their tax obligations, he asserted, "I want to see the Chinaman kept to himself and foul diseases kept away from white people". The resolution was withdrawn on the advice of the Governor. Soon after the entry of the new province of British Columbia in 1871, at the first session of the Legislature, two motions were introduced by John Robson, the radical M.L.A. for Nanaimo who was strongly supportive of the cause of labour, advocating a head tax and the exclusion of Chinese labour from public works projects.[13] While both failed to attract the necessary support, their demise was attributable to constitutional scruple (the majority view was that imposing a tax would be outside the Province's jurisdiction) rather than any groundswell of sympathy for the Chinese. If the Legislature was not ready to exclude or limit the number of Chinese immigrants, it had no compunction about denying those already in B.C. access to the political process. This it did by withdrawing from them both the provincial and municipal franchise.[14]

As Peter Ward has noted, the period between 1872 and 1878 was relatively quiet as far as anti-Chinese activity was concerned, in all likelihood because of the relatively small number of immigrants entering and remaining. That sinophobia was merely percolating and had not evaporated is evidenced by the consideration by a committee of the whole of the Legislature of "steps toward preventing the country

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[11] On the emergence of these sentiments, see M. Zaffroni, The Great Chain of Being: Racism and Imperialism in Colonial Victoria, 1858-1871 (M.A. Thesis, University of Victoria, 1987) at 26-66.

[12] J. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851-1871*, vol. V (Victoria: Public Archives of British Columbia [hereinafter P.A.B.C.], 1880) 400 (26 January 1871).

[13] British Columbia, Legislative Assembly, *Journals*, vol. 1 at 15-16 (1872).

[14] *Act to Make Better Provisions for the qualification of Voters*, S.B.C. 1874, c. 12, s. 3. This denial of the franchise was extended to municipal elections by S.B.C. 1876, c. 1, s. 1.

from being flooded with a Mongolian population, ruinous to the best interests of British Columbia, particularly her labouring classes" in 1876.[15] While nothing immediate came of this initiative, other than a vague call to the government for action, the provincial government and legislature did move decisively two years later when a dramatic increase took place in the number of Chinese disembarking in British Columbia, and fears were growing of a new influx based on talk of exclusion legislation in the United States.

A package of anti-Chinese measures was introduced by the government led by George Walkem, a reformist lawyer who counted amongst his clients the Nanaimo miners.[16] At the level of government policy the measures included the insertion of a clause in provincial public works contracts stipulating that Chinese should not be employed.[17] More dramatic because it imposed a penalty on all Chinese residents, was the Chinese Taxation Act.[18] This statute, which was based on recent Queensland legislation, purported in its preamble to ensure that the Chinese would pay existing taxes which were their due. However, in its body it applied a new and discriminatory tax to them in the form of a quarterly license of $10 payable by every Chinese person over twelve years of age. The penalty for non-compliance was a heavy fine and the prospect of the seizure of goods, and even imprisonment for failure to pay.[19] Employers of Chinese labour could also be fined up to $100 for failing to supply lists of Chinese employees liable to pay the license fee.[20] The Chinese community was not prepared to take this discriminatory legislation lying down. Complaints were lodged by Victoria Chinese merchants in Ottawa with the Governor General, and in London through the Imperial

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[15] British Columbia, Legislative Assembly, "Papers relating to the Chinese Question" in *Sessional Papers* (1883) at 229.

[16] Walkem had most recently represented the miners during a bitter strike in which Chinese 'scab' labour had been used by the employer, Robert Dunsmuir: Bowen, *supra*, note 8 at 161-62.

[17] Roy, *supra*, note 3 at 47.

[18] *Act to provide for the better collection of Provincial Taxes from the Chinese*, S.B.C. 1878, c. 35.

[19] *Ibid.*, ss. 2, 8. By section 12 a Chinese who neglected, refused or was unable to take out a license was liable "to perform labour on public roads and works in lieu thereof".

[20] *Ibid.*, s. 6.

Chinese Government.[21] Furthermore, the legislation was challenged in the courts. A number of applications were brought before the Supreme Court by various merchants and employers of Chinese labour whose goods had been seized under the legislation, seeking an injunction against the Collector of Taxes to restrain him from selling or otherwise proceeding with the seizure of goods. The thrust of the argument of the applicants was that the Act was ultra vires the Province. In *Tai Sing* v. *Maguire*[22] Justice John Hamilton Gray, one of the Fathers of Confederation from New Brunswick and a former Tory federal M.P., struck down the Act as trenching upon federal jurisdiction over aliens and trade and commerce, as well as upon the treaty-making power of the Dominion government. If exceptional legislation of this sort was needed, said the judge, it must be sought through "the proper channel, that is by the action of the Dominion Parliament".[23]

For the next six years the suggestion of Mr. Justice Gray was followed by B.C. politicians, who turned their attention to pressuring Ottawa into dealing legislatively with the "Chinese question". Both Bunster and De Cosmos, recently translated by the electorate to federal politics, led the attack without any pretence at subtlety in suggesting how the Chinese should be treated.[24] However, economic considerations (in particular the desire to finish the transcontinental railway, the construction of which was heavily dependent on Chinese labour) led the federal government to resist calls for legislation for restricting Chinese immigration.[25]

However, by late 1883 and early 1884 it was becoming clear not only to British Columbian politicians, but also to the Prime Minister of

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[21] See W. Hodgins, ed., *Correspondence, Reports of the Ministers of Justice and Orders in Council, 1867-1895* (Ottawa: Government Printing Bureau, 1896) at 1060-65.

[22] *Supra*, note 2.

[23] *Ibid.* at 113.

[24] In March of 1878, in an attempt to prevent the employment of Chinese on the transcontinental railway Arthur Bunster moved the 'pigtail clause': "that the Government insert a clause in each and every contract let for the construction of the C.P.R., that no man wearing his hair longer than 5½ inches shall be deemed eligible for employment": Canada, H.C., *Debates* at 1207 (18 March 1878).

[25] See P. Roy, "A Choice between Evils: The Chinese and the Construction of the Canadian Pacific Railway in British Columbia" in H. Dempsey, ed., *The CPR West: The Iron Road and the Making of a Nation* (Vancouver: Douglas & MacIntyre, 1984) 13.

Canada, Sir John A. Macdonald, that the "railway card" could not be played for much longer. As the C.P.R. neared completion, lay-offs of Chinese labourers took place at the same time as new immigrants were arriving to look for work.[26] The government in Victoria, worried about the resulting surfeit of Chinese labour and well aware of the proclivities of some of the Province's leading industrialists, most notably the coal mining magnate, Robert Dunsmuir, to employ cheap oriental labour when it suited their purposes,[27] determined to step up the pressure on Ottawa. This it did in 1884, when it brought in a package of legislation designed to bar further immigration from China to B.C. and to force existing immigrants to return to their home land. The sinophobes in the B.C. legislature were politically astute enough to recognize that there was no guarantee that all elements of the package would survive federal scrutiny or constitutional challenge. For them, the strategy had as its major purpose the shaming of the Dominion government into stemming further Chinese immigration.

The *Chinese Immigration Act*[28], which made it unlawful for any Chinese, not already resident, to enter B.C., was disallowed by the Governor-General-in-Council as a probable infringement on the jurisdiction of the Dominion of Canada over trade and commerce and immigration.[29]

By contrast the *Chinese Regulation Act*,[30] which contained a scurrilous preamble in which the "sins" of the Chinese population of the Province were aired, and provided, *inter alia*, for the imposition of an annual tax on all Chinese residents of B.C., survived disallowance.

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[26] *Ibid.* at 29-31; Ward, *supra*, note 3 at 36-38. With the enactment by the United States Congress of the *Chinese Restriction Act* in 1882 prohibiting the further immigration of Chinese labourers to that country, British Columbia was now the only jurisdiction open to legal immigration on the western seaboard.

[27] On the labour practices of Dunsmuir and the reaction to them, see Ward, *supra*, note 3 at 37-38; Roy, *supra* note 2 at 53-54; Bowen, *supra*, note 8 at 182-219.

[28] *Act to prevent the Immigration of Chinese*, S.B.C. 1884, c. 3.

[29] C. Gaz., 1884.XVII.41.1586. The Province had argued that it had power to regulate immigration under s.95 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*) [hereinafter the *B.N.A. Act*]. In his letter recommending disallowance the Hon. A. Campbell, Minister of Justice, advised that the purpose of that provision was to encourage and regulate immigration rather than to restrict it. Moreover, he suggested that imperial interest might be compromised by the legislation: Hodgins, *supra*, note 21 at 1092.

[30] *Act to Regulate the Chinese Population of British Columbia*, S.B.C. 1884, c. 4.

Although the Minister of Justice, the Honourable A. Campbell, recognized that it might fall afoul of the *B.N.A. Act* as dealing with direct taxation and interfering with trade and commerce, he felt that the issue should be left to resolution by the courts.[31] A Chinese resident who had been convicted and fined $20.00 by Victoria's police magistrate for not having a license as required by the Act was ready to oblige. He appealed to the Supreme Court seeking a writ of certiorari quashing the conviction because the enactment was ultra vires the legislative power of the Province. In *R.* v. *Wing Chong*[32] Justice Henry Pellew Crease found the legislation to constitute an infringement of federal authority over aliens and trade and commerce and an infraction of imperial treaties with China, and to involve the imposition of direct taxation. As a consequence he granted the writ.[33]

Another discriminatory provision of the same Act was challenged before the Supreme Court in *R.* v. *Gold Commissioner of Victoria District*.[34] Section 14 provided:

> The sum payable by a Chinese for a free miners certificate shall be fifteen dollars for each year during which the same is to be in force instead of five dollars, as by the present mining laws provided, and no free miner's certificate shall hereafter be issued to any Chinese except upon payment of the said sum of fifteen dollars.

In a show-cause hearing on the issue of why a writ of mandamus should not issue against the Gold Commissioner of the Victoria District commanding him to issue a free miner's certificate at the normal fee to a Chinese applicant, Justice John Foster McCreight, formerly the first Premier of the Province, declared the provision unconstitutional. Speaking for a Divisional Court composed of Chief Justice Begbie and Justices Crease and Gray, as well as himself, he concluded that section 14 imposed a discriminatory form of taxation on Chinese residents who needed a free miner's license to operate effectively as miners or in business in the gold fields. He made the

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[31] Hodgins, *supra*, note 21 at 1092. In dealing with this issue Campbell referred specifically to the *Tai Sing* decision of Justice Gray.

[32] *Supra*, note 2.

[33] A third piece of legislation, the *Crown Lands Act*, which was designed to prevent the sale of Crown lands to Chinese, was pronounced as within B.C.'s legislative jurisdiction, presumably because it dealt with "property and civil rights".

[34] *Supra*, note 2.

order for the writ absolute, directing that a certificate be issued to the applicant for the sum of five dollars.

As Justice McCreight noted in his judgment, the Government of British Columbia had apparently acquiesced in the decisions in *Tai Sing* and *Wing Chong* by failing to take appeals. No attempt was made to take the instant case any further. The result was that the *Chinese Regulation Act* became functus.[35] After the Dominion Parliament passed the *Chinese Immigration Act* in 1885,[36] which sought to reduce the number of new Chinese immigrants, the provincial government relented in its campaign to legislate the Chinese out of the Province directly.

Less overt attempts to use legislation to make life intolerable for the Chinese residents of B.C. were to continue. Municipalities, acting either pursuant to provisions in provincial legislation governing their operations which allowed for discriminatory fees or licenses, or using 'discretion' to achieve the same end, sought to squeeze out Chinese businesses. Where these initiatives were challenged before the Supreme Court they received the same short shrift as the taxation legislation. In *R.* v. *Mee Wah*[37] the accused had been convicted by the Victoria police magistrate for operating a public laundry without the license required by a city by-law made pursuant to s.11 of the *Municipal Act*.[38] He appealed to the County Court. That court, in the person of Chief Justice Matthew Baillie Begbie, allowed the appeal, finding that section 11 was probably outside the Province's jurisdiction to exact indirect taxation, but more importantly that it was unconstitutional because it was designed to discriminate against a particular class of persons, the Chinese.

The City of Victoria was to run up against the Chief Justice again in *R.* v. *Corporation of Victoria*.[39] The City had ordered its Collector to neither issue nor renew licenses to Chinese wishing to engage in

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[35] In *Wing Chong* special leave was in fact sought by the Attorney General of B.C. to take an appeal directly to the Privy Council. Although leave was granted, it was not followed up, probably because the Provincial Government was increasingly doubtful of its ability to succeed in the courts. See Hodgins, *supra*, note 21 at 1095.

[36] *Act to restrict and regulate Chinese immigration into Canada*, S.C. 1885, c. 71.

[37] *Supra*, note 2.

[38] *An Act to amend the "Municipality Act, 1881"*, S.B.C. 1885, c. 21, s. 11.

[39] *Supra*, note 2.

the business of pawnbroking. Several Chinese who were denied these licenses applied for writs of mandamus to compel the City to renew theirs. Chief Justice Begbie, in tune with his earlier decision and those of his brethren, allowed the application. He found that it was not competent to the provincial legislature, let alone a municipality, to discriminate against particular classes in granting or withholding licenses. Moreover, he was satisfied that the municipality, in claiming to exercise a discretion in denying licenses, was acting outside the terms of the empowering statute, which provided no such leeway.

III. Judicial Reasoning in the Anti-Chinese Discrimination Cases

In these decisions the B.C. Supreme Court Justices did not limit their opinions to the narrow issues of constitutional interpretation before them, that is divining the true object of the legislation and where it was located in ss.91 and 92 of the B.N.A. Act. They showed no hesitation in going behind the legislation to examine the political motives of the legislators, and in critiquing those motives in terms of what they perceived to be a basic precept of British law and justice: the equality of all residents of the Province before and under the law. Moreover, in some instances they were prepared to comment upon the adverse social and economic consequences of upholding the legislation and administrative action taken pursuant to it.

All of these cases were decided well before the Privy Council imposed its sanitized view of constitutional interpretation on the Canadian courts, designed to prevent comment on the substantive merits of the legislation under the challenge.[40] Moreover, there was little or nothing in the way of guidance at that point in time on the interpretation of the Canadian constitution on the issues of immigration, the treatment of aliens, international trade and commerce and Canadian and imperial treaty obligations, because of the infancy of the *B.N.A. Act*. By the time the second case, *Wing Chong*, was decided, the Privy Council had had the opportunity to expatiate on the relative powers of the federal Parliament and provincial legislatures under sections 91 and 92 of the *B.N.A. Act*, and had in *Hodge* v. *R.*[41] recognized both the plenary power of the provinces under section 92, and a coexistent

[40] See *Union Colliery Co. of B.C. Ltd.* v. *Bryden*, [1899] A.C. 580 (P.C.); *Cunningham* v. *Tomey Homma*, [1903] A.C. 151 (P.C.).

[41] (1883-84), 9 A.C. 117 (P.C.).

federal and provincial power to legislate on the same subject matter where the federal initiative had a national purpose and the provincial legislation a local object. None of this, however, precluded the British Columbia Supreme Court's close and critical scrutiny of the legislation in question. In general terms within the confines of accepted limitations on the judicial role, the British Columbia judges felt that they were not constrained by any rigid constitutional theory as to how to approach these controversial issues.

The judges were in no doubt as to what the provincial government and legislature had in mind passing such legislation, and felt perfectly justified in exposing those motives. In *Tai Sing* Justice Gray, after examining the draconian nature of the clauses of the *Chinese Taxation Act*, observed:

> From the examination of its enacting clauses, it is plain that it was not intended to collect revenue, but to drive the Chinese from the country, thus interfering at once with the authority reserved to the Dominion Parliament as to the regulation of trade and commerce, the rights of aliens, and the treaties of the Empire.[42]

"Social ostracism", he added, "the Local Legislature has no power to enforce."[43] In *Wing Chong* Justice Crease, using calculated irony and referring to the more general context of anti-Chinese legislation, came to the same conclusion about the *Chinese Regulation Act*:

> On applying to the preamble, we find that it looks like a bill of indictment as against a race not suited to live among a civilized nation, and certainly does not prepare one for legislation which would encourage or tolerate their settlement in the country. Indeed, the first lines of the preamble sound an alarm at the multitude of people coming in, who are of the repulsive habits described in the last part of the preamble, and prepares one for measures which should have tendency to abate that alarm by deterrent influences and enactments which should have the effect of materially lessening the number of such undesirable visitors. The provisions of the Act...bear out that view, and the concurrent and previous legislation bear out the same impression, for on the same day as this act was passed, another Act was passed, the very object of which was plainly stated to be "to prevent the immigration of Chinese".[44]

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[42] *Supra*, note 2 at 112.

[43] *Ibid.* at 112-13.

[44] *Supra*, note 2 at 157.

In commenting later upon the discriminatory tax and the special provisions for its enforcement he concluded that they were passed "to make this country too hot for him [the Chinese person] to live in".[45]

Chief Justice Begbie was not to be denied his chance to expose the true purpose of the legislation before him, even though the statute and by-law under challenge before him made no express reference to the Chinese. In *Mee Wah*, drawing on the inspiration provided by Justice Stephen J. Field of the Federal Circuit Court in California in the context of a challenge to similarly discriminatory legislation, he asserted:

> When we take our seats on the Bench, we are not struck with blindness and forbidden to know as judges what we see as men; and when an ordinance, though general in its terms, only operates against a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it should only have such operation and treat it accordingly". Now can anybody in the Province, on or off the Bench conscientiously say that this ordinance does not come within the principle thus enunciated? I, for my part, cannot arrive at any other conclusion than that it is specially directed against Chinamen because they are Chinamen and for no other reason; to compel them to remove certain industries from the Province.[46]

The judgments agree that legislation which either directly or indirectly selects out particular classes as the subject of discriminatory treatment offends basic conceptions of law and justice, and in particular the right to be treated equally by law. In several there are strong hints that adherence to this fundamental tenet is essential if law is not to be governed by popular whim and fad. This response was justified by appeals to abstract notions of equality and justice, but more particularly by references as to how courts in the United States, especially in the Pacific coast states, had approached these types of conflict.

Although recognizing the differences in constitutional tradition and substance between the two countries, the judges expressed no doubts about the value of appealing to American interpretive values and techniques in upholding what they saw as common "basic law". The fact that American courts had struck down state legislation directed against the Chinese, even though under the United States Constitution residual power was located in the states, gave their opinions

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[45] *Ibid.* at 162.

[46] *Supra*, note 2 at 412.

added weight in interpreting a constitution where those powers were clearly lodged with the national Parliament.

In *Tai Sing* Justice Gray evinced strong concern about the draconian and potentially partial character of the legislation before him:

> The Act, exceptional in its nature as to one class of foreigners, bristles with imprisonment and hard labour, and places the frightful power of conviction and punishment in the hands of any Justice of the Peace throughout the country, at the instance of a Collector whose interest it may be to gratify the promoters of the Act.[47]

Gray, who had very little in the way of Canadian jurisprudence to work with, was obviously relieved to find Californian decisions which had already charted so calmly and clearly these stormy seas. After citing with approval several authorities which denied the right of the State to apply special, discriminatory taxes to Chinese residents,[48] he noted:

> These California Reports are referred to as exceptionally applicable, the Chinese question on the Pacific Coast emphatically belonging to that State. There, almost every argument that legal ingenuity could suggest has been used to take from the General and vest in Local Government the power of expulsive or prohibitory legislation as against this particular class of foreigners; and though towards them the mobs may there occasionally exhibit a somewhat rude exuberance of license, few countries can be found where, in considering their cases, more correct views of law are laid down than in the high Courts of that State.[49]

Justice Crease in *Wing Chong* complained of the reverse onus provisions in the *Chinese Regulation Act*. These he saw as unfair to the Chinese, not the least because of the latter's ignorance of the law and of English, and potentially dangerous as a precedent for more widespread discriminatory treatment whenever the populace demanded it:

> In other words, every Chinese is guilty until proved innocent - a provision which fills one conversant with subjects with alarm; for 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

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[47] *Supra*, note 2 at 111.

[48] He referred in particular to Lin Sing v. Washburn, 20 Cal. 534 (Sup. Ct. 1862).

[49] *Ibid.* at 106.

for putting any other foreigners or even special classes among ourselves, as coloured people, or French, Italians, Americans, or Germans, under equally the same law.[50]

He too was convinced that the lead set by the "higher California courts" should be followed in challenges to legislation which discriminated against the Chinese. The California judges he described as "more than ordinarily skilled" in laying down the law correctly in constitutional points of that nature.[51]

Chief Justice Begbie in *Mee Wah*, in seeking to limit the power granted to the provinces in s.92 of the *B.N.A. Act* to exact indirect taxation reflected on the unfortunate consequences of reading the power broadly:

[I]f the Province can insist on imposing licenses upon everything and upon every act of life, and tax each licensee at any moment they please, there would be a very simple way of excluding every Chinaman from the Province, by imposing a universal tax, not limited to any nationality, of one or two thousand dollars per annum for a license to wear long hair on the back of his head; or to exclude Russians by a license to wear a beard, or Jews by a license to eat unleavened bread. No Chinaman will shave the back of his head; no true moujik will shave his chin.[52]

Like his brethren, Begbie expressed enthusiasm for the guidance afforded by American decisions, noting their longer experience in dealing with these issues and the analogous nature of their institutions. He referred with obvious approval to the reflection in the judgments of Justices Field, Sawyer, Hoffman and Deady of international law and "natural equity and common sense", all of which had persuaded him that their opinions were "entitled to great weight beyond the limits of their own jurisdiction".[53]

The Chief Justice was even willing to recognize not merely a right to equal treatment by the law, but also a right to exercise one's labour freely without constraint, which he believed had legal force. In *R.* v. *Corporation of Victoria* he observed that "*[p]rima facie*, every person living under the protection of British law has a right to exercise his

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[50] *Supra*, note 2 at 163.

[51] *Ibid.* at 159-60.

[52] *Supra*, note 2 at 408.

[53] *Ibid.* at 410.

industry and ability in any trade or calling he may select".[54] Although recognizing that there were some trades or professions which imposed requirements of fitness or qualification, there was no general discretion in licensing bodies to exclude individuals or groups at pleasure. To allow such discretion to operate would, he felt, amount to encouraging monopoly to trades and professions.[55]

For these judges, obligations to afford not only citizens but also alien residents equal protection of the law were not confined to domestic or North American constitutional arrangements and theory. The case of *R.* v. *Corporation of Victoria* contains an intriguing passage which suggests that the Chief Justice at least was alert to legal developments elsewhere in the western world which confirmed his view that legal discrimination on the basis of race was contrary to the basic law of civilized nations more generally:

> Victoria does not possess a monopoly of race jealousy. In the French colony of Cayenne, the Town Council recently handicapped the superior capacities of Chinamen by imposing on the merchants of that empire an extra tax of $300 per annum, deeming it also expedient to handicap English and German traders by a surtax of $200 on them. But on appeal to the courts at Paris, all these impositions were declared null on the very same principles as those on which the Courts here insisted...as being infringements at once of personal liberty and of the equality of all men before the law, and also negations of international rights.[56]

The appeal to the demands of an international legal order mentioned in this passage was even more openly articulated by Justice Gray in *Tai Sing* and Justice Crease in *Wing Chong*. In both cases the issue arose of whether the legislation under scrutiny offended imperial treaty organizations. The former quoted with apparent approval a statement by the eminent American jurist Chancellor Kent suggesting that the rulers of host states were bound to treat citizens and foreigners within their borders alike in matters of taxation, especially

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[54] *Supra*, note 2 at 332.

[55] In Begbie's bench book entry for this case, he indicates that it would not be within the power of a professional licensing body to exclude people on the basis of their nationality: P.A.B.C., GR 1727, vol. 736, B.C.S.C. (Victoria), Civil and Criminal Bench Books, Begbie 1887-1889.

[56] *Supra*, note 2 at 333.

where treaties of peace and amity, trade and commerce had been concluded.[57] He added:

> Treaties are regarded as the highest and most binding of laws, beyond any merely internal regulation which one of the parties thereto may make for the Government of, because on the subject to which they refer, they bind the people of both powers, however dissimilar in other respects may be their institutions, customs of laws.[58]

For his part, Justice Crease referred to treaties with foreign nations as "above all municipal law, for obvious international reasons, for without such a provision there can be no permanent security, which is the life of all commercial intercourse".[59] Both judges emphasized that not only were these obligations binding on the parties, but they should also be read "most strongly against the party for whose benefit they are introduced".[60] The treaties with China, they observed, were "forced" upon that state. As Justice Crease candidly put it:

> In the case of the Chinese treaties they were forced at the point of the bayonet on China, to obtain a right for us to enter China, and in return for a similar permission to us, full permission was for the Chinese to trade and reside in British dominions everywhere.[61]

In both judgments it is noted that the Emperor of China was induced by British negotiators to give his permission to his own subjects to travel to and settle in British "dominions" or "colonies" and to enter into "engagements with British subjects for that purpose".[62] Both judges clearly considered it duplicitous for the government of part of a British Dominion to subvert the reciprocal character of treaties entered into by the imperial government on behalf of the British Empire, especially where reciprocity had been forced on the other contracting party.

The judges were also ready to point to the harm that would be done by upholding the provincial legislation at issue. Apart from interfering

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[57] *Tai Sing*, *supra*, note 2 at 108-09.

[58] *Ibid.* at 109.

[59] *Supra*, note 2 at 162.

[60] *Tai Sing*, *supra*, note 2 at 109; *Wing Chong*, *supra*, note 2 at 161.

[61] *Supra*, note 2 at 161.

[62] *Tai Sing*, *supra*, note 2 at 110; *Wing Chong*, *supra*, note 2 at 161.

with what they considered to be a constitutional division of powers set out in the *B.N.A. Act* which had carefully placed such transcendent issues as the treatment of aliens, trade and commerce (especially in the international sphere) and treaty obligations firmly within the jurisdiction of the federal Parliament, they saw practical difficulties with the enactments. Both Justice Gray in *Tai Sing* and Justice Crease in *Wing Chong* pointed to the negative effects on commercial intercourse which would flow from the imposition of discriminatory taxes and licenses on racially selected groups, not to mention the penalties to be exacted both from members of the excluded race and of the dominant community who hired or dealt commercially with them:

> To enact that employment shall not be given to classes, except on hazardous and ruinous terms, is practically prohibiting intercourse with the particular class specified. If you cannot deal or trade with but at the risk of a penalty far exceeding the value of the service, that dealing or trading will be put an end to.[63]

Justice Crease, drawing on evidence before the Royal Commission on Chinese Immigration of 1885,[64] referred to calculable economic loss which was likely to be the result of forcing the Chinese out of the Province:

> And as to trade and commerce, if the Chinese be driven out an annual loss to the revenue, it appears by the tables in the Chinese Commission Report, of $110,000 will take place; and more than $1,500,000 of property and business will be lost to us, besides an injury to trade to an incalculable extent.[65]

Crease also dwelt on the adverse impact which such legislation would have elsewhere in Canada. He concluded that it was highly presumptuous of British Columbia to pass statutes which would have as an effect the barring of access by other provinces, for example Manitoba, and the North West Territories to Chinese labour.[66] As already noted, Chief Justice Begbie voiced his personal concern about adverse economic impact in *Corporation of Victoria*, when he suggested that

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[63] *Tai Sing*, *supra*, note 2 at 110.

[64] *Supra*, note 1.

[65] *Supra*, note 2 at 160-61.

[66] *Ibid.* at 164.

discriminatory license fees would have the effect of allowing a monopoly on certain types of trades and professions.[67]

Apart from the general adverse effects which would follow from the exclusion from the economy of a class of trader, entrepreneur and labourer, the fact that in both *Tai Sing* and *Wing Chong* the legislation went so far as to make employers liable for the failure of their servants to comply with licensing requirements rankled the judges. Justice Gray talked in general terms of the hardship that vicarious liability, coupled with reverse onus provisions where a license was lacking and the provision for summary procedure, would impose on employers:

> Thus a farmer in the urgency of a pressing harvest, a merchant or trader in the emergency of business, before he can avail himself of this species of labour or assistance, must lose his time, his harvest, or his opportunity in testing the genuineness and lawful issue of the document, as well as the identity of the person holding it. Distance, inability to prove identity, pressing necessity, are of no avail. Non-employment or the risk of the penalty !!! It is a somewhat startling proposition to confound the innocent with the guilty, and hold the free citizens of a country responsible for the tricks and defaults of foreigners.[68]

Justice Crease noted with thinly veiled asperity and, no doubt, with a measure of self-interest as the employer of domestic Chinese labour, that the legislation before him provided fines for employers in the event of their Chinese employees failing to pay the license fee, and opened the door to the seizure of their (the employers') property if found in the rooms or quarters of defaulting Chinese servants. As a consequence, he asserted, it fixed every employer with the default of servants whose language he could not understand, and rendered "the employment of Chinese so distasteful and annoying to the employer that he must cease to employ them".[69]

IV. Judicial Ideology and the "Chinese Question"

What do the decisions reveal about the judicial ideology of these men, and what clues do they provide as to the extent to which their political and social beliefs affected their thinking on the bench? Fortunately, the reports of the cases are not the only form of extant

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[67] See above at 111.

[68] *Tai Sing*, *supra*, note 2 at 111.

[69] *Wing Chong*, *supra*, note 2 at 163.

evidence available as a basis for answering those questions. In the case of three of the judges, Gray, Begbie and Crease, documentary evidence exists of their views on the politics of the "Chinese question". Furthermore, from the position which this court took on other politicized issues we have some sense of their attitude towards the broad relationship between law and government. Finally, we know from other contexts in which they exercised their judicial function in cases involving Chinese litigants how they viewed this segment of the population more generally.[70]

Clearly the position they espoused in these cases was not popular. Although the law of contempt represented a real impediment, or at least threat, to critical discussion of the substance of the judgments, there is enough in the way of fragmentary adverse comment in the press - in editorials, in the reports of public meetings organized by Victoria's anti-Chinese forces, and in letters to the editor - on the pro-Chinese proclivities of the bench to suggest that for British Columbian sinophobes the Supreme Court judges were part of the problem. With the earliest decision, that of Justice Gray in *Tai Sing*, the focus of criticism in the newspapers was the ineptitude of the provincial government of George Walkem in framing legislation which, it was claimed, was destined to be struck down.[71] By 1885 immunity of the judges from criticism was no longer ensured.

The anti-Chinese sentiments of white workers had developed to the point where it had been institutionalized in the Anti-Chinese Union, the fundamental objective of which was to ensure that the Chinese were driven from the province.[72] The public meetings organized by this group lent themselves to the recitation of litanies of complaints against the Chinese and the identification of those who were counted as or with the enemy.

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[70] The more general views on the "Chinese question" of John Foster McCreight, whose judgment in *R.* v. *Gold Commissioner of Victoria District*, *supra*, note 2 was rendered on behalf of the full court, are much more difficult to discern.

[71] Editorial, *Victoria Daily Colonist* (4 September 1878) 2; Editorial, *Victoria Daily Colonist* (10 October 1878) 2; Letter from "Law Society", *Victoria Daily Colonist* (10 October 1878) 3; Extract from *San Francisco Bulletin*, *Victoria Daily Colonist* (23 October 1878) 2; Editorial, *Victoria Daily Colonist* (27 October 1878) 2; Editorial, *Victoria Daily Colonist* (31 October 1878).

[72] For the constitution of the Anti-Chinese Union, see *Victoria Daily Colonist* (29 May 1885).

Furthermore, Gray, Begbie and Crease had by this time become involved in the political ramifications of the "Chinese question", Gray as a member of the Royal Commission on Chinese Immigration, and Begbie and Crease as witnesses before that inquiry. Their favourable comments on the Chinese, and their resistance to excluding or discriminating against them, persuaded the sinophobes that they could not expect any sympathy from these men. In a report on a mass meeting of white workingmen in Victoria in May, 1885 the Lieutenant Governor, the industrialist Robert Dunsmuir, and the Chief Justice were together "denounced in scathing terms" for their anti-worker stance before the Commission.[73] An editorial on the meeting in the *Victoria Daily News* which was obviously sympathetic to the outpouring of resentment from workers noted with approval that "a resolution fastening the blame of future bloodshed on the heads of our governmental and *judicial* [emphasis added] rulers was carried amidst wild applause".[74]

In the report of a meeting of the Anti-Chinese Union in August of the same year, E.C. Baker, the M.P. for Victoria inveighed against the Report of the Royal Commission, in which Justice Gray had shared, for failing to listen to local sentiment, and for not excluding the Chinese "hordes" altogether.[75] His fellow member, Noah Shakespeare, picked out Justice Crease as one who in opposition to the popular will favoured Chinese offenders being allowed to wear their pigtails while in jail.[76] The message in these fragments seems clear. The judges were seen as Chinese lovers by a significant segment of the population, by their political representatives, and by some elements of the press.

It is tempting to claim that the British Columbian judges, in taking the stance they did in the Chinese decisions, were representative of an early strain of rights sentiments in Canadian judicial thinking and thus the harbingers of much later moves, both in the courts and in Parliament and the legislatures, to enshrine in constitutional doctrine or documents the rights and liberties considered essential to a free and democratic society. That would be both to transpose in a simplistic way contemporary values to a society in which democratic values

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[73] *Victoria Daily Times* (22 May 1885) 1.

[74] *Victoria Daily Times* (23 May 1885) 2.

[75] *Victoria Daily Colonist* (4 August 1885) 3.

[76] *Ibid.*

and their significance were only slowly emerging (and in which there was much uncertainty over the practical implications of popular democracy) and to mistake the combination of intellectual inspirations and pragmatic motives of the men in question. However, that having been said, it would also be wrong to reject entirely the claim that there is both political and legal continuity between the thought patterns reflected in those decisions and later developments in Canadian constitutional theory and practice. Even less would it be correct to assert that the judges who rendered these decisions were lacking any strong sense of moral principle in reaching the conclusions which they did.

What we know about these judges, in particular Chief Justice Begbie and Justice Crease and their view of politics, points to a degree of antipathy towards popular democracy, at least as practised on Canada's west coast. Both, but particularly Crease, were less than enthusiastic about the wisdom of British Columbia's joining Confederation. Crease, who was Attorney-General of the colony of British Columbia, fretted over his future in a Canadian province.[77] Begbie, worried about a diminution in the power of the judges in a constitutional structure which reduced the Supreme Court to provincial status.[78] While their immediate anxieties were, it seems, satisfied, it soon became apparent that they regretted the political consequence: the election by the adult male white population at large of politicians who were, in their eyes, far too ready to identify with the emotional biases and fickleness of a majority of the electorate. There is little doubt that this reaction in party reflected a selfish and nostalgic hankering after the colonial period, when judges, and especially Begbie, were an important element in not only the legal but also the political life of British Columbia. Hamar Foster has shown the extremes to which this bench was prepared to go in battling with the provincial authorities over matters relating to the control of the criminal process and court organization, which it saw as within its

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[77] See H. Foster, "The Struggle for the Supreme Court: Law and Politics in British Columbia, 1871-1885" in L. Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 167 at 168-170.

[78] See D. Williams, *"The Man for a New Country" - Sir Matthew Baillie Begbie* (Sidney, B.C.: Gray's Publishing, 1977) at 159-62, 167.

proper domain.[79] Both Foster and David Williams in his study of Begbie have pointed to the enthusiasm with which the early Supreme Court espoused the federal cause in constitutional interpretation in order to limit provincial jurisdiction and what they perceived as the excesses of popular democracy.[80]

Each of the decisions on the "Chinese question", and in particular the emphasis placed by the judges on preserving the plenary powers given to the Dominion Parliament and keeping provincial powers in check, reflect the conservative, patrician attitude noted by Foster and Williams. 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 and cant. Gray, in explaining *Tai Sing* and the demise of the *Chinese Taxation Act* in his report as Royal Commissioner said as much:

> Such Legislation would hardly be tolerated anywhere among a free people, nor in any country in which fanaticism had not usurped the place of reason. It was that Act which led to the Chinese strike in Victoria, in 1878, and was disallowed by the Dominion Government as soon as attention was by this judgment called to its provisions.[81]

The criticism of popular democracy in the racial context was also made explicit by Crease and Begbie in their responses to the questionnaire administered by the Royal Commission on Chinese Immigration in 1885. Crease, true to form, was the more direct and acerbic:

> The outcry against the Chinese takes its rise in great measure in the efforts of persons, who, for political motives, are desirous of posing themselves as the friends of the working classes, through their sweet votes to gain political power and influence. All political parties, the 'ins' as well as the 'outs' aim at this: and through the press and orations, and even no little misrepresentation, exaggerate.[82]

The Chief Justice contented himself with elaborating what he considered to be the constitutional hallmarks of popular democracy and showing how they explained the legislative treatment accorded to

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[79] H. Foster, "The Kamloops Outlaws and Commissions of Assize in Nineteenth Century British Columbia" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Osgoode Society, 1983) 308; Foster, *supra*, note 77.

[80] Foster, *supra*, note 79 at 310; Williams, *supra*, note 78 at 164.

[81] *Supra*, note 1 at lxxii.

[82] *Ibid.* at 143.

the Chinese. He noted that in a "constitutional state" the members of the legislature "are in duty bound to take the views of their constituencies as expressed at the polls; and to support such measures as please their constituents".[83] In turn, a "constitutional ministry" is bound by the majority of votes in the house, acting as "a sort of managing committee to carry into effect the wishes of that majority". As the provincial franchise was limited to adult male Europeans possessing an inbred antipathy to a racially distinct group who were seen as their competitors in the labour market and as draining the local economy of wealth, it was no surprise that the result would be discriminatory legislation.[84]

Implicit in both these statements is the message that it is the judges who have the responsibility to check the excesses of 'responsible' government, in this instance legislation prompted by racial animosity, by the application of accepted principles of law and reason. Although this position can be characterized as conservative, authoritarian and anti-democratic, it cannot be dismissed merely as mindless nostalgia or calculated pique. It may well have stemmed from a more principled concern about theories of government. Vigorous debate was taking place in Britain between the 1860s and 1880s, as intellectuals and politicians grappled with the advisability of extending the franchise. Indeed, the question of who should govern, and how, was a major focus of dialectic in that country between liberals who had espoused the cause of representative democracy, most notably John Stuart Mill, and both liberals and tories still wedded to whiggish notions of government by the well-bred and wise, a view articulated in the writings of, among others, James Fitzjames Stephen.[85] Moreover, the notion that the established bulwarks against the excesses of the state in the British 'constitution' were the common law and the judges, was to achieve its most authoritative statement in Alfred Venn Dicey's *Introduction to the Study of the Law of the Constitution* during this

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[83] *Ibid.* at 73.

[84] In his evidence Begbie expatiated at some length on the human characteristic of suspicion and of hostility towards those of different race or ethnic background especially when they were perceived to be seeking or exploiting an economic advantage. In particular he drew parallels between the treatment accorded to the Jews of Europe and the Chinese in North America as the "scapegoats" of envy, insecurity and ignorance of the dominant community: *ibid.* at 72.

[85] K.J.M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988) at 190-96.

period.[86] Although, this work, published first in 1885, was too late to have affected the British Columbian judges in their formative years, or to have been the specific inspiration for their judgments in these cases, it is highly probable that the judges were well attuned to the intellectual debate raging in Britain on the nature of government. It is likely that they were instinctively impressed with arguments supporting a limited franchise, and in terms of their legal ideology, influenced by elements of the whig constitutional theory which found its ultimate apologist in Dicey.

In this particular context of judicial reaction to popular democracy as it was perceived and practised in British Columbia, it is difficult to fault the members of the court. Their analysis of what democracy meant to the B.C. politicians of the era, and how it should be practised, was remarkably astute and close to the mark. There was abundant evidence, both from the history of the republic to the south as well as from contemporary white settler sentiment in B.C. itself, that popular democracy was the vehicle and justification for the wildest forms of ethnocentrism and racism. The judges correctly surmised that there was no local institution other than the court which would seek to temper those proclivities and to preach more transcendent and enduring values. The fact that in the United States, where there had been devotion to popular democracy for a century, the courts had taken such an open and strong stand against discriminatory legislation against the Chinese, confirmed the British Columbia justices in the view that what they were doing was both right and necessary.

The specific concerns voiced by the judges in these decisions about the adverse economic effects of discriminatory legislation against the Chinese was also reflective of something other than mere abstract musing. As I have suggested above, there is more than a hint, especially with Crease, of identification with the cause of the employers of Chinese labour. This raises the question of whether in their judgments these men were impelled largely, if not exclusively, by economic considerations, more particularly by the belief that what was wrong about the legislation was its interference with the freedom of capital to exploit available sources of labour to the best advantage.

The judgments, read together with the statements of Crease, Begbie and Gray in connection with the Royal Commission, leave no doubt that the judges believed strongly that the presence of the Chinese had

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[86] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: St. Martin's Press, 1959).

been and would continue to be a benefit to the economy of the Province, that, in the absence of adequate and reliable pools of white labour, they served a continuing need, and that it was natural that they should be hired, at a wage lower than that demanded by white workers, by employers who were the risk takers responsible for opening up the economic potential of the Province. By the same token, they were critical of the attitude of white workers who, they claimed, had made unrealistic financial demands on employers and, when they were rebuffed, proved entirely opportunistic in seeking and securing employment elsewhere, especially in the United States.

It was Crease who articulated these views most clearly in his evidence to the Royal Commission. He pointed out that British Columbia in its early years had been unique among British colonies in being required by London to pay its own way, a stipulation which had placed a great financial burden on white settlers. The system, he suggested, had not been able to meet the unrealistic expectations of white labour, most of whom wanted to be 'bosses', with the result that frequently they had gone south to the United States to seek their fortunes. This disaffection, and the chronic shortage of certain types of workers in B.C., in particular domestic servants, had induced employers and white settlers to look to the Chinese population as a labour source. The latter had more than proved themselves in household service, railway construction, mining and the fish canneries. In almost apocalyptic terms, Crease described the effect of the Chinese leaving the Province:

> The railway works would "peter out" for want of labour to construct them. The canneries would instantly be stopped. The shoe and other manufactories the same. The farmers would be at once injuriously affected. The coal mines would in several most important instances be abandoned. Improvements now only possible by Chinese labour would come to a sudden end, and the misery - domestic misery to 80 out of every 100 families here - would to those who have not gone through it for so many years as we have, be inconceivable. It would be perfectly appalling. The wail of the housewife would sweep through the land, and find a very decided expression in every husband's vote at the polls, and that in a manner not very flattering to those who now affect to be the white labourer's friend.[87]

In attributing the blame for anti-Chinese sentiment Crease was to reveal his attraction to the market as the arbiter of the supply and demand of labour. The practical effect of the campaign to exclude the Chinese, he said, "would necessarily be to create the worst of all

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[87] Royal Commission, *supra*, note 1 at 144-45.

monopolies, next to that of capital: the tyranny of labour under whose withering blight mines, fisheries, manufacture, arts and improvements of all kinds would speedily languish or die..."[88]

Begbie, in his responses, reached conclusions similar to those of his brother judge on the value of the Chinese to the B.C. economy. He also openly articulated a market theory of labour. After suggesting that the effect of cutting of the source of Chinese labour would be to deter capitalists from settling and investing in the Province, he continued:

> It does not seem generally understood by those who work with their hands, that unless the result of their handiwork, is marketably worth more than the money they receive for wages, their employment must soon stop. The lowest limit of wages is the money which will be the necessities of life for the labourer. The highest limit is the whole of the augmented value which his labor confers on the material operated on. If the labourer accepts less than the first, he will die of want. If the employer give the whole of the second, he will leave himself nothing to live upon, and will speedily die of want in his turn...Between these two impassable limits the rate of wages oscillates according to supply and demand.[89]

Gray, in his report, used language which came closest to suggesting that the Chinese occupied the role of a serf class. After suggesting that white labour had nothing to fear from the Chinese because their sphere of labour were so different, and that the attraction of the Chinese to hard bodily exertion relieved the white worker from toil and slavery "in grovelling work, which wears out the body without elevating the mind",[90] he likened them to machines:

> The Chinese...are living machines differing from artificial and inanimate machinery in this, that while working and conducing to the same end with the latter, they are consuming the productions and manufactures of the country, contributing to its revenue and trade, and at the same time expanding and developing its resources.[91]

Along with his brothers he pointed to the indissoluble link between labour and capital as necessary elements in promoting the provincial economy, suggesting that it was only the availability of cheap Chinese

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[88] *Ibid.* at 143.

[89] *Ibid.* at 77.

[90] *Ibid.* at lxviii-lxix.

[91] *Ibid.* at lxx.

labour which made the investment of capital in the Province attractive.[92]

The views of the judges expressed in connection with the Royal Commission smack not only of economic determinism, but also of class bias. Already we have noted the dangers they saw in an unlimited franchise. In Crease's remarks on the fickleness of white workers and of "the tyranny of labour", and the didactic posture adopted by Begbie in lecturing the working class on the realities of the market economy, there is already a sense that they did not believe that the white working man could be trusted. This feeling is accentuated by their contrast between the working habits and values of white labour and the Chinese. Begbie in particular took the position that by comparison with the white working population the Chinese were markedly industrious, thrifty, sober and law abiding. "Their ceaseless toil", he maintained, "is like nothing but an ant hill".[93] Indeed, he suggested that these traits were the cause of their unpopularity. Both Begbie and Crease were of the view that while the Chinese had their vices, these were generally conducted in private, unlike those of their white counterparts.[94] True to form, Crease gave graphic meaning to the point by focusing on "white abomination":

> Who that has seen a leading mainland town on the railway line of pay-days can ever forget the disgusting sights that every where meet his eyes? Furious drunken men in the street, saloons and corners at all hours of the day and night, weekdays and sundays all alike, the fights, the uproar, the gambling that made day and night hideous, besotted drunken whites kicked out of the houses, prostrate in the morning in the places where they fell over night sleeping off the effects of the previous debauch only to stagger up and engage again in the same round of vice.[95]

Chinese vices were also considered less debilitating. Begbie in particular claimed that the problems allegedly associated with opium smoking were insignificant as compared with those which could be attributed to whisky in the white community.[96] Both men felt that

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[92] *Ibid.* at lxix.

[93] *Ibid.* at 71.

[94] *Ibid.* at 80, 143-44.

[95] *Ibid.* at 144.

[96] *Ibid.* at 74-75.

the Chinese were honest and less violent than members of other races.[97]

The commitment to 'the unseen hand', and the class bias of those judges, might suggest that the members of the Anti-Chinese Union were correct, that their lordships were in league with industry, and especially big business, in supporting what was in essence a new form of slavery. Such a conclusion would reflect only a partial appreciation of what the members of this bench stood for in economic terms: economic liberalism. That cause probably came naturally to them. For Begbie and Crease, both educated and with professional experience in Britain, their formative years would have matched fairly closely the high point of free market economics in nineteenth century British political and intellectual circles.[98] While the credo was one which distorted the reality of labour relations, it at the same time purported to encourage economic initiative, and with it the prospect of social mobility. At the level of theory at least, it was an ideology which eschewed artificial barriers to wealth creation, whether external, imposed by the state, or internal, created by monopolistic forces.

There are certainly hints of this type of thinking in the judgments and comments of these justices about the role of the Chinese within the economy. In three of the five decisions the issue of discrimination related to what the courts perceived to be interference with the ability of the Chinese to engage in the practice of a trade or business. In each case, either explicitly or implicitly, the judges made it clear that they thought it was as wrong to place impediments in the way of Chinese access to economic opportunity as it was to do so in the case of anyone else. The Chief Justice decried the use of discretionary administrative power to encourage monopoly of a trade or profession in *Corporation of Victoria*.[99] Moreover, Crease made it clear in his evidence to the Commission that there was only one thing worse than monopoly in-

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[97] *Ibid.* at 71-72, 75, 140-41.

[98] Both Begbie and Crease were Cambridge men. Begbie was there in the late 1830s, Crease in the early to mid-1840s. Thereafter both had qualified for the Bar and practised, although Crease had spent time in Toronto before returning to England to practise in the 1850s. On their education and careers, see Williams, *supra*, note 78 at 6-27; D. Verchere, *A Progression of Judges: A History of the Supreme Court of British Columbia* (Vancouver: U.B.C. Press, 1988) 42.

On the role of individualism in nineteenth century political and economic thought, see P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 219-358.

[99] *Supra*, note 2 at 332.

duced by the "tyranny of labour", and that was capitalist monopoly.[100]

The Supreme Court judges were well aware of the fact that the Chinese were active in commercial dealings. Contrary to the popular belief that the Chinese had no understanding of the law in British Columbia, they were frequently in court as a result of commercial disputes between themselves, as well as with members of the white community, using the law of commercial transactions sometimes as a sword, sometimes as a shield.[101] Both Crease and Begbie in their submissions to the Royal Commission noted the involvement of the Chinese in commerce as if that was perfectly natural.[102]

While the economic analysis of the Supreme Court bench appears blinkered to us, based, as it was, on series of what now seems misguided assumptions about the existence of natural laws governing the economy, and by their own elitist social viewpoint, it reflected a genuine, although naive, belief in the ability of all productive individuals in society to better themselves. As Gray put it in his report:

> The graduations of labour are simply the dispensations of Providence, by which the highest good can be obtained for mankind, and he who commences on the lowest rung of the ladder frequently attains the highest.[103]

Accordingly, while it is true that they subscribed in varying degrees to the view that the Chinese who had settled in British Columbia were by experience and instinct a labouring class who fell naturally into the lowest paying industrial and service jobs, they also recognized the Chinese as having some capacity for independent productive endeavour. It is difficult, as a result, to conclude definitively that this line of

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[100] *Report and Evidence of the Royal Commission, supra*, note 2 at 143.

[101] See, *e.g.*, P.A.B.C., G.R. 1863, B.C.S.C. (Victoria), Index to Judgments (Civil), 1 January 1885 - 1 November 1895. For this period there are no less than 99 suits listed with Chinese plaintiffs and 118 with Chinese defendants.

[102] *Report and Evidence of the Royal Commission, supra*, note 1 at 72, 141. Begbie (at 75) noted that the Chinese were to be found "in nearly every manufactory or undertaking of any description, not being under the authority of a board or council elected exclusively by white voters". He also pointed to their dominance of the market garden industry.

[103] *Ibid.* at lxxiii.

jurisprudence reflected simply an affinity for the demands of the Province's capitalists.

As I have argued in the analysis of the five decisions, these judges used language and juristic inspirations which suggests a commitment to the "rule of law", in the sense of equal treatment by the law and its processes of all who lived in the Province. Was this merely impressive-sounding rhetoric, trotted out when the occasion demanded, or did it reflect more deep-seated beliefs about law and justice and the judicial function.

Although the judgments provide little in the way of information about as to how the judges felt about the Chinese, other than that their presence conduced to desirable economic intercourse, their statements in the context of the Royal Commission provide a much clearer sense of their feelings.

The notion of equal treatment before the law as a corollary of "rule of law" was, in the hands of its major proponent, A.V. Dicey, a minimalist doctrine - purely formal in its requirements. Its role was twofold; first to ensure that no-one would suffer legal penalty or disadvantage without a breach of the law having been established on the part of that individual in an ordinary court; secondly, that no-one was above the law, and that everybody, whatever their "rank or condition", were "subject to the law of the realm and amenable to the jurisdictions of the ordinary tribunals".[104] There is nothing here about the use of the law to reduce economic or social disparities. Nor is there any direction about how to deal with legislation that expressly discriminates against particular groups within the larger community. Dicey attempted to suggest that the rule of law as understood in England comprehended certain "general principles of the constitution" (citing "the right to personal liberty, or the right of public meeting" as examples) which, he said, were established by the judiciary in private litigation. However, apart from an appeal to a vague concept of "felt tradition" he failed to show how there principles could and would override the sovereignty of Parliament.[105]

The British Columbian judges in the Chinese discrimination cases clearly saw the notion of equality before the law as having broader

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[104] Dicey, *supra*, note 86 at 188-97.

[105] *Ibid.* at 195-202. In a very unconvincing passage Dicey suggests that, while it is possible for the *Habeas Corpus Act* to be suspended by statute, to do so would be to remove temporarily just one of the remedies designed to protect personal freedom. That *Act* might be suspended "and yet Englishmen may enjoy almost all the rights of citizens"!: *supra* at 202.

significance than that suggested by Dicey. For them the operation of the rule of law extended to striking down on substantive grounds laws enacted by the legislature which discriminated against certain groups within the larger community. As we have seen, they believed that both the international and the metropolitan legal order justified that initiative.

The comments of the British Columbia judges in the context of the Royal Commission are also remarkable in that to one degree or another they express some understanding of, and in the case of Begbie, respect for the Chinese. The point of these comments seems to be to demonstrate that not only are these people entitled to consideration in the strictly legal sense, but also that they have some positive qualities which justify their fair and equitable treatment as residents of the Province.

The dangers in applying stereotypes in this context were highlighted in the Report of Justice Gray on behalf of the Commission. In a wry introductory comment which reflects a worldliness lacking among most white British Columbians of the era, as well as a judicious concern to examine the evidence carefully, he remarked:

> At the end of the Long Drive in the Royal Park at Windsor, about two miles from the Castle, on the spot where four roads meet, forty years ago stood, and it may stand there yet, a monument erected by the late King George the IV, to his father George III. It was surmounted with the figure of the old king and bore this inscription:
>
> *"Pius filius optimo Patri".*
>
> The relations between father and son from youth to age hardly warrant this descriptive tribute. Either History or the monument must tell an untruth.
>
> It, however, clearly indicates one suggestion that to arrive at truth, we must examine the characters of those who give characters to themselves or others, as well as the characters of those to whom the characters are given. The Italian proverb tells us, "Every medal has its reverse".[106]

This comment was certainly more than idle rhetoric. At a number of points in his report Gray took pains to note that objections voiced against the Chinese related to anti-social conduct which was by no means unique to them. He was particularly blunt about the issue of opium smoking. The Chinese, he asserted, had been pressured and even bludgeoned militarily into taking and using the product by the

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[106] *Report and Evidence of the Royal Commission, supra*, note 2 at lv.

British seeking a sure market for opium exported from India.[107] He pointed to the irony of the Chinese being criticized in Canada for their vicious habits in this respect when the product was a perfectly legitimate item of trade and commerce, and its more dangerous derivatives were being widely used by "the higher and cultivated members of English, European and American society".[108] Along with Begbie and Crease he noted that prostitution was not exclusively nor even predominantly a Chinese vice.[109] Moreover, he agreed with the Chief Justice that opium smoking was qualitatively less serious than whisky drinking. He noted that in answer to the question of what was the difference between the two vices one respondent had differentiated "a heathen vice" from "a Christian habit", a distinction, said Gray, "which it would be difficult for Carlyle to comprehend or Father Matthew to apply - '*Mutato nomine de te fabula narratur.*'"[110]

Gray, Crease and Begbie all commented on the criticisms directed against the supposedly "alien" and "uncivilized" customs of the Chinese, although their comments reveal some differences of opinion on the legitimacy of the charges. One complaint levelled against the Chinese was that they were dangerous because of their proclivity to form secret societies which were by their nature subversive of the law. Gray expressed himself satisfied that there was something in this charge, but was prepared to attribute the phenomenon in part to the failure of the dominant community to involve them in public decision making and to let them share in some aspects of their governance.[111] The solution, he felt was to afford them some measure of responsibility for the dissemination and enforcement of the law in their communities. Crease for his part doubted the stories, preferring to attribute them to misunderstandings flowing from language barriers.[112] In Begbie's mind clan tensions, reflecting differences in regional affinities, customs and language, were responsible for jealousy and

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[107] *Ibid.* at lvi.

[108] *Ibid.* at lvi-lix.

[109] *Ibid.* at lix-lx.

[110] *Ibid.* at lxii-lxiii.

[111] *Ibid.* at lxii-lxiii.

[112] *Ibid.* at 140-141.

bad blood in the Chinese community.[113] Insofar as they were attributable to differences in dialect he saw parallels with the misunderstandings that inevitably arose between Englishmen from widely scattered locations.

Basing their views on what they considered to be reliable medical opinion, all three men rejected out of hand the belief that the Chinese were particularly prone to contracting and spreading leprosy.[114] They differed on the issue of whether the Chinese lived in filthy conditions, a common view in the white community. Begbie was of the opinion that they were no threat to public health and their living quarters no worse than those in which whites lived in close contact.[115] Crease attributed their crowded living conditions to the ghettoization which was a result of their desire for self-protection in the face of hostility among the white population and exploitation at the hands of white landlords.[116] Although he drew parallels with the slums of European and American cities, Gray found substance in the charge, although he thought that B.C. municipalities were adequately equipped with the legal weapons to cure the problem.[117]

Perhaps the greatest cleavage of opinion among the judges related to the issue of how law abiding the Chinese were. It was common ground that they had a reputation for probity and honesty in business dealings, but that was the extent of the agreement.[118] Begbie felt that they were generally law-abiding. In his experience, far from lacking respect for the law "they place perfect confidence in the administration of justice by our officials; and they testify their submission to and acquiescence in the judgments of our courts by every means apparently in their power".[119] In Crease's opinion, their testimony in court was untrustworthy, although he was prepared to attribute that to language difficulties and possible misunderstandings

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[113] *Ibid.* at 80.

[114] *Report and Evidence of the Royal Commission, supra*, note 1 at lxv-lxvi, 74, 80, 148.

[115] *Ibid.* at 73-74.

[116] *Ibid.* at 143-44.

[117] *Ibid.* at lxiii-lxvi.

[118] *Ibid.* at vii-viii, 72, 141.

[119] *Ibid.* at 82.

as to the significance of taking the oath.[120] Gray, in his report, contradicted Begbie directly. Lacking understanding of the British system of government, the Chinese, he suggested, reacted to its exercise of authority with suspicion and communal evasion of their responsibilities.[121] Moreover, he said, they had an unhealthy disregard for the truth in criminal cases when their own feelings and emotions were at stake:

> [A]n adherence to truth...is simply an admission of weakness...Duplicity and capacity to deceive are of a higher value than truth.[122]

Even Gray, however, concluded that this detriment was outweighed by the advantage of the Chinese contribution to the economy, and might be alleviated by giving them more responsibility for administration of the law.[123]

Little was said about the judges' perceptions of how the Chinese might fit into the British Columbian society in the long run. All three saw their continuing presence as necessary to the economic welfare of the Province, but had no thoughts on how they might better integrate. Gray was inclined to believe that certain levelling tendencies were at work in North America, conducing to greater social and economic equality in the future, but he seemed to be talking about the white population.[124] Only Crease made particular mention of the Chinese as part of the larger community. Pessimistically, he concluded that the Chinese would never assimilate, because of their life-style, lowly status and lack of emotional commitment to British Columbia. He

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[120] *Ibid.* at 146.

[121] *Ibid.* at lx-lxi.

[122] *Ibid.* at lxi-lxii. By way of justifying this contention Gray referred to a case in which a Chinese had been found severely injured and beaten on the sidewalk. On the basis of his evidence two other Chinese were convicted of inflicting grievous bodily harm and consigned to the penitentiary. Subsequently the apparent victim was indicted for perjury, the contention being that he had inflicted the injuries on himself and had falsely charged his two countrymen out of revenge. When the judge had expressed disbelief at the story a Chinese witness had pulled out a razor and slashed his head to make the point that this was by no means abnormal for a Chinese harbouring feelings of revenge!

[123] *Ibid.* at lxii-lxiii.

[124] *Ibid.* at lxxiii-lxxiv. Gray pointed to the great changes in social attitudes in his lifetime, attributable in large part to the democratization of education. He made specific reference to the advances achieved by women in North American society.

evidently hoped that some at least would ultimately return to their homeland, as they were not the stock from which the citizens of "a free and progressive country" would spring.[125] Furthermore, he opined, "[m]iscegenation with the race is on any scale impossible".[126]

Permeating these statements, which sometimes seem almost orchestrated, but at other times strangely discordant; sometimes prompted by careful reflection, at others little more than knee-jerk reactions; at some points remarkably open-minded, and at others blinkered; was the view that the Chinese were on balance a benefit to the Province, that they came from a culture which had some claim to being civilized, and that they had a legitimate claim to equal treatment at the hands of the law.

What sense does one make of all of this in juristic terms? In the same way that the political and economic ideologies of these judges reflected discernible strains of thought in mid-nineteenth century dialectic in the English-speaking world, so did their views on law and justice. Here, indeed, it may be argued, one can see most clearly reflections of the highly transitional and often contradictory state of political and social thought in mid to late nineteenth century Britain, a period during which whiggish conservatism, tory paternalism, liberalism and nascent socialism vied for attention.[127] Moreover, it is possible to see how the North American locus of the Chinese question gave its own unique quality to the juristic analysis employed and the results reached.

From what they said in their judgments and political statements, these judges seem to have been conscious of taking their juristic inspirations from a variety of sources. Certainly there is much in what they had to say which reflects the metamorphosis in British political thought from a whiggish attachment to the protection of inherited property and place to liberalism and its dual branches, emphasizing on the one hand individual autonomy and economic initiative and on the other the utilitarian philosophy of creating the optimum conditions for the exercise of individual freedom. Their opinions also betray traces of the new alliance in the fashioning of imperial policy, in which elements of whig paternalism, liberalism and utilitarianism had combined from the 1830s on to support a more aggressive process of

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[125] *Ibid.* at 145.

[126] *Ibid.* at 146.

[127] Atiyah, *supra*, note 98 at 219-37.

colonization by British settlers and the notion of "trusteeship" of lesser races.[128]

It should be no surprise in fact that the early British Columbia bench should have adopted what was at an intellectual level such an eclectic approach to decision-making. In the first place, while they were evidently well-read and informed, these judges were not philosophers with a developed set of jurisprudential beliefs. For them the writing of judgments, often in the context of issues which were entirely new in both legal and cultural terms, demanded the weaving together of both principle and pragmatism in order to reach conclusions which seemed to fit the particular circumstances in which they were operating. Secondly, the political philosophers and jurists of the period whose works the judges would almost certainly have read were themselves often torn and tormented, as they sought to come to terms ideologically with the dramatic changes taking place in society. This was especially true of such men of John Stuart Mill and James Fitzjames Stephen, who in their writing focused on the relationship between law, justice and rights.[129] Thirdly, it was widely believed in intellectual circles that it was the combination of political stability, belief in economic autonomy, and commitment to equal justice before the law within its national experience, which made Britain the envy of the world and justified a policy of imperial expansion.[130] It was no coincidence that two of the judges, Begbie and Crease, clearly shared this perception and had participated actively in the latter mission.

There is little doubt, then, that this bench was profoundly affected by strains of intellectual thought emanating from Britain. It was from that source that the concept of the "rule of law" which is embedded in their decisions seems to have come. However, that was not the limit of the juristic stimulants upon which they drew. As I have suggested above, the interpretation which they gave to the concept of the rule of law embraced the notion that it was open to the courts to strike down legislation which discriminated against certain groups within the

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[128] J.M. Ward, *Colonial Self-Government* (Toronto: University of Toronto Press, 1976) at 233-46.

[129] Mill, who is often stated to be the last of the 'classical economists', had developed a degree of scepticism about the claims of both free market economics and utilitarianism in his later years: Atiyah, *supra*, note 98 at 319-21. Stephen was pulled by both free-thinking liberalism and utilitarianism, and affected in his later years by a whiggish attachment to limited democracy: Smith, *supra*, note 85 at 172-73, 100-09.

[130] Ward, *supra*, note 128 at 235.

larger community. This view would not have been sustainable under the Diceyan theory of the rule of law and its antecedents, which stopped short of challenging Parliamentary sovereignty.[131] Its inspiration was rather American notions of constitutionalism which relied on a series of basic, entrenched principles against which all legislation, both federal and state, could be judged. As we have seen, the specific model was provided by a series of decisions from California and Oregon striking down legislation of these states designed to discriminate against the Chinese and thus to make life so intolerable for them that they would feel compelled to leave.

The British Columbia Supreme Court justices of this era seem to have thought it was possible to evolve a form of hybrid constitutional doctrine for Canada. While recognizing Canadian constitutional realities, in particular the division of powers under the *B.N.A. Act*, they drew upon principles underlying specific American constitutional provisions as unwritten norms to place substantive curbs on discriminatory law-making. The view that this was possible seems to have rested on two premises: the first that the British Parliament in enacting the *B.N.A. Act* itself had itself approved of the idea of protecting the rights of aliens and racial minorities from the excesses of local popular sentiment by placing jurisdiction over them with Ottawa; the second that, unlike the situation under the U.S. Constitution, residual power in Canada lay with the Dominion Parliament, allowing the courts some leeway in considering the more transcendent interests associated with nationhood and membership in the community of nations.

V. CONCLUSION

THIS PERIOD OF JUDICIAL CREATIVITY in dealing with discriminatory, racist legislation was short lived.

In the first place, to the extent that this creativity purported to reflect more transcendent national and imperial concerns with justice, equality and reciprocity, it was increasingly undercut by the policies of both the Dominion and imperial governments, which effectively caved in to white settler pressure. By 1885 London had shed most of the remnants of concern previously voiced about anti-Chinese

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[131] On 'rule of law' ideology in British legal thinking, see P. Romney, "Very late Loyalist Fantasies: Nostalgic Tory History and the Rule of law in Upper Canada" in W. Pue & B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 119.

legislation based on treaty obligations to China, and within fifteen years the Colonial Secretary would be advising self-governing white Dominions how to keep out the oriental hordes without offending their governments.[132] The Dominion government, partly on the advice of Gray, was to secure the passage of federal legislation designed to reduce the flow of Chinese immigrants in 1885 by the imposition of a head tax and an immigrant/ship's tonnage ratio.[133] Thereafter, by a combination of diplomatic and regulatory strategies Ottawa was able to limit the flow of both Japanese and East Indian migrants.[134] When it came to a choice between international obligation or commitment to the ideal of a multi-racial empire on one hand, and accommodating the ever vocal and sustained demands of the bearers of British culture and economic interests on the other, there was in fact no contest.

Secondly, the character of the British Columbia Supreme Court changed, especially in the 1890s, as its original members retired or died and were replaced by individuals, some of whom had been provincial politicians who had proposed or at least supported anti-Chinese legislation. The hostile attitude which the early court, almost certainly taking its cue from Begbie, showed in dealing with anti-Chinese legislation, was not shared by some of the newer appointees, who were not so ready to assume provincial powerlessness in matters of race.[135] Racially discriminatory legislation continued to be struck down from time to time, but more for technical reasons than out of any sense of principle.[136]

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[132] See R. Huttenback, *Racism and Empire: White Settlers and Colored Immigrants in the British Self-Governing Colonies 1830-1910* (Ithaca, N.Y.: Cornell University Press, 1976).

[133] *Supra*, note 36.

[134] M. Timlin, "Canada's Immigration Policy, 1898-1910" (1960) 26 Can. J. Econ. & Poli. Sci. 517.

[135] Good examples are Walkem and Drake JJ. who sat on the reference *In Re Coal Mines Regulation Amendment Act 1890* (1896), 5 B.C.R. 306 (S.C.) in which the exclusion of Chinese workers from underground work in the coal mines was found to be within the jurisdiction of the Province.

[136] See in particular *In Re Rahim* (1911), 16 B.C.R. 469 (S.C.); *In Re Rahim (No.2)*, (1911), 16 B.C.R. 471 (S.C.); *In Re Narain Singh et al.* (1913), 18 B.C.R. 506 (S.C.) in which Dominion regulations designed to stem East Indian immigration were struck down.

Even if the Supreme Court bench had sustained its original position on anti-oriental legislation, it is questionable how much protection would have been afforded in fact to the Chinese residents of the Province. The views of superior court judges were not shared by the magistrates, police, and by-law officers, who were the representatives of the justice system with whom the Chinese would most frequently have come into contact, and by whom their lives were most closely affected.[137]

A third development which ensured the demise of this judicial activism against racially discriminatory legislation was the evolution of a theory of constitutional interpretation for Canada which effectively stifled the exercise of critical judgment by courts on the underlying character of legislation which was the subject of challenge. An obvious weakness of the interpretive approach taken by the early B.C. Supreme Court was that it did not address the tension between judicial construction of the *B.N.A. Act* and the demands of legislative sovereignty in the Canadian system of government. The Court was never asked to pass on the constitutionality of Chinese restriction legislation enacted by the Dominion Parliament, which was clearly discriminatory, but was at the same time within federal jurisdiction. It is possible that their concern with more transcendent considerations would not have survived that test. In any event, before long the issue was decisively put to rest by the Privy Council, which ordained that the role of the courts was to deal with the division of powers issues in constitutional litigation and no more,[138] and in so doing created the effective compromise between Canadian federalism and legislative sovereignty which made the acceptance of judicially found and fashioned constitutional principles so difficult in this country until the advent of the Canadian Charter of Rights and Freedoms.

An appreciation of the record of the early British Columbia Supreme Court justices on the "Chinese question" is not on this account of purely antiquarian interest. It provides evidence of an earlier acceptance in some judicial quarters of the notion, however limited and imperfect, of an irreducible core of legal rights which every resident of a jurisdiction claiming to be governed by British concep-

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[137] For a revealing examination of the administration of the law at the level of the local community in B.C., see N. Parker, The Capillary Level of Power: Methods and Hypotheses for the Study of Law and Society in Late-Nineteenth Century Victoria, British Columbia (M.A. Thesis, University of Victoria, 1987).

[138] *Union Collieries* v. *Bryden*, *supra*, note 40; *Cunningham* v. *Tomey Homma*, *supra*, note 40.

tions of justice should be entitled to enjoy. In the process, the judges indicated that to one degree or another they were willing to accept the multi-racial composition of the Province's population. It did not mean that these judges were bereft of prejudice. Based on some of their observations quoted above, they shared certain of the prejudices and stereotypes harboured by their white neighbours. Nor can it be said, on the basis of this evidence alone, that during their careers on the bench they were invariably consistent and principled in exercising the judicial function, even in matters of race.

However, in the particular context of anti-Chinese legislation they seem to have recognized that the judicial role was one which should be exercised in a way which would cut through the bias, judgmentalism and hypocrisy demonstrated by a significant portion of the white community.[139] Although their impulses in this respect were the product of nineteenth century political and juristic thought and dialectic, some of the underlying values which they espoused in their judgments, in particular their extended notion of the rule of law and their belief in pervasive constitutional norms, have proved durable enough to have experienced revival. To that extent there is a connection between the strains of modern liberalism in their opinions and the anti-discrimination stance of judges of today.

[139] It is possible to attribute this relatively benign position on the "Chinese question" to the fact that the judges were not themselves threatened by the Chinese in any way. While not discounting this as an element in their thinking, I incline to belief that their motives were more complex and their attitudes more principled.