HISTORICIZING NARRATIVES OF ARRIVAL: THE OTHER INDIAN OTHER

Audrey Macklin, Faculty of Law, University of Toronto
Audrey.macklin@utoronto.ca

Introduction

To honour the fiftieth anniversary of Canada's first *Citizenship Act* in 1947, Citizenship and Immigration Canada (CIC) commissioned a book that would trace "the evolution of Canadian citizenship and the role of immigration in the development of Canada"[1]. That monograph, also available on the CIC website[2], is entitled *Forging Our Legacy*.

I like that title.

A few months ago, US Homeland Security secretary Michael Chertoff announced plans to secure the homeland from illegal entry by migrants and terrorists by building a fence along the US borders with Mexico and Canada: "We're going to have a virtual fence … It's going to be a smart fence, not a stupid fence —a 21st century fence, not a 19th century fence".[3] Recently, I ran across this news item: "After years of neglect and under funding by Washington and Ottawa, the International Boundary Commission admits it can no longer identify large swaths of the Canada-U.S. border"[4].

And so on.

All legacies are forged, all communities are imagined, and all borders are fictive, but that does not make them unreal. They are, to borrow a phrase, truth-producing falsehoods[5]. Consider the concerted act of reification required to sustain the existence of a border across thousands of kilometres of open, unmarked terrain. But that doesn't make the line-ups at the Peace Bridge any shorter, or the bodies of Mexicans in the Arizona desert any less dead.

Law is one of many narrative forms that generates these truth-producing falsehoods. What it lacks in rhetorical eloquence it makes up for with force. Arguably, law itself is a truth-producing falsehood. This is another way of expressing the paradox of law's self-founding, whereby the legal order emerges "out of that which is itself unlawful"[6]. This is the originary violence of law, the genesis story that outlaws all subsequent violence except that which preserves law[7].

---

[1] Citizenship and Immigration Canada, "Canada's Citizenship Week Begins with Book Launch" (Press Release), 16 October 2000, http://www.cic.gc.ca/english/press/00/0017-pre.html.
[2] http://www.cic.gc.ca/english/press/00/0017-pre.html
[3] "Smart Fence, not Stupid Fence, says Chertoff", National Defence Magazine, February 2006, http://www.nationaldefensemagazine.org/issues/2006/feb/SecurityBeat.html.
[4] "Canada-US border seems to be missing", *Ottawa Citizen*, 7 October 2006, http://www.canada.com/ottawacitizen/news/story.html?id=17c5f136-b517-4aea-bf22-770c658be52b&k=67921.
[5] Mary Ellen Turpel, UNB article?
[6] Robert Cover, "Nomos and Narrative"
[7] Derrida (on Benjamin), the Force of Law.

Although my pre-occupation is with legal narratives of arrival, a proper analysis of the specific operation of law in Canadian myths of origin demands their explicit articulation with narratives of contact[8]. For the story of Canada as a nation of immigrants can only be recounted with pride (as it always is) if immigration is understood as a process of extending hospitality and membership by those entitled to do so, as opposed to governmentalizing ongoing invasion and occupation. The rendering of indigenous peoples as internal other – the alien within -- must transpire in order that a settler society can usurp the epistemic privilege of identifying and excluding the external other. Without this move, the sovereign could not properly differentiate the flood of illegal aliens swamping the nation from the immigrants coming to build it. In this sense, narratives of contact and arrival are necessarily intertwined[9]. Writing about Australia, Katrina Schlunke astutely observes that the legitimacy of regulating membership is especially fraught "in a settler nation whose non-Aboriginal population has no treaty with the owners of the land and who depend upon our being-hereness to continue to be here"[10].

An unlikely but handy site for a legal narrative of migration resides in the institutional allocation of Canadian authority over immigration. These time-lapse departmental snap-shots tell a story about how the state configured immigrants, and the intersections of immigrants with Indigenous peoples in the national imaginary.

In 1867, immigration fell within the responsibility of the Minister of Agriculture, in anticipation and hope of the arrival of immigrant farmers. Within a few years and for the next five decades, responsibility for administering immigration legislation was transferred to the Minister of the Interior, except for the *Chinese Immigration Ac*t. This latter statute instituted the head tax upon each Chinese migrant. Since customs officers collected duties and tariffs on imported commodities, they were also tasked with collecting the tax on imported Chinese labour. The *Chinese Immigration Act* was administered by the Department of Trade and Commerce. From 1917 – 1932, immigrants and Indigenous peoples became the responsibility of the Minister of Immigration and Colonization. With the deepening of Depression (and then war), immigration virtually halted and management was submerged into the portfolio of the Minister of Mines and Resources. In 1950, with the post-War resumption of mass immigration and the introduction of Canada's first *Citizenship Act*, immigration and Indian Affairs were again united. Colonizing Indigenous peoples and recruiting immigrants into that project was replaced with the new goal of enrolling them into citizenship. 'Indians' and immigrants were both assigned to the new Minister of Citizenship and Immigration[11].

---

[8] And, for that matter, narratives of departure.

[9] DEFINE INDIAN is an evolving series of panel discussions that fosters an inter-communal dialogue between South Asian and First Nations arts communities..

[10] Katrina Schlunke, "Sovereign Hospitalities", Borderlands e-journal, http://borderlands ejournal, Adelaide.edu.au/vol1no2_2002/schlunke_hospitalities.html.

[11] A fascinating unpublished paper by Franca Iacovetta and Heidi Bohaker unearthed a policy statement by then Prime Minister Louis St. Laurent explaining that the objective of the new Ministry was "to make Canadian citizens of those who come here as immigrants and to make Canadian citizens of as many as

In the mid-1960s, immigrants and Indians were re-allocatd again. The immigrant-as-worker returned to the fore with the creation of the new Department of Manpower and Immigration (subsequently gender-neutralized into Employment and Immigration) managed immigration until 1993. For a brief moment in 1993, immigration was transferred to a newly created Department of Public Security. After much indignation over the institutional casting of the immigrant as security threat, the Minister of Citizenship and Immigration was revived in 1994. A few months after September 11 2001, the government transferred enforcement functions of Citizenship and Immigration to the new Minister of Public Safety and Emergency Preparedness. Admitting people now rests with Citizenship and Immigration. Excluding and expelling people comes within the purview of the Minister of Public Safety and Emergency Preparedness, along with national security, law enforcement, crime prevention corrections, and emergency management (natural disasters, public health crises, terrorist attack, etc.). This time, 'good' (legal) immigrants are assigned to one government department and the 'bad' (illegalized) immigrants to another.

To see the past in the present requires scrutiny of diachronic founding narratives about nation, state and sovereignty. This involves (among other things) recounting the role of law in constituting we who are here as 'we' and here as 'Canada'[12]. It also alerts us to the synchronic quality of founding narratives: the almost liturgical incantation of recurrent themes, motifs, personages, plot-lines, tropes. Because the history of settler societies are relatively short, the double inscription of the narrator/narrated "as pedagogical objects and performative subjects"[13] lies close to the surface. When the stories are happy ones, these retellings reassures and flatter us about the foundations of the state and ourselves as founders – we might see ourselves (or our parents or grandparents) in today's honest-hard-working-immigrant-makes-good, or feel validated in our Canadian nationalist universalism when hundreds of refugees are airlifted from Kosovo to Canada[14]. But when the stories are negative, as they often are, we must delete the last version of and re-record a new version over it, because too many Canadians are too close to the immigration experience to abide the dissonance of hearing themselves recycle the same stories about the other that were told about them (or their parents, or grandparents). The normative distance between our past and present national selves must be adjustable on an as-needed basis.

So, immigrants in the past were always harder working, more law-abiding at the moment of seeking entry and ever after, more self-reliant, healthier, and more committed to Canada than today's immigrants. If yesterday's immigrants were stereotyped, abused

---

possible of the descendants of the original inhabitants of this country." 'Immigrants Too:' Aboriginal Peoples and Canadian Citizenship, 1947-1966 (get permission to cite)

[12] Homi Bhabha speaks of the compulsion to retell "the same old stories", which are "differently gratifying and terrifying each time" (Location of Culture . . .)

[13] Homi Bhabha, DissemiNation: Time, Narrative and the Margins of the Modern Nation, *Nation and Narration* (New York: Routledge 1990), 291-322, at 302.

[14] Catherine Dauvergne's superb analysis of the role of humanitarianism in immigration law is the definitive work on this point. (cite)

and exploited, it was not their fault; yesterday's bigotry accounts for the inaccurate and unfair perceptions of them. We, however, can and do accurately perceive today's migrants. And they really are lazier, more disrespectful of law, a greater burden to health care and social services, less willing to integrate, more of a menace to national security, etc. In short, their bodies arrive marked as potential vectors of political, social, moral and physical disease infecting the body politic. In a 'country of immigration', it is crucial that these negative narratives of arrival be revised and recited as if freshly generated by – as opposed to projected upon -- the particularized figure of the other in the present moment.[15]

At this point, I take up the invitation of the conference organizers to historicize narratives of arrival by recalling the appearance of a single ship not far from where we stand today: Near us in geographical distance, closer in political space to Pubjab than Portland, and almost a century removed in time. The Komagata Maru incident is literally a narrative of exclusion: In the spring of 1914, some 376 British subjects journeyed from British India to the Dominion of Canada. They got as far as Vancouver Harbour. If there is one eternal, invariant archetype in the migration canon, it is that the apparition of the darkened other on a boat denotes bursting floodgates, alien invasion and loss of sovereign control. Whether it is Punjabis in 1914, or Fujian migrants in 1999; Jews aboard the SS St. Louis in 1938 or Haitians in rafts off the Florida coast in 1987; Afghans straining toward a retracting Australia in 2004, or Sri Lankans intercepted by Canada in 2002 thousands of kilometers from Canada (off the coast of Africa in fact), we know the story by heart. It is a semiotic resource instantly available to be mined in the service of moral panic.

Just as the subject defines itself through the portrait of its negation, so too do narratives of exclusion tell us something about inclusion. Indeed, the Komagata Maru incident can also be portrayed as an episode within larger founding narratives. For the white settler society of Canada, the staging of that classic spectacle of sovereignty, namely excluding the alien, marked an important moment in the transition from self-governing colony to independent sovereign state. Across the ocean and the empire, the humiliation inflicted upon the passengers of the Komagata Maru in Canada and then in India, became a footnote to the larger story of anti-colonial resistance in direct rule in India that eventually culminated in India's own foundational narrative of sovereign independence

While post-colonial analyses tend to focus exclusively on the dyad of metropole/periphery the Komagatu Maru incident offers the opportunity to triangulate two distinct colonial projects located differently in relation to metropole and to one another. To the extent that Empire encompassed a contested and variegated transnational political space, familiar issues of citizenship, nationalism, sovereignty, the rule of law,

[15] This is one illustration of how "writing the nation" always begins with "a minus at the origin".Homi Bhaba, DissemiNation, at 310.

legal pluralism, and transnational diaspora converged in ways that can productively de-familiarize the present and, ideally, defamiliarize our own sense of [national] self[16].

The story of the Komagata Maru has been recounted on stage, in history books, and on film. Each form has its own idiom and mode of operation on the intended audience. The core around which I organize my re-telling is the legal saga, especially the judgment of the British Columbia Court of Appeal in *Re Munshi Singh*, in which the regulations excluding the passengers of the Komagata Maru were upheld. More specifically, I present this case as the bootstrap enactment of a nascent and evolving sovereignty. For present purposes, sovereignty consists of the interactional and mutual creation of a bounded legal order, a bounded national space, and a bounded territorial space. Yet law, nation and even territory strain against the determinacy borders. Law and nation strategically rely on the particularism of one to compensate for the universalism of the other (and vice versa)[17] through a yin and yang process of inclusion and exclusion. The *Munshi Singh* case provides a case study for instantiating this descriptive claim. I argue that *Munshi Singh* demonstrates how incorporation of the other into the legal order was necessary precisely in order to seize and execute the authority to exclude him from the nation. While echoes of Agamben's rendering of the state of exception and the liminality of the migrant reverberate in my re-telling, my tentative (and admittedly undeveloped) sense is that historicization also complicates and casts doubt on the cogency of Agamben's account of law.

Narrating the Alien in Law

Section 95 of Canada's initial constitutional text, the 1867 *British North America Act (*de-colonized in 1982 into the *Constitution Act 1867*, hereafter BNA Act*)* grants concurrent jurisdiction over immigration to the provinces and the federal government. From the outset, the federal government 'occupied the field' of immigration with the consent and acquiescence of the provinces. Section 91(25) of the BNA Act, also granted exclusive jurisdiction to the federal government over "aliens and naturalization". Throughout the late nineteenth and early twentieth century, the province of British Columbia engaged in a sustained exercise of constitutional disobedience by enacting laws it knew to be beyond its authority in order to protest the entry of Asian migrants. Time and again, the laws were disallowed by federal government or declared *ultra vires* by the courts. Britain also intervened through the Colonial Office if it perceived Canadian policy to be inimical to Imperial interests. In addition, the Judicial Committee of the Privy Council, sitting in London, remained the final court of appeal for the Dominion Canada[18]. While the federal government remained unchallenged as the formal site for

[16] As Nicholas Thomas observes, the critical (not to say ironic) value of subjecting the present to the past is that the very "similarity of past and present [] defamiliarizes the here and now" (p. 21).
[17] Peter Fitzpatrick, Modernism and the Grounds of Law . . . .Partha Chatterjee makes the point about nation as follows: "Nationalism ... seeks to represent itself in the image of the Enlightenment and fails to do so. For Enlightenment itself, to assert its sovereignty as the universal ideal, needs its Other; if it could ever actualise itself in the real world as the truly universal it would in fact destroy itself" (quoted in Bhabha, 1990, at 293).
[18] This practice ended in 1949, around the same time as the introduction of Canada's first *Citizenship Act*.

regulation of immigration into Canada, it absorbed and responded to pressures percolating from below and emanating from above.

The specific language of 'naturalization and aliens', repeated in the Australian constitution, awkwardly confers authority both over a class of persons and a process. Notably, only Indians – the colonial state's internal aliens – are similarly distributed as objects of sovereign power (s. 91(24)).

Instead of granting authority over "naturalization and aliens" the BNA Act might have conferred jurisdiction over alienage and nationality – thereby maintaining symmetry and affirming Parliament's power to legislatively determine who aliens are and what the nation is – but it didn't. At least two readings of this curious construction are available: By granting authority over a particular type of being, the BNA Act conferred jurisdictional ownership of the alien body to the federal government[19]. On this view (and following Agamben) the Constitution paradoxically configures the alien in bio-political terms and locates this body in the liminal space within and outside the constitution of sovereign law. If and when the state permits passage through the rites of naturalization, this alien body arrives into at a less fraught condition of political subjectivity namely, the British Subject[20]. In functional terms, the BNA Act authorizes Parliament to legislate *about* the alien, requires it govern *for* the British Subject, and enables Parliament to regulate the transition from object/alien to subject/Subject.

However, another reading of 'aliens' in the Constitution is that they were fixed as a category because they were constituted by a prior and higher legal order, namely Empire[21]. The Constitution did not grant Parliament jurisdiction over nationality, only over naturalization[22] because the Canadian citizen had no autonomous legal existence

[19] Obviously, a literal application of federal power over the alien as such would necessarily collide with allocations of power according to spheres of activity. Indeed, the courts eventually sorted out the matter by clarifying that federal authority encompassed the rules of entry to the territory (immigration) and formal entry to the polity (naturalization), leaving the provinces free to legislate against aliens and to discriminate between citizens under the rubric of 'property and civil rights'. Law students frequently read the early case of Union Colliery v. Bryden, wherein the courts struck down a law prohibiting the employment of 'Chinamen' in British Columbia mines. It is frequently hailed as a beacon of the unwritten constitution and the protection of rights under cover of federalism. In relation to the rights of migrants, however, it was effectively distinguished and marginalized in subsequent cases that upheld denial of the franchise to Asians, and legislatively prohibited Chinese from employing white women.

[20] Tempting as it is to indulge in extended wordplay around 'subject' of political theory and 'subject' of the monarch, I will resist doing so, except insofar as I capitalize the subordinate Subject in order to differentiate the abstract political subject from the particular British Subject.

[21] Such explanation might have been plausible regarding the recognition of Indians in s. 91(24), had the framers of the Constitution approached conferral and transmission of Aboriginal identity as an instance of indigenous sovereign authority outside the colonial legal order with which the Canadian government would not interfere. But, of course, federalism was as pluralist as much pluralism as the framers of the Constitution would bear, as successive *Indian Acts* generated ever more meticulous and ruthless methods of defining and distinguishing status Indians from non-status Indians.

[22] " Notwithstanding the fact that many colonies acquired a substantial degree of self-government during the late nineteenth and early twentieth centuries, legislation with respect to British nationality was considered to be exclusively within the province of the 'Imperial' Parliament." Jones, quoted in Galloway, supra at 210.

until the introduction of Canada's first *Citizenship Act* in 1947. The naturalization process stated to in s. 91(25) referred to naturalization as a British Subject in Canada, and while Parliament possessed jurisdiction to devise the process for naturalization, the outcome was pre-ordained as political membership in the supranational community of Empire. One might be a British subject by birth on imperial territory, or a naturalized British subject of New Zealand, Australia, Canada or India, but the nationality recognized by the law of nations remained British subject[23].

Having said that, Canada's *Immigration Act* of 1910 created a limited concept of Canadian citizenship by casting the immigrant (whose entry and residence the *Act* regulated) as the other of the Canadian citizen (who possessed an unfettered right of entry). Section 2(a) begins by stating that for purposes of the Act, "Alien means a person who is not a British subject", but for immigration purposes, British subjects are divided into Canadian citizens and others, and only Canadian citizens possess an unqualified right to enter and remain in Canada. A Canadian citizen was in turn defined as a (1) a person born in Canada who had not become an alien, (2) a British subject domiciled in Canada, or (3) a person naturalized in Canada not having lost domicile or become an alien[24]. In short, Canadian citizenship consisted of a sub-set of British subjects. The *Immigration Act* invented the Canadian citizen and posited the immigrant as its other.

As a functional attribute of membership, Canadian citizenship possessed a certain evanescence: it materialized at the border, was visible only to Canadian immigration officials, and evaporated upon entry. On either side of the geographic border, there existed only British Subject and alien other.

The foregoing addresses only citizenship and nationality in the legal sense. I assume awareness of the rampant popular and political discourses of "White Canada" that circulated during this period and freely traded on corresponding images of the Canadian citizen and the Canadian nation. The Komagata Maru sailed into these turbid waters that simultaneously conjoined and split Britain and its colonies.

Locating the Komagata Maru[25]

The British Columbia Court of Appeal sat here, in Victoria, and its judges were members of the local community, embedded in the matrix of informal rules and practices that constituted their 'nomos'. At the same time, they were federally appointed Canadian judges, charged with applying federal law in the name of the national community. They were also British Subjects, accountable not only to the Supreme Court of Canada, but ultimately to the judicial discipline of an Imperial court, the Judicial Committee of the Privy Council in London.

[23] The 1906 Nationality Act set out the process for naturalizing as a British subject in Canada, and also the mechanisms by which such naturalization could be lost or revoked.
[24] Quoted in Galloway.
[25] The material in the section draws extensively on material and sources contained in Audrey Macklin, "The History of Asian Immigration", August 1987 (unpublished, on file with author).

The nested memberships of the judges (and, by extension, the colonial white settler society) can be set against those of the passengers aboard the Komagata Maru. Most were Sikhs from the Punjab region of British India. Unlike Chinese and Japanese immigrants, with whom they shared space on the racialized margins of nation, they were British Subjects, able to lay claim to a common legal membership with Canadians inside the borders of the transnational, non-contiguous political space of Empire.

Indian entrepreneur and nationalist Gurdit Singh chartered the Komagata Maru in Hong Kong in spring 1914. In an earlier incarnation and under different ownership, the same ship transported thousands of European immigrants to Canada between 1898 and 1913. Singh's business ambition was to establish a passenger line between Calcutta and Vancouver, but this first voyage would not be a continuous journey from India to Canada. After obtaining a legal opinion from a Hong Kong firm of solicitors that the ship's passengers should encounter no legal obstacles to their admission, the Komagata Maru set sail in April 1914 from Hong Kong, with 376 passengers aboard, including two women and five children[26]. News of the voyage preceded the ship, and when the Komagata Maru arrived in Vancouver Harbour on 23 May 1914, Immigration authorities leased boats, and harmed armed ex-police officers to prevent disembarkation. For the next two months, the Komagata Maru become a floating detention camp. The local Vancouver Sikh community organized a shore committee to provide the passengers with material, legal and moral support. Immigration officials in turn prohibited passengers from accessing provisions, legal counsel or the members of the shore committee.

The spectre of the ship and the brown bodies upon it fused into a racialized border marker starkly visible on the horizon. However, to simply describe the passengers in Agamben's terms as bio-political subjects contained in a sovereign state of exception is to regard as self-evident an outcome that the Komagata Maru incident was instrumental in producing.

Gurdit Singh insisted that everyone aboard the Komagata Maru was entitled to enter Canada as of right. This contention was not based on a universal mobility right qua human, but rather on a civil right flowing from a particular form of political membership which, while itself a form of subjugation, entailed equality as between all persons so designated[27]. All British subjects were free to move within the borders of Empire. At least, that's what their British colonial rulers assured them, consistent with the dominant interpretation of *Calvin's case*[28]:

> Every one born within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of - therefore, according

[26] It appears that the Hong Kong lawyers based their opinion on the fact that the British Columbia courts had struck down the previous version of the continuous journey provision in 1913. They did not know that Parliament had amended the regulation yet again to close the loophole.

[27] Tempting as it is to indulge in sustained word play around the double meaning of 'subject', I think it is more distracting than illuminating, and so I will capitalize Subject in reference to the legal status, recognizing the irony in so doing.

[28] *Calvin v. Smith*, 77 Eng. Rep. 377 (K.B. 1608).

to our common law, owes allegiance to - the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman[29].

In a sense, the legal position asserted by the passengers aboard the Komagata Maru shares more with complaints of discrimination voiced by Bulgarians or Romanians denied access to other EU member states, than to the contemporary assertion of mobility as a cosmopolitan human right[30]. That is, the passengers opposed discrimination between members (British Subjects), not between member and stranger.

This scalar dimension of membership and governance is crucial to explaining the variation in the legal technologies deployed to regulate racialized immigrants. Chinese immigrants were legislatively segregated into the Chinese Immigration Act, which imposed the notorious head tax. During this period, the Colonial Office in London expressed little concern about how Canada managed Chinese migration to Canada, since China's political and economic heft was slight.

Not so with Japan. In 1894, Japan and Britain entered into a *Treaty of Commerce and Navigation* which granted citizens of each state "full liberty to enter, travel or reside in any part of the dominions and possessions of the other contracting party [and] full and perfect protection for their persons and property". In 1905, Canada became a party to the 1894 Treaty between Britain and Japan. By 1907, anti-Asian sentiment erupted into violence, and on September 7, a volatile white mob rampaged through the Chinese and Japanese district of Vancouver, terrorizing the residents and destroying property. The international embarrassment felt by the Canadian government precipitated an investigation and payment of compensation to the victims[31]. It also led to intensified efforts to restrict future Japanese immigration. The freedom of movement guaranteed by the *Treaty of Commerce and Navigation* stood in the way of enacting a Japanese version of the *Chinese Immigration Act*. Instead, Minister of Labour Rodolphe Lemieux "Gentlemen's Agreement" with Japan to limit the emigration of its subjects to 400 annually, but only if the agreement was portrayed publicly as voluntary, self-imposed, and consistent with Japan's sovereign rights under the *Treaty of Commerce and Navigation*. Most importantly, the quota was to remain confidential. Imperial pressure not to publicly embarrass Japan, and Canada's pretensions toward playing on the international stage, generated this mode of covert governance, at least in comparison to the overt racism of the *Chinese Immigration Act*. To put it another way, if the Chinese

[29] Herbert Broom, *Constitutional Law Viewed in Relation to Common Law* (London, W. Maxwell & Son, 2d ed. 1885), at 31.

[30] I do not mean to overstate similarities between Empire and the European Union as transnational political entities. Obviously, there are many salient differences.

[31] Report of the Royal Commission Appointed to Investigate Losses Sustained by the Chinese Population of Vancouver, British Columbia on the Occasion of the Riots in that City in September, 1907, Sessional Papers 1908, no.74f; "Report of the Royal Commission Appointed to Investigate Losses Sustained by the Japanese Population of Vancouver, British Columbia on the Occasion of the Riots in that City in September, 1907", Sessional Papers 1908, no. 74g.

were treated as imported commodities subject to duty, then the Japanese were allowed to manage the emigration of their own population through voluntary export restraint[32].

Migration from British India to Canada began around 1905, facilitated by the establishment by the Canadian Pacific Railway of a shipping line between Calcutta and Vancouver. Indians were no more welcome in British Columbia than the other 'Asiatics' who preceded them. Although the 1910 *Immigration Act* explicitly authorized Cabinet to prohibit the entry "of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of any specified class, occupation or character" [33], Britain strenuously discouraged the one colony from employing explicitly racist measures that would exacerbate agitation against British rule in the other colony. Canadian officials unsuccessfully lobbied the British colonial rulers to restrict emigration from India to Canada through a bilateral agreement similar to the one reached with Japan.

Britain did not actually object to Canadian exclusion of Indians[34]. On the contrary, Britain preferred to contain Indian British Subjects within India. Whereas the dispersal of white settlers and colonial managers throughout the Empire contributed to consolidation of Empire, the proliferation of diasporic networks of subaltern Subjects only multiplied potential nodes of resistance. The contamination of white Canada by brown bodies was less of a concern to London than the contamination of brown minds by the rhetoric of democracy and rights. Indeed, the local Vancouver Sikh community was already suspected of fomenting sedition and kept under active surveillance by WC Hopkinson, the chief immigration inspector in Vancouver. Members of the local Sikh community, radicalized by racism in Canada and Imperial oppression in India, established and supported Ghadar ("Mutiny"). Founded in North America mainly by Sikh immigrants, the Ghadar movement was a transnational, anti-colonial, secularist political movement, unique in its diasporic origin. It advocated not only for equal rights within Empire, but also for full Indian independence[35]. Many endorsed violence. Some were members of the Komagata Maru shore committee. Hopkinson was formerly a member of the Calcutta police. He infiltrated the local community with the help of informants, and shared his intelligence with London, Ottawa and Washington.

Cabinet responded to Imperial anxiety by deploying an assortment of regulations, each enabled in general terms under statute, but particularized through text formulated by Cabinet. For example, the *Immigration Act* authorized restrictions on the entry of any

[32] Remarkably, Parliament gave its imprimatur to the Gentlemen's Agreement in early 1908 without demanding disclosure of the numerical limit. Parliamentary debates at the time suggest that Lemieux appealed to Parliament's sovereign aspirations (not to say vanity) when characterizing the secret agreement as an instrument of Canadian diplomacy; he also stressed that the alternative to the Agreement was abrogation of the Treaty, which would deprive Canada of a potentially lucrative trading market of 50 million Japanese.

[33] Immigration Act 1910, s. 38(c).

[34] Indeed, Britain also devised various stratagems to avoid its own formal commitment to admitting British subjects, particularly those of undesirable classes and races.

[35] Sukhdeep Bhoi, "Ghadar: The Immigrant Indian Outrage Against Canadian Injustices 1900-1918", MA (History) Thesis (Queen's University, 1998) (unpublished manuscript on file with author). In addition to pervasive racism, British Indians in Canada were legally disenfranchised and denied access to professions.

immigrant on the basis of race or occupation. Cabinet did not prohibited the landing of Indians, but did prohibit the landing of labourers at any British Columbia port of entry in anticipation of the arrival of ships from India. The *Immigration Act* authorized Cabinet to require immigrants to possess a certain amount of cash ("landing money") that varied according to the race of the immigrant. It then imposed a $200 requirement exclusively on 'Asiatics', but exempted those who were governed by conflicting legislation or an international agreement. The effect was to exempt the Chinese because of the *Chinese Immigration Act*, and the Japanese because of the Lemieux Agreement, leaving Indians as the sole occupants of the racial category 'Asiatic' governed by the landing money requirement.

The regulation that became known as the continuous journey provision was devised especially for South Asians. It prohibited the landing of any immigrant "who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen". Only one shipping company, Canadian Pacific (CP), operated a direct service between India and Canada. Within days of enacting the first continuous journey provision in 1908, the government issued a directive to CP to suspend its service, thereby obviating the possibility of making a continuous journey from India to Canada. Thus deprived of significant revenue, CP sponsored a series of successful legal challenges to the continuous journey provision, until the provision was refined and amended to the point where the loopholes were closed and CP gave up.

The main concerns of parliamentarians about the continuous journey provision was that it might inadvertently deflect otherwise desirable Europeans who could not arrive by continuous passage from their countries of nationality. They were placated by the following exchange in Parliament:

> "I think the object of this amendment … is quite plain."
> "To exclude Hindus, that is all".
> "Yes, to exclude Hindus and Asiatics and all kinds of undesirable people"[36].

In order to avoid any misunderstanding, Frank Oliver, Minister of the Interior, followed up with several internal memoranda to immigration officers to instruct them on how to enforce of the continuous journey provision. He issued his first on the very day that the first iteration of the continuous journey provision was enacted by Cabinet:

> Please bear in mind that the newly issued Order-in-Council re: "continuous journey" is absolutely prohibitive in its terms but that **it is only intended to enforce it strictly against really undesirable immigrants.** You will understand, therefore, that a great deal is left to your discretion with regards to the application of the particular Order[37].

Soon after, Oliver followed up with another letter:

[36] House of Commons *Debates* 1902, 6435.
[37] Quoted in Sampat-Mehta *supra* note X, 140.

> The regulation excluding immigrants who come otherwise than by direct passage from their own country is mandatory with the provision that if such immigrant is otherwise desirable the question of his exclusion is to be referred to Head Office and in the meantime he is to be permitted to proceed to destination according to the terms of instructions to immigration agents. This regulation is rendered necessary by conditions on the Pacific coast. . . . **This regulation is therefore intended as a means of excluding those whom it is the policy of the government to exclude, but not those whom the policy is to admit** (emphasis added)[38].

And lest there remain any ambiguity:

> Owing to the great scarcity of railway workers it has been decided to admit with the exception of Asiatics and irrespective of any qualifications of direct journey, all railway construction labourers who are mentally, morally and physically fit ….

For many of the classical constitutional scholars of the time, administrative discretion was the antithesis of law, a lawless zone circumscribed by law (thus Ronald Dworkin's folksy metaphor describing discretion as the hole in the doughnut of law). The foregoing instructions from the Minister to the bureaucracy do not actually instantiate the problematic nature of legal grants of discretion. As Oliver admits, none of the relevant provisions purport to leave room for discretion – he regards them as precise and mandatory commands. Instead, Oliver, in the role of sovereign, instructs his agents to simply suspend application of the law for everyone except the intended targets of its enforcement. It is a curious inversion of the state of the exception as conventionally described, but my intuition that this may provide a more apt model for how exceptions begin to become normalized in the absence of declared emergencies[39].

One does not require a particularly robust conception of the Rule of Law to recognize that the Orders-in-Council and subsequent instructions from the Minister to his subordinates are a textbook case of the Rule of Men: They purport to be of general application, but their application is wholly restricted to one targeted group. They purport to guide rather than prohibit conduct, but instead articulate rules that do not permit of compliance. (The same might be said of a landing money requirement so exhorbitant as to be unattainable[40]). They purport to publicly communicate a valid rule through legislation, but baldly subordinate the rule to the instrumental attainment of policy objectives outside the scope of the rule. (The same might be said of the prohibition on the landing of labourers). Even without access to the directions from Oliver to his bureaucrats, British Columbia courts managed to strike down two versions of the

[38] Quoted in Sampat-Mehta supra note X, 141.
[39] This point needs developing to make it persuasive – open to suggestion … Masked as discretion in enforcement, but really about application of law itself, not operational question about resources, etc.
[40] The average annual income of a production worker in Canada was about $417. Citizenship and Immigration Canada, *Forging our Legacy* http://www.cic.gc.ca/english/department/legacy/chap-3.html#chap3-2

continuous journey regulation as exceeding the authority granted Parliament to the executive[41].

There is no mystery in the fact that Canadian policy was racist, or that the mechanisms of exclusion barely coated it with a paper-thin veneer of legality. But why not dispense with the dissimulation and simply use the power available in the statute to explicitly prohibit the entry of Indians? After all, the Chinese head tax had never been challenged in court, much less successfully. Political pressure from Imperial overseers furnishes the pretext for pretext, but that only begs the question. The systematic submersion of the migration regime beneath the surface of legislative text, down to less visible regulatory subtext, and ultimately to discretionary counter-text is a feature of Canadian migration governance that continues to the present[42].

My hypothesis is that the inception of this pattern during at a period of transition in the political form of Canada is not coincidental. The desire for stability is surely heightened and exposed during periods of flux, and the contradictory impulses toward stabilizing the legal order and stabilizing the 'nation' are especially raw during these periods: Settler societies with higher sovereign aspirations must demonstrate their capacity to adhere to the formal universalism embedded in the Rule of Law in order to earn their entitlement to self-govern. More precisely, they must prove that they are at least as 'civilized' as their Imperial progenitor[43]. At the same time, the irresistible particularism of nation-building, especially the exigencies of excluding the uncivilized other – must be accommodated. The foundations of the nation are perpetually vulnerable to corrosion by foreign elements, while the Rule of Law grows ever more insistent and expansive in its demands.

The Truth About Munshi Singh

The *Munshi Singh* judgment opens with a narrative within a narrative. Over the course of a month spent stranded in Vancouver Harbour, local media coverage grew increasingly frenzied about the Komagata Maru's presence, the British Viceroy in India urged Canadian Prime Minister Borden to avoid any violent resolution that would stoke resentment in India, and Immigration authorities delayed processing the applications for landing. Meanwhile, food and fresh water were running out, and Immigration authorities denied the passengers access to provisions or to legal counsel in the vain hope that the passengers would give up and turn back. Eventually, the shore committee accepted a federal government proposal that one passenger of the Komagata Maru come ashore and serve as the test case that will determine the admissibility of all passengers. Lawyer Edward Bird picked the name of Munshi Singh, a 26 year-old Punjabi farmer, off the passenger list and designated him as the representative litigant. His legal fate is the fate of everyone aboard the Komagata Maru and, by extension, all Indians, present and future. His story becomes The Story. His case was first adjudicated before a Board of Inquiry,

[41] *Re Rahim*, XXXXX, *Re Thirty-Nine Hindus* (1913) 15 DLR 189, 192.
[42] Several scholars in addition to me have noted and commented on the prevalence of discretion in migration regimes. See, e.g. Dauvergne, Pratt, Legomsky etc..
[43] One might sarcastically note that this does not exactly set the bar very high.

which determined that he was inadmissible to Canada because he was a member of an excluded class (labourer), possessed less than the $200 in landing money required of 'Asiatics', and arrived other than by a continuous journey. The appeal challenged the finding of fact regarding his occupation, the interpretation of the landing money requirement, and the legal validity of the continuous journey regulations.

The first basis for Munshi Singh's exclusion turns on the evaluation of his *viva voce* testimony. He testifies through an interpreter that he is a farmer. At the time, Canada could not attract or retain farmers in sufficient numbers, despite offers of subsidized passage and grants of free or discounted land to prospective white farmers. On the hierarchy of occupational desirability, the farmer of the early twentieth century (Clifford Sifton's 'stalwart peasant in a sheepskin coat with a stout wife and five children') ranked with today's elite IT professional. Then, as now, agriculture was the main economic activity of the Punjab. Then, as now, Canada projected itself in public discourse and in legal text as an advanced economy that required something other and better than 'unskilled labour'.

Munshi Singh is the third person ('he') in the transcript of evidence from the Board of Inquiry which is excerpted in the judgment of the Court of Appeal. The questions were posed by the Board. The answers were given through an unidentified translator:

> "He says he is a farmer.
>
> "What farming work has he done? Work on his farm producing grain, etc."
>
> "Had he a farm in India? Yes
> "How long had he lived on that farm? When he became a young man he began to work on his farm; since he became able to work.
>
> "What is the value of the farm? Twenty five thousand rupees.
>
> "How big is that farm? He says he cannot describe. He has separate land, some here, some there, divided into small measurements.
>
> "Several parcels divided into small holdings? Yes
>
> "Where did he leave his wife and child? At his home.
> . . .
>
> "Why did he come to British Columbia? To do work on farms, to purchase some land and do work as a farmer.
>
> "How is he to get farming work here when he does not own any farm here? He says he will search out here any tract of land, but when he finds one suitable to him he will wire to his home and purchase it.

> "Has he ever done any work besides working his own farm? No, he has done no other work."

The second basis of inadmissibility was the lack of adequate landing money:

> "Has he got any money in India? Yes.
>
> "Why did he not bring more money with him? He says: I am not educated and may not transfer money to banks, and I have not brought much money so that I may not be looted on the way, as I have to pass from the different countries".
>
> "Would he be able to wire to his people and have his money sent on? Yes.
>
> "Would he be able to have as much as $200 of our money sent on here? Yes, 600 rupees.
>
> "How much has he got now? Six pounds.
>
> "Can he produce it? Yes (produces six gold sovereigns).

Inspector Hopkinson, the local Superintendent of Immigration on the west coast and the 'front line' officer who determined that Munshi Singh was inadmissible, testified as follows in response:

> "[What was the basis of your opinion that Munshi Singh's] landing would be contrary to the provisions of the *Immigration Act*? Although he has been declared on the manifest as a person who intends to be a farmer in this country, and he has reiterated that statement, yet I believe that the man has no more intention of being a farmer than I have, and my reasons for this are, that the man, for a start, has not sufficient money to make a living for a month, much less to buy a farm in this country. Of the 2,500 East Indians resident in this country, to my personal knowledge 90 per cent are employed as labourers, and the remaining 10 per cent are divided between farmers and real-estate operators.
>
> "Cross examined: Did you examine this man for the purpose of ascertaining what resources he had in India? No, sir.

The Board of Inquiry issued an order declaring Munshi Singh to be an unskilled labourer, a finding which the BC Court of Appeal did not disturb. That is to say, it accepted Hopkinson's opinion that Munshi Singh lied about his future intentions, and possibly about his past occupation. His claim to have money in India, and his explanation for why he did not bring more with him, are implicitly dismissed as ludicrous. The banal finding of fact that Munshi Singh is an unskilled labourer suffices to exclude all the passengers of the Komagata Maru, quite apart from the validity of the landing money or continuous journey regulations.

It is this legal judgement *of* narrative that sustains the expulsion of Munshi Singh -- and by extension all passengers aboard the Komagata Maru -- from discursive, moral and ultimately political community. Not only is he immanently and immutably other, he is not even who he says he is. Under the colonial judicial gaze, his otherness is at once knowable and inscrutable. The foreignness of his language externalizes the impossibility of the transfer of meaning, but hardly captures the full expanse of the communicative chasm separating Munshi Singh and the Board of Inquiry.

I stress the conceptual significance of this exercise of credibility determination in part because it illustrates the legal mechanics whereby the other's account of himself is discarded, and supplanted by a competing narrative of what he *really is*. And Munshi Singh really is a liar, in contradistinction to the truth-telling Canadian, and he really is an unskilled labourer, whether or not he ever farmed in the Punjab, and he really is dangerous, precisely because what lurks behind the dissimulation (seditious intentions perhaps …) eludes the judges' grasp. The words "I am a farmer" are not lost in translation from Punjabi to English. When uttered by Munshi Singh, however, the words signified to his audience that he was asking for recognition as something he was not allowed to be[44]. Munshi Singh cannot be a farmer, and the Board of Inquiry knows this about Munshi Singh, and they make it true.

Several elements of this judgment of narrative warrant emphasis because of their persisting resonance: As a matter of process, a legal regime's system of review and appeal turns away from the subject adjudged a liar at first instance, ostensibly on the basis that "the trial judge sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case"[45]. Having said this, at least one judge was willing to opine that Munshi Singh's evidence "was of such an inadequate character, and fell so far short of what might reasonably have been expected in the circumstances, that I am not surprised it failed to convince the Board of its veracity"[46]. The judge does not state what might reasonably have been in expected of the circumstances of Munshi Singh, whom one can safely assume had limited understanding of what was happening around him.

Perhaps most significantly, any ethical demands of engagement with the other are suspended once that person is discredited. If one is not who or what one claims to be, if one's documents are fake (as often happens today in refugee claims), if one insists that one has $200 available to be wired from home (which may well have been implausible), The Board of Inquiry is relieved of any need to listen further, or listen more deeply, and higher courts need not listen either. The non-credibility of a particular other both evinces and instantiates the non-credibility of *the* other. Munshi Singh is a liar, so all Indians are liars / All Indians are liars, so Munshi Singh is a liar. The effect of the third element may obliterate *ab initio* the ethical demands described in the second.

[44] See John Berger, quoted in Bhabha, supra at 315-316.
[45] Khoo Sit Hoh v. Lim Thean Ton, (1912) AC 323 at 325, quoted in Munshi Singh, at para. 38.
[46] Re Munshi Singh, para. 37.

Narrating the Alien: Nativity and Nationality Revisited

The appeal against the landing money requirement pursued the dismal strategies of insisting that Indians belonged to the Caucasian rather than Asiatic race, and urging an interpretation of the regulation that would not require the immigrant to physically possess the requisite landing money at the moment of arrival. The argument that the regulations violated the equality of British subjects by discriminating on racial grounds or trenched on their civil rights (a matter of provincial jurisdiction) was barely audible to the judges as a legal complaint[47]. Nor could it be otherwise, given that racial (and gender) discrimination between British Subjects inside Canadian borders (Indigenous peoples, women, the Indian community itself) was constitutionally sanctioned. Judges rarely departed from the formal position that the constitution did not prohibit discrimination. The constitution only dictated which level of government, provincial or federal, was authorized to engage in the particular form of discrimination, and whether the discriminatory action in question was properly authorized.

This last basis of judicial review sufficed to hold the continuous journey provision *ultra vires* twice in the past, but the federal government responded to earlier defeats by amending and refining the continuous journey provision to the point of formal invulnerability. Counsel for Munshi Singh appears not to have seriously embarked on the manoevres of statutory interpretation to find loopholes. Instead, counsel for the appellant advanced two frontal assaults on the entire package of provisions: First, he asserted that the domestic law violated the nearest equivalents to transnational human rights norms available at the time, namely the *Magna Carta* and the *Habeas Corpus Act* of 1679[48]. In so doing, counsel presaged a contemporary pattern, which is that invocations of international human rights figure disproportionately in immigration cases before domestic courts[49]. Perhaps the preponderance of international legal arguments in the field of migration arises from the fact that legal orders organized by and around territorial sovereignty provide singularly inhospitable terrain for cultivating legal norms protective of the alien. Creative lawyers necessarily must reach beyond the borders of domestic law for normative reinforcement. At the same time, any litigator knows that if one's strongest argument in a domestic court is that the law violates a norm whose source lies outside the state, one is on the losing side of the case. It is difficult to discern exactly what the arguments were because the Court of Appeal dispensed with them so perfunctorily.

Counsel's second and more radical gambit consisted of translating (more or less directly) the standpoint of the passengers into legal argument. He baldly asserted that Canada lacked the sovereign authority to exclude British Subjects. The expansive Imperial perspective on mobility within Empire presupposed that migration would flow from centre to periphery for purposes of settlement and colonization. The prospect of mass movement in the reverse direction ('the Empire strikes back') was hardly

[47] Re Munshi Singh, para. 48

[48] Agamben cites habeas corpus as an example of the 'bio-political' body's first appearance in law. Along with Peter Fitzpatrick, I am skeptical of the characterization of the subject of habeas corpus as existing prior to law.

[49] For contemporary Canadian examples, see *Baker, Suresh, Burns and Rafay…*

contemplated in Britain at the time. Affirming the equal mobility of all British Subjects within the borders of Empire seemed a low-risk pacifier to offer the sub-altern. At the same time, Britain also assured Canada that it would not interfere with Canadian immigration policy, with the proviso that Imperial sensitivities be taken into account in devising the manner by which restriction was accomplished[50].

Thus, while the legal adversaries were Munshi Singh and the Canadian government, the real addressee in the dispute was Imperial Britain. Either British Subjects were equal throughout the Empire, or not. Either Canada was a self-governing Dominion, or not.

Giorgio Agamben posits refugees as a limit concept for the modern nation-state order because "by breaking the continuity between man and citizen, nativity and nationality, they put the originary fiction of modern sovereignty in crisis"[51]. However, in the real-time transition from colonial self-rule to independent state, nationality itself was a layered, shifting and mutating concept. The Komagata Maru incident tested the originary fiction of Canadian sovereignty while the elements of the narrative were still being written into the legal order. Within the nation-building story of white settler society, the brown men aboard the Komagata Maru were hypervisible embodiments of the disjuncture between nativity and nationality. In law, they surfaced the tangled conjuncture of sovereignty and nationality, a linkage that Agamben's contemporary perspective implicitly regards as uncomplicated. Indeed, the *Toronto Star* conveyed more subtlety than it probably intended when, alone among media commentators, it timidly suggested that "we ought to recognize that the situation is one which is very difficult to justify to Hindus, who are compelled to be in the Empire in one sense and out of it in another"[52].

In arguing for the mobility of British subjects, Munshi Singh's lawyer deployed the foundational text constituting Canada as legally sovereign as a constraint on the performance of that iconic act of national sovereignty, namely border control. Simply put, the BNA Act did not authorize Parliament to effectively alienate British subjects:

> "Mr. Bird further urged that the Act, in so far as it purported to deal with the exclusion of British subjects, was *ultra vires* the Parliament of Canada"[53]

The Court swiftly dismissed the submission by citing precedent:

> In *Hodge v. Reg.*, it was decided that a Colonial Legislature has within the limits prescribed by the statute which created it 'authority as plenary and as ample . . .as

[50] Secretary of State for India, Lord Crewe, announced at the 1911 Imperial Conference that "nobody can attempt to dispute the right of the self-governing Dominions to decide for themselves whom, in each case, they will admit as citizens of their respective Dominions". *Re Thirty-Nine Hindus* (1913) 15 DLR 189, 192. Note, however, that admission to citizenship and admission to territory are not synonymous.
[51] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford 1998: 131).
[52] Quoted in *Canadian Annual Review* 1914, 119.
[53] Re Munshi Singh, para. 53.

> the Imperial Parliament in the plenitude of its power possessed and could bestow"[54]

Shorn of ornamentation, the quote from *Hodge* really stands for the proposition that the radius of Canada's power of self-governance ranges as far and as wide as the length of the leash tethering it to Mother England. It fails to answer the contention that the limits prescribed by the *BNA Act* did not contain with them the power to exclude British Subjects.

I noted earlier that the Constitution authorized Parliament to legislate in respect of immigration and 'naturalization and aliens', that the legal form of nationality available was British Subject, and that one of the rights attached to that status – according to the Imperial Sovereign to whom members were Subject-- was entry into any of the territories of the British Empire. The Canadian government never disputed that the 'alien' of the Constitution was the other of the British Subject. One exited the status of alien by naturalizing as a British subject. Indeed, the *Immigration Act 1910* explicitly defined 'alien' as a person who was not a British subject. But it then proceeded to carve out of British subject status a new legal subject, the Canadian citizen, which amounted to a container for British subjects with a physical connection by birth or domicile to Canadian territory. The sole purpose and effect of it was to produce an excludable other that would encompass British subjects, something that the legal category of alien could not do[55].

Unexpectedly, this glimpse into legal genealogy reveals that the origins of Canadian citizenship status reside in immigration control and occupy a thoroughly exclusionary valence. The dilemma facing Parliament was that Canada could not restrict the mobility right of British subjects without effectively assimilating certain British Subjects into the category of alien, which Parliament lacked constitutional authority to do. Canadian citizenship was a device for escaping this conundrum.

The Court did not appear to notice the problem. With a certain enthusiasm for policy pronouncements that judges of the era usually eschewed, the Court took a legally vacuous Canadian citizenship, invigorated and reified it with the febrile fantasy of white nationhood, and read it back as that which must be preserved through law. To paraphrase Peter Fitzpatrick, the universalism of law is given determinate content through the particularism of nation, and the particularism of nation is universalized into a legal right to exclude derived from principles of 'natural justice' [56]:

---

[54] Re Munshi Singh, para. 86.

[55] The *Immigration Act 1906*, 6 Edward VII c. 19, s. 2(a) defined neither citizen nor alien, but rather defined immigrant as any person arriving in Canada who has not "previously resided in Canada". Canada's first *Immigration Act, 1869*, 32-33 Vict. Cap. X, s. 31 did not define immigrant beyond stating that "the word Passengers shall apply to all Passengers and Immigrants commonly known as such". It is important to note that these first two immigration statutes contained very few exclusionary provisions. The introduction of the citizenship category coincided with a dramatic shift in the orientation of migration governance from permissive-with-exceptions to restriction-with-exemption.

[56] Peter Fitzpatrick, Modernism and the Grounds of Law (cite)

The Immigration Act is . . . an Act passed in pursuance of the power conferred by the [Constitution Act], and applies to all persons coming to Canada, irrespective of race and nationality . . . The only privileged persons are those who in accordance with natural justice should be allowed free entry – by any nation – being her own Canadian citizens and persons who have Canadian domicil. These are permitted to land in Canada as a matter of right[57]

. . .

It is irresistible that self-government and national status must attach to itself this power [to deport British subjects]. It is a power of preservation of the nation . . .

. . .

In that our fellow British subjects of the Asiatic race are of different racial instincts to those of the European race - and consistent therewith, their family life, rules of society and laws are of a very different character - in their own interests, their proper place of residence is within the confines of their respective countries in the continent of Asia, not in Canada, where their customs are not in vogue and their adhesion to them here only give rise to disturbances destructive to the well-being of society and against the maintenance of peace, order and good government.

Lord Watson, in Abd-ul-Messih v. Chukri Farra, supra, said at p. 91, dealing with the law of India:

> "By the law established in India, the members of certain castes and creeds are, in many important respects, governed by their own peculiar rules and customs, so that an Indian domicil of succession may involve the application of Hindu or Mohammedan law; but these rules and customs are an integral part of the municipal law administered by the territorial tribunals."

It is apparent that it will not conform with national ideals in Canada to introduce any such laws into Canada, or give them the effect of law as applied to people domiciled in Canada, and this, probably, would be the germ of discontent that would be brought to this country with any considerable influx of people so different in ideas of family life and social organization. Better that peoples of non-assimilative - and by nature properly non-assimilative - race should not come to Canada, but rather, that they should remain of residence in their country of origin and there do their share, as they have in the past, in the preservation and development of the Empire[58].

[57] Munshi Singh, at para. 85.
[58] Munshi Singh, at paras. 91 – 104 (*passim*).

Like an underground tremor that surfaces elsewhere through fissures in the earth's crust, the modulated violence of the judgment in *Munshi Singh* traveled along the colonial transmission lines and erupted into physical violence in Vancouver and in India[59]. Defeated, demoralized and immiserated, the Komagata Maru returned to India. Of 376 passengers, only twenty-two who were able to prove previous Canadian domicile remained in Vancouver. A short time later, assailants from the Sikh community gunned down two of Hopkinson's local informants, and Hopkinson's chief agent shot two Sikhs and wounded nine when cornered in the local Sikh temple. While Hopkinson was waiting outside the courtroom to testify at his agent's trial in October 1914, a local Sikh killed Hopkinson, and was later hanged for his crime.

If Gurdit Singh and his passengers did not understand themselves to be engaged in anti-colonial resistance by sailing to Vancouver, they did by the time they returned to India. British authorities met the Komagata Maru as it docked, and attempted to divert the passengers from Calcutta, where they would normally have boarded a train to Punjab. The goal was to deliver them back to the Punjab before they could galvanize the local population and bring the Ghadar movement's call to violent resistance home to India. A riot broke out, and seventeen passengers were killed in what become known as the Budge-Budge massacre. Although the British soon crushed the Ghadar movement in India, news of the massacre in Punjab marked the beginning of the end of Sikh support for the British in India.

The continuous journey remained survived intact until 1947, the very moment that Canadian citizenship arrived in law and India arrived at independence.

All foundings are violent, after all.

The *Munshi Singh* decision legitimated Canadian sovereignty over admission by forging the Canadian citizen. This particular act of violence could not be accomplished within law without the incorporation of the British Subject of India into the Canadian legal order qua other *to Canada* in order to effectuate his exclusion *from Canada*.

Narrating the Present

The potential parallels between the Komagata Maru incident and the contemporary scene are many, and many are obvious. Migration control has evolved from pre-condition to last bastion of sovereignty. Globalization has succeeded imperialism in constraining the state and re-situating governance above the state. Sedition, the Ghadar movement, Imperial nationality, etc. readily (if imperfectly) link up with contemporary discourses around national security, 'home grown' terrorism, European Union citizenship, multiculturalism, legal pluralism, transnational citizenship etc. I will not survey here the array of possible connections, except to highlight one. In 2003, Canada and the United States entered into a Safe Third Country Agreement. The Agreement states that a refugee claimant who seeks to enter Canada via the territorial border of the United States will be deflected back to the United States for determination of refugee status and *vice versa*.

59

Although the Agreement contains exceptions, and does require that one state or the other actually inquire into the refugee claim, many commentators (including me) believe that the technique of deflecting asylum seekers exposes them to a system that is more unfair and more likely to expose them to arbitrary detention in the United States and possible *refoulement*.[60]

The section of the 2001 that authorizes the Canadian government to enter into the Safe Third Party Agreement bears striking resemblance to the 1914 continuous journey provision. Compare the two:

Immigration Act, 1910, s. 38

> The Governor in Council may, by proclamation or order whenever he deems it necessary or expedient, prohibit the landing in Canada . . . of any immigrant who has come otherwise than by continuous journey from the country of which he is a native or naturalized citizen . . .

Immigration and Refugee Protection Act, 2001, s. 101

> A [refugee] claim is ineligible to be referred to the Refugee Protection Division if … the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence.

In its first full year of operation (2005), the number of asylum seekers making refugee claims at the Canadian border with the United States dropped by 55%. The Canadian government considers the Agreement a success.

Beyond the homology of specific legal technologies, it is worth tracing some less patent elements of continuity in the configuration of law and legal narrative in the rendering of nation. How does the legal discourse of migration embody, materialize and represent the truths produced by the falsehood of sovereign founding?

Visible Nation; Invisible Law

Between 1914 and the repeal of the continuous journey provision in 1947, few Indians immigrated to Canada. Like their Chinese counterparts, the Indian diaspora in Canada consisted mainly of 'bachelor husbands'. During this period, the state also denied Indians (and Chinese) the ability to bring spouses and children to Canada, thereby limiting in the most literal sense their role in [re]producing the nation. Today, the majority of permanent immigrants to Canada come from the global South[61]. A recent

[60] Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement", (2005) 36 *Columbia Human Rights Law Review* 365.

[61] The top ten source countries for 2005 are: China: 42,491; India: 33,146; Philippines: 17,535; Pakistan: 13,576; U.S.: 9,262; Colombia: 6,031; U.K.: 5,865; South Korea: 5,819; Iran: 5,502; France: 5,430. Citizenship and Immigration Canada (cite)

media report indicates that India is now poised to overtake China as the top source country[62]. If one combines Pakistan and India, South Asians are already at the top. For those who would draw an unbroken colour line from past to present, the numbers imply the need for a more nuanced analysis. A significant majority of permanent immigrants to Canada are assigned to the official demographic category known as 'visible minority', which is legislatively defined as "persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour". If nothing else, this ungainly label helpfully exemplifies Homi Bhabha's remarks regarding the topos of national identity:

> The recurrent metaphor of landscape as the inscape of national identity emphasizes the quality of light, the question of social visibility, the power of the eye to naturalize the rhetoric of national affiliation and its forms of collective expression. There is, however, always the distracting presence of another temporality that disturbs the contemporaneity of the national present . . . the origin of the nation's *visible* presence is the effect of a narrative struggle[63].

Statistics on the visible minority composition of migration flows[64] frequently figure in the recitation of Canada as a nation committed to equality and multiculturalism. Years of comparative research on migration and multiculturalism policies make me less cynical about these claims than my critique suggests. Nevertheless, it ought to be apparent (visible?) that the majority of today's immigrants are only visible as minorities because of the prior fabrication of a white national landscape (rivaling the harshness of the wintry geographic landscape) against which the foreign other was made visible (and, not incidentally, unsuited to the cold climate). Even now, migration scholars talk of 'majority minority' cities to describe global urban spaces where the majority of the municipal population consists of people identified at the national scale as minorities, and *vice versa*. The term plurality might better describe the urban distribution of diversity. The expression 'majority minority' blithely accedes to the tenacity of whiteness as a normative category[65], just as the term visible minority imports past into present, however earnestly the numbers strain against it.

Immigration law neither defines nor uses the term 'visible minority'. The term is defined in employment equity legislation[66] whose raison d'etre is the structural exclusion of the other from the internal borders of market citizenship[67]. Immigration law no longer 'sees' race: the optimal immigrant is the neo-liberal subject, a highly skilled, self-sufficient, flexible, plug-and-play economic actor. In the case of immigrant selection, the

---

[62] "India Challenges China as Top Immigration Source to Canada", Workpermit.com, 14 November 2006 (http://www.workpermit.com/news/2006_11_14/canada/india_china_immigration_shift.htm)
[63] Bhabha, at 295.
[64] Not to be confused with the flood of aliens …
[65]. See, e.g., Philip Kasinitz, John Mollenkopf and Mary C. Waters, "American/becoming New Yorkers: immigrant incorporation in a majority minority city (1)", (2002) 36 *International Migration Review*, 1020-1036.
[66] Employment Equity Act, SC 1995, c. 44, s. 3.
[67] Anti-discrimination law, in the form of human rights codes, is nominally capable of dealing with systemic discrimination, but has proven largely unable to move beyond individualistic, pathologized acts of discrimination.

operation of race is mediated through class, gender and social capital. Countries with huge populations (India and China) can produce sizable numbers of educated, professional, 'highly skilled' candidates for the economic class, even if the numbers represent a small proportion of their respective populations. Among African countries, the absolute and relative number of people able to meet Canada's restrictive selection criteria is much smaller, thereby exposing a more direct racialized impact of colonial histories on contemporary migration patterns[68]. Among those who do immigrate to Canada, the non-recognition or under-valuation of skills, credentials and experience from elsewhere relegates many to the margins of the labour market, thereby displacing patterns of exclusion from the territorial frontier to other borders within the state.

So committed is law to erasing race from the nation-building narrative that the most important case in Canadian administrative law in the past twenty years effectively quashes an immigration decision on account of bias while carefully declining to name the animus as racism. Mavis Baker entered Canada from Jamaica as a visitor and remained past the expiry of her visa to become a non-status migrant ("illegal"). She worked as a domestic worker for ten years, bore four children in Canada, suffered a mental collapse and then collected social assistance, whereby she came to the attention of Immigration authorities and was ordered deported. She applied for permission to remain in Canada under a category known as "humanitarian and compassionate discretion" ('H&C'), which enables the Minister of Citizenship and Immigration (through a delegate) to exempt a non-citizen from the application of the rules on entry and residence found elsewhere in the statute. The H&C provision is discretionary in two senses: first, the phrase 'humanitarian and compassionate' is sufficiently vague as to leave significant space to exercise interpretive choice. This implicit discretion is guided by over 80 pages of detailed instructions buried in the *Immigration Manual*. The general message of these guidelines is that the most deserving recipient of humanitarian and compassionate discretion is one who demonstrates the self-sufficiency of an economic immigrant and/or has developed the familial relationships of a family class immigrant. Secondly, the provision is explicitly discretionary in that the Minister *may* -- not *must* -- grant a humanitarian and compassionate exemption where circumstances warrant. Humanitarian and compassionate discretion is in some ways emblematic of the migration regime from the days of the Komagata Maru onward: it reserves broad and vague power to the executive, its actual interpretation cannot be discerned from the text of the law, and the principles that actually determine its content are contained in texts far removed from democratic accountability.

Mavis Baker's application was refused and eventually her lawyer was able to obtain the notes that the Supreme Court of Canada regarded as reasons for the decision:

[68] A chronic failing of the current regime is the gap between the criteria for admission to the country versus admission to the labour market. No one disputes that immigrants, even those designated highly skilled and allegedly most in demand, encounter systemic underemployment, under-recognition of skills, and non-recognition of credentials by Canadian employers. And few would dispute that these impediments are exacerbated by race. For a recent study, see Jeffrey Reitz, "Tapping Immigrants' Skills: New Directions for Canadian Immigration Policy in the Knowledge Economy" *IRPP Choices*, February 2005, www.irpp.org.

> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region[69].

Here is how the Supreme Court of Canada described why the reasons gave rise to a reasonable apprehension of bias. Because they offer a rendition of the contemporary narrative of Canadian nation, I quote them in full:

> Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.
>
> In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own

[69] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 5.

> frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias[70].

There may be prudential reasons why the judgment avoids identifying race as the thread weaving together occupation (domestic worker), family status (single), number of children (four in Canada, eight in total), and economic status (welfare recipient) into a stereotypic story about Mavis Baker, the Black, fecund, lazy and crazy welfare mother[71]. Nor would one expect to find in a legal judgment a recounting of the long history of how the migration regime was used to recruit and contain Caribbean women in live-in domestic work[72]. And, after all, the Supreme Court managed to detect a bias that two lower courts did not. Nevertheless, the effect of pushing race to the margins of the text is that this contemporary narrative of nation – the humanitarian, compassionate and multicultural Canadian people, properly appalled by the aberrant behaviour of individual gate-keepers -- can be recited anew and uninterrupted by the past. Elsewhere in the judgment, *Baker* infuses the doughnut hole of discretion with normative principles of legality that require, incidentally, attention to international human rights norms.

In most ways, then, *Baker* is a reassuring antidote to *Munshi Singh*. But what remains consistent in both cases (and more broadly as a *leitmotif* in migration law), is the yin-yang effect of these different topographies of governance: If Munshi Singh had to be enfolded into the Canadian legal order in order to exclude him, Baker had to be relegated to the margins of the legal order in order to admit her. The Supreme Court of Canada confined her to the zone of humanitarian discretion – albeit a legally enriched zone – and pointedly refused to hear her story as a potential violation of constitutional rights. Indeed had the Court done so, a vindication of Mavis Baker' rights would likely have been read as a subtraction from sovereignty-as-control, rather than an affirmation of sovereignty-as-legality. Munshi Singh could not share nationality with Canadians, just as Mavis Baker could not share the status of rights bearer with Canadians. Both nation and law need each other, just as they need the other, to sustain their bounded self-conceptions.

The Truth About Migrants

The passengers aboard the Komagata Maru were illegal immigrants. They traveled via unauthorized means (continuous journey), and brought with them too little cash (landing money) and too little human capital (unskilled labour). Each of these failings cast them outside the formal requirements of Canadian immigration law. Technologies of illegalizing migrants have grown vastly more sophisticated in form and dispersed in locus over the last thirty years. In particular, the bureaucratic capacity of states to issue advance authorization to immigrate means that the process of exclusion begins at the point of departure. This only enhances the range of technologies available for doing what the Canadian government did in 1914, namely impose legal requirements

[70] Baker, para. 48.
[71] Mental illness -- how is independent stereotype about mental illness racialized here?
[72] See Audrey Macklin, "Foreign Domestic Worker" (1992) 37 McGill LJ XXX, Agnes Calliste, XXX.

that are designed to make compliance virtually impossible for the people who feel most impelled to migrate. Visa applications, documentation of human and financial capital, medical exams, DNA samples, criminal checks, can all be done without having to – or being able to -- leave home. The only groups of people left who are lawfully entitled to apply for admission at the border are citizens of wealthy (visa-exempt) states and asylum seekers. Even then, admission is presumptively temporary.

At the limit, migration law is engaged in the continuous production and regulation of outlaw bodies and lawless spaces. Every new exclusionary practice – each additional visa requirement, each 'tightening of the border', produces another way to become 'illegal', whereby legal status is not merely inscribed on the body, it *is* the body. One may traverse the border, only to be moving within national territorial spaces enveloped by a piece of the border[73]. The Canada-US Safe Third Country Agreement, for example, ensures that yesterday's refugee claimant who crossed into Canada from the United States will be tomorrow's 'illegal' if the same act is repeated. One might reach what appears to be a border – an airport transit lounge, a port-of-entry, a coastline -- only to remain suspended in a place where the roar of the state mutes its addressees. (While the invocation to a state of exception is certainly attractive here, I think it is worth noting that they function as complements or analogs to other technologies for which the Schmitt/Agamben metaphor seem less apt).

Scholars from a variety of disciplinary and theoretical orientations have incisively documented and critiqued this production of outlaw bodies and lawless spaces in the context of migration and the War on Terror[74]. Rather than attempt to summarize this valuable body of work, I will end by returning to *Munshi Singh* and the role that judgment *of* narrative plays in the production of outlaw bodies.

Recall that even without the continuous journey provision or the landing money requirement, the determination that Munshi Singh lied about being a farmer would have sufficed to exclude, all passengers aboard the Komagata Maru, and all Indians. The trope of the other-as-dissembler continues to reverberate in contemporary migration narratives, with the figure of the asylum-seeker as sub-altern. I contend that its significance remains underestimated.

Normative theorists typically stress the right of asylum and the duty of liberal states to accept refugees. They argue as if addressing an adversary who denies the duty. In a way, they continue to push on an open door while ignoring the locked one just beyond it. Those in power usually concede (more or less grudgingly) that, at a minimum, states have a positive legal obligation not to *refoule* refugees, if for no other reason than because they are Parties to the 1951 *UN Convention Relating to the Status of Refugees*.

What enables states to evade their obligations is not the denial of duty, but rather the segregation of asylum seekers from moral community. The mechanics of this process are epistemological, and concern how knowledge about the asylum seekers and refugees

[73] I owe this metaphor to Allison Mountz.
[74] Cite authors (Mountz, Dauvergne, Crepeau, Morrison, edited volume by Guild & Bigo, etc. etc.)

is produced, and the discursive openings that flow from the 'truth' about the people assigned to these legal categories.

If one listens to political leaders, they rarely disparage refugees as such. Instead, they insist that 'most', or 'the vast majority', or 'virtually all' asylum seekers are liars -- bogus refugees, economic migrants, possible security risks -- who are not actually fleeing persecution within the narrow terms of the refugee definition. Leaders often express genuine concern for 'real' refugees, who are typically far away in refugee camps, and to whom no obligation of resettlement is owed. If the rate of acceptance for asylum seekers is relatively low (as it is in most European countries), political leaders rely on it to validate their position. If the acceptance rate is perceived as high (as it is in Canada), decision-makers must be dupes.

Either way, impugning the credibility of *most* asylum lends itself to legitimating the array of techniques of deterrence and deflection to prevent *all* asylum seekers from accessing state borders, which ultimately converges with the more general objective of deferring any encounter with 'the unannounced stranger'[75]. And given that asylum seekers are the only group left (apart from citizens of wealthy states) who may arrive at the border without advance permission, it should hardly surprise us if not everyone who claimed to be a refugee could insert herself into the very small subset of desperate migrants who meet the refugee definition, and also enact the particular combination of anguish, rationality and meticulous record-keeping demanded by the refugee determination process. That not all asylum seekers are 'genuine' refugees is an empirical truth produced by the falsehoods upon which the foundation of migration control is constructed.

Toward the end of the judgment in *Munshi Singh*, one of the judges remarks that "Further acquaintance with the subject shows that the better classes of the Asiatic races are not given to leave their own countries – they are non-immigrant classes, greatly attached to their homes and those who become immigrants are, without disparagement to them, undesirables in Canada, where a very different civilization exists"[76]. The desire to immigrate proves Munshi Singh's unworthiness. Similarly, the very agency that propels some asylum seekers to reach the borders of Australia, Europe or North America is served up as evidence of the asylum-seeker's inauthenticity[77]. All the real refugees are are always already languishing in a refugee camp, too abject to surmount the treacherous and (therefore) exhorbitantly expensive obstacles that wealthy states erect to stop them. As soon as they join the ranks of migrants who clamber onto trucks, stow away on a container ship, or find a smuggler who accepts payment in future labour, they become

[75] Katrina Schlunke, "Sovereign Hospitalities".
[76] Munshi Singh, para. 100.
[77] In 1999, Canada airlifted 5,000 Kosovars to Canada and resettled them as refugees. They received a warm welcome and their individual or collective identity as refugees was never called into doubt. Yet, the process of selecting these Kosovars for resettlement from among the population was neither as individualized nor as rigorous as the process by which refugee claimants in Canada are scrutinized. My hunch is that the perception that they were 'real' refugees depended less on the risk facing them in Kosovar and more on the fact that they did not try to come here on their own initiative and, once here, often expressed the desire to go home.

illegals. The space left by the discursive disappearance of the refugee has been filled beyond capacity and has merged into the distending category marked by illegality.

Perhaps this offers the definitive enactment of sovereignty's paradox at this (post-whatever) moment in history, for it is an utter failure of sovereignty as national-preservation-through-border-control that 'illegals' exist, and a triumph of sovereignty as law that anyone believes that legality is a human attribute. Legal narratives of the other, and of exclusion remind us why we are always approaching, but never quite arriving, at ourselves or at Canada.