Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909

Bruce Ryder
Osgoode Hall Law School of York University, bryder@osgoode.yorku.ca

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Abstract
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RACISM AND THE CONSTITUTION: THE CONSTITUTIONAL FATE OF BRITISH COLUMBIA ANTI-ASIAN IMMIGRATION LEGISLATION, 1884-1909

By Bruce Ryder*

The author explores the values and forces that influenced judicial and federal cabinet decisions regarding the constitutional validity of over one hundred BC statutes discriminating against persons of the Japanese or Chinese race passed between 1872 and 1922. He argues that the interpretation of the constitutional division of powers was shaped by a racist ideology that viewed Asian immigrants as different from, and inferior to, European immigrants in all respects but one: their capacity for work. In this, the first part of his study, he focuses on the nature of the federal disallowance power and the reasons why it was used to veto the BC Immigration Acts that had the effect of prohibiting Chinese, and later, Japanese immigration.

I. INTRODUCTION

This paper is the first part of a study of how the constitutional allocation of legislative and executive power shaped the legal treatment of Chinese and Japanese people in British Columbia from 1872 to 1922. A racist theory and practice, rationalized by a belief in the natural superiority of the caucasian race, was deeply entrenched in the law, culture and institutions of

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*Associate Professor, Osgoode Hall Law School, York University. I would like to thank Annie Bunting, Joon Min Cho, John Evans, Reuben Hasson, Patrick Macklem, Toni Pickard, Tim Stanley and Lee Waldorf for their comments on an earlier draft of this paper. I would also like to thank Joon Min Cho and Lee Waldorf for their excellent research assistance.
the province. Over this period, the BC legislature passed over one hundred acts or bills containing provisions discriminating explicitly against persons of the Chinese or Japanese race. In exploring the constitutional fate of BC anti-Asian legislation, one must look both at court decisions and at the use of the Dominion powers of reservation and disallowance. Many of these laws were challenged in the courts and six were declared *ultra vires* on the grounds that they were beyond the constitutional powers of a provincial legislature. On three occasions, the Lieutenant-Governor of BC reserved assent to anti-Asian Bills and thereby prevented them from coming into force. The use of the federal disallowance power imposed more serious constraints on the legislative expression of racism in BC: between 1878 and 1921, the federal cabinet invoked the disallowance power on twenty-two occasions to veto BC anti-Asian legislation. Indeed, given the importance that disallowance played in this context, much of this paper is focused on discovering the factors which motivated resort to that extraordinary federal power.

To do so, I have examined the occasions on which federal officials refused to intervene as well as the occasions on which they did take action against BC anti-Asian legislation. As Mallory pointed out in his study of the disallowance power in a different context, "[A]n examination of the petitions that went unheeded would be

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1 I want to emphasize that the legal discrimination was on the grounds of race, as opposed to national origin or citizenship. The legislation operated equally against all Asian residents of British Columbia, whether they were aliens, naturalized subjects or natural-born British subjects. Typically, legislation defined Chinese (Japanese) as "any native of the Chinese (Japanese) Empire or its dependencies not born of British parents, and shall include any person of the Chinese (Japanese) race." See, for example, *Provincial Elections Act*, S.B.C. 1903-5, c. 17, s. 3. As Martin J. commented after surveying a range of anti-Chinese statutes in *Re Coal Mines Regulation Act* (1904), 10 B.C.R. 408 (B.C.S.C.) at 426: "These Acts show a very remarkable adherence by the Legislature to the view that the Chinese are objected to not so much on the ground of nationality as on that of race."

2 This study covers the period from 1872 to 1922 because it was during this period that BC passed explicitly anti-Asian laws that were considered for federal disallowance. By the 1920s, new instances of legal discrimination tended to be expressed in less visible forms of delegated and discretionary decision-making. Simultaneously, disallowance had lost much of the fragile political legitimacy it once had. Thereafter, attempts at federal control of provincial policies had to be more subtle than the crude form of dominance allowed by the disallowance power. In other words, this study is framed by the distinct legal forms of racism and federal control in the first fifty years of BC's provincial history.
more illuminating than a consideration of those that were acted upon.\(^3\)

If attention was given solely to those occasions on which BC anti-Asian legislation was disallowed, one could form the impression, understandably, that the federal government fought a battle against the entrenchment of racist policies in the law. However, this would be a serious mistake; the federal government refused to veto a wide range of BC anti-Asian legislation and itself adopted explicitly racist legal policies in such areas as immigration and the right to vote throughout the period under study. By placing the use of the disallowance power in the larger context of Dominion and BC immigration and labour policies, it becomes apparent that the Dominion vetoed BC anti-Asian legislation only when it felt it necessary to protect its conception of Dominion or Imperial economic or strategic interests.

Both federal and provincial politicians subscribed to a racist ideology that stressed the inherent, natural superiority of European (white)\(^4\) people over non-European people. Legislation ensured that elected officials were exclusively white male British subjects who were accountable to an electorate composed, equally exclusively, of their own gender and race.\(^5\) That Canada should be a nation dominated by the white races of Europe was an assumption shared by all men with political power in the late nineteenth and early

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\(^4\) I will use the terms "European," "Euro-Canadian," or "whites" to refer to the caucasian population of British Columbia. Of course, many white residents of British Columbia were born in Canada, the United States or some other non-European nation. Similarly, Asian residents of British Columbia were of diverse (including Canadian) national origin. However, British Columbia's anti-Asian laws were based explicitly on race, regardless of national origin. They affected persons of actual or perceived Asian descent who were aliens, naturalized subjects or natural-born British subjects equally. I will use the terms Asian and European to designate race rather than nationality, since this usage most accurately reflects the social and economic racial hierarchy in the province.

twentieth century. There was, however, profound disagreement between the Dominion and BC governments about the politically appropriate response to Asian immigration and employment. These disagreements were based on different class-based assessments of the short-term\(^6\) value of the availability of Asian workers in the province. For the white working men of BC, who believed that Asian workers threatened their interests, Asian immigrants were different from and inferior to Europeans in all respects and thus ought to be excluded from the province. For the white capitalist class, Asians were an efficient and relatively cheap source of labour. These disagreements, regarding the definition of racial difference, played out in the BC legislature whenever the passage of anti-Asian immigration and labour legislation was debated. And whenever anti-Asian legislation was passed by the BC legislature, the debates between Euro-Canadian men, divided by class interests, over the definition of racial difference continued at the level of federal-provincial politics. In contrast to their counterparts in the BC legislature, politicians at the federal level were less influenced by the demands of the white working class of BC and far more influenced by considerations such as the maintenance of an adequate labour supply for large nation-building projects and the preservation of diplomatic relations with Japan.

Within British Columbia, differences about the value of Asian residents became a high profile staple of debates amongst

\(^6\) In the nineteenth century, Euro-Canadian politicians assumed that Chinese and Japanese immigrants were "sojourners" who would voluntarily return to their country of origin: A.B. Chan, "The Myth of the Chinese Sojourner in Canada" in G. Hirabayashi & K.V. Ujimoto, eds, Visible Minorities and Multiculturalism: Asians in Canada (Toronto: Butterworths, 1980). A clear statement of this attitude is the following speech by Prime Minister MacDonald defending the passage of legislation in 1885 depriving Chinese of the vote in Dominion elections: "The Chinese are foreigners. If they come to this country, after three years' residence, they may, if they choose, be naturalized. But we still know that when the Chinaman comes here he intends to return to his own country; he does not bring his family with him; he is a stranger, a sojourner in a strange land, for his own purposes for a while; he has no common interest with us, and while he gives us his labor and is paid for it, and is valuable, the same as a threshing machine or any other agricultural implement which we may borrow from the United States on hire and return it to the owner on the south side of the line; a Chinaman gives us his labor and gets his money, but that money does not fructify in Canada; he does not invest it here, but takes it with him and returns to China; and if he cannot, his executors or his friends send his body back to the flowery land. But he has no British instincts or British feelings or aspirations, and therefore ought not to have a vote." Canada, H.C. Debates vol. 18 at 1582 (4 May 1885).
voters and elected representatives beginning with the rise of industrial modes of production in the 1870s and continuing through the period under study. On some occasions, politicians who favoured the presence of Asian workers in the province as a source of cheap labour prevailed in the legislature; on other occasions, coinciding with the political influence of organized white labour, those who favoured exclusionary policies were in the majority.

While the BC government's commitment to an anti-Asian policy wavered over time depending on the political influence of the Euro-Canadian working class, the Dominion government followed a consistent policy of vetoing BC's legislative prohibitions on Asian immigration and on the employment of Asian labour. As a result, conflict between Ottawa and Victoria over immigration and labour policy was a constant feature of constitutional politics from the late 1870s until 1908. After 1908, provincial and federal policies regarding Asian immigration were in harmony, the supply of unskilled labour was more assured, and constitutional conflict over the issue dissipated.

However, over the entire period under study, both levels of government were content to enact or leave in place laws that disenfranchised Asian people, or laws that in other ways contributed to rendering Asian workers a relatively powerless and vulnerable minority in the BC labour force. Judicial interpretation of the constitutional division of powers followed the same pattern by preventing the provinces from enacting legislation that interfered with the right of Asians to reside in the province and work as wage labourers, but otherwise, with minor exceptions, left discriminatory legislation intact.

The history of racism in BC has been developed by a number of scholars. Some have studied the destructive impact of the fur trade, and later colonial expansion, settlement, and industrial

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7 I will refer at times to "voters," or the "electorate," and to "politicians," or "elected officials," rather than to the "public at large," so as not to obscure the monopolization of political power in the hands of white male British subjects. Women, other than Asian and First Nations' women, achieved the right to vote in 1917 (Provincial Elections Act Amendment Act, S.B.C. 1917-18, c. 23), Chinese and South Asian men and women in 1947 (Provincial Elections Act Amendment Act, S.B.C. 1947, c. 28, s. 14), and Japanese and First Nations men and women in 1949 (Provincial Elections Act Amendment Act, S.B.C. 1949, c. 19, s. 3).
development on First Nations' cultures. In addition, historians have documented thoroughly the racist policies and practices encountered by Chinese and Japanese immigrants in British Columbia. Moreover, valuable recent work has described the forms of resistance and mobilization within Asian communities against discriminatory laws and oppressive social and economic practices, and the participation of Asian women in early economic development in British Columbia. These studies have shown that class and racial inequality are dual products of colonialism and capitalist development that combined to place Asian immigrants into the lowest sectors of the British Columbia working class.

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This study seeks to build on the above analyses by demonstrating how the legal structure of Canadian federalism played a significant role in creating and consolidating a racial hierarchy within the province. A close examination of conventional legal sources reveals that judicial and federal cabinet interpretations of the Constitution tended to permit uses of state power that contributed to the formation of a class structure embedded in and intertwined with relations of racial inequality and to prohibit those that did not.

The study is limited to BC legislation because it was in BC that the vast majority of the Canadian Chinese and Japanese population resided during the period of constitutional conflict under study. Because BC was the Dominion’s sole province on the Pacific coast, it provided the port of entry for almost all Asian immigrants in the late nineteenth and early twentieth century. For these reasons, federal-provincial conflict over Asian immigration and employment occurred almost exclusively in BC. The specific focus of this paper should not obscure the fact that Japanese and Chinese persons settling east of BC were also subject to discrimination in provincial and municipal laws.

I begin in Part II with a description of the nature and source of the Dominion powers of reservation and disallowance of provincial laws, and I offer general explanations for the manner in which these powers were exercised with regard to BC anti-Asian legislation. In Part III, I will explore the constitutional fate of the nine anti-Asian immigration Acts passed between 1884 and 1908. In the second part of this study, the analysis will proceed with a

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12 In tracing the legal-constitutional history of BC anti-Asian legislation, I have relied primarily on the BC Legislative journal and sessional papers, the statutes of British Columbia, reported judicial decisions, and two valuable volumes compiling correspondence and reports relating to the use of the federal disallowance power: W.E. Hodgins, *Dominion and Provincial Legislation (1867-1895)* (Ottawa: Government Printing Bureau, 1896) and F.H. Gisborne & A.A. Fraser, *Correspondence, Reports of the Minister of Justice and Orders in Council: Upon the Subject of Provincial Legislation, 1896-1920*, vol. 2 (Ottawa: F.A. Acland, 1922).

13 For example, in 1911, of all Chinese and Japanese residents of Canada, 95% of the Japanese population and 70% of the Chinese population resided in BC. See Roy, *supra*, note 9 at 269; see also Li, *supra*, note 9 at 51.

consideration of each of the other types of BC anti-Asian legislation enacted from 1872 to 1923: legislation restricting the rights of Asians to be employed in certain industries, private companies’ incorporation legislation with clauses prohibiting the hiring of Asian labour, legislation excluding Asians from the right to vote and the right to hold public office, and legislation imposing discriminatory taxation, licensing or regulatory requirements on Asians. By tracing the ultimate constitutional fate of each instance of anti-Asian legislation, a clear pattern of results emerges regarding each type of legislation. The immigration and labour laws were almost invariably ruled ultra vires in the courts, reserved by the Lieutenant-Governor of BC or disallowed by the federal cabinet; the other discriminatory laws were rarely reserved or disallowed and, with a few exceptions, survived constitutional challenges in the courts.

II. THE FEDERAL POWERS OF DISALLOWANCE AND RESERVATION

A. The Nature of the Powers

The powers of disallowance and reservation function as executive restraints on the exercise of power by a subordinate legislature. They originated as mechanisms for imperial control of colonial legislatures. When legislative powers were granted to the British colonies, the Imperial government retained a veto by way of...
disallowance over legislation passed by a colonial legislature. In addition, the Imperial government had the power to intervene prior to the coming into force of a colonial bill by instructing the appointed colonial Governor to withhold royal assent, and thereby prevent the bill from coming into force. Or, if the Governor was uncertain about whether a colonial bill was consistent with Imperial policies, he could choose to reserve assent for the opinion of the Imperial government.

The Constitution Act, 1867\(^\dagger\) did not purport to end the hierarchical political relationship between Britain and its North American colonies. Instead, sections 55 to 57 of the Act expressly preserved British authority to invalidate any Canadian statute by the exercise of the powers of disallowance and reservation. Section 55 empowered the Governor-General to withhold or reserve royal assent, the necessary, final step to a bill becoming an act of Parliament. Section 56 provided that any Dominion legislation could be disallowed by Imperial order in council issued within two years of the legislation’s enactment by royal assent.

Moreover, section 90 of the Act replicated the imperial model in relations between the Dominion government and the provinces. The Governor-General was given the power to disallow any provincial legislation within a year of the receipt of an authentic copy of the legislation by the Secretary of State. In practice, this power has always been exercised on ministerial advice and has taken the form of an order in council recommended by the Minister of Justice.

The provincial Lieutenant-Governors were also given the powers of reserving and withholding assent to any provincial bill. The Lieutenant-Governor of a province is appointed by the federal government (section 58), and can be instructed to withhold royal assent to provincial bills or to reserve them for the consideration of the Governor-General (sections 55 and 90), who will act on the advice of the federal Cabinet. The bill will remain inoperative unless the Governor-General gives his or her assent within one year of the date of reservation (sections 57 and 90). The powers of disallowance or reservation may be exercised whether or not the

\(^{16}\) (U.K.), 30 & 31 Vict., c. 3 (formerly British North America Act, 1867).
legislation or bill falls within the legislative competence of the province.

Although the powers of disallowance and reservation are not constrained by any substantive legal limitations, the formal limitations are significant. First, the powers relate only to legislative enactments, and not to other forms of delegated decision-making by executive or administrative bodies. Secondly, the powers of disallowance and reservation cannot be used to excise only the offending portions of a statute, leaving the balance intact. It is an all or nothing choice: the federal authorities must choose between allowing the entire Act to stand, or having it fall in its entirety. From the Dominion's point of view, this is an inconvenient limitation, for disallowance will disrupt expectations built on legislation that has already gone into force and that may be unobjectionable apart from one clause. Thirdly, and most significantly, the disallowance power must be exercised within one year of the receipt of the legislation in Ottawa. Beyond this one year period where the threat of disallowance hangs over provincial legislation, Ottawa loses its ability to unilaterally nullify provincial laws. As we shall see, all of these formal features of disallowance influenced Dominion Cabinet decisions regarding the use of the power against BC anti-Asian legislation.

The executive powers of disallowance and reservation conferred on the Dominion with respect to provincial legislation long outlived the legitimacy and use of the Imperial powers.  

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17 Duff C.J.C. affirmed that "[i]t is indisputable in point of law [that] the authority is unrestricted." Reference Re the Powers of Disallowance and Reservation, [1938] S.C.R. 71 at 78 [hereinafter Re Powers]. This was true prior to 1982, but it may be that any future use of the powers will be open to challenge on the grounds that they must be exercised in a manner consistent with the Charter of Rights and Freedoms. See Operation Dismantle v. R., [1985] 1 S.C.R. 441 at 455, where the Supreme Court held that cabinet decisions taken pursuant to the Royal Prerogative "fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution." It is likely that executive decisions to exercise the powers of disallowance and reservation would similarly be subject to the constraints of the Charter.

18 The Imperial power of reservation was exercised eleven times between 1867 and 1878, and one Dominion statute was disallowed in 1873. Apart from these early uses, the Imperial powers were abandoned in practice, and formally disavowed at the 1930 Imperial Conference. The United Kingdom agreed not to exercise the power of disallowance, nor to instruct the Governor-General of Canada to reserve assent to Canadian statutes. See P. Hogg,
Since Confederation, 70 bills have been reserved by Lieutenant Governors, and 112 provincial statutes have been disallowed by federal order in council,\(^19\) as the following table illustrates.

### Disallowances of Provincial Legislation by Period and Province\(^20\)

<table>
<thead>
<tr>
<th>Province</th>
<th>1867-1881</th>
<th>1881-1896</th>
<th>1896-1911</th>
<th>1911-1924</th>
<th>1924-1945</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>BC</td>
<td>12</td>
<td>8</td>
<td>21(^21)</td>
<td>2</td>
<td>0</td>
<td>43</td>
</tr>
<tr>
<td>Alberta</td>
<td>-</td>
<td>-</td>
<td>0</td>
<td>1</td>
<td>11(^22)</td>
<td>0</td>
</tr>
<tr>
<td>Sask.</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Manitoba</td>
<td>6</td>
<td>19(^23)</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Ontario</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Quebec</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

19 These figures are drawn from the tables set out in La Forest, *supra*, note 15 at 83-115. These tables conveniently summarize every act and bill that was disallowed or reserved respectively. I know of only one instance in which these powers were exercised after La Forest’s study was published in 1955, namely, the reservation of Saskatchewan’s Bill 56 in 1961 described in Mallory, “The Lieutenant-Governor’s Discretionary Powers: The Reservation of Bill 56,” *supra*, note 15.

20 Compiled from the data in La Forest, *supra*, note 15.

21 Of the twenty-two disallowances of BC anti-Asian statutes between 1878 and 1921, eighteen occurred between 1898 and 1908.


23 Twelve of the Manitoba statutes disallowed in this period authorized the construction of railways in the province, at odds with the Dominion policy of granting a monopoly to the CPR. See J.A. Jackson, *The Disallowance of Manitoba Railway Legislation in the 1880’s: Railway Policy as a Factor in the Relations of Manitoba with the Dominion, 1878-1888* (M.A. Thesis, University of Manitoba, 1945) [unpublished].
From the vantage point of the contemporary operation of Canadian federalism, it is difficult to imagine that, from Confederation to the First World War, the powers of reservation and disallowance were used as a significant Dominion means of policing the legislative policies of the provinces. Between 1867 and 1920, 66 bills were reserved, and 96 statutes were disallowed. Each year up until the early 1920s, the Ministers of Justice scrupulously reviewed provincial legislation to determine what laws ought to be disallowed and prepared lengthy reports on the legislation they found objectionable.

Given the pervasive nature of Dominion supervision of provincial legislation, federal control could be exerted without having to resort to reservation or disallowance: many potential legislative initiatives were thwarted or amended in the face of the threat or fear of Dominion disallowance. The provinces had to alter the form in which they pursued their policies to evade the limitations imposed by the Dominion government’s exercise of the disallowance power (and, of course, to evade limitations imposed by the judicial interpretation of the division of powers). The history of BC anti-

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24 Of the occasions where reservation of a provincial bill has occurred since Confederation, 94% occurred prior to 1920; a similarly high percentage of all disallowances occurred prior to 1920 (86%). These numbers are based on the information in La Forest, supra, note 15.

25 La Forest, supra, note 15 at 26. The deliberations and reasoning behind the Ministers’ decisions, including the texts of correspondence and official reports, are fully documented in two volumes: Hodgins, supra, note 12, and Gisborne & Fraser, supra, note 12.
Asian legislation is a long, constitutional "tango" between Victoria and Ottawa, each move precipitating a counter-move by the other level of government. BC legislators demonstrated an extraordinary (although largely unsuccessful) capacity for constitutional adaptation, creativity and perseverance in pursuing an Asian exclusion policy in the face of Ottawa's opposition.

In the early years after Confederation, the federal government developed principles to constrain and justify the use of the disallowance power. The fragile legitimacy of a Dominion veto over any provincial legislation would have been threatened if its use had appeared randomly despotic. As Vipond has demonstrated, through the 1870s disallowance was justified primarily as a jurisdictional veto. The federal cabinet exercised the role later played exclusively by the courts.

The Dominion government risked a provincial rights backlash if it admitted that a disallowed statute dealt with a subject matter validly within provincial jurisdiction. Disallowance had greater legitimacy if it was premised on the supremacy of the Constitution rather than the supremacy of Dominion policy in provincial areas of jurisdiction. For this reason, the argument that the federal government was simply policing the boundaries of provincial jurisdiction remained the most common justification offered for the use of disallowance throughout its history. This led to the development of a self-serving jurisprudence of the division of powers fashioned in official reports prepared by Ministers of Justice. These reports lacked the status of legal precedents, but nevertheless played an important role in the shaping of early constitutional doctrine at a time when court decisions had provided only the barest sketch of the division of powers. Indeed, in some areas, such as provincial jurisdiction over immigration, the repeated use of disallowance

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26 For example, in 1869, MacDonald laid down four grounds on which provincial legislation ought to be disallowed: 1) where the legislation was wholly illegal or unconstitutional; 2) where it was illegal or unconstitutional in part; 3) where it clashed with federal legislation in fields of concurrent jurisdiction; and, 4) where it affected interests of the Dominion as a whole. Canada, H.C., "Disallowance" by Sir John MacDonald (Minister of Justice) in Sessional Papers, No. 18 (1869) (vol. 5 at 1 of the paper).

meant that jurisprudence developed by federal Ministers of Justice had the effect of pre-empting judicial interpretation of the constitutional division of powers.

Disallowance was not always justified as a jurisdictional veto. According to Vipond, beginning in the 1880s, "As the nation-building pretensions of the MacDonald government began to grow, so did its use of disallowance."\(^28\) The federal government was devoted to the National Policy, building the railway, and maintaining conditions favourable to capital investment. These goals were interpreted as requiring the disallowance of statutes interfering with vested property and contract rights.\(^29\) Between 1881 and 1887, the federal government disallowed fourteen Manitoba railroad charters on the grounds that they interfered with the monopoly of the CPR and would have diverted trade to the United States away from the fledgling Canadian system of railways.\(^30\) Over the years, the western provinces were especially vulnerable to disallowance: of the 112 instances in which the power was exercised, legislation from the western provinces fell victim on eighty-six occasions.\(^31\)

The legitimacy of the powers of disallowance and reservation became increasingly fragile over time as a hierarchical conception of the Canadian federation was gradually contested and replaced by the view that the provinces and the federal government are equally autonomous bodies when acting within their respective spheres of jurisdiction.\(^32\) In addition, the growing acceptance of the principles of liberal democracy undermined the legitimacy of the powers of disallowance and reservation. These powers were an all too visible and partisan interference with the provincial legislative process. An increased reliance on the courts replaced the blatantly anti-democratic nature of the disallowance power. In addition, the

\(^{28}\) Ibid.

\(^{29}\) Ibid. The most well-known example being the repeated disallowance of the Ontario River and Streams Act beginning in 1881.

\(^{30}\) Jackson, supra, note 23.

\(^{31}\) Ibid. and Wilson, supra, note 15.

parameters of provincial jurisdiction became more clearly defined over time by judicial decisions and by the use of federal disallowance. As a result, the disciplinary, policing function of disallowance became less important. In modern Canadian federalism, federal control of provincial policies is less necessary than it was in the first half century following Confederation, and is now exercised by more subtle fiscal and regulatory powers. For all of these reasons, resort to the powers of reservation and disallowance has fallen off dramatically since 1920.

In 1938, the Supreme Court held that the powers continue to exist in law, unaffected by their abandonment in practice. The disallowance power has not been invoked since 1942, and no bills have been reserved since 1961. Although one occasionally hears calls for the resuscitation of the disallowance power, typically to prevent the provinces from overriding Charter rights and freedoms, any federal government would pay a high political price for such an invasion of provincial autonomy. Disputes relating to the federal division of power are now resolved through processes of intergovernmental negotiation or by resort to the courts. Thus, in the future, disallowance will likely be used sparingly, if at all, to veto provincial policies that run seriously afoul of central Canadian economic interests, as, for example, Alberta Social Credit legislation did in the late 1930s and early 1940s. The federal government can no longer routinely police the boundaries of provincial jurisdiction by resort to unilateral, executive fiat. At the moment, the continued legal existence of the powers is an anomalous legacy of the quasi-colonial relationship of the provinces to the federal government embodied in the Constitution Act, 1867.

Mallory has described the disallowance power as "an imperial device for holding other provinces under the sway of the predominant economic interest of the central provinces." Forsey's evaluation of the role of the disallowance power is similar:

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33 Re Powers, supra, note 17.


35 Mallory, supra, note 3 at 176-77.
He would be rash indeed who would now venture to suggest that the power of disallowance is any safeguard except for the liberties of those who are as a rule well able to look after themselves. The Dominion Government will be on the side of the big battalions. The revival of Dominion control over the provinces is really the revival of Dominion control over such provinces as try to do things which the dominant economic interests of Canada dislike.36

While Mallory and Forsey were not directing their analyses of the disallowance power to its use against BC anti-Asian statutes, its use in this context is consistent with their assessments. Although Ministers of Justice frequently recommended disallowance on the grounds that BC anti-Asian legislation was ultra vires or inconsistent with Imperial treaty obligations, the pattern of disallowances of anti-Asian legislation as a whole can be explained only by reference to Dominion or Imperial economic interests. Before embarking on a detailed analysis of the constitutional fate of each instance of BC anti-Asian legislation to demonstrate this thesis, it is necessary to provide some background on Imperial treaties with China and Japan, and on the intersection of social hierarchies based on race and class in early British Columbia.

B. British Treaties with China and Japan

A series of unequal treaties were imposed upon China by the European imperialist powers in the nineteenth century. The main purposes of these treaties were to transfer control of territory to the European states and to open up specified Chinese ports to European trade. At the end of the Opium War (1839-42), China and Britain entered the Treaty of Peace, Friendship and Commerce signed at Nanking on 29 August 1842.37 Article 1 of the Treaty of Nanking provided that the subjects of China and Great Britain "shall enjoy full security and protection for their persons and property within the Dominions of the other."38 Britain's victory in the Opium

36 E. Forsey, "Canada and Alberta: The Revival of Dominion Control over the Provinces" (1939) 4:16 Politca 95 at 123.


38 ibid. at 466.
War was followed by many other foreign invasions of China, resulting each time in an unequal treaty that interfered with the territorial and economic integrity of China. A second Treaty of Peace, Friendship and Commerce, signed at Tientsin on 26 June 1858, renewed and confirmed the provisions of the 1842 Treaty of Nanking. Other international agreements involving China in the late nineteenth and early twentieth century simply enlarged the trading rights of Britain and other foreign powers in China. Britain was also interested in securing the right to import Chinese labour. By Article 5 of the Peking Convention of 1860, the Chinese Emperor undertook to decree that Chinese subjects are "at perfect liberty ... to take service in British Colonies ... and to enter into engagements with British subjects for that purpose." The treaty rights of Chinese subjects to "enjoy full security and protection for their persons and property" while in British Dominions such as Canada remained unaltered by any subsequent treaty into the twentieth century. While the Chinese treaty rights existed on paper, in practice their existence was rarely acknowledged by legal decision-makers in Canada.

Whereas the treaties with China originated in the European powers' desire for commercial exploitation, Britain's treaties with Japan were motivated by a strategic desire for a military and commercial alliance to better secure its interests in east Asia. Britain and Japan had a common fear of Russian expansion in China and Korea. Their concern to check Russian military and naval power in east Asia led to the Anglo-Japanese Alliance which lasted formally from 1902 until 1923. The Treaty of Commerce and Navigation between Great Britain and Japan, signed on 16 July 1895...
1894, and renewed in 1905 and 1911, provided in Article 1 that "[t]he subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the dominions and possessions of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property." By the *Japanese Treaty Acts* of 1907 and 1913, the Canadian government declared that this treaty would have the force of law in Canada. Prior to 1907, neither the Chinese nor Japanese treaties had been incorporated in Canadian domestic law.

Throughout the period under study, Chinese and Japanese subjects residing in BC had similar treaty rights to enjoy the protection of their persons and property arising from the 1842 *Treaty of Nanking* and the 1894 *Treaty of Commerce and Navigation* respectively. However, no matter how similar Chinese and Japanese nationals in Canada were in terms of the treaty rights that could be asserted on their behalf by their respective governments, diplomatically their situations were worlds apart. Japan was a rising international power; China a subjugated state. As a result, Canadian authorities paid little heed to the Chinese treaties, while they treated Japanese treaty rights very seriously, even before they were enacted into domestic law in 1907.

As we shall see, while disallowance was exercised repeatedly on the grounds that it was necessary to safeguard treaty rights, this was true only of the Japanese treaties. The western powers viewed the Chinese treaties in a manner consistent with their origins: they were unilateral treaties operating to their benefit in China. The clear terms of the Chinese treaties were ignored when it came to protecting the rights of Chinese nationals in Canada. For China, naturally, the treaties meant what they said: they granted reciprocal rights to Chinese and foreign citizens to the protection of their persons and property in the dominions of the other.

The conclusion is inescapable that the principle of protecting treaty rights did not in itself determine the use of federal disallowance against BC anti-Asian legislation. The exercise of

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43 Consolidated Treaty Series, vol.180 (1894) at 257.
44 S.C. 1907, c. 50; S.C. 1913, c. 27.
disallowance, however, was strongly informed by the need to preserve Imperial economic and diplomatic interests. Securing Imperial interests in China and elsewhere in Asia was dependent on the maintenance of the Anglo-Japanese Alliance; China, rendered a helpless power, could safely be ignored.

C. Race and Class in BC

In addition to Imperial interests in Asia, the exercise of disallowance cannot be explained without an understanding of the dynamics of race and class in early British Columbia and, in particular, of the phenomenon of a racially fragmented labour market.\(^{46}\) In such a labour market, wage differentials exist between racial groups performing similar tasks. In addition, segmentation occurs by job function, with the dominant racial group monopolizing higher paid positions and the lower groups restricted to marginal participation, performing the most menial unskilled labour. Both of these phenomena occurred in BC. For example, Chinese and Japanese workers were paid anywhere from one quarter to two thirds less than what unskilled white men were paid for performing the same tasks.\(^{47}\) And Chinese and Japanese workers in the mines were frequently employed as white miners' helpers and Chinese

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miners were legislatively excluded from positions of responsibility.\textsuperscript{48}

Racism affected

\[ \text{the allocation of persons to different positions in the production process and the allocation of material and other rewards and disadvantages to groups so categorized within the class boundaries established by the dominant modes of production.} \textsuperscript{49} \]

A complex and disparate array of factors contributed to the development of a racially stratified labour market in British Columbia. First, many Chinese, Japanese and European workers came to Canada as contract labourers, recruited by labour agencies. These workers were obligated to pay back the agencies the costs of travel and any other advances through deductions from their wages. After disembarking from ships, many immigrant workers went directly to boarding houses where labour contractors would come for men.\textsuperscript{50} The contract labour method of recruitment promoted both racial isolation and intra-group solidarity.

Secondly, employers promoted and exploited racial divisions to their advantage. Employment practices contributed to the creation of an economic hierarchy with British workers at the top, followed by other Europeans, with Asians and First Nations’ workers at the bottom. Employers successfully used sub-groups of this racially stratified labour force as strike breakers, to cut wages or otherwise to divide the interests of the working class and prevent the development of class solidarity.

Thirdly, state policies contributed to a racially stratified labour market by denying legal, political and civil rights to non-European racial groups. These policies restricted the political influence of and options open to members of non-European racial groups. As a result, the bargaining power of Asian and First Nations’ workers with employers and other workers was reduced; this in turn made it possible to justify racial wage differences. According to Bonacich,

\textsuperscript{48} Roy, supra, note 9 and Ryder, supra, note 5, c. 1, "Labour Legislation".


\textsuperscript{50} Adachi, supra, note 9 at 31.
The prejudices of business do not determine the price of labor, darker skinned or culturally different persons being paid less because of them. Rather, business tries to pay as little as possible for labor, regardless of ethnicity, and is held in check by the resources and motives of labor groups. Since these often vary by ethnicity, it is common to find ethnically split labor markets.\(^5\)

Thus, as Creese argues, a racially stratified labor market results from the "unequal economic, political, and cultural resources available to engage in the struggle for better pay and working conditions."\(^5\) Over time the low economic status of racial groups who perform menial labour further reinforces their social marginality.\(^5\)

The bargaining power of immigrant workers, for example, is affected by the legal rights accorded them by the state, which in turn will be affected by the degree of diplomatic influence that can be exerted by the worker's home state to advance legal protection abroad. As we shall see, Japan's rise as an international power, and China's subjugation by imperial states, had some influence in producing differing legal treatment of Chinese and Japanese residents of BC. In protesting anti-Japanese laws, Japanese diplomats insisted that their people be distinguished from the Chinese, whom they viewed as an inferior race. For military and commercial reasons, the Dominion and Imperial governments urged BC to exempt Japanese from its anti-Asian laws. Japan's greater diplomatic clout would have resulted in a greater disparity in the legal treatment of Japanese and Chinese if BC legislative provisions had treated Chinese and Japanese persons separately. But BC voters and politicians insisted on passing provisions excluding Chinese and Japanese alike; if anything, the growing strength of the Japanese Empire led them to harbour a greater fear of Japanese labour competition.\(^5\) As a result, appeals by the Japanese for federal disallowance, where they were successful, ironically worked to remove legal discrimination against the Chinese as well.


\(^{52}\) Creese, supra, note 9 at 59.

\(^{53}\) Li, supra, note 9 at 34.

\(^{54}\) Adachi, supra, note 9 at 46-47.
A racially-structured labour force heightened racial awareness and racial tension. For example, the mainstream, Euro-Canadian labour movement, represented by the Trades and Labour Congress of Canada, opposed Asian immigration and sought to restrict Asian employment. Wages, working conditions and job security were poor and further threatened, in the eyes of most white workers, by Asian and other "undesirable" workers. Asian workers and socialist trade unions made attempts to organize workers of all races, but generally, in late nineteenth and early twentieth century British Columbia, the development of class solidarity was hindered by racial divisions. Unions were seeking legal recognition, better wages and better working conditions. BC politicians were slow to respond to these demands to empower working people as a whole. However, they were willing to negotiate the Asian immigration issue, and manipulated it to give the appearance that they were doing something for the white working man. In fact, until the turn of the century, the only significant legislative initiatives channelled labour issues — resulting from the use of strike breakers, low wages and poor working conditions — into immigration and racial issues. In this way difficulties caused by underlying industrial conflict were consistently reconstructed as racial problems.

Viewed in light of the social context of a racially fragmented labour market, federal disallowance followed a pattern that favoured the interests of the European capitalist class in British Columbia. Laws that interfered with the ability of employers to take advantage of a segregated and marginal Asian labour force, such as prohibitions on Asian immigration and employment, were consistently disallowed. Laws that rendered Asian workers a


56 See E. Comack, "We will get some good out of this riot yet": The Canadian State, Drug Legislation and Class Conflict in S. Brickey & E. Comack, eds, The Social Basis of Law: Critical Readings in the Sociology of Law (Toronto: Garamond Press, 1986) 67 and Phillips, supra, note 55 at 78, notes that it was not until a 1919 conference of the BC Federation of Labour that "[t]he triumph of the socialists was evident in the abandonment of anti-orientalism and the resolution that 'this body recognizes no alien but the capitalist.'"
relatively powerless sector of the labour force, by depriving them of rights and opportunities in the province other than the right to take up wage employment, were generally allowed to remain in place.

III. THE DISALLOWANCE OF BC ANTI-ASIAN IMMIGRATION ACTS

A. Section 95 of the British North America Act

Between 1884 and 1908, the British Columbia legislature passed nine immigration acts prohibiting Asian immigration into the province. The first two acts, passed in 1884 and 1885, prohibited Chinese immigration. The last seven acts, passed annually from 1900 to 1908, empowered officials to require prospective immigrants to pass a test in any language of Europe prior to admission. These latter acts were aimed at excluding Japanese and other Asian immigrants. None of these acts was in force for long. Of the nine immigration acts, eight were disallowed by the federal Cabinet within a year of their coming into force, and one was reserved by Lieutenant-Governor Dunsmuir in 1907.

Neither treaty rights nor the constitutional distribution of powers provides a full explanation for the pattern of federal disallowance of BC anti-Asian immigration laws. BC's Chinese immigration acts were disallowed in 1884 and 1885 notwithstanding direction from the Imperial authorities that Chinese treaties need not be considered. As for provincial jurisdiction to legislate regarding immigration, section 95 of the Constitution Act, 1867 granted the provinces and the federal government concurrent jurisdiction over the regulation of immigration and agriculture:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

The text of section 95 appears to give the provincial and federal governments equal powers to pass laws regarding immigration within
their respective territorial boundaries.\textsuperscript{57} Provincial immigration laws are valid and will operate subject to federal paramountcy if they are repugnant to (inconsistent with) any federal law.

In practice, the federal government has exercised exclusive control over the definition of admissible categories of immigrants since Confederation. BC anti-Asian legislation represents the only provincial attempt to exert significant legislative control over immigration in Canadian history.\textsuperscript{58} Conflict between Ottawa and Victoria over Asian immigration provided the context in which a strategy of exclusive Dominion legislative control over immigration was forged. Until 1906, Dominion control was exercised by means of the disallowance power; thereafter, with the passage of the first comprehensive federal immigration legislation in 1906, federal dominance of immigration policy has been ensured by the rule of federal paramountcy set out in section 95.

As we shall see, BC immigration laws were disallowed in 1884 and 1885 to ensure a supply of Chinese labour for railway construction. From 1900 to 1908, disallowance was motivated by a desire to preserve the Anglo-Japanese alliance by which Imperial commercial and military interests in east Asia were secured. However, federal Ministers of Justice preferred to explain disallowance on legal, jurisdictional grounds rather than asserting the primacy of Dominion policies in an area of shared jurisdiction with the provinces. This led to the articulation of significant limitations on provincial powers over immigration to justify the use of federal disallowance. According to federal cabinet interpretations of section 95, the provincial power to "make laws in relation to


\textsuperscript{58} Brossard, ibid at 104-13, describes provincial immigration initiatives since Confederation. The provinces were involved in promotional policies in the United States and Europe similar to those conducted by the federal government: N. MacDonald, Canada: Immigration and Colonization 1841-1903 (Toronto: MacMillan, 1966) at 90; J.D. Cameron, The Development of Legislation Relating to Emigration to Canada (Ph.D. Thesis, University of Toronto, 1943) [unpublished] and H.M. Troper, Only Farmers Need Apply: Official Canadian Government Encouragement of Immigration from the United States, 1896-1911 (Toronto: Griffin House, 1972).
immigration into the province" meant that the provinces had the authority to *promote* immigration into the province, but lacked the power to *prohibit* immigration. The courts had little opportunity to consider this interpretation of section 95. In all but one instance, BC immigration acts were disallowed before any court challenge was brought. When the constitutional validity of a BC anti-Asian immigration act was finally considered in court in 1908, it was ruled inoperative on the grounds that it conflicted with two paramount federal statutes, the 1906 *Dominion Immigration Act* and the 1907 *Japanese Treaty Act*.59

It might be argued that the focus placed here on Dominion economic interests ignores a simpler explanation for the disallowance of BC immigration laws based in the reality of Canadian geography. In matters of immigration policy prior to the era of air travel, Ontario and the prairie provinces were largely at the mercy of the provinces with active ocean ports. As BC is Canada's only Pacific province, its assertion of jurisdiction over Asian immigration under section 95 could have effectively established a policy of Asian exclusion for the entire Dominion. Disallowance could be understood as an indication of the Dominion government's insistence that it alone should be entitled to establish policies that will have an impact on the Dominion as a whole.

However, federal politicians did not object to BC's immigration policy on the grounds that it blocked the rest of the country's access to Asian immigrants. The immigration recruitment policies of the federal government and the provinces indicated that they lacked interest in promoting Asian immigration. Moreover, migration of Asian settlers east of the Rockies was negligible prior to the turn of the century.60 Central Canadian politicians did express dismay at the potential damage to trade relations with Japan that might result from BC's actions.61 The evidence suggests that Ottawa insisted on controlling Asian immigration into BC because of the importance it attached to the maintenance of both an adequate

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59 See *infra*, notes 164-68 and accompanying text.

60 Li, *supra*, note 9 at 51.

61 See *infra*, note 133.
supply of cheap labour in BC and of Imperial relations with Japan. So long as these two concerns were satisfied, the Dominion government was as willing as the BC government to pursue a "white Canada" immigration policy.

B. Disallowance of the 1884-85 BC Chinese Immigration Acts

From Confederation to the First World War, the Dominion government's main immigration policy goal was to attract European agriculturalists with capital.62 It pursued advertising campaigns in Europe and the United States, warning the physically "unfit" and the indigent that they were not welcome, and promising capitalists a good return on investment.63 It paid bonuses to steamship lines for each European immigrant brought to Canadian shores. The government offered free land to farmers and gave railway companies huge grants of land for resale to immigrants. No agents were commissioned, no promotional literature was distributed and no plans were made for the agricultural settlement of Asians.

In five Dominion-provincial conferences held between 1868 and 1874, the Dominion and provincial governments agreed to cooperate in seeking to attract European settlers and in facilitating the settlement of uncultivated lands.64 These conferences were aimed at developing a cooperative approach to the exercise of concurrent jurisdiction under section 95. The provinces agreed that control of immigration should be exercised exclusively by the


63 MacDonald, supra, note 58 at 107.

64 Cameron, supra, note 58, Book II at 3-13 and MacDonald, supra, note 58 at 96-97.
Dominion Minister of Agriculture. Reception and colonization of immigrants would be a provincial responsibility. The Dominion and the provinces agreed to promote immigration by all means available. These policies were expressed in the preamble to the first federal Immigration Act, 1869.65

For a variety of reasons, Canada was not successful in attracting European immigrants in the latter half of the nineteenth century. Many European countries had restrictive emigration policies. The United States was a more attractive destination to Europeans: the climate was preferable, and the U.S. government had advanced further than Canada in appropriating native lands through the treaty process, and in building a continental transportation infrastructure. As a result, Canada’s foreign-born population remained relatively steady until the turn of the century. One consequence of low immigration levels was a shortage of labour, particularly for large nation-building projects like the construction of the CPR.

Chinese workers started arriving in the colony of British Columbia in the 1850s.66 Many came as contract labourers who were obligated to pay back the labour recruitment agencies the costs of travel and any other advances through deductions from their wages. Some were independent miners, merchants, domestic workers and other service workers employed in various industries. Almost all were men.

The first Chinese men in Victoria in 1858 were drawn by the discovery of gold in the Fraser Valley and later in the Caribou region. By 1860, the Chinese population on Vancouver Island was 1,577, compared to 2,884 Europeans. When the gold rush was seemingly over in the mid 1860s many Chinese stayed. Through the 1870s and 1880s they worked in gold-mining, the salmon canneries, the Vancouver Island coal mines and in various service occupations. Chinese workers generally held low paying jobs with unpleasant working conditions; the better jobs were reserved for white workers.

65 S.C. 1869, c. 10.

66 For thorough descriptions of the causes and patterns of Chinese immigration, see Tan, supra, note 10; Li, supra, note 9; Chan, supra, note 6; Chan, supra, note 9 and Wickberg, supra, note 9.
Nevertheless, by the mid 1870s, after the right to vote had been denied by legislation to Chinese and "Indians," concerns about Chinese labour competition began to be expressed in the legislature. In 1876, the legislature reported that "it is expedient for the government to take some steps to prevent this province from being overrun with a Chinese population to the injury of the settled population of the country." Initially, the legislature adopted discriminatory taxation statutes as the means to accomplish this objective; when the Chinese Tax Act, 1878 was subsequently ruled ultra vires and then disallowed by the federal government, the legislature appealed to Ottawa for a "solution" over the next few years.

From 1881-85, over 15,000 Chinese workers entered BC to complete the western section of the CPR. At the same time, the railway brought increased numbers of settlers from Europe, the United States and eastern Canada. In the eighteen months from June 1883 to November 1884, over 11,000 European immigrants arrived in BC; this influx was followed by increased conflict between Asian and European workers. In 1882, the BC legislature demanded that the federal government impose a requirement that CPR contractors hire European labour only. The federal government refused to impose such a requirement or to accede to demands to place limits on Chinese immigration. As Prime Minister

67 British Columbia, Legislative Journals (1876) at 46.
68 S.B.C. 1878, c. 35.
69 See Ryder, supra, note 5, c. 4, "Anti-Asian Taxation and Licensing Legislation."
70 Ward, supra, note 9 at 35 and Wynne, supra, note 9 at 346 & 353. In 1878, Chinese immigration was discussed in Parliament for the first time. Prime Minister Mackenzie ridiculed a suggestion that men wearing their hair longer than 5V2 inches be excluded from working on the Canadian Pacific Railway. A motion to that effect was defeated on the grounds that it would interfere with the construction of the railway. Woodsworth, supra, note 42 at 26-27.
72 Ibid. at xlix.
73 Avery & Neary, supra, note 62 at 25; Woodsworth, supra, note 42 at 28-40; Li, supra, note 9 at 27.
MacDonald put it to the House of Commons in 1883: "It will be all very well to exclude Chinese labour, when we can replace it with white labour, but until that is done, it is better to have Chinese labour than no labour at all."74

Frustrated by federal inaction, the BC legislature appointed a Select Committee on Chinese Labour and Immigration in 1883. The Committee made thirty-one recommendations that led to the passage in February 1884 of three anti-Chinese acts. One of these, An Act to Prevent the Immigration of Chinese,75 was the first of nine legislative attempts made by the BC government to prohibit Asian immigration. In the preamble to the Act, the legislature relied on section 95 of the Constitution Act, 1867 as the constitutional basis for its action, and pointed out that "the provisions hereinafter contained are not repugnant to any Act of the Parliament of Canada." Section 2 made it unlawful for any Chinese person to enter the province, imposed a penalty on those who did and provided that suspected offenders could be arrested without warrant.

In a report dated 7 April 1884, federal Minister of Justice Alexander Campbell stated his opinion that section 95 did not grant the provinces jurisdiction to prohibit immigration:

Having reference to the condition of Canada at the time of union of the provinces, the undersigned is of the opinion that the authority given by the 95th section of the British North America Act is an authority to regulate and promote immigration into the province and not an authority to prohibit immigration.

A law which prevents the people of any country from coming into a Province cannot be said to be of a local or private nature.76

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74 Canada, Parliament, House of Commons Debates, No. 14 at 905 (30 April 1883). See also Canada, Parliament, House of Commons Debates, No. 12 at 1477 (12 May 1882): "At present it is simply a question of alternatives: either you must have this labour or you cannot have the railway." See also the protests of an eastern MP on the need to use Chinese labour in order to complete the railway and open up trade to China: Canada, Parliament, House of Commons Debates, No. 13 at 326 (29 March 1883). The debates in these years made it clear that as long as there was a shortage of European labour throughout Canada, there was very little support for curtailing Chinese immigration. See Wynne, supra, note 9 at 354-57, which contains some remarkable 1882 correspondence from Andrew Onderdonk, the Chief Contractor of the CPR, to the Prime Minister.

75 S.B.C. 1884, c. 3.

76 Hodgins, supra, note 12 at 1092.
The federal Minister's view that a province could promote but not prohibit immigration was a self-serving exercise in constitutional interpretation. This view had no support in the text of section 95, nor in the legislative history of the Constitution Act, 1867. The text simply empowers the provinces to pass laws "in relation to immigration into the province." As with the other subject matters of jurisdiction allocated to the provinces by the Constitution Act, 1867, the language "in relation to" suggests that any law that in pith and substance deals with that subject matter, whether in a prohibitive or facilitative manner, is intra vires the province. While it lacked a textual basis, Campbell's theory did fit nicely with the policies of promoting immigration and facilitating settlement that had been agreed upon by the Dominion and the provinces in the conferences held after Confederation. His view was reiterated by subsequent Ministers of Justice in future years to explain the disallowance of BC anti-Asian immigration laws. Due in part to the repeated disallowance of these laws, the theory of restrictive

77 Mercier, supra, note 57 at 152; Brossard, supra, note 57 at 43-52 & 104-13.

78 For example, provincial jurisdiction in relation to property and civil rights (section 92(13)) allows the provinces to pass legislation both protecting or restricting those rights. See, for example, Citizens Insurance Co. v. Parsons (1881), 7 App. Cas. 96, 1 Cart. 265 (P.C).

79 Cameron, supra, note 58.

80 See Canada, House of Commons Debates, vol. 58 at 604-5 (27 March 1903). Minister of Justice Charles Fitzpatrick, after quoting from Minister of Justice Campbell's 1884 opinion, stated: "That principle laid down by Sir Alexander Campbell at that time has been followed ever since with respect to British Columbia legislation on the subject of Chinese emigration." See also the reliance of the Secretary of State for the colonies on Campbell's opinion in text accompanying note 126.

Apart from BC legislation, I know of only one other occasion on which Ottawa considered disallowing a provincial law affecting immigration. In 1893, Nova Scotia passed a law imposing a penalty of $200 on any person in charge of a vessel bringing a poor or indigent person to Halifax. Minister of Justice Thompson commented:

To the extent to which this provision is intended to relate to the subject of immigration it is, in the opinion of the undersigned, ultra vires. Several statutes have been passed by parliament in relation to the landing in Canada, and removal therefrom, of pauper and other immigrants likely, to become a public charge.

The undersigned is of opinion, however, that the provision in question may properly be left to such operation, as it may have with regard to matters within the legislative authority of the province, and not within that of parliament.

Hodgins, supra, note 12 at 635. The difference between the Nova Scotia provision and BC's anti-Asian legislation was that the former was not inconsistent with federal immigration policy.
provincial powers under section 95 was not (and has not been) tested in the courts.\footnote{81}{The 1908 BC Immigration Act was held to be inoperative, rather than ultra vires, as a result of its inconsistency with paramount federal legislation; \textit{Re Nakane and Okazake} (1908), 13 B.C.R. 370 and \textit{Re Narain Singh et al.} (1908), 13 B.C.R. 477. See \textit{infra}, notes 165-68 and accompanying text. A finding of federal paramountcy is based on an assumption that the provincial law is intra vires. Thus these decisions are implicitly at odds with the Minister of Justice's interpretation of provincial power under section 95.}

The text of section 95 employs the same language in granting the provinces and the federal government alike the power to pass laws "in relation to immigration." However, the federal government did not interpret its own power to pass laws in relation to immigration as being limited to the promotion of immigration. The 1869 \textit{Immigration Act} contained a provision enabling the government to prohibit the entry of paupers,\footnote{82}{S.C. 1869, c. 10, s. 16.} and a provision enabling the government to require that a bond be posted to prevent ill or disabled immigrants from becoming public charges.\footnote{83}{\textit{Ibid.}, s. 11(2) (relating to "Lunatic, Idiotic, Deaf and Dumb, Blind or Infirm" persons).} An 1872 amendment authorized the passage of executive orders excluding "any criminal, or other vicious class of immigrants,"\footnote{84}{S.C. 1872, c. 28, s. 10.} and subsequent federal immigration laws gave the executive unlimited power to define excludable groups.\footnote{85}{See \textit{infra}, notes 183-90 and accompanying text.} Ultimately, the courts upheld the federal power to prohibit the immigration of particular races or classes of persons.\footnote{86}{\textit{Re Munshi Singh} (1914), 20 B.C.R. 243 (C.A.)}

Although the constitutional text itself places no limits (other than territorial limitations) on provincial legislative jurisdiction over immigration, the language of section 95 does make clear that any provincial immigration law will be inoperative to the extent that it is inconsistent with federal laws. The Minister of Justice could have justified disallowance on the firmer ground of federal paramountcy if the 1869 federal \textit{Immigration Act} had contained a policy regarding Chinese immigration. But federal legislation contained no provisions relating to the race of prospective immigrants. The only
immigration restrictions related to class, character, and health, suggesting that the Dominion's only concern was that prospective immigrants, regardless of race, be capable of contributing to the development of the wealth of the country.

In future years, federal Ministers of Justice occasionally argued in other contexts that disallowance could be used for "preventing the provincial legislatures from interfering with Dominion policy in matters in which it is competent under the constitution to the Dominion government to have a policy." It was competent under the constitution for the Dominion to have an immigration policy, and it had a policy of admitting immigrants of all races. Thus, this theory would have justified the disallowance of BC immigration legislation, even in the absence of an express conflict with federal legislation. It is a theory that would have justified the disallowance of any provincial immigration legislation, essentially eliminating the existence of concurrent provincial jurisdiction over immigration under section 95. Perhaps for this reason, Minister of Justice Campbell preferred to propound the theory that only prohibitions on immigration were ultra vires a province in his 1884 report.

In any event, in his report on the 1884 Act, the Minister of Justice went on to state that it was not necessary to reach a definite conclusion regarding the scope of BC's constitutional jurisdiction to regulate immigration. Apart from the question of jurisdiction, Campbell stated that the Act involved "Dominion and possibly Imperial interests." For this reason, he was

87 For an explanation of the disallowance of a P.E.I. statute in 1898, see "Report to the Governor-General from Minister of Justice David Mills" in Gisborne & Fraser, supra, note 12, 762 at 764.

88 Hodgins, supra, note 12 at 1092.
entertained as to the authority of the legislature to pass the Act, the undersigned respectfully recommends that it be disallowed.\textsuperscript{69}

The Act was promptly disallowed by an order in council published on 12 April 1884,\textsuperscript{90} prior to advice being received from the British government regarding Imperial interests.

Upon hearing of the reasons given by the Minister of Justice for the disallowance, the Earl of Derby, Secretary of State for the colonies, informed the Governor-General by a letter dated 31 May 1884, that Imperial interests would not be affected by legislation prohibiting Chinese immigration:

Her Majesty's government have not held that the relations of this country with China require them to interfere with the Australian [anti-Chinese] legislation, and it has been treated as a manner of internal administration, with which a responsible colonial government is competent to deal. When, therefore, the Dominion Ministers advise your lordship with regard to these Acts, you may understand that the question is not held to involve imperial interests and that you should deal with it as a Canadian interest only.\textsuperscript{91}

Treaties and diplomatic relations with China could safely be ignored so long as the country was rendered powerless by the occupying European powers.

Throughout 1884, the federal government continued to refuse to enact laws restricting Chinese immigration. Prime Minister MacDonald responded to requests by BC Members of Parliament for federal legislation prohibiting the entry of Chinese into BC by pledging to set up a Royal Commission to examine the whole subject including "its trade relations, its social relations and all those moral considerations which make Chinese immigration inadvisable."\textsuperscript{92} MacDonald believed, accurately as it turned out, that the result of such a commission would be "restrictive regulation of Chinese immigrants."\textsuperscript{93} In the meantime, MacDonald informed the House, "there are certain contracts connected with the Canadian Pacific

\textsuperscript{69} Ibid. at 1092-93.
\textsuperscript{90} Ibid. at 1093.
\textsuperscript{91} Ibid.
\textsuperscript{92} Canada, \textit{H.C. Debates}, vol. 16 at 1287 (2 April 1884).
\textsuperscript{93} Ibid.
Railway which are to be finished, I suppose, next year; and I do not think the Government could have made such satisfactory contracts if it had been supposed that they could not get Chinese labour.\textsuperscript{94} Once the railway was finished, he said, there would be "a flow into that Province of our own race," and the anticipated arrival of Europeans would obviate the "difficulty in supplying the wants of the labour market."\textsuperscript{95} The evidence suggests that assuring an adequate supply of cheap labour for the completion of the railway was the true "Dominion and Imperial interest" that motivated the disallowance of the 1884 BC \textit{Chinese Immigration Act}.

As promised, the federal Royal Commission on Chinese Immigration was appointed in July 1884, once completion of the CPR was assured.\textsuperscript{96} The Commission's task was to consider "all those moral considerations which it is alleged make Chinese immigration undesirable,"\textsuperscript{97} with a view to determining the advisability of passing a law to prohibit or restrict the immigration of Chinese persons to Canada. The Commission's Report, released in February 1885, recommended the imposition of a $10 head tax on Chinese immigrants. In the Report, Commissioner Gray described Chinese workers as "living machines," valuable for their contribution to the rapid development of the country.\textsuperscript{98} He explained the Commission's recommendation of a "judicious" and "moderate" policy of restriction rather than prohibition in a manner consistent with MacDonald's views:

There is not in the province of British Columbia the white labour to do the required work. Yet the work must be done or the country must stand still. When the white labour is so abundant that there is a reasonable fear that the country may be injured by the competition, Parliament can legislate by exclusion, or otherwise,

\textsuperscript{94} \textit{Ibid.}
\textsuperscript{95} \textit{Ibid.}
\textsuperscript{97} \textit{Report of the Royal Commission, supra}, note 71 at vi.
\textsuperscript{98} \textit{Ibid.} at bx.
Following the Report’s recommendations, the federal government passed the first *Chinese Immigration Act*,\(^{100}\) imposing a $50 head tax that would come into force on 1 January 1886, after the completion of the railway.

Meanwhile, in March 1885, BC re-enacted *An Act to Prevent the Immigration of Chinese*,\(^{101}\) in terms virtually identical to the disallowed 1884 legislation. The Speaker of the BC legislature, in a letter to the Governor-General, regretted the disallowance of the 1884 Act on grounds of "expediency," and urged that restrictive legislation be passed, "to prevent our province from being completely over-run by Chinese."\(^{102}\)

This would not be the last time that BC passed anti-Asian legislation in the face of prior federal disallowance. Even if the result was inevitable, it was not a completely futile exercise, for it allowed the legislature to convey its determination both to Ottawa and to the electorate. In addition, even if the Act was eventually disallowed, it could be enforced in the time period between the granting of royal assent by the Lieutenant-Governor and the issuance of an order in council by the federal Cabinet. This time period would last at least as long as it took for an authentic copy of the legislation to be sent to Ottawa, and then anywhere from several days to a year longer, following the receipt of the legislation by the Secretary of State, depending on the importance of the issue to the federal government.

In 1885, Minister of Justice Campbell could no longer rely on imperial considerations to justify disallowance of the re-enacted *Chinese Immigration Act*, London having informed him in 1884 that there were no imperial objections to anti-Chinese legislation.\(^{103}\) He referred to his view that "the power given by the 95th section of the

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\(^{100}\) S.C. 1885, c. 71.

\(^{101}\) S.B.C. 1885, c. 13.

\(^{102}\) Letter dated 3 March 1885, Hodgins, *supra*, note 12 at 1099.

\(^{103}\) See text accompanying note 91.
The Minister based his argument that the legislation was in relation to trade and commerce solely on American jurisprudence regarding the scope of the power of Congress to regulate commerce. He did not mention that in 1881, the Privy Council in the Parsons case had embarked on a much more restrictive interpretation of Parliament's jurisdiction over trade and commerce than that taken by the United States Supreme Court. The Minister's argument that the Chinese Immigration Act was ultra vires the BC legislature was not compelling, suggesting either that the federal government was resisting the Privy Council's restrictive interpretation of its powers in Parsons, or that the real reasons for disallowance were not articulated.

In reality, there was little doubt that this legislation, as was the case with the 1884 Act, would be disallowed given the railway contractors' continuing need to import Chinese labour. In February 1885, the leading CPR contractor in the west, Andrew Onderdonk, had written to George Stephen, the president of the CPR, requesting that any BC legislation be disallowed immediately to save him any embarrassment in bringing 2,000 Chinese men over the border from Oregon and California. Stephen then wrote to MacDonald warning that if the Act was "not promptly disallowed the CPR [could..."
not possibly be finished this year."\textsuperscript{107} Ottawa had anticipated the passage of the Act and asked the Lieutenant-Governor to forward a copy to Ottawa as quickly as possible.\textsuperscript{108} Within weeks of the legislation's passage on 9 March 1885, the Chinese Consolidated Benevolent Association of Victoria, formed the year before to defend the interests of Chinese persons in BC, wrote to the Secretary of State pointing out that the Act was being enforced to turn back Chinese persons arriving at Victoria, and requesting that the Act be disallowed at once.\textsuperscript{109} A copy of the legislation arrived in Ottawa on 23 March 1885.\textsuperscript{110} Onderdonk, who was in Portland recruiting workers, sent a telegram to the Minister of Justice on 25 March stating: "Am waiting here for disallowance Chinese Act. Please telegraph me, soon as action taken."\textsuperscript{111} The Act was disallowed by Order in Council three days later.\textsuperscript{112}

\textsuperscript{107} Roy, \textit{ibid.} at 32.

\textsuperscript{108} See Canada, H.C., "Letter from Secretary of State J.A. Chapleau to the Lieutenant-Governor" No. 21 in \textit{Sessional Papers} (1888) (vol. 16 at 280 of the paper).

\textsuperscript{109} \textit{Ibid.} at 281-82.

\textsuperscript{110} \textit{Ibid.} at 290.

\textsuperscript{111} \textit{Ibid.} at 283.

\textsuperscript{112} \textit{Ibid.} at 288 and C. Gaz. 1885.XVIII.1569. Curiously, the Act was twice disallowed by order in council. Another report, written on 11 March 1886 by Sir John Thompson, the new Minister of Justice who succeeded Alexander Campbell, recommended disallowance of the already disallowed 1885 \textit{Chinese Immigration Act}. He reasoned that "there are stronger reasons now for the disallowance of the Act" than there were for the disallowance of the 1884 Act given that the federal \textit{Chinese Immigration Act} had been passed in the 1885 session. Hodgins, \textit{supra}, note 12 at 1101. Now the federal government could justify disallowance on paramountcy grounds rather than on questionable arguments that the legislation was \textit{ultra vires} the BC legislature. Pursuant to the Minister's recommendation, an Order in Council disallowing the Act was issued on 16 March 1886, seven days before the one year time period for disallowance would have expired. Canada, H.C., No. 21 in \textit{Sessional Papers} (1888) at 288-89 and C. Gaz. 1886.XIX.1686. One can only surmise that the change in Justice Ministers was responsible for this second disallowance being carried out oblivious to the fact that the Act had already been disallowed a year earlier.
C. Disallowance of the 1900-1908 British Columbia Immigration Acts

The BC government did not pass legislation prohibiting Asian immigration again until the turn of the century. There was very little Chinese or Japanese immigration in the late 1880s and early 1890s. The Chinese population in the province was in decline until the early 1890s, partly a result of the federal head tax, and partly attributable to the high unemployment and destitution that many Chinese workers faced in the years following the completion of the CPR. The Chinese population grew from 8,910 in 1891 to 14,628 in 1901, with the bulk of the increase occurring in 1899 and 1900 when over 4,000 Chinese entered in each year.\textsuperscript{113}

Japanese immigration to BC was insubstantial prior to the mid-1880s.\textsuperscript{114} Like the Chinese, Japanese immigrants were almost exclusively young men.\textsuperscript{115} Some came to work as contract labourers in the coal mines, others worked in the logging industry, while close to half of the Japanese population worked in the Fraser River fishery by the turn of the century.\textsuperscript{116} The Japanese population of the province was negligible in 1891, increasing to 1,000 by 1896 and to 4,544 in 1901.\textsuperscript{117} By the early-1890s, the Japanese immigrants had attracted the attention of European inhabitants who were fearful of Japanese labour competition. From 1895 on, legislated anti-Asian policies, such as exclusions from employment and the franchise, were directed at the Japanese and Chinese alike.

Apart from the relatively low levels of immigration, the absence of any further BC immigration legislation prior to the turn of the century can be attributed to the fact that the legislature, until the late 1890s, was controlled by MLAs who were more sympathetic to the desires of employers than they were to the demands of the rising organized white labour movement in BC. Nevertheless, further

\textsuperscript{113} Roy, supra, note 9 at 92.

\textsuperscript{114} Adachi, supra, note 9 at 13; Roy, supra, note 9 at 81-88.

\textsuperscript{115} Adachi, ibid. at 17 & 28-29.

\textsuperscript{116} Ibid. at 26-27.

\textsuperscript{117} Roy, supra, note 9 at 92.
restrictions on Asian immigration continued to be raised as an issue in the legislature through the 1890s.\textsuperscript{118}

At the 1897 Colonial Conference, Joseph Chamberlain, Secretary of State for the colonies, expressed concern about the possible passage of anti-Asian immigration legislation in BC. He stressed the need to maintain imperial relations and trade. He suggested the adoption of legislation along the lines of the \textit{Natal Act}, named after the British colony in South Africa, which had excluded non-white immigrants by the application of a European language test, rather than an explicit racial exclusion. He had apparently been assured by M. Kato, the Japanese Minister in London, that such legislation would not be objected to since it was not discriminatory on its face.\textsuperscript{119} In 1898, Chamberlain noted that discriminatory legislation is "extremely repugnant" to the people of Japan, and suggested that any threat of "a large influx of Japanese labourers into Canada" be dealt with by restrictive legislation along the lines of the \textit{Natal Act} "which is likely to be generally adopted in Australia."\textsuperscript{120} He argued that Japan took offence to "their exclusion nominatim," but would not object to an "educational test."\textsuperscript{121}

\textsuperscript{118} In 1891, the legislature passed a resolution requesting the federal government to make the \textit{Chinese Immigration Act} more restrictive, by increasing the head tax to $100. British Columbia, Legislative Assembly, "Restriction of Chinese Immigration" in \textit{Sessional Papers} (1892) at 627. A similar resolution was transmitted to the federal government in 1893. The federal Minister of Trade and Commerce replied that "in view of the commercial relations of Canada with China and its possible extension, it is not expedient to change the provisions of the \textit{Chinese Immigration Act} as it at present exists, nor to take any action that might be construed by the Chinese government as unfriendly thereto..." British Columbia, Legislative Assembly, "Correspondence Re Chinese Per Capita Tax" in \textit{Sessional Papers} (1894) at 1004.

In 1897, the BC legislature requested that the federal government amend the \textit{Naturalization Act} to extend the period of residence required prior to naturalization from three to ten years for Japanese and Chinese immigrants. British Columbia, \textit{Legislative Journal} (30 April 1897) at 141. This request was refused on the grounds that it would constitute a violation of treaties with China and Japan. BC also requested that the head tax be increased and that BC receive three quarters of the revenue from the tax, "as the chief injury from the presence of the Chinese is sustained by the Province, and not by the Dominion." British Columbia, \textit{Legislative Journal} (23 February 1897) at 34.

\textsuperscript{119} Woodsworth, \textit{supra}, note 42 at 53-54.

\textsuperscript{120} Gisborne & Fraser, \textit{supra}, note 12 at 542-43.

\textsuperscript{121} \textit{Ibid.} at 555.
On 31 August 1900, three weeks after Japan had announced voluntary restrictions on emigration to Canada, BC passed the Immigration Act that made it unlawful for any person to immigrate to British Columbia if that person failed to fill out an application "in the characters of some language of Europe" when asked to do so by an officer, as the Colonial Office had suggested. The legislation was drafted in a manner that attempted to avoid any conflict with Dominion legislation that would give rise to federal paramountcy. Section 2(f) provided that the Act did not apply to "any persons the terms of whose entry into Canada have been fixed, or whose exclusion from Canada has been ordered by any Act of the Parliament of Canada." The Dominion had set the terms of entry of Chinese immigrants by imposing a $50 head tax in 1885, increased to $100 in 1900. As a result, Chinese immigrants were not subject to the terms of the BC Immigration Act.

The legislature's partial deference to Dominion immigration policy blunted the legal objections to the Act, but the diplomatic problems raised by the restriction of Japanese immigration remained. The Japanese Consul in Vancouver, S. Shimizu, objected to the Act, stating that the language test was a guise for the true purpose of prohibiting Japanese immigration into the province. It certainly seemed unlikely that provincial immigration officers would use the legislation to exclude illiterate Europeans. As the Japanese Consul put it, the language test is not a test of the vernacular language of this province, because other European languages than the English are admitted for the test ... It is scarcely necessary to point out that the object of this Bill is to prohibit immigration of Japanese into this province, as Chinese are made to be exempted from the application of this Act.

Chamberlain's hopes that the legislation would be acceptable to Japan were thus dashed. Chamberlain urged the federal government to disallow the Act on the grounds that it was ultra vires the

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122 Woodsworth, supra, note 42 at 60-61.
123 S.B.C. 1900, c. 11.
124 Chinese Immigration Act, 1900, S.C. 1900, c. 32.
125 Gisborne & Fraser, supra, note 12 at 588.
province in terms very similar to those articulated by Justice Minister Campbell in 1884:

The whole scheme of the British North America Act implies the exclusive exercise by the Dominion of all "national" powers, and though the power to legislate for the promotion and encouragement of immigration into the provinces may have been properly given to the provincial legislatures, the right of entry into Canada of persons voluntarily seeking such entry is obviously a purely national matter, affecting as it does directly the relations of the Empire with foreign states.126

Unlike the situation in 1884,127 Asian immigration was an Imperial issue now that Japanese rather than Chinese were the target of BC's immigration prohibition. As Chamberlain stated, it "is the particular desire of His Majesty's government to do nothing especially at the present time to impair existing relations with Japan."128

In his report dated 5 January 1901, Minister of Justice David Mills recommended disallowance of the Act on the grounds of the paramountcy of federal immigration policy:

[As parliament has already legislated with regard to the subject of immigration, and has not seen fit to impose any educational requirement whatever, the present Act seems inconsistent with the general policy of the law, and the undersigned considers that in cases where foreign relations are involved, it is not at present desirable that the uniformity of the immigration laws should be interfered with by special provincial legislation.]129

Even though the BC Immigration Act did not apply to federally regulated classes of immigrants, by excluding Japanese immigrants it nevertheless ran afoul of the Dominion's general "open-door" immigration policy. Nor was the Minister willing to let the courts decide whether the Act was valid and operative:

[I]n view of the objections raised by Japanese consul, and other similar objections which may arise in the operation or administration of the Act, it would be inadvisable to leave this Act to its operation.130

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126 Ibid. at 599.
127 See text accompanying note 91.
129 Gisborne & Fraser, supra, note 12 at 595.
130 Ibid. at 596.
No immediate action was taken on the grounds that the BC government was considering amending the legislation to "remove the grounds of objection taken on behalf of the government of Japan."\textsuperscript{131} The BC government however, was vigorously enforcing the Act, and had no apparent intention of changing its policy. Moreover, a BC executive committee sent a report to Ottawa in March 1901 requesting that federal immigration legislation be passed, incorporating "an educational test, similar to that imposed in the colony of Natal."\textsuperscript{132} The federal government was constrained by Imperial policy from pursuing this course,\textsuperscript{133} although Prime Minister Laurier was willing to increase the head tax on Chinese immigration to $100, effective 1 January 1901,\textsuperscript{134} and promised to appoint a Royal Commission to investigate Chinese and Japanese immigration.\textsuperscript{135} After receiving further clarification from the Colonial Office on Imperial policy, a report of the Minister of Justice, dated 4 September 1901, recommended disallowance again.\textsuperscript{136} The Act was finally disallowed on 11 September 1901,\textsuperscript{137} less than a week before the deadline,\textsuperscript{138} after it had been in force and rigorously enforced by provincial authorities for nine months.\textsuperscript{139}

\textsuperscript{131} Letter from Minister of Justice David Mills to the Governor General (5 March 1901), ibid. at 596.

\textsuperscript{132} Gisborne & Fraser, supra, note 12 at 601.

\textsuperscript{133} Prime Minister Laurier would sanction no interference with Japanese immigration because of Imperial policy. He hoped that the people of BC "will be prepared to put no obstacle in the way of an alliance between Japan and England; and although it may call for sacrifice on their part, they will be prepared to make that sacrifice for the sake of the mother country and for the sake of a united empire." Eastern MPs supported these sentiments: see Canada, \textit{H.C. Debates} (1900) at 7055-56, 7412, 8174 & 8199-8205.

\textsuperscript{134} Supra, note 124.

\textsuperscript{135} Canada, \textit{H.C. Debates} (1900) at 7407-11, 8201-14.

\textsuperscript{136} Gisborne & Fraser, supra, note 12 at 604.

\textsuperscript{137} P.C. 1901-1741, C. Gaz. 1901.XXXV.455.

\textsuperscript{138} The Act had been received by the Secretary of State on 17 September 1900; see Gisborne & Fraser, supra, note 12 at 600.

\textsuperscript{139} See the reports of the provincial immigration officers reproduced in British Columbia, Legislative Assembly, \textit{Sessional Papers} (1902) at 849ff. The reports indicate that the officers successfully tracked down and sent back Japanese and Chinese immigrants who could not pass
Given the uncertainty about what Imperial relations with Japan required in 1900, disallowance was exercised in 1901 only after a series of communications between representatives of the Imperial, Dominion, provincial and Japanese governments in Victoria, Ottawa and London. While in 1884-85 disallowance of BC’s *Chinese Immigration Acts* was an assertion of the primacy of Dominion labour policy, at the turn of the century it was BC’s doubly subordinate position within the hierarchy of state interests — as a colony within a colony — which led to the disallowance of its anti-Asian statutes.

As promised, a federal Royal Commission on Chinese and Japanese Immigration was appointed in September 1901. Its 1902 Report recommended that further Chinese immigration be effectively prohibited by raising the head tax to $500. The commissioners were of the opinion that voluntary restriction on Japanese emigration by the Japanese government precluded the need for restrictive Canadian action.\(^{140}\) However, in the event that the Japanese government changed its policy, the Commissioners recommended the adoption of a Natal Act to limit Japanese immigration which was more "dangerous" to the "welfare of the [white] working man" than Chinese immigration.\(^{141}\)

The BC legislature passed another *Immigration Act* in June 1902 virtually identical to the 1900 Act disallowed nine months

\(^{140}\) Canada, H.C., "Report of the Royal Commission" No. 54 in *Sessional Papers* (1902) vol. 13 at 1-430.

\(^{141}\) *Ibid.* at 397.
The Japanese Consul General, Mr Nosse, requested that this "obnoxious" law be disallowed immediately:

If this Bill come into force, the Japanese will be totally deprived of their treaty right of free entry into Canada ... this legislation even for a moment left in force, will most injuriously interfere with the free movement of all classes of Japanese in general, the consequence of it will eventually lead to jeopardizing of trade relations between Japan and Canada, in which British Columbia is particularly interested.  

Minister of Justice Charles Fitzpatrick's report, dated 14 November 1902, recommended disallowance for the same reasons expressed in the report on the disallowance of the 1900 Act. It was disallowed on 5 December 1902, after it had been in force for six months. In the House of Commons on 27 March 1903, the Dominion government was pressed to justify why it had resorted to disallowance rather than leaving the validity of the Act to be determined by the courts. The Minister of Justice relied on the view expressed by his predecessor in 1884 that the Act was ultra vires. Prime Minister Laurier, on the other hand, was more sensitive to the political need to distinguish Dominion intervention in this case from other instances, like the Manitoba schools crisis, where he had relied on provincial rights to justify federal non-intervention. Rather than relying on the theory that BC's Immigration Act was ultra vires, a theory that could just as well be determined by the courts as by the federal executive, he emphasized the importance of maintaining friendly and profitable relations with Japan. He stated that the Dominion government had informed the BC legislature

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142 S.B.C. 1902, c. 34. Like its predecessor, the Act rendered unlawful the immigration into BC of any person unable to complete an application in a language of Europe (section 4). In addition, the exemption of persons whose right of entry had been regulated by Dominion legislation was continued by section 3(f).

143 Gisborne & Fraser, supra, note 12 at 635.

144 Ibid. at 638.

145 Canada, H.C. Debates at 604-7 (27 March 1903).

146 Ibid. at 602-3.
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that if they were to restrict their action to Chinese immigration, that if they were to except Japanese immigrants from their legislation, we would not interfere, leaving them to exercise their own will in regard to Chinese immigration.\textsuperscript{147}

The manner in which disallowance was exercised made it worthwhile for BC to re-enact legislation in the face of the inevitable constitutional rebuke from Ottawa. The regular re-enactment of anti-Asian legislation through 1908 in the face of repeated federal disallowance was largely a symbolic ritual sending out a variety of signals: to Asians, that they were not welcome; to Ottawa, that it ought to direct attention to the issue;\textsuperscript{148} and to voters in BC demanding Asian exclusion, that the provincial government was making a serious attempt to block Asian immigration. In addition, the \textit{ex post facto} operation of the disallowance power allowed the \textit{Acts} to function temporarily. At the time of the construction of the CPR, the federal government had disallowed BC’s immigration restrictions without delay, given the urgency of guaranteeing a supply of labour. At the turn of the century, the Cabinet moved slowly. Indeed, it often seemed to drag its heels deliberately. The delays in disallowing anti-Asian legislation could not have been the result of inadvertence, as the Japanese Consul wrote forceful protests against such delays and the consequent damage to relations with Japan.\textsuperscript{149} Disallowance was exercised almost reluctantly, in order to preserve diplomatic relations with Japan. The formal or symbolic affirmation of intolerance of provincial anti-Asian laws appears to have been more important to the Dominion government than actually doing anything to protect prospective Japanese immigrants. Frequently, the period between enactment and disallowance was longer than the period that followed between disallowance and reenactment. As a

\textsuperscript{147} Ibid. at 603.

\textsuperscript{148} See, for example, "Letter from Premier Dunsmuir to Prime Minister Laurier," \textit{supra}, note 128 at 56. After conceding that BC legislation passed in the 1900 session might be unconstitutional, the Premier stated: "What I feel particularly is this, that an unquestionable remedy lies with the Dominion authorities, and having promised the House that we would use our utmost influence with your government, and through the Dominion government with the Imperial authorities, to bring about a settlement, I cannot too strongly urge upon your attention the great desirability of dealing effectively with our representations." Canada, No.74b in \textit{Sessional Papers} (1907-8) at 56.

\textsuperscript{149} See, for example, the letter from Mr. Nosse to the Governor General reproduced in Gisborne \& Fraser, \textit{supra}, note 12 at 645.
result, in the period from 1900 to 1908, BC anti-Asian Immigration Acts were in force more often than not. The change in Dominion practice from 1884-85 to the later 1900-1908 period is an indication of the declining commitment of the Dominion government to an "open-door" immigration policy. The number of European immigrants arriving in Canada was increasing significantly by the turn of the century. The Dominion government no longer faced a choice of Asian labour or no labour at all.

Early in 1903, a federal bill was introduced to implement the Royal Commission's recommendation that the head tax on Chinese immigration be increased to $500. The new law came into effect on 1 January 1904, and virtually eliminated Chinese immigration for the next few years.

In May 1903, the BC legislature re-enacted the previously disallowed Immigration Act with its exclusion of all persons unable to complete a form in a language of Europe when asked to do so by an officer. The Act was disallowed, but not until 26 March 1904. The ritual continued with the re-enactment of slightly altered legislation in April 1904 that was disallowed in January 1905. Shortly after the January disallowance, the BC legislature re-enacted the identical Act. This time the Act was disallowed promptly, in April 1905, almost as soon as it had reached Ottawa,

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151 See figures in Roy, supra, note 9 at 270.
152 British Columbia Immigration Act, 1903, S.B.C. 1903, c. 12.
153 The Minister of Justice recommended disallowance in three separate reports dated 5 June 1903, 1 October 1903, and 8 January 1904. Gisborne & Fraser, supra, note 12 at 643-44.
154 British Columbia Immigration Act, 1904, S.B.C. 1904, c. 26. The Act prohibited the immigration into BC of any person "who fails to write out at dictation ... a passage of fifty words in length, in an European language, directed by the officer" (section 3); classes of immigrants regulated by Dominion legislation were excluded (section 4(g)).
155 See Gisborne & Fraser, supra, note 12 at 659-60 for a copy of the Minister's report recommending disallowance following "the course adopted on previous occasions."
156 British Columbia Immigration Act, 1905, S.B.C. 1905, c. 28.
reflecting the growing impatience of the federal, British and Japanese governments with BC's annual "farce."\(^{157}\)

After a brief respite in the 1906 legislative session, the legislature passed another immigration bill in 1907.\(^{158}\) Lieutenant-Governor Dunsmuir reserved assent, apparently acting on his own, without Dominion or Imperial advice. Dunsmuir explained to the Secretary of State that the bill was "but a modified form of other Acts dealing with the same subject" that had been previously disallowed, and that the Bill "might seriously interfere with our international relations and Federal interests."\(^{159}\) The federal Minister of Justice refused to recommend that royal assent be given to the Bill.\(^{160}\) Feelings against Dunsmuir amongst voters ran high — he had for many years been a leading employer of Asian labour in his coal mines. He was burned in effigy during the Vancouver anti-Asian riots that occurred in September 1907.\(^{161}\)

\(^{157}\) See Roy, supra, note 9 at 162-63. The growing irritation of the Minister of Justice is evident in his report of 19 April 1905 recommending disallowance of the Immigration Act and other anti-Asian laws passed that session: "The undersigned does not consider it expedient that the present enactments should remain in force, and the fact that the assembly continues to re-enact these statutes after full discussion, and after they have been several times disallowed, shows that it would be a mere waste of time to communicate with the Provincial Government with a view to repeal or modification of these Acts at the hands of the assembly." Gisborne & Fraser, supra, note 12 at 664.

\(^{158}\) British Columbia Immigration Act, 1907, S.B.C. 1907, c. 21A. It prohibited the immigration into BC of any person unable to fill out an application form in English or any other language of Europe (section 4). Members of a class of immigrants regulated by Dominion legislation were exempted from the operation of the Act (section 3(f)).

\(^{159}\) British Columbia, Legislative Assembly, "Correspondence Re Bill No. 30, 1907" in Sessional Papers (1908) (at D-44).

\(^{160}\) Report dated 27 November 1907. Gisborne & Fraser, supra, note 12 at 690.

As a result of the deference it paid to Britain’s military and commercial alliance with Japan, Canada was constrained from passing overtly discriminatory legislation against the Japanese as it had against the Chinese. The only way of satisfying the anti-Asian sentiment of voters was to renegotiate Japan’s voluntary restrictions on emigration. Following the Vancouver anti-Asian riot, Adolphe Lemieux, the Minister of Labour, was appointed to discuss the issue in Tokyo with the British Ambassador and the Japanese authorities. In the resulting Lemieux Agreement (or "Gentleman’s Agreement"), announced in the House of Commons on 21 January 1908, Japan agreed to limit the number of emigration passports issued to workers and domestic servants to four hundred annually.\(^{162}\)

In February 1908, the BC legislature passed another immigration act with a European language test,\(^{163}\) its final attempt, as it turned out, to pass legislation rendering Asian immigration unlawful. The only difference between this Act and the six earlier versions passed between 1900 and 1907 was the removal of the exemption for persons whose right of entry was regulated by Dominion legislation. The passage of the first sweeping *Dominion Immigration Act*\(^{164}\) in 1906 meant that the *British Columbia Immigration Act* might not have operated with respect to any Asian immigrants if the exemption that had appeared in previous BC Acts had been retained. Several weeks after its passage, a BC court held that the 1908 *British Columbia Immigration Act* was unenforceable against Japanese subjects,\(^{165}\) as it was inconsistent with the paramount federal *Japanese Treaty Act, 1907*,\(^{166}\) which gave effect to the provisions of the 1894 Treaty between Great Britain and Japan.\(^{167}\) In a subsequent case involving a charge against a


\(^{163}\) *British Columbia Immigration Act, 1908*, S.B.C. 1908, c. 23, s. 30.

\(^{164}\) S.C. 1906, c. 19.

\(^{165}\) *Re Nakane and Okazake, supra*, note 81.

\(^{166}\) S.C. 1907, c. 50.

\(^{167}\) Article 1 of the 1894 Treaty provided that the subjects of each party shall have "full liberty to enter, travel or reside in any part of the dominions and possessions of the other Contracting Party, and shall enjoy full and perfect protection for their person and property."
number of south Asian immigrants, the BC Supreme Court held that the British Columbia Immigration Act was inoperative in its entirety because the federal government had "occupied the field" by enacting a "complete code" to regulate immigration in the 1906 Dominion Immigration Act.\textsuperscript{168} For good measure, the Act was disallowed in February 1909.\textsuperscript{169}

The two 1908 court decisions were the first to consider the constitutionality of a BC anti-Asian immigration law. In neither case did the judges discuss the federal government's theory that the provinces lacked the constitutional authority to prohibit immigration into the province. Rather, they seemed to assume that the provincial Act was \textit{intra vires} and would be operative in the absence of federal legislation.\textsuperscript{170} As the results in the cases were based squarely on federal paramountcy resulting from a conflict with the Dominion Immigration Act of 1906 and the Japanese Treaty Act of 1907, the reasoning in the cases suggests that previous BC immigration acts were constitutionally valid and would have operated, prior to the enactment of the 1906 federal Act, were it not for federal disallowance.

By 1908, changes in immigration patterns and consequent changes in federal laws made it unnecessary for BC to pass any further legislation restricting Asian immigration. The long-standing federal policy of recruiting European settlers had begun to pay off by the turn of the century. Canada's economy experienced unprecedented growth from 1896 to 1911. The price of Canadian

\textsuperscript{168} \textit{Re Narain Singh et al.,} supra, note 81. One of the powers contained in the 1906 federal Act was the power to define classes of persons who are excluded as potential immigrants. See \textit{supra,} note 164, s. 30.

\textsuperscript{169} In his report dated 19 November 1908, the Minister of Justice recommended disallowance for the reasons given for earlier incarnations of the Act, and for the additional reason that it was repugnant to the 1907 Japanese Treaty Act. The Act was accordingly disallowed on 15 February 1909. See Gisborne & Fraser, \textit{supra,} note 12 at 691-92.

\textsuperscript{170} See the decisions of Irving J. in \textit{Re Nakane and Okazake,} supra, note 81 at 373 and of Hunter C.J. in \textit{Re Narain Singh et al,} supra, note 81 at 480.
exports rose, a national transportation infrastructure was in place, and the federal governments policy of entering into treaties with the First Nations facilitated European settlement of aboriginal lands. As a result, plenty of good agricultural land was available for settlement, while by the turn of the century, there was not such an equivalent abundance of quality land in the United States. Minister of the Interior Clifford Sifton aggressively developed existing schemes for recruiting European immigrants by advertising, providing land giveaways and giving bonuses to transportation companies.\textsuperscript{171} Promotional policies were also directed at European farmers in the United States.\textsuperscript{172} Beginning in 1903, immigration levels reflected the growing success of this policy. Immigration to Canada had hovered around 30,000 persons per year in the 1890s; it jumped to an average in excess of 200,000 per year from 1903 to 1914, reaching a high of 400,870 in 1913.\textsuperscript{173} While the number of emigrants had exceeded the number of immigrants in each decade after Confederation prior to the turn of the century, immigrants outnumbered emigrants by more than 700,000 from 1900 to 1910.\textsuperscript{174} As a result, federal policy makers no longer found it necessary to keep the doors open to Asian immigration. There was now an abundance of "more desirable" European labour. In addition, the massive expansion of demand for an unskilled labour force that had accompanied late nineteenth century industrialization was beginning to slow down by the turn of the century.\textsuperscript{175}

Federal restrictions on Asian immigration coincided with these changes in immigration patterns and the needs of the labour market. The federal government first restricted Chinese immigration by increasing the head tax to $100 in 1900 and to $500 in 1903, and then virtually eliminated further Chinese immigration in 1923 with

\textsuperscript{171} Troper, \textit{supra}, note 58; Avery, \textit{supra}, note 62 and Imai, \textit{supra}, note 62; Cameron, \textit{supra}, note 58.

\textsuperscript{172} Troper, \textit{supra}, note 58.


\textsuperscript{175} Creese, \textit{supra}, note 9 at 71.
the passage of the *Chinese Immigration Act, 1923*. The Act excluded Chinese from entering the country except those that fell within one of four narrowly defined exceptions for diplomats, children born in Canada of Chinese parents, merchants or students. Until its repeal in 1947, the Act blocked further immigration of Chinese workers and affirmed the inferior status of Chinese already in the country.

Japanese immigration was limited to 400 workers per year by the Lemieux Agreement of 1908. This agreement remained in force until the early 1920s, when negotiations began between Canada and Japan to further restrict Japanese immigration. In 1923, Japan agreed to further restrict the emigration of labourers to 150 annually.

South Asian immigration was effectively halted by the 1908 orders in council providing that an immigrant could enter Canada only if he or she came by continuous passage from his or her country of birth or citizenship, and requiring landing money of at least $25 cash in summer or $50 in winter. The only through

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176 S.C. 1923, c. 38. In addition, Order in Council, P.C. 1923-1272, C. Gaz. 1923.LVII.277, passed under the Act on 10 July 1923, required the registration of all Chinese living in Canada.

177 *An Act to Amend the Immigration Act and to Repeal the Chinese Immigration Act S.C. 1947, c. 19.*

178 Bolaria & Li, *supra*, note 46 at 135 and Adachi, *supra*, note 9 at 137-38: "King and his Liberals, meanwhile, walked the slippery diplomatic tightrope of attempting to appease British Columbia and of not offending Japan, from whom Canada was profiting handsomely in terms of increasing trade and exports."

179 P.C. 1908-27, 8 January 1908.

180 P.C. 1908-28, 8 January 1908. These orders were struck down as beyond the powers delegated to the Minister by the legislation: see *Re Behari Lal et al.* (1908), 13 B.C.R. 415. Shortly after this decision, both orders were rewritten to impose the continuous journey and landing money requirements: P.C. 1908-662 & P.C. 1908-656 (27 March 1908). In addition, the *Immigration Act* was amended to make it clear that the imposition of these requirements was permitted; S.C. 1908, c. 33, s. 1. Pursuant to this new provision, a new continuous journey order (P.C. 1908-932, 27 May 1908) and a new landing money order were passed (P.C. 1908-1255, 3 June 1908), the latter increasing the landing money requirement to $200. These orders were subsequently replaced by P.C. 1910-920 & P.C. 1910-926 passed on 9 May 1910. These orders were held invalid in *In Re Narain Singh* (1913), 18 B.C.R. 506. They were again rewritten as P.C. 1914-23 & P.C. 1914-24, C. Gaz. 1914.XLVII.2335 (7 January 1914) and upheld in *Re Munshi Singh* (1914), 20 B.C.R. 243.
passage from India to Canada was by Canadian Pacific steamer, and a government directive sent to CP outlets in India prohibited the sale of through passage tickets. Later, when direct journeys by sea to Vancouver became commonplace, and "having regard to the unemployment conditions now existing in Canada," an order was passed excluding "any immigrant of Asiatic race" except farmers, farm labourers, female domestic servants, and "the wife and child under 18 years of age of any person legally admitted to and resident in Canada, who is in a position to receive and care for his dependents." In this way, the Dominion government demonstrated that its assertion of exclusive control over immigration did not preclude the consideration of the concerns of voters in BC.

The demands of voters in BC were further accommodated in the federal regulatory scheme by the passage of an order in council on 8 December 1913 dealing specifically with the arrival of immigrant workers in BC. The order stated that "in view of the present overcrowded condition of the labour market in British Columbia," the landing at designated ports of entry in British Columbia of "any immigrant ... artisans [or] labourers ... is hereby prohibited." In this way, the Dominion government demonstrated that its assertion of exclusive control over immigration did not preclude the consideration of the concerns of voters in BC.

181 Imai, supra, note 62 at 94-95; Avery & Neary, supra, note 62 at 30; Ward, supra, note 9 at 86 and Adachi, supra, note 9 at 96.


184 The effectiveness of the federal orders was dramatically demonstrated in May 1914. The steamship Komagata Maru arrived in Vancouver with 376 prospective south Asian immigrants, but was forced to leave after the BC Court of Appeal upheld the validity of the federal Act and executive orders: see Re Munshi Singh, supra, note 180. For accounts of the Komagata Maru incident, see H. Johnston, The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar (Delhi: Oxford University Press, 1979) and T. Ferguson, A White Man's Country: An Exercise in Canadian Prejudice (Toronto: Doubleday, 1975).
By 1906, the increase in European immigration and changing needs of the labour market meant that the federal government could afford to abandon its open door immigration policy in favour of a selective policy that favoured able-bodied Europeans and excluded everyone else. The 1906 Immigration Act\textsuperscript{185} expanded and systematized the prohibited classes of immigrants, which had previously been developed on an \emph{ad hoc} basis.\textsuperscript{186} By section 30, Cabinet was empowered to make orders prohibiting the landing in Canada of any specified class of immigrant. For the first time, powers of deportation were included in the legislation.\textsuperscript{187} Officers were appointed and boards of inquiry established to administer the \textit{Act}.\textsuperscript{188} The broad discretionary powers conferred on the federal executive to control the flow of immigration was continued and clarified in the 1910 Immigration Act.\textsuperscript{189} Sections 38(a) and (b) set out the authority to pass orders imposing the continuous journey and landing money requirements. Section 38(c) empowered the Cabinet to make orders to

\begin{quote}
[p]rohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry in Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character.
\end{quote}

This clause was expanded again in 1919,\textsuperscript{190} and remained the legislative basis for a "white Canada" immigration policy for over fifty years.\textsuperscript{191} While BC had sought to assert an anti-Asian immigration policy in legislation and on the basis of a language test with a transparent racial purpose, the Dominion policy had the advantages,

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\textsuperscript{185} S.C. 1906, c. 19.
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\textsuperscript{186} Sections 26-29 of the \textit{Act} included the following prohibited classes of immigrants: "feebleminded" persons, "idiots," "epileptics," and "insane" persons; persons infected with a "contagious disease"; "paupers" and persons convicted of "crimes of moral turpitude."
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\textsuperscript{187} Sections 32-33.
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\textsuperscript{188} Sections 6-7 & 31.
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\textsuperscript{189} S.C. 1910, c. 27.
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\textsuperscript{190} \textit{An Act to Amend The Immigration Act}, S.C. 1919, c. 25, s. 13.
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\textsuperscript{191} Hawkins, \textit{supra}, note 62 at 17.
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from a diplomatic point of view, of relative subtlety and discreetness. Apart from the Chinese Immigration Act, federal restrictions prior to the First World War were not based on racial grounds, and they were embodied in executive orders and diplomatic arrangements rather than in legislation. A 1910 American study accurately summed up the value of the new regulatory scheme to the Dominion government:

The Canadian immigration law is admirably adapted to carrying out the immigration policy of the Dominion. Under its terms no immigrants are specifically denied admission solely because of their race or origin, or because of the purpose for which they have come to Canada, but the discretion conferred upon officials charged with the administration of the law does make discrimination entirely possible. With this discretionary authority Canadian officials are able to regulate the admission of immigrants according to the demand for immigrant labour in the Dominion at the time.\(^2\)

As a result of the flexible structure of administration and executive rule-making put in place by the 1906 and 1910 Immigration Acts, there was no longer any reason for anti-Asian sentiment in BC to be expressed by the passage of provincial immigration legislation. Provincial and federal policies were now united in opposing further Asian immigration. There was no need for the BC government to augment federal rules or to pass legislation to draw Ottawa’s attention to BC voters’ demands for Asian exclusion. Moreover, after 1906, the courts had made it clear that any BC immigration legislation would be inoperative as a result of federal paramountcy. For these reasons, constitutional conflict over Asian immigration to BC receded after 1908.

IV. CONCLUSION

Constitutional interpretation is never solely a matter of textual exegesis or the application of judicial precedent; this was especially true in late nineteenth century Canada, when the judiciary and the Dominion executive had to embark on an interpretation of the skeletal language of the Constitution Act, 1867 without the

guidance of judicial precedent or of any meaningful legislative history. A study of this period thus provides an opportunity to see clearly the values and assumptions that guided the development of constitutional doctrines that continue to give shape to the division of powers to this day.

We have seen that, although constitutional jurisdiction over immigration was shared by the Dominion and the provinces, the Dominion executive narrowly interpreted the scope of provincial power to justify the disallowance of BC anti-Asian immigration laws. These laws, passed in response to the demands of the BC white working class for Asian exclusion, were disallowed in 1884 and 1885 to ensure an adequate supply of labour for construction of the CPR. From 1900 to 1908, seven further BC anti-Asian immigration laws were either disallowed or reserved. When a plentiful supply of "more desirable" European labour became available after the turn of the century, the explanation for disallowance shifted from the Dominion's protection of the domestic labour supply to its desire to respect the British government's alliance with Japan.

In the second part of this study, it is shown that the Dominion executive also consistently disallowed BC laws prohibiting the employment of Asian workers in the province. Disallowance in this context was justified in part by reference to the theory that the right of aliens and naturalized subjects to take up employment was within exclusive federal jurisdiction and thus could not be interfered with by provincial legislation. This constitutional theory, accepted by the Privy Council in the Union Colliery Co. v. Bryden case, was premised on the view that the dominant characteristic ("pith and substance") of BC anti-Asian labour laws was the imposition of a punitive disability on a racial group composed largely of aliens and naturalized subjects, rather than a bona fide regulation of

193 For a general discussion of the weaknesses of the historical record as a source of interpretation of the Constitution Act, 1867, see K.E. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years (Toronto: Carswell, 1990) at 89-111.

194 Ryder, supra, note 5.


196 And thus within federal jurisdiction over "Naturalization and Aliens" (section 91(25) of the Constitution Act, 1867).
employment relations in the province. If Asians were different in their capacity to work, their exclusion from employment would have been validly grounded in provincial powers over local workplaces, akin to exclusions, for example, of women and children from working in the mines based on assumptions regarding their different roles and capacities. In other words, the assumption that Asian workers were no different than European workers in their suitability for employment underpinned the development of the constitutional doctrine that placed laws excluding Asians from employment beyond provincial competence.

Apart from the immigration and labour laws, BC's laws imposing disabilities on Chinese and Japanese persons as racial groups were not disallowed or reserved, with rare exceptions. As is demonstrated in the concluding part of this study, laws depriving Asian residents of BC of the vote and of eligibility for public office were uniformly allowed to stand. Moreover, in a telling twist of constitutional doctrine, neither the Dominion executive nor the courts viewed anti-Asian laws as beyond the competence of a provincial legislature so long as they did not interfere with the right to enter a province and take up wage labour or effectively drive Asian residents from the province. In the Cunningham v. Homma and Quong-Wing v. R. cases, the courts upheld provincial laws prohibiting Japanese persons from voting and prohibiting Chinese men from employing white women. If the courts had believed that Asians were similar to Europeans in their capacity to be responsible voters or employers, these laws may well have been viewed as ultra vires attempts to impose punitive disabilities on racial groups composed largely of aliens and naturalized subjects rather than a legitimate exercise of provincial jurisdiction over the franchise and local workplaces. By accepting the validity of assumptions of racial difference, the judiciary grounded BC anti-Asian laws (other than labour and immigration laws) within subject matters allocated to

197 And thus not within provincial jurisdiction over "Property and Civil Rights" (section 92(13) of the Constitution Act, 1867).
198 [1903] A.C. 151 (P.C).
199 (1914), 49 S.C.R. 440.
In these ways, the interpretation of the constitutional division of powers by the Dominion executive and the judiciary was shaped by assumptions regarding racial similarity and difference. Legal decision-makers accepted a racist ideology that viewed Asian immigrants as different from European immigrants in all respects but one: their capacity for work. Indeed, Justice Gray's description of Chinese workers as "living machines" and Prime Minister MacDonald's statement that a Chinese worker is as valuable as "a threshing machine or any other agricultural implement" were indicative of the prevailing view amongst non-working class white men that Asians were particularly efficient workers. While non-working class white men in late nineteenth and early twentieth century Canada recognized that Asian immigrants, like immigrants of all other races, were useful as workers, they denied that Asian immigrants were similar to Europeans in any other respect. In their view, Asians were a race apart, unable to assimilate into or participate in the governance of a European-dominated society.

This network of racist assumptions underlay the construction of constitutional doctrine by the Dominion executive and judiciary. If BC had been left to its own devices without any interference by the courts or the Dominion government, by the mid-1880s, Asian immigration into BC probably would have been prohibited and the continued residence of Asians already in BC probably would have been rendered impossible by punitive economic regulation. In passing these laws, the BC legislature expressed the view of European working class men in the province that Asian immigrants were different from and inferior to Europeans in all respects and thus were undesirable settlers of the province. The pattern of selective judicial and Dominion executive interference with BC anti-Asian laws indicates that legal decision-makers rejected some of the assumptions of racial difference that were used to rationalize BC's anti-Asian policies. In particular, the judiciary and the Dominion executive appeared to accept the view of the capitalist class in BC.

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200 Supra, note 97 at bcx.

201 Debates, supra, note 6.
that Asians were efficient workers and for this reason, and this reason alone, were desirable residents of the province.

In essence, then, the constitutional conflict over BC anti-Asian legislation was a struggle between European men, divided by class interests, over the definition of racial difference played out at the level of federal-provincial politics. In the end, with the assistance of the Dominion government and the courts, the interests of the white capitalist class in BC prevailed. The judiciary and the Dominion executive fashioned a series of constitutional doctrines which had the effect of preventing BC from interfering with the rights of Japanese and Chinese to enter the province and work in low-paying, low-status jobs. Other forms of discrimination against Asians pursued by BC did not concern the Dominion government or the courts, or led to sporadic intervention at best. By this pattern of selective constitutional invalidation, the courts and the Dominion government rejected BC's policy of Asian exclusion in favour of a policy that fostered the exploitation of a segregated and marginal Asian labour force.