

“THE WAL-MART WAY”: DUKES V. WAL-MART STORES, INC., SOCIAL CHANGE, AND THE CANADIAN LEGAL LANDSCAPE

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INTRODUCTION

As the world's largest private employer and retailer, it is not surprising Wal-Mart Stores, Inc.¹ (“Wal-Mart”) is sued “every 90 minutes every day of the year”.² Although some of these lawsuits have attracted national and international attention, none have achieved the notoriety of *Dukes v. Wal-Mart Stores, Inc* (“*Dukes*”).³ *Dukes* is the largest employment discrimination class action in American history.⁴ Jenkins J. of the United States District Court for the Northern District of California certified *Dukes* as a class action in June 2004. His ruling paved the way for a case that “dwarf[s] other employment discrimination cases”.⁵ The *Dukes* plaintiffs are approximately 1.5 million women who have been employed at roughly 3,400 Wal-Mart stores in the United States “at any time since December 26, 1998 who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices”,⁶ con-

1 Wal-Mart Stores, Inc. was founded by Sam Walton in Arkansas in 1962. The company employs more than 1.3 million associates worldwide and in nearly 5,000 stores across fifteen countries, including the United States, Mexico, Puerto Rico, Canada, Argentina, Brazil, China, Korea, Germany and the United Kingdom. Worldwide, about 140 million customers visit Wal-Mart stores weekly. Wal-Mart has topped the FORTUNE 500 list of companies for four consecutive years (2000-2004), with annual global sales of over 250 billion. Wal-Mart has also been named a “most admired retailer” by FORTUNE Magazine. “The Wal-Mart Story” online: Wal-Mart <<http://www.walmartstores.com>>.

2 In 2002, Wal-Mart was sued 6,087 times. Amongst the suits: refusing to pay overtime, forcing employees to work without pay during lunch and rest breaks, and violating the *Federal Fair Labor Standards Act*'s child labor laws. Cora Daniels, “Women vs. Wal-Mart” *Fortune* (21 July 2003), online: CNN <http://money.cnn.com/magazines/fortune/fortune_archive/2003/07/21/346130/index.htm>; see also Ritu Bhatnagar, “Recent Development: *Dukes v. Wal-Mart* as a Catalyst for Social Activism” (2004) 19 *Berkley Women's Law Journal* 246 at 248.

3 *Dukes v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXUS 11 297 (Lexis) (N.D. Cal.), 222 F.R.D. 137 [*Dukes*]. Every major mainstream media outlet covered the case; Liza Featherstone, *Selling Women Short* (New York: Basic Books, 2004) at 246.

4 *Dukes*, supra note 3 at 6. I use the terms class action and class proceedings interchangeably throughout this paper.

5 *Ibid.*

6 *Ibid.* at 5.

trary to sex discrimination acts under Title VII of the 1964 *Civil Rights Act*.⁷

In Part I of this paper, I first detail this historic class certification by addressing how the *Dukes* action arose. Second, I outline the four requirements for class certification under the Federal Rules of Civil Procedure, 23(a) and 23(b)(2) (“Rule 23”)⁸ and summarize the District Court’s ruling. The *Dukes* certification ruling is currently under appeal. In Part II, I argue that regardless of the outcome at the Court of Appeals, *Dukes* has already positively altered “The Wal-Mart Way”. I also suggest that an adjudicative order in favour of the plaintiffs or a settlement between the parties will increase the salutary effects of *Dukes*. Finally, in Part III, I explore the viability of a similar class action in Canada. Unfortunately, I do not yet have a blue-print for a Canadian *Dukes*—there are many intricacies and complications that need to be worked out. That being said, I articulate a number of possible arguments and identify specific areas in need of further exploration. My hope is that this article will begin a dialogue, ultimately creating a space for viable Canadian employment discrimination class actions.

PART I – *Dukes v. Wal-Mart Stores, Inc.*: The Historic Case

SO BEGAN *DUKES V. WAL-MART STORES, INC.*

In 1996, in a Californian Wal-Mart warehouse chain called Sam’s Club, an assistant manager named Stephanie Odle discovered she was making \$10,000 less a year than her male colleague. Odle’s supervisor explained to the single mother that her less experienced male colleague received a higher salary because he had a “wife and kids to support”. After submitting a household budget for inspection, she eventually received a \$40 per week raise. In 1999, humiliated and angered by her experience, Odle filed a sex discrimination claim with the Equal Employment Opportunity Commission (“EEOC”) which oversees Title VII of the 1963 *Civil Rights Act*.⁹ Odle secured the services of Stephen Tinkler and Merit Bennett, of Sante Fe, New Mexico, who had previously represented plaintiffs in sexual harassment suits against Wal-Mart. It was during one of these suits that Tinkler and Bennett obtained a court order compelling “Wal-Mart to produce workforce data on its hourly and management employees broken down by gender”.¹⁰ Although the vast majority of lower-level hourly positions were held by women, the data Wal-Mart produced revealed very “shockingly few women in management positions”.¹¹ Tinkler and Bennett thus set about assembling a team of lawyers dedicated to changing Wal-Mart’s discriminatory practices and earning Wal-Mart’s working women the money they deserved.

The *Dukes* team consists of three non-profit groups (The Impact Fund, Equal Rights Advo-

7 *Dukes*, *supra* note 3 at 3. *Civil Rights Act*, 42 U.S.C. § 2000e et seq. (“Title VII”). Sec. 2000e-2 (a) “It shall be unlawful employment practice for an employer – (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”; Title VII covers all private employers, state and local governments, and educational institutions that employ fifteen or more individuals.

8 Fed. R. Civ. P. 23.

9 Daniels, *supra* note 2; Featherstone, *supra* note 3 at 20-25. Title VII created the EEOC to enforce implementation of the legislation, including conducting investigations and gathering data.

10 William Rodarmor, “The Class of ‘04: How a tag team of plaintiffs lawyers embarrassed Wal-Mart in the largest class action in U.S.” *California Lawyer* (September 2004) online: California Lawyer.com <<http://californialawyer magazine.com>>.

11 Featherstone, *supra* note 3 at 22. This information could not be used directly in the case as it had been obtained under a confidential court order. Therefore, as addressed on page 5 of this paper, economist Marc Bendick was hired to analyze the employment data submitted yearly to the EEOC by Wal-Mart.

cates, and the Public Justice)¹² and three private firms (Cohen, Milstein Hausfeld & Toll, Davis Cowell & Bowe and Tinkler & Bennett)¹³ amounting to a total of eighteen lawyers.¹⁴ Brad Seligman of The Impact Fund became lead counsel and immediately narrowed the discrimination claim's focus to issues of pay and promotion.¹⁵ Seligman determined that in order to simplify and advance *Dukes*, issues of discriminatory "hiring, hostile work environment, failure to train, retaliation, or other adverse employment actions" would be excluded from the claim.¹⁶ For similar reasons, also excluded were issues of race, age, and disability.¹⁷ They sought relief "that could legally be awarded to a nationwide class without individualized proof of harm": injunctive and declaratory relief, lost back-pay and punitive damages.¹⁸

Seligman hired an economist, Marc Bendick, to analyze employment data that Wal-Mart submitted yearly to the EEOC.¹⁹ Bendick confirmed Tinkler and Bennett's earlier findings. For example, "[i]n general, roughly 65 percent of hourly employees are women, while roughly 33 percent of management employees are women," with 86 per cent of store managers being men.²⁰ According to Bendick, the statistical likelihood that such disparities were the result of chance, rather than systemic discrimination, was "very many times less than one chance in many billions".²¹ Buoyed by Bendick's findings, the group launched the largest employment class action in American history. Having decided to file the claim in California because of its reputation for high damage awards, the legal group sought representative plaintiffs.²² Using their website,²³ advertisements, and word of mouth, the legal team found six representative plaintiffs, including Betty Dukes: a 54-year-old Wal-Mart worker who, despite excellent performance reviews, was passed over for salaried managerial positions in favour of men.²⁴ So began *Dukes v. Wal-Mart Stores, Inc.*

Dukes' story resonated with Wal-Mart employees across the country. Discovery in *Dukes* took place between 2001 and 2003. The *Dukes* plaintiffs received from Wal-Mart, "1.25 million pages of documents. ... The two sides took nearly 200 depositions".²⁵ Much of this evidence and expert interpretation of this evidence played an integral role in the *Dukes* class certification

12 The Impact Fund is a public foundation that provides representation, technical assistance and funding for litigation that addresses systemic social and environmental injustices, human and civil rights violations and poverty issues. They also conduct training programs, conferences, and administer the Discrimination Research Center, a non-profit, civil rights think tank that measures discrimination in employment, public services and other aspects of daily life. Adapted from <<http://www.impactfund.org/>>.

Equal Rights Advocates is a litigation and advocacy group whose mission is to protect and secure equal rights and economic opportunities for women and girls. Adapted from <<http://www.equalrights.org/>>.

The Public Justice Center pursues progressive, widespread and lasting social change through individual, class action and appellate litigation related to poverty and discrimination issues. The group also advocates for legislative and policy changes and engages in public education campaigns. Adapted from <<http://www.publicjustice.org/>>.

13 Daniels, *supra* note 2.

14 Featherstone, *supra* note 3 at 27.

15 Generally stated, the plaintiffs alleged that women employed in Wal-Mart stores (1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer promotions to in-store management positions than do men, and those who are promoted must wait longer than their male counterparts to advance. *Dukes*, *supra* note 3 at 3.

16 *Dukes*, *supra* note 3 at 5; Rodarmor, *supra* note 10.

17 *Ibid.*

18 *Dukes*, *supra* note 3 at 3; Rodarmor, *supra* note 10.

19 *Dukes*, *supra* note 3 at 51.

20 *Ibid.* at 22.

21 Featherstone, *supra* note 3 at 25. Bendick's specific findings appear later in the paper at pages 13–14 when the judgment in the *Dukes* certification hearing is more thoroughly discussed.

22 See Vicki Young "Gender Renders Legal Issues" *Women's Wear Daily* 182(21) (5 July 2001).

23 Online: Wal-Mart Class <<http://www.walmartclass.com/walmartclass94.pl>>.

24 For further and more detailed information on *Dukes* lead plaintiffs, see Daniels, *supra* note 2; Featherstone, *supra* note 3 at 36–50; and Liza Featherstone "Wal-Mart Values" *Nation* 275(21) (16 December 2002) at 11.

25 Rodarmor, *supra* note 10.

hearing. Moreover, in addition to affidavits from the six representative plaintiffs, the plaintiffs' counsel relied upon more than one hundred class member depositions. The deposed witnesses were current and former Wal-Mart workers from across the United States who had faced or observed sex discrimination in pay and promotions.²⁶ Their stories brought the statistics to life and would also be accepted by the Court as anecdotal evidence that raised an inference of discrimination.²⁷

STEPS FOR CLASS CERTIFICATION UNDER FEDERAL RULES OF CIVIL PROCEDURE 23(A) AND 23(B)

Rule 23(a) requires that four factors be met. First, the plaintiffs must show that the class is so numerous that joinder of all members is impractical (numerosity). Second, they need to prove that there are questions of law or fact common to the class (commonality). Third, the plaintiffs must prove that the claims or defences of the representative parties are typical of the claims or defences of the class (typicality). And fourth, the plaintiffs must demonstrate that the representative parties will fairly and adequately protect the interests of the class (adequacy).²⁸ Rule 23(b) requires only one of its three subsections be met. The plaintiffs in *Dukes* relied upon Rule 23(b)(2) which provides that,

[the] party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.²⁹

At each stage of class certification, the plaintiffs' burden "entails more than the simple assertion of [commonality and typicality] but less than a *prima facie* showing of liability".³⁰ Thus, without actually determining the case's merits, the court usually considers the factual and legal issues comprising the plaintiffs' cause of action and determines whether expert evidence is supportive of the plaintiffs' claim.

26 Featherstone, *supra* note 3 at 7. Of the more than one hundred plus depositions, one was given by a male Wal-Mart employee. He testified to the fact he had witnessed the unequal treatment of men and women by Wal-Mart supervisors.

27 See text accompanying notes 60 to 61 below.

28 *Dukes*, *supra* note 3 at 10.

29 *Ibid.* at 10–11.

The entire Federal Rule of Civil Procedure 23(b) states:

(b) *Class Actions Maintainable*: An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of
 (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
 (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
 (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. *Supra* note 8.

30 *Dukes*, *supra* note 3 at 3.

SUMMARIZING *DUKES V. WAL-MART STORES, INC.*

Rule 23(a): Numerosity

To satisfy this requirement, the class must be “so numerous that joinder of all members is impractical”. Numerosity was uncontested in *Dukes*, as, according to estimates of both parties, the proposed class included over one million women.³¹

Rule 23(a): Commonality

Commonality focuses on the relationship of common facts and legal issues among class members. The requirement is not that all questions of law or fact be common to the class as a whole. Rather, plaintiffs may demonstrate commonality by showing that class members have shared legal issues but divergent facts or that they share a common core of facts but base their claims for relief on different legal theories. The test is qualitative rather than quantitative. Accordingly, one significant issue common to the class may be sufficient to warrant certification.³²

Jenkins J. held that the evidence led by the plaintiffs raised an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affects all plaintiffs in a common manner. Thus, Jenkins J. held that the plaintiffs met the burden required to establish commonality.³³ The plaintiffs grouped their evidence regarding commonality into three major categories: (1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management.³⁴ I will address each in turn.

Company-Wide Policies and Practices

One of Wal-Mart’s key defences in *Dukes* is aptly captured by the phrase “every store [is] an island”.³⁵ Wal-Mart argued that any discrimination encountered by the plaintiffs was isolated, unconnected, and not the result of systemic discrimination.³⁶ Wal-Mart pointed to the sheer number of its stores in the United States (3,400), as well as the fact that each store is operated by a store manager who oversees between forty and fifty-three separate departments, each also with its own manager. Therefore, Wal-Mart argued that although the plaintiffs might have claims against specific managers or stores, they did not have legitimate claims against the corporation itself.³⁷ In response, the plaintiffs led evidence which highlighted the uniformity of personnel³⁸

31 *Ibid.* at 14–15.

32 *Ibid.* at 16.

33 *Ibid.* at 86–87.

34 *Ibid.* at 17.

35 Featherstone, *supra* note 3 at 68–69.

36 *Dukes*, *supra* note 3 at 18, 36.

37 *Ibid.*

38 The personnel structure within Wal-Mart Stores is complex. At the top of the hierarchy are *salaried positions*. The salaried positions in hierarchal order are: Store Manager; Co-Manager (overseeing grocery departments); Speciality Department Managers (One-Hour Photo, Optical, Pharmacy, Shoes, Jewellery, Tire & Lube Express, Hearing, and Wireless Services); and Assistant Managers (several per store). Next are those individuals who are paid an hourly wage but are enrolled in the four to five month “*Management Trainee*” program. Finally, there are those Wal-Mart employees that are paid an *hourly wage*. The hourly wage positions, in hierarchal order are: Support Managers (who feed into “*Management Trainee*” program); Department Managers; Customer Service Managers; Cashiers; Sales Associates; and Hardlines/ Home Area Overnight Associates/ Stockers. *Ibid.* at 12–15.

and pay³⁹ structures within *all* Wal-Mart stores. The plaintiffs also led evidence suggesting subjectivity was the primary feature of promotion decisions made in Wal-Marts across the nation.⁴⁰ Only minimal objective criteria were used to determine who would be promoted.⁴¹ Many promotional opportunities were not posted.⁴² The lack of posted promotional opportunities was illustrated by an internal Wal-Mart email authored by a Wal-Mart senior vice president for personnel in 2002:

I need to get someone working immediately on a project of how *does* an hourly associate know how to get promoted to the manager training program? We do not have a poster, brochure, nothing that I am aware of. We may even need to put it on Pipeline [the Wal-Mart intranet] and capture those that express interest.⁴³

These practices were particularly problematic for Wal-Mart; as Jenkins J. noted, “courts have long recognized that the deliberate and routine use of excessive subjectivity is an ‘employment practice’ that is susceptible to being infected by discriminatory animus”.⁴⁴ Given these consistent corporate policies, the plaintiffs were able to satisfy Jenkins J. that significant uniformity existed across Wal-Mart stores—every store was not an island.

Jenkins J. also found commonality existed within the class based on the notable uniformity of Wal-Mart culture. The plaintiffs argued “The Wal-Mart Way” promotes and sustains uniformity in operational and personnel practices through shared language, values and rituals.⁴⁵ Four examples illustrate “The Wal-Mart Way”: (1) employees attend a daily meeting during shift changes, where managers discuss the company culture and employees do the Wal-Mart cheer; (2) the “Home Office” (or corporate headquarters for the entire Wal-Mart chain) in Bentonville, Arkansas controls the temperature, what music is played, and what television station

39 Similarly, the pay structure for each of the above classifications is complex. First, each *salaried position* has a base salary range determined by the Wal-Mart “Home Office” in Bentonville, Arkansas. Within this range, Regional Managers and District Managers have broad discretion to make salary decisions. The following are examples of how salaries are calculated, as well as some specific salary ranges:

- o Store Managers: base salary + incentives based on store size and profitability
 - Base: \$44,000–\$50,000 (US dollars) depending on store size
- o Co-Managers: base salary + incentive plan based on store profitability
 - Base: \$42,000–\$47,000
- o Speciality Department Managers: base salary + incentive plans based on store profitability + annual merit and performance increases
 - Base: \$24,000–\$40,000
- o Assistant Managers: base salary + annual merit and performance increases + bonuses
 - Base: \$29,500–\$42,000

Second, for the *hourly wage* earners, the Home Office sets the minimum starting wage for each job classification. Above this minimum, the Store Managers have discretion. For example, Store Managers are allowed to pay the minimum plus \$2.00/hour without looking at objective criteria or having to report to District Manager. Further, they can pay above this \$2.00/hour cap for “exceptional performance” without having to report to the District Manager. If, however, the rate is set at 6 per cent above the minimum allocated, the District Manager must approve. In 2001, the average salary for a Wal-Mart hourly wage earner, in the United States, was \$18,000. All currencies are in U.S. dollars. *Ibid.* at 23-27.

40 *Ibid.* at 28.

41 To be eligible for the Management Training Program the following criteria were assessed: (1) have at least one year in their current position; (2) receive an “above average” evaluation; (3) be current on training; (4) not be in a “high shrink” department or store; (5) be on the company’s “Rising Star” list; and (6) be willing to relocate. *Ibid.* at 29.

42 For example, until January 2003, Wal-Mart did not post job vacancies for its Assistant Management Training Program, and it posted only a small number of vacancies for the Co-Manager position. Moreover, despite a stated policy to post hourly Support Manager positions, roughly 80 per cent of these openings were not in fact posted. *Ibid.* at 16.

43 Rodarmor, *supra* note 10 [emphasis added].

44 *Dukes, supra* note 3 at 33.

45 *Dukes, supra* note 3 at 49; Featherstone, *supra* note 3 at 52; For an excellent first hand account of her experience working at a Wal-Mart store, see the following undercover reportage book, Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (New York: A Metropolitan/Owl Book, 2001) at c. 3: “Selling in Minnesota.”

is turned on in every one of the country's 3,400 stores; (3) Wal-Mart has a high management centralization ratio, in that 15.4 per cent of its managers are located at Home Office, compared with an average of 8.1 per cent for its twenty closest competitors; and (4), store level managers are moved from one retail facility to another, with each manager being transferred on average 3.6 times during their time with Wal-Mart.⁴⁶ As William Bielby, the plaintiffs' sex discrimination expert, found, "the company was unusually centralized and coordinated, and that its culture 'sustains uniformity in policy and practice' throughout its operations".⁴⁷

With such uniformity in policy and practice, Bielby concluded Wal-Mart was vulnerable to gender bias primarily because personnel decisions are based on subjective factors and are not assessed in a systemic and valid manner. Further, Bielby questioned the effectiveness of Wal-Mart's diversity and equal opportunity policies. Wal-Mart had not identified possible barriers to women's advancement, nor had it implemented any strategy that was specifically aimed at increasing the number of women in management. There was no financial incentive for managers to improve diversity amongst their employees. Finally, Wal-Mart had never administered an employee survey addressing diversity and gender issues.⁴⁸

Wal-Mart urged the Court to take notice of its diversity initiatives, including company handbooks and training sessions which had earned them national diversity awards. Jenkins J. noted that conflicting expert testimony need not be decided on its merits; rather, for the purposes of class certification it was sufficient that the plaintiffs' expert testimony was supportive of an inference of discrimination common to all class members.⁴⁹

Gender Disparities Attributable to Discrimination

Jenkins J. stated there were "largely uncontested descriptive statistics" gathered from Wal-Mart's yearly reports to the EEOC, which showed that women working in Wal-Mart stores were disadvantaged in terms of pay and promotions.⁵⁰ These statistics showed that pay disparities existed in most job categories within the company and that the higher the job category within the Wal-Mart hierarchy, the lower the percentage of women employed in that category.⁵¹ How to interpret these statistics, however, was the subject of debate during the class certification hearing. Dr. Drogin, the plaintiffs' statistics expert, analyzed the data and concluded the data raised an inference of class-wide gender discrimination because the gender-based disparities existed in all forty-one Wal-Mart regions.⁵² On the other hand, Wal-Mart's expert deemed Drogin's methods flawed, citing additional factors that needed to be taken into account.⁵³ Jenkins J. held Wal-Mart had not proven Drogin's methods were flawed. Instead, Wal-Mart merely offered an alternative, albeit no more reasonable, interpretative approach. The merit

46 *Dukes*, *supra* note 3 at 40-43.

47 Featherstone, *supra* note 3 at 69.

48 *Dukes*, *supra* note 3 at 24.

49 *Ibid.* at 25.

50 *Ibid.* at 24.

51 Jenkins J. also found the following information presented by the plaintiffs relevant to the *Dukes* inquiry: women were paid less than men in every region; the salary gap widens over time even for men and women hired into the same jobs at the same time; and women take longer to enter into management positions (on average, it took women 4.38 years from date of hire to be promoted to assistant manager, while men took 2.86 years; it took 10.12 years for women to reach Store Manager, compared with 8.64 years for men). *Dukes*, *supra* note 3 at 54, 73.

52 In reaching his conclusion, Dr. Drogin controlled for gender, length of time with the company, number of weeks worked during the year, whether the employee was hired or terminated during the year, full-time or part-time, which store the employee worked in, whether the employee was ever hired into a management position, job position, and job review ratings. *Dukes*, *supra* note 3 at 51, 67.

53 *Dukes*, *supra* note 3 at 52, 68; Featherstone, *supra* note 3 at 105. Wal-Mart's expert argued that Drogin's calculations were flawed, as they did not account for number of hours worked, seniority, leaves of absence, full-time/part-time status at hire, recent promotion or demotion, prior grocery experience, pay group, night shift, department, store size, and store profitability.

of these competing approaches was a question for a jury at the next stage of the proceedings. Further, Jenkins J. held this debate underscored that there was a significant issue affecting all class members that would best be addressed through a class action.⁵⁴

Wal-Mart argued that women's interests and career choices were factors that accounted for the gender disparities in the workforce data they had submitted to the EEOC. They argued that women were not as interested in management positions, a problem symptomatic of the labour force in general—not Wal-Mart's corporate practices.⁵⁵ To counter Wal-Mart's assertion, the plaintiffs had labour economist Bendick perform a study comparing the EEOC workforce data from Wal-Mart with data from twenty of Wal-Mart's closest competitors.⁵⁶ The assumption in this type of study is that if retail chains comparable to Wal-Mart are successfully employing women at a higher rate, then women are presumably available, interested, and qualified to hold comparable positions at Wal-Mart at a similar rate. Bendick found that while the in-store managerial workforce at the comparison stores was 56.5 per cent female, it was only 34.5 per cent female at Wal-Mart.⁵⁷ Also, although the percentage of female managers at Wal-Mart was rising, the progress was so slow that Bendick predicted it would take Wal-Mart about eighty-eight years to catch up to its competitors.⁵⁸ Jenkins J. concluded that Bendick's data analysis supported the plaintiffs' submission that an inference of discrimination was common to all class members.⁵⁹

Anecdotal Evidence

In addition to the raw numbers, the plaintiffs used anecdotal evidence to bolster their claim. Similar to statistical disparities, anecdotal evidence of discrimination is commonly used in Title VII pattern and practice cases to bring “the cold numbers convincingly to life”.⁶⁰ Class members who were deposed each had their own story about Wal-Mart's discriminatory practices. Jenkins J. highlighted a few stories that supported the inference that Wal-Mart had discriminatory policies and procedures. One store manager told a declarant that “[m]en are here to make a career and women aren't. Retail is for housewives who just need to earn extra money”. Similarly, after seeking transfer to Hardware, another male support manager told one declarant, “[w]e need you in toys... you're a girl, why do you want to be in Hardware?”⁶¹

Thus, after reviewing the evidence led by the plaintiffs—including facts, expert opinions, statistical evidence, policies, and anecdotal evidence—Jenkins J. held that the plaintiffs had met the evidentiary burden required under commonality. The plaintiffs' had successfully raised an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affected all plaintiffs in a common manner.

Rule 23(a): Typicality

Typicality requires that the representative plaintiffs (here Betty Dukes and five others) are members of the class they represent and “possess the same interest and suffer the same injury”

54 *Dukes*, *supra* note 3 at 70–71.

55 The assertion that women choose not to be in management, or that external factors influence the number of women in management is a standard refrain in employment discrimination claims. For example, this type of defence was used in “a well-known class action case from the 1980s against Sears, in which the company successfully argued that the lack of women in commission jobs was due to their lack of interest”. See Michael Selmi, “The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects” (2002-2003) 81 *Tex. L. Rev.* 1249 at 1283.

56 Retailers that Bendick compared Wal-Mart with included Costco and Target. Featherstone, *supra* note 3 at 105.

57 *Dukes*, *supra* note 3 at 83.

58 Featherstone, *supra* note 3 at 99.

59 *Dukes*, *supra* note 3 at 85.

60 *Ibid.* at 86.

61 *Ibid.*

as other class members.⁶² Wal-Mart argued that the representative plaintiffs' interests and injuries were too individually specific.⁶³ This method of classifying the harm as too individualized is similar to the every store is an island defence detailed above. Wal-Mart argued that the six women shared nothing in common, either with each other or with the class. Their experiences related to different stores, managers, years of experience, and performance ratings. Any discrimination they suffered was thus not the result of systemic sex discrimination. As stated by Mona Williams, a Wal-Mart spokeswoman, it was actually just "a couple of knucklehead [managers] out there who do dumb things".⁶⁴ In response to this conventional defence, Jenkins J. noted that typicality does not require that the representative plaintiffs be identical to the class as a whole as long as their interests and injuries are reasonably coextensive. More specifically, he held that adjudicating the representative plaintiffs claims would necessarily involve determining the common question of discrimination affecting the class as a whole. Typicality was satisfied.⁶⁵

Rule 23(a): Adequacy of representation

The final requirement under Rule 23(a) is that the plaintiffs are represented by qualified counsel and that the proposed representative plaintiffs do not have a conflict of interest with the proposed class.⁶⁶ The former requirement was not contested in *Dukes*. However, Wal-Mart argued that hourly and salaried workers within the class had adverse interests, as salaried managers are decision-making agents of Wal-Mart. Jenkins J. disagreed with Wal-Mart's argument and concluded that a class composed of both supervisory and non-supervisory employees was certifiable. Moreover, he held that even if some individual female managers decided to testify in favour of Wal-Mart, this would not create a substantive class conflict of interest.⁶⁷

Rule 23(b): Maintainability

The *Dukes* plaintiffs also had to satisfy the Court that the proposed class was maintainable under one of the Rule 23(b) subsections. The critical issue under Rule 23(b)(2) was whether the sheer size and nationwide scope of the class could be adequately managed by the Court.⁶⁸ If the Court was not confident that it could oversee the case in a responsible and reasonable manner, the class could not be certified.⁶⁹ As the future trial would be bifurcated into the liability and remedy stages, the Court had to conclude the class action procedure would be efficient, manageable and judicially economical at both stages.⁷⁰ First, to establish liability, the plaintiffs would have to prove on the balance of probabilities that Wal-Mart's standard operating procedures were discriminatory. If they met this burden, Wal-Mart would be liable for breaching Title VII and the question of who suffered individualized harm would be addressed at the remedy stage. Wal-Mart again used the every store is an island defence when they claimed each store's liability had to be litigated individually, resulting in an unwieldy and lengthy thirteen year trial.⁷¹ Jenkins J. rejected Wal-Mart's arguments. The focus would be on Wal-Mart's pay and promotions policies and procedures writ large at the liability stage. Although, complex, Jenkins J. held

62 *Ibid.* at 87.

63 *Ibid.* at 89.

64 Featherstone, *supra* note 3 at 40.

65 *Dukes*, *supra* note 3 at 49–50.

66 *Ibid.* at 93–94.

67 *Ibid.* at 97.

68 *Ibid.* at 102, 111.

69 *Ibid.* at 113.

70 *Ibid.*

71 Featherstone, *supra* note 3 at 50.

this liability stage would not be unmanageable.⁷²

If the plaintiffs established liability, the trial would move to the remedy stage. The *Dukes* plaintiffs sought three remedies: injunctive and declaratory relief, lost back-pay and punitive damages. Wal-Mart did not contest the maintainability of injunctive and declaratory relief; however, Wal-Mart did challenge the maintainability of lost back-pay. To be eligible for back-pay in terms of promotions, the jurisprudence requires: first, an identification of the specific class members who were either actually, or at least potentially, harmed by the employer's discriminatory policies; and second, a determination of the specific amount of back pay each person is owed.⁷³ Jenkins J. held that a class action is the appropriate procedure for determining who qualifies for the award and the value of each award. He noted the specifics could be worked out in the future, with a formula-derived lump sum as a likely scenario. Although objective data regarding who was qualified for promotions was easily attainable through Wal-Mart's database,⁷⁴ Jenkins J. refined the sub-class of plaintiffs who could qualify for promotions back-pay awards to include only those women documented on Wal-Mart's personnel database as having applied for management positions, requested management positions on their evaluations or mapping of goals and objectives, or appealed promotion decisions.⁷⁵

Similarly, Jenkins J. found that a lost pay remedy for class members who were not paid equally for work of equal value was also manageable. Class members would benefit from the presumption that all employees desire equal pay for equal work.⁷⁶ Therefore, Jenkins J. held that objective criteria could be applied to Wal-Mart's personnel database in order to identify the women who suffered from Wal-Mart's discriminatory pay policy and calculate their awards. Although it would be labour intensive, such a process would not be unmanageable.⁷⁷

Punitive damages are permitted in Title VII cases if the plaintiff proves that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual".⁷⁸ Punitive damages cannot, however, be the primary goal of the litigation. The primary goal under Title VII must be declaratory and injunctive relief. Because of the potentially immense punitive damages that could be awarded against Wal-Mart, Wal-Mart argued that the plaintiffs' claim for punitive damages overwhelmed the entire case and thus should be struck from the claim. Jenkins J. disagreed with Wal-Mart. He noted that predominance does not rest on the size of the potential award; he also accepted the plaintiffs' claim that their first and foremost goal was to affect long-term fundamental changes to Wal-Mart's practices.⁷⁹ In sum, the plaintiffs' motion for class certification in *Dukes* was granted, although the promotion claim with respect to lost pay and punitive damages was amended: only those class members who could provide objective data documenting their interest in promotions were included.⁸⁰

72 *Dukes*, *supra* note 3 at 113, 118, 131.

73 *Ibid.* at 121.

74 Justice Jenkins noted that in determining eligibility for the damage awards, Wal-Mart could use Wal-Mart's "PeopleSoft" database, "an extraordinarily sophisticated information technology system". The database contains information on each employee with respect to job history, seniority, job review ratings, and many other factors, thereby enabling a sophisticated user to create detailed reports of individual work histories and qualifications. *Dukes*, *supra* note 3 at 137.

75 *Ibid.* at 146. The plaintiffs have cross-appealed on this issue. See text accompanying notes 87–90 below.

76 *Dukes*, *supra* note 3 at 151.

77 *Ibid.* at 150.

78 *Ibid.* at 102. Title VII was amended in 1991 to permit plaintiffs to recover punitive damages.

79 *Ibid.* at 105.

80 See Note 75.

WAL-MART'S APPEAL OF DUKES

Wal-Mart has launched an appeal that was heard by a three-judge panel in the United States Court of Appeals for the Ninth Circuit, in San Francisco, California in 2005.⁸¹ Wal-Mart focused on two key arguments. First, they argued that if the class action was allowed to proceed the Court would be “trampling” on Wal-Mart’s Fifth Amendment constitutional right to basic due process. That is, hearing claims en masse would deprive Wal-Mart of their right to defend themselves against each woman’s claim, particularly as to punitive damages.⁸² Second, Wal-Mart argued that Jenkins J. “simply ignored” “Wal-Mart’s *unrebutted* evidence [that] showed that more than 90% of the stores showed no statistically significant disparities in pay”.⁸³ And thus, “even if plaintiffs’ statistics showed *some* discrimination in the system, they failed to establish that the class members suffered a *common* injury”.⁸⁴ In response to Wal-Mart’s constitutional argument, the plaintiffs asserted that a class action does not deprive Wal-Mart of its constitutional right to defend itself:

First, at the liability phase, Wal-Mart may put on evidence that it did not engage in class-wide discrimination, and to challenge plaintiffs’ statistical model for liability. ... Second, at the remedial stage, Wal-Mart may argue and present evidence pertaining to the appropriate model for relief, such as the factors to include and the proper measure of damages.⁸⁵

As for the second ground, the plaintiffs’ pointed to the fact that the so-called “‘unrebutted’ statistics ... were entirely discredited and their underlying factual predicate stricken from the record”.⁸⁶ The plaintiffs also cross-appealed on Jenkins J.’s finding that only those women who met specific objective criteria would qualify for promotions back-pay awards.⁸⁷ They argued that by redefining the class on this issue, Jenkins J.

rejected relief for the portion of the class most injured by Wal-Mart’s discriminatory practices—those denied promotion by the tap-on-the-shoulder system characterized by no posting, no application procedures and excessive subjectivity.⁸⁸

The plaintiffs’ argued that Wal-Mart would, ironically, only face monetary exposure when it had taken steps, “however limited, to implement a posting system”.⁸⁹ Drawing on their trial arguments, the plaintiffs’ proposed that instead the eligible class for promotions be all women in “‘feeder pools’ (i.e. all qualified women in a job category and geographical location from which promotional candidates are drawn)”.⁹⁰ The Court of Appeals has not yet rendered their decision.

81 Ann Zimmerman, “Wal-Mart Appeals Bias-Suit Ruling; Retailer Seeks a Reversal of the Class-Action Status in Sex-Discrimination Case” *Wall Street Journal* (8 August 2005) B5.

82 *Dukes v. Wal-Mart Stores, Inc.*, [2005] United States Court of Appeals for the Ninth Circuit (Principal Brief for Wal-Mart Stores, Inc.) at 13, 36–50 online: Wal-Mart Class <www.walmartclass.com>.

83 *Ibid.*, at 11, 23–35 [emphasis in original].

84 *Ibid.*, at 11, 23–35 [emphasis in original].

85 *Dukes v. Wal-Mart Stores, Inc.*, [2005] United States Court of Appeals for the Ninth Circuit (Opening Brief for Appellees and Cross-Appellants) at 44 online: Wal-Mart Class <www.walmartclass.com> [Plaintiff Brief].

86 *Ibid.*, 85 at 1, 4–6.

87 See note 80.

88 Plaintiff Brief, *supra* note 85 at 59.

89 Plaintiff Brief, *supra* note 85 at 59.

90 Plaintiff Brief, *supra* note 85 at 59; *Dukes*, *supra* note 3 at 62, 64, 74.

PART II – The Progressive Nature of Dukes

DUKES ALTERS “THE WAL-MART WAY”

Wal-Mart is paying attention to *Dukes*. As a Wal-Mart spokesperson stated, the “lawsuit has certainly heightened [Wal-Mart’s] awareness”.⁹¹ Wal-Mart executives not only made numerous references to the lawsuit at recent annual meetings, but also, for the very first time they hired an outside public relations firm to identify what the public found problematic about Wal-Mart.⁹² Apparently they found problems with the public perception of Wal-Mart, as the company has launched a massive public relations campaign,⁹³ published an open letter advertisement in more than one hundred U.S. newspapers and set up a website which promises the “unfiltered truth”.⁹⁴

More significantly, Wal-Mart has instituted changes to its policies and procedures for pay and promotions. Again, Wal-Mart hired an outside consulting firm, this time to revamp its job criteria in order to make it more uniform and objective.⁹⁵ Similarly, Wal-Mart has substantially increased the number of posted management opportunities and the retailer has created a database that allows employees to apply for promotions across the country.⁹⁶ They are also working towards making their wage structure more equitable.⁹⁷ Wal-Mart’s Chief Executive Officer, Lee Scott, told shareholders at their 2003 annual meeting, “[e]veryone must be treated fairly, with equal access to pay and promotion”.⁹⁸

Wal-Mart has also recently created a new diversity department and a new position, Chief Diversity Officer.⁹⁹ The department appears to be actively addressing some of the concerns raised by the *Dukes* plaintiffs. For instance, unlike Wal-Mart’s previously ad hoc diversity goals that were cited as problematic in Bielby’s expert testimony, the new diversity department’s mandate includes specific national goals. The promotion of women and minorities in proportion to the number applying for management positions is one such example.¹⁰⁰ Thus far, Wal-Mart has been successful in increasing the number of high-ranking women within its organization, “impressively improv[ing] the sex ratio in its top executive ranks” to slightly above the national corporate America level of 15.7 per cent.¹⁰¹ The diversity department is also addressing the plaintiffs’ concerns about Wal-Mart’s lack of a diversity monitoring process. All personnel data will be analyzed quarterly to ensure that Wal-Mart is “getting the ‘fairness’ right”, said a Wal-

91 Featherstone, *supra* note 3 at 251.

92 *Ibid.* at 249 and 259.

93 See Michael Barbaro, “A New Weapon for Wal-Mart: A War Room” *New York Times* (1 November 2005) online: *New York Times* <<http://nytimes.com/2005/11/01/business/01walmart.ready.html?ei=5094&enaf9d3>>.

94 See online: Wal-Mart Facts <www.walmartfacts.com>. This website does not mention the *Dukes* challenge.

95 Featherstone, *supra* note 3 at 249 and 259.

96 Daniels, *supra* note 2; Featherstone, *supra* note 3 at 252. Ironically, the changes Wal-Mart are currently making have been encouraged by business scholars for many years. Over thirty years ago in the 1974 *Harvard Business Review*, an article encouraged “firms to establish non-discriminatory job descriptions and salary classification systems and to ‘ensure that prescribed qualifications and pay scales can be justified on business grounds and that inadvertent barriers have not been erected against women and minorities’”. Similarly, in the same year the EEOC “issued a guidebook for employers, titled *Affirmative Action and Equal Employment*, which suggested that employers could avoid litigation by formalizing hiring and promotion procedures, and expanding personnel record-keeping so that they would be able to prove that they did not discriminate”. See Frank Dobbin, “Do the Social Sciences Shape Corporate Anti-Discrimination Practice?: The United States and France” (2001-2002) 23 *Comp. Lab. L. & Pol’y J.* 829 at 850–851.

97 Featherstone, *supra* note 3 at 254.

98 Daniels, *supra* note 2.

99 Featherstone, *supra* note 3 at 252.

100 Amy Joyce “Wal-Mart Bias Case Moves Forward” *Washington Post* (23 June 2004) A01 online: *The Washington Post* <www.washingtonpost.com>.

101 *Ibid.*

Mart spokesperson.¹⁰² Wal-Mart has also started a \$25-million U.S. private equity fund “to help women- and minority-owned businesses supply products to retailers”.¹⁰³ Finally, Wal-Mart’s Chief Executive Officer announced executive bonuses would be cut by 7.5 per cent if Wal-Mart failed to meet its 2004 diversity goals and 15 per cent if they failed in 2005.¹⁰⁴ This announcement addresses the concern that without managerial incentives for meeting diversity goals, as a former Wal-Mart Vice President aptly stated, Wal-Mart’s diversity efforts would remain merely “lip service”.¹⁰⁵ In sum, as the above examples illustrate, there are indications from a variety of fronts that Wal-Mart is doing more than paying “lip service” to the equity and diversity concerns raised in *Dukes*.¹⁰⁶ Most importantly, the changes made by Wal-Mart are institutional ones that will protect future female employees.¹⁰⁷

Not only are Wal-Mart executives paying attention to *Dukes*, but so are Wal-Mart employees. Betty Dukes’ case serves as an educative example. Until Dukes heard about the lawsuit, she was unaware that being denied a promotion on the basis of her sex was both discriminatory and illegal on Wal-Mart’s part. In her words, “[a] lot of women [at Wal-Mart] are being sex-discriminated against every day and don’t know it”.¹⁰⁸ What sex discrimination means, how it works, or who experiences it, are issues the plaintiffs’ attorneys are trying to address. They have run seminars and set up websites and hotlines to disseminate information about the litigation and discriminatory practices more generally.¹⁰⁹ They highlight, for instance, that Wal-Mart’s former policy prohibiting employees from discussing wages is illegal.¹¹⁰ Such a “gag-rule” is one of the barriers to identifying discriminatory pay structures because employees are not informed about what other employees are being paid and therefore have no point of comparison (Odle’s experience which began *Dukes* is illustrative). Thus, *Dukes* may serve to remind Wal-Mart employees that they have a right to discuss wages, an important step in eradicating the gendered pay gap. As Jocelyn Larkin, of the non-profit Impact Fund stated, increasing employee awareness of sex-discrimination is “one of the most prominent—and potentially beneficial—side-effects of *Dukes*”.¹¹¹

102 Mona Williams quoted in Daniels, *supra* note 2.

103 “Wal-Mart to help women-owned businesses” *Calgary Herald* (19 October 2005) D5.

104 Joyce, *supra* note 100.

105 *Ibid.*

106 I acknowledge that some (or, even, most) of the changes Wal-Mart has instituted could be directly related to their litigation strategy—for instance, to mitigate a future punitive damage award—as opposed to a heartfelt and genuine transformation. My argument is that regardless of the reasons for these changes, the changes are nonetheless positive and will continue to influence Wal-Mart’s future practices.

107 Here, I am specifically thinking of the changes to posting systems, the creation of objective criteria for promotions, the movement towards a more equitable pay scale and the implementation of a diversity monitoring process. One of the assumptions that I make throughout my analysis is that once Wal-Mart has instituted such progressive changes, it is unlikely they will subsequently return to past (and more problematic) practices.

108 Featherstone, *supra* note 3 at 3.

109 For more information on these various initiatives, see <www.walmartclass.com> and the websites of the three non-profit groups involved in the case, *supra* note 13. The site also has a phone number for and web link to the United Food and Commercial Workers. Arguably, in addition to raising employees’ awareness of sex discrimination, there is the possibility that *Dukes* may serve as the impetus for Wal-Mart workers to do something much more drastic: unionize. Wal-Mart has a notorious history of anti-union animus. One need only look to the recent steps taken by Wal-Mart in Jonquière, Quebec, in their effort to prevent successful unionization, to see Wal-Mart’s attitude towards the unionization of its stores. However, by exposing some of Wal-Mart’s most problematic policies and procedures, *Dukes* may have signalled to labour organizations that Wal-Mart workers may be more ready to unionize than in the past. See a summary of the Jonquière, Quebec situation, as well as Wal-Mart’s reaction to similar union drives in Saskatchewan and British Columbia, in Stephanie Hanna, “Wal-Mart and the Unions: An Overview of the Situation in Canada” (July 2005), [unpublished, archived at <<http://www.law.uvic.ca/jrk/326/documents/Wal-Mart.doc>>]. See also Doug Struck, “Wal-Mart Leaves Bitter Chill” *Washington Post* (14 April 2005) E5 online: *Washington Post* <<http://www.washingtonpost.com/wp-dyn/articles/A51532-3005Apr13.html>>; “Wal-Mart to close unionized Quebec store” *CBC Business News* (14 February 2005) online: CBC <<http://www.cbc.ca/story/business/national/2005/02/09/walmart-050209.html>>.

110 See *Wal-Mart Stores Inc. and United Paperworkers International Union, Case 18-CA-14757* (17 September 2003) ([United States] National Labor Relations Board) online: National Labor Relations Board <http://www.nlr.gov/nlr/shared_files/decisions/340/340-31.pdf>. See also Featherstone, *supra* note 3 at 139–140.

111 Bhatnagar, *supra* note 2 at 250.

INCREASING THE SALUTARY EFFECTS OF DUKES

Most large scale discrimination class actions in the United States settle out of court.¹¹² “Indeed, aside from the uncertainty of a trial’s outcome (and thus different opinions regarding the true value of any claim), both plaintiff and defendant have a strong incentive ... to avoid trial”.¹¹³ Defendants want to reduce legal fees, minimize negative publicity, avoid court-dictated, inflexible injunctive relief and have some control over the amount of back-pay and punitive damages. Settlements can reduce plaintiffs’ legal fees, as well as help them avoid the risk of obtaining no injunctive relief or damages and accelerate their receipt of these remedies. For these reasons, *Dukes* may settle. In fact, according to a recent report, since the Court of Appeals heard the case, “Wal-Mart has been hedging its bets by engaging in settlement talks with the plaintiffs”.¹¹⁴ However, my argument remains the same regardless of whether the parties settle or is there a court order in favour of the plaintiffs. Either result will significantly increase *Dukes*’ salutary effects.

At this point, what might find its way into a settlement or adjudicative order (the “result”) is conjecture. Yet, past discrimination settlements,¹¹⁵ statements from the attorneys on both sides of the *Dukes* action¹¹⁶ and the three remedies sought by the *Dukes* plaintiffs help to frame the discussion. First, one likely result is that Wal-Mart will have to build on the institutional changes discussed above in order to address systemic discrimination issues in their corporate practices. For example, Wal-Mart may be required to develop and implement standardized promotion practices for *all* positions, including: creating objective hiring criteria and evaluation systems that would decrease the problematic subjective nature of Wal-Mart’s current practices; posting promotions to avoid the “tap on the shoulder” method that lends itself to an inference of gender discrimination; and providing management training programs for all interested employees. Second, a likely result is the development and full-implementation of a uniform salary structure that equally remunerates work of equal value. The newly created diversity committee will likely be expected to continue to set specific diversity goals and targets that will be assessed and re-evaluated on an ongoing basis.

In terms of the compensatory remedy sought by the *Dukes* plaintiffs, their lawyers estimated that the cost to Wal-Mart to pay back the Wal-Mart women their lost wages and rectify the current male-female pay gap would be at least \$500 million.¹¹⁷ The resulting financial cost to Wal-Mart in terms of punitive damages could also be very high. Accounting for the number of women impacted in *Dukes*, Wal-Mart’s ongoing profitability and using previous settlements as a basis, estimates of punitive damages runs as high as the “billions”.¹¹⁸ It has been argued elsewhere that unless the size of awards in discrimination class actions threatens profitability

112 For example, in 1997 Home Depot Inc. settled a sex-discrimination class-action suit for \$104 million. Similarly, in 1996, Texaco Inc. paid out a \$176.1 million settlement on behalf of black employees who sued for racial discrimination. And, Coca-Cola Co. paid \$192.5 million to employees who also sued for racial discrimination. See Selmi, *supra* note 55; Featherstone, *supra* note 3 at 162–167.

113 Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003) at c.3(1.1) (QL). For a detailed analysis of the advantages of settlement for both sides in lawsuits, see Steven Shavell, “Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs” (1982) 11 J Legal Stud. 55; Cara Faith Zwibel, “Settling For Less? Problems and Proposals in the Settlement of Class Actions” (2004) 1/2 Can. Class Action Rev. 165. Settlements are not, however, without their share of problems. See for example David Brainerd Parrish, “Dilemma: Simultaneous Negotiation of Attorneys’ Fees and Settlement in Class Actions”, (1999) 36 Hous. L. Rev. 531; Geoffrey Miller, “Competing Bids in Class Action Settlements” (2003) 31 Hofstra L. Rev 633 at 633–635.

114 Aaron Bernstein, “Wal-Mart vs. Class Actions” *Business Week* 3925 (21 March 2005) at 73 (Lexis).

115 See note 112.

116 See for example an interview with Debra Smith, attorney at the San Francisco-based Equal Rights Advocates and one of the plaintiff’s attorneys, in Bhatnagar, *supra* note 2 at 250. For an article that examines what a Wal-Mart settlement might look like, see Wendy Zellner, “What a Wal-Mart Deal Might Look Like” *Business Week Online* (25 June 2004) online: Business Week Online <http://www.businessweek.com/bwdaily/dnflash/jun2004/nf20040624_2134_db035.htm>.

117 Joyce, *supra* note 100.

118 *Ibid.*

they may simply begin to be seen “like accidents—a cost of doing business”.¹¹⁹ *Dukes* has thus far not brought Wal-Mart any apparent financial stress. Wal-Mart’s stock price took a dip for a few days after Jenkins J. announced certification in *Dukes*.¹²⁰ This market fluctuation was temporary and Wal-Mart remains one of the most profitable corporations in the world.¹²¹ Yet, there are potential crippling awards that would inevitably affect their bottom line. However, evidence suggests settlements that have been negotiated in past discrimination class actions represent only a fraction of the defendants’ operating costs. In a record-breaking race discrimination settlement, the \$193 million Coca-Cola owed represented a mere 0.15 per cent of the company’s stocks and bonds.¹²² Similarly, the \$104 million Home Depot settlement equalled two weeks’ pre-tax profit for the company.¹²³ The argument goes that such “minor” awards do not modify corporate discriminatory behaviour. Although there may be something to this argument, I am not convinced that millions, and potentially billions, of dollars that Wal-Mart may have to pay out will not have some lasting effect.

As I have argued, even before Wal-Mart has paid a penny to the class members, some of Wal-Mart’s problematic practices have already been re-evaluated and re-vamped. Further, the importance of such awards to class members should not be undervalued. Wal-Mart’s female employees are arguing they have been unfairly remunerated because they are women. Compensation for their harm is not only necessary, but also vindicates their claims. Similarly, punitive awards are meant to punish Wal-Mart and deter further discriminatory actions. A punitive award against Wal-Mart sends two messages. First, Wal-Mart’s behaviour towards women was not only wrong, but also bad. And second, directed to those companies that model themselves after Wal-Mart: if your practices are similar, watch out. It may thus be the case that it is not the size of the award, but the very public nature of *Dukes* and the potential for increased negative publicity that will ultimately affect Wal-Mart’s bottom line.

Negative publicity has plagued Wal-Mart since *Dukes*’ inception. For example, anti-Wal-Mart stories have appeared daily in newspapers and every major news outlet covered the *Dukes* ruling.¹²⁴ Recent *Dukes* focused headlines include: “Wal-Mart’s Gender Gap” (*Time*);¹²⁵ “Judge Certifies Wal-Mart Sex Discrimination Suit as Class Action” (*Wall Street Journal* cover story);¹²⁶ “Wal-Mart May Value Families, but Women?” (*Los Angeles Times Columnist*);¹²⁷ and “Is Wal-Mart Hostile to Women” (*Business Week*).¹²⁸ *Dukes* is also discussed in the feature length and highly critical documentary *Wal-Mart: The High Cost of Low Price*.¹²⁹ Wal-Mart has

119 Selmi, *supra* note 55 at 1252, 1316. See also Bhatnagar, *supra* note 2 at 249. Interestingly, American insurance carriers now offer Employment Practices Liability Insurance to cover the costs of discrimination claims.

120 Featherstone, *supra* note 3 at 248. The Dow sank 0.59% in midday trading after the Wal-Mart decision was released, according to CNBC Market Dispatch. Such a temporary drop accords with research completed by Michael Selmi. He analyzed the stock prices of companies after discrimination class actions were settled and found “there was no significant effect on stock prices ... and these findings held true regardless of the nature of the suit or the magnitude of the settlement”. Selmi also noted that “social investing remains a very small part of the investment world and even within the realm of social investors, employment practices generally do not factor into the investment decision”. See Selmi, *supra* note 55 at 1260, 1267.

121 See note 1 above.

122 Featherstone, *supra* note 3 at 267.

123 Selmi, *supra* note 55 at 1266.

124 Featherstone, *supra* note 3 at 246.

125 Lisa Takeuchi Cullen, “Wal-Mart’s Gender Gap” *Time* 164/1 (7 May 2004) at 44.

126 Ann Zimmerman, “Judge Certifies Wal-Mart Sex Discrimination Suit as Class Action” *Wall Street Journal* 243/122 (23 June 2004) at A1.

127 Patt Morrison, “Wal-Mart May Value Families, but Women?” *Los Angeles Times Columnist* (29 April 2003) at A23.

128 Michelle Conline, “Is Wal-Mart Hostile to Women” *Business Week* 3741(16 July 2001) at 58.

129 Robert Greenwald (Brave New Films, 2005).

also been criticized on a number of other issues in a spate of recent books.¹³⁰ Wal-Mart CEO Lee Scott stated these various initiatives form “one of the most organised, most sophisticated, most expensive corporate campaigns ever launched against a single company”.¹³¹ According to a recent poll, this campaign is affecting the public’s opinion about Wal-Mart: “38% of Americans have a negative opinion of Wal-Mart”, with 55 per cent having formed a less favourable opinion “based on what they have recently seen, heard, or read”.¹³² Wal-Mart’s profits are continuing to rise despite these changing attitudes. Yet, this continued public relations assault against Wal-Mart *combined* with a settlement or a finding of liability in *Dukes* could eventually hamper profit margins. Therefore, much of *Dukes*’ ability to change “The Wal-Mart Way” is likely tied to how effectively the case—in conjunction with and forming part of this negative publicity campaign—can mobilize Wal-Mart’s critics *and* consumers. We all need to demand equitable pay and promotions practices from Wal-Mart. As Wal-Mart’s Vice-Chairman stated, “[w]e’re most sensitive to what the customer has to say. ... Your customers will tell you when you’re wrong”.¹³³

Two features that make Wal-Mart’s situation so unique are their highly centralized operations and the inculcation of Wal-Mart values and culture. Although the plaintiffs argued these measures increased the likelihood of gender stereotyping at Wal-Mart, these same two factors could actually play a positive role, making a significant difference in terms of the effectiveness of eradicating workplace discrimination. If Wal-Mart committed itself to creating a non-discriminatory environment at the uppermost “Home Office” level and mandating the same requirements throughout its 3,400 stores, the high centralization could manifest itself positively. For instance, the “Home Office” could require that the Wal-Mart culture weekly meetings discuss gender discrimination—its harmful effects, what it means, how it looks, and how to remedy it. Further, given Wal-Mart’s influential status in the retail world, Wal-Mart’s dedication could further influence other employers who model themselves after Wal-Mart. As Carolyn Short, a Philadelphia corporate defence lawyer, stated when asked about the effect *Dukes* may have on the industry, “I do think there are going to be concentrated corporate efforts to make sure they’re in compliance with the law and be female-friendly”.¹³⁴

Regardless of which of the above results find their way into a settlement or court order, implementation will take years. Much of the effectiveness of the various types of salutary benefits—institutional, educative, and financial—will depend on the strength of monitoring this implementation. Thus, it is safe to assume any further result in *Dukes* will include an enforcement provision, hopefully in the form of a combination of an independent and court monitored process.¹³⁵ One potential advantage of *Dukes* is that the three non-profit firms on board cannot profit from a settlement or win. These non-profit groups may (and should) continue their relationship with the class members and help them to navigate Wal-Mart’s policies post-judgment or settlement.

130 For a summary see “Wal-Mart: The behemoth from Bentonville” *The Economist* (23 February 2006) online: The Economist <http://www.economist.com/books/displaystory.cfm?story_id=5545325>. Examples include: Anthony Bianco, *Economist: The Bully of Bentonville: How the High Cost of Wal-Mart’s Everyday Low Prices is Hurting America* (New York: Doubleday, 2006) and Bill Quinn, *How Wal-Mart is Destroying America and the World: And What You Can Do About It*, 3rd edition (Berkeley: Ten Speed Press, 2005).

131 “Everyday low blows: What should Wal-Mart do about those who are bashing it?” *The Economist* (8 December 2005) online: The Economist <http://www.economist.com/business/displaystory.cfm?story_id=5284640>.

132 *Ibid.* The poll was completed by Zogby International and the full results can be found at <<http://www.zogby.com/news/ReadNews.dbm?ID=1045>>.

133 Anthony Bianco and Wendy Zellner, “Is Wal-Mart Too Powerful?” *Business Week* (6 October 2003) at 1.

134 Joyce, *supra* note 100.

135 As lead counsel for the plaintiffs, Seligman stated: “[s]uch an overseer ‘is completely nonnegotiable’”; and, Wal-Mart’s spokeswoman Mona Williams agreed: Wal-Mart “would be happy to cooperate” with an independent monitor. Zellner, *supra* note 116.

Wal-Mart has changed some of its questionable practices. Sex discrimination is on employees' radar. National media is profiling *Dukes* and the women's stories. Organizations calling for increased diversity measures across the industry have emerged. I have thus argued in Part II that *Dukes* has had, and will continue to have, a progressive social influence. Even if nothing more than the changes Wal-Mart is currently making are fully implemented and followed, something positive has taken place. Of course, should the parties settle, or Wal-Mart be found liable and relief ordered, *Dukes* may have a much more profound impact. I now turn my attention to north of the 49th parallel.

PART III – A Canadian *Dukes*?

How viable is a *Dukes*-like action in Canada? There is no straightforward answer to this question. Although Canadian and American class action legislation and jurisprudence are similar in many ways, there are also significant differences. Our legal landscapes also differ in that we do not have a statutory provision like Title VII, nor is there a tort of discrimination in Canada. Such differences pose difficulties to a Canadian *Dukes*. In this section, I try to work through some of these difficulties while detailing one example of Canadian class action legislation. I do so for two reasons. First, I do think such an action is possible—the form may be different, but the concept could work. Second, and related, I hope to open up a dialogue with lawyers and academics across the country who are interested in pursuing employment discrimination class actions.

JANE'S STORY: THE CLASS PROCEEDINGS ROUTE

For the purposes of this section, I assume that Wal-Mart Canada Corp. ("Wal-Mart Canada") functions similarly to its American counterpart. More specifically, I assume that Wal-Mart Canada's statistics for pay and promotion rates for male and female employees mirror the statistics presented by the *Dukes* plaintiffs. I have also chosen to rename the plaintiff in this hypothetical Canadian action in order to avoid confusion – *Dukes* becomes Jane.

To begin, in Canada there is no national class action legislation.¹³⁶ Instead, there is a patchwork of class action statutes at the provincial levels, including British Columbia,¹³⁷ Manitoba,¹³⁸ Newfoundland and Labrador,¹³⁹ Ontario,¹⁴⁰ Quebec¹⁴¹ and Saskatchewan.¹⁴² There are also several provinces where no class action legislation is in force. Notwithstanding this fact, as Craig Jones states, because of the Supreme Court of Canada's decision in *Canadian Shopping Centres Inc. v. Dutton* ("*Dutton*"),¹⁴³ "there is no longer any Canadian province or territory in which class actions are not possible".¹⁴⁴ Strategically, currently the best jurisdiction for Jane

136 The merits and viability of a national class action statutory regime is the subject of much recent commentary and a national class action regime has been proposed by various parties throughout the country. See the recent report by the Uniform Law Conference of Canada's National Class Actions Project, "Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations" (9 March 2005) online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/poam2/National_Class_Actions_Rep_En.pdf>; See also the differing opinions in Craig Jones, "The Case for the National Class," (2004) 1/1 Can. Class Action Rev. 29 [Jones]; Ward Branch and Christopher Rhone, "Chaos or Consistency? The National Class Action Dilemma," (2004) 1/1 Can. Class Action Rev. 3; F. Paul Morrison, Eric Gertner & Hovsep Afarian "The Rise and Possible Demise of the National Class in Canada" (2004) 1/1 Can. Class Action Rev. 67.

137 *Class Proceedings Act*, R.S.B.C. 1996, c.50.

138 *Class Proceedings Act*, C.C.S. M. c.C130 [CPA].

139 *Class Actions Act*, S.N.L., 2001, c.18.1.

140 *Class Proceedings Act, 1992*, S.O. 1992, c.6.

141 *An Act Respecting the Class Action*, R.S.Q., c. R-2.

142 *Class Actions Act*, S.S. 2001, c.12.01.

143 *Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 [Dutton].

144 Jones, *supra* note 136 at 36.

to commence her action on behalf of the greatest number of female Wal-Mart employees is Manitoba.¹⁴⁵ Manitoba is the only Canadian no costs, opt-out jurisdiction.¹⁴⁶ Whereas, opt-in provisions require a person to choose to be a class member, opt-out provisions automatically include class members unless they choose to opt-out. Opt-out provisions are preferable as class members are unlikely to opt-out;¹⁴⁷ therefore, the class size remains higher, as does the likelihood of positive institutional, educative, and financial effects.

In order for Jane's claim to be heard in Manitoba, she would have to demonstrate that there is a "real and substantial connection" between Manitoba and the defendant or subject matter of the law suit.¹⁴⁸ Here, Jane could draw upon *Webb v. K-Mart Canada Ltd. et al.* ("*Webb*").¹⁴⁹ In *Webb*, a class action claim for wrongful dismissal, Brockenshire J. certified a national class of 3,000–4,000 former K-Mart employees. Brockenshire J. noted that although K-Mart was incorporated in Nova Scotia, the "commercial reality was that the company carried on business as a national chain".¹⁵⁰ Similarly, MacFarland J., in denying K-Mart leave to appeal, stated that K-Mart was "a company with offices in and carrying on business across the country—nothing unusual in modern times" and that the trial judge's decision to certify a national class reflected this "modern reality".¹⁵¹ Thus, Jane could likely satisfy the "real and substantial connection" test by arguing that Wal-Mart Canada truly is a national retailer operating stores across the country, including thirteen in Manitoba.¹⁵²

STEPS FOR CLASS CERTIFICATION UNDER MANITOBA'S CLASS PROCEEDINGS ACT SECTION 4

Assuming Jane meets the real and substantial connection test, she will then have to fulfill the requirements of s. 4 of the *Class Proceedings Act* ("*CPA*"):

The Court must certify a proceeding as a class proceeding under section 2 or 3 if

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

145 *CPA*, *supra* note 138.

146 *Ibid.* ss. 16 and 37(1). For example, British Columbia, Saskatchewan, Newfoundland and Labrador and Alberta are opt-out jurisdictions for provincial residents, but opt-in for those living outside the provincial boundaries. And, with the exception of Alberta, claimants in these provinces are immune from costs. In Ontario, plaintiffs are liable for costs; however, the scope is national on an opt-out basis. Rodney Hayley and Ward Branch, "Insiders Guide to Certification" (Canadian Bar Association Continuing Legal Education seminar presented September 2004, Victoria, B.C.). Note that "no costs" does not preclude an award if the claim is struck prior to certification.

147 Hayley and Branch, *supra* note 146.

148 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. For a discussion of the jurisprudence governing the constitutional context (or extra-provincial jurisdiction) in which national opt-out classes will be considered, see Jones, *supra* note 136 at 41–45. Also for a discussion on jurisdictional challenges and successes to national class actions see Branch and Rhone, *supra* note 137 at 3–8.

149 *Webb v. K-Mart Canada Ltd. et al.* (1999), 45 O.R. (3d) 389 (Gen. Div.) [*Webb* (Gen. Div.)]. This case has a long judicial history with nineteen proceedings thus far, including leave to appeal the original certification that was dismissed (*Webb v. K-Mart Canada Ltd. et al.* (1999), 45 O.R. (3d) 638 (S.C.J.) [*Webb* S.C.J.]). The motions judge amended the process for determining quantum of damages *Webb v. 3584747 Canada Inc.* (2001), 54 O.R. (3d) 587 (S.C.J.). This amendment was successfully appealed to the Divisional Court, affirmed by the Court of Appeal, leave to the Supreme Court of Canada was denied. See *Webb v. 3584747 Canada Ltd.* (2002), 24 C.P.C. (5th) 76 (Ont. Div. Ct.), *aff'd* (2004), 69 O.R. (3d) 502 (C.A.), leave to appeal to S.C.C. dismissed [2004] S.C.C.A. No. 114.

150 *Webb* (Gen. Div.), *supra* note 149 at 401.

151 *Webb* (S.C.J.), *supra* note 149 at 640.

152 Wal-Mart Canada was incorporated pursuant to the laws of Ontario. Wal-Mart Canada Corp. "Storefinder" online: Wal-Mart Canada. <<http://www.walmartcanada.ca/wps-portal/storelocator/Canada-Storefinder.jsp?content=storefinderResuIt&lang=null>>.

- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
- (e) there is a person who is prepared to act as the representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding; and
 - (iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.¹⁵³

Recently, *Wall v. Bayer Inc.* ("*Bayer*")¹⁵⁴ was one of the first class actions to "receive detailed scrutiny" by the Manitoba Court of Appeal. Although relatively new compared to some class action legislation, including the United States, Ontario and Quebec equivalents, Kroft J.A. noted that the Manitoba CPA is "similar in form to class legislation elsewhere".¹⁵⁵ The Court approved the lower court decision,¹⁵⁶ including the trial judge's extensive reliance on "important statements ... effectively articulated by the Chief Justice [of the Supreme Court of Canada]" in *Dutton*,¹⁵⁷ *Hollick v. Toronto (City)*¹⁵⁸ and *Rumley v. British Columbia*¹⁵⁹ (hereafter the "*trilogy*").¹⁶⁰ Thus, to assess the viability of Jane's claim it is necessary to consider both the statutory regime and the *trilogy*; as well, it is advisable to review jurisprudence under similar legislation from across Canada.

Section 4(a): Cause of Action

At the first step of class certification proceedings the burden is on the plaintiff to show that the pleadings disclose a cause of action. A plaintiff will only fail at this stage of the inquiry if it is "plain and obvious" that the action cannot succeed. According to the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*,¹⁶¹ "plain and obvious" requires that "if there is a chance that the plaintiff might succeed", the burden is met.¹⁶² Justice Smith in *Endean v. Canadian Red Cross Society*¹⁶³ added four more principles that are to be applied when determining if the s. 4(a) requirements are satisfied:¹⁶⁴

- (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
- (b) The defendant, in order to succeed, must show that it is plain and obvious beyond

153 CPA, *supra* note 138, s. 4.

154 *Wall v. Bayer Inc.*, [2005] M.J. No. 286 (Man. C.A.) (QL) at para. 7 [*Bayer* (C.A.)]. Application for leave to appeal to the Supreme Court of Canada denied, [2005] S.C.C.A. No. 409.

155 *Ibid.* para. 6.

156 *Walls v. Bayer Inc.*, [2005] M.J. No. 4 (Man. Q.B.) (QL) [*Bayer* (Q.B.)].

157 *Dutton*, *supra* note 143.

158 *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 [*Hollick*].

159 *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 [*Rumley*].

160 For a thorough analysis of the strengths and weaknesses of the *trilogy*, as well as a thoughtful critique on the *trilogy*'s impact, specifically that the *trilogy* raises the bar for plaintiffs and makes it harder to achieve certification see Christine Marafioti-Mazzi, "The Post-Trilogy Class Action Certification Regime: A More Onerous Threshold for Plaintiffs to Meet," (December 2004) 1/2 Can. Class Action Rev. 235.

161 *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980 [*Hunt*].

162 Note in *Hunt*, Justice Wilson is reviewing Rule 19(24) of the British Columbia Rules of Court. However, the principles remain the same when interpreting class action legislation. See also *Brogaard v. Canada (Attorney General)*, [2002] B.C.J. No. 1775 (B.C.S.C.) (QL) at para. 31 [*Brogaard*]. See *infra* note 195 regarding the subsequent judicial history of *Brogaard* and its inclusion in a new Ontario action.

163 *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) at 165.

164 *Ibid.*

- doubt that the plaintiffs could not succeed;
- (c) The novelty of the cause of action will not militate against the plaintiffs; and
 - (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

Thus, s. 4(a) usually presents a low burden for plaintiffs and prompts many defendants to concede this requirement.¹⁶⁵ Despite this, there are two reasons that Jane may run into difficulty at this stage. First, Wal-Mart's response to *Dukes* suggests they will likely fight certification every step of the way. Second, and more importantly, the cause of action in this case is not clear and may pose a significant hurdle for Jane. I address this latter concern later in this article under the common issues inquiry (s. 4(c)) as to tackle the most complicated aspects of a Canadian *Dukes* together in one section.¹⁶⁶

Section 4(b): Identifiable Class

The s. 4(b) requirement is similar to the United States Federal Rule of Civil Procedure 23(a) numerosity requirement: there must be a sufficient number of class members. However, the Canadian courts have focused on the term "identifiable" to create a more detailed framework of analysis. First, a class member must be identifiable without reference to the merits of the action.¹⁶⁷ More specifically, class members need to be defined by reference to objective criteria that are not dependent on the litigation outcome.¹⁶⁸ Second, while there is no requirement to name every class member, the class must be bounded, not unlimited.¹⁶⁹ Third, there must be a "rational connection between the class as defined and the asserted common issues", yet not every class member need "share the same interest in the resolution of the asserted common issue".¹⁷⁰ And fourth, the class must not be unnecessarily broad.¹⁷¹ McLachlin C.J.C. outlined the policy rationale behind a clear class definition in *Dutton*. She stated, "[c]lass definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment".¹⁷²

Given I am assuming that the statistics for Wal-Mart Canada mirror those presented in *Dukes*, the class definition in Jane's case would likely parallel that in *Dukes*:

All women employed at any Wal-Mart's [Canada] domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's [Canada] challenged pay and management track promotions policies and practices.¹⁷³

As noted, all of Wal-Mart's female employees across Canada would be covered unless they chose to opt-out of the litigation. The definition likely also meets the four requirements of s. 4(b). First, as the class is framed as "who have been or may be" subjected to Wal-Mart's allegedly discriminatory practices, the class definition is not dependent on the outcome of litigation. Employment records tied to social insurance numbers would constitute objective criteria

165 *Brogaard, supra* note 162 at para. 30. See also *Bayer (Q.B.), supra* note 156 at para. 23.

166 See (3) Section 4(c): Common issues of fact or law, below.

167 *Hollick, supra* note 158 at para. 17; *Bayer (Q.B.), supra* note 156 at 28.

168 *Brogaard, supra* note 162 at para. 102.

169 *Hollick, supra* note 158 at para. 17.

170 *Ibid.* at paras. 19, 21.

171 *Ibid.* at para. 21.

172 *Dutton, supra* note 143 at para. 38.

173 *Dukes, supra* note 3 at 5.

that would enable the court to determine if a woman had worked or continues to work for Wal-Mart Canada. Second, although the exact number of employees and former employees would not be known at the beginning of the proceedings, the number is bounded, given that Wal-Mart Canada employs a total of approximately 70,000 workers across Canada.¹⁷⁴ Therefore, while not as high as the number in *Dukes*, this would still dwarf the largest employment related class action claim successfully launched thus far in Canada: the 3,000-4,000 employees in *Webb*.¹⁷⁵ Third, there is a rational connection between an exclusively female class when women's pay and promotional status is at issue. Further, the class definition is not invalid simply because some of the women share a different interest in the resolution of the issues. For example, some women within the class may have been subjected to longer periods of inequitable pay, and thus their damages may be higher. Similarly, some women may primarily be seeking injunctive relief—for example, a change in corporate promotion practices—whereas others may seek primarily damages.

Finally, s. 4(b) mandates that the class not be unnecessarily broad. The proposed class definition in *Webb* (Gen. Div.) was deemed overly broad as it not only included those who were wrongfully dismissed, but also those who could be shown to have been terminated for just cause.¹⁷⁶ Therefore, Brockenshire J. amended the definition to exclude “persons proven to have been terminated for just cause”.¹⁷⁷ In Jane's case, a similar argument could be made against the proposed definition, as the definition may include women denied raises and promotions for reasons other than gender. There are two possible responses to this argument. First, the definition could be amended, as in *Webb*, to exclude these women. More likely, however, as the Manitoba Court of Queen's Bench recently held in *Bayer* (Q.B.), the court hearing Jane's claim would likely consider that at the s. 4(b) analysis stage, “it is not necessary that prospective class members be able to successfully establish that they have suffered injury. The criterion is simply that they claim to have suffered injury”.¹⁷⁸ In other words, at this stage, it is necessary to “define those who have a claim, and not just those who will ultimately succeed”.¹⁷⁹ Here, the plaintiffs could make an argument similar to the one made in *Brogaard*, where the plaintiffs claimed retroactive survivors' pensions and damages denied to them on the basis of sexual orientation. They successfully argued that at the s. 4(b) stage, the relief sought by the potential class members “is the right to ‘stand in the line’ for their assessment” of damages.¹⁸⁰ As articulated in *Dukes*, should the court find Wal-Mart Canada liable, the onus would shift to the defendants to prove pay and promotions decisions affecting individual women were made for reasons unrelated to sex. Thus, a court could adopt Jane's class definition, particularly given that the s. 4(b) “requirement is not an onerous one”.¹⁸¹

Section 4(c): Common Issues of Fact or Law

The third requirement under the CPA is similar to the Rule 23(a) commonality factor. Recently, the Manitoba Court of Queen's Bench succinctly stated the requirements under s. 4(c):

Section 4(c) requires that the action raise common issues of fact or law. They need not be determinative of liability nor dominant issues in the litigation. But they must be issues common to all members of the class in the sense

174 Wal-Mart Canada Corp. “About Wal-Mart: Company Overview” online: Wal-Mart Canada <http://www.walmartcanada.ca/wps-portal/storelocator/Canada-About_Walmart.jsp?lang=null>.

175 *Webb* (Gen. Div.), *supra* note 149 at 395.

176 As discussed in *Hollick*, *supra* note 158 at para. 21.

177 *Webb* (Gen. Div.), *supra* note 149 at 395.

178 *Bayer* (Q.B.), *supra* note 156 at para. 29.

179 *Webb* (Gen. Div.), *supra* note 149 at 395.

180 *Brogaard*, *supra* note 162 at para. 105.

181 *Hollick*, *supra* note 158 at para. 21.

that their decision at a common issues trial will advance the litigation in some meaningful way.¹⁸²

The common issue successfully argued in *Dukes* was that the plaintiffs' evidence raised an inference that Wal-Mart engages in discriminatory compensation and promotion practices that affects all plaintiffs in a common manner.¹⁸³ Their claim rested on Title VII: it is unlawful for all private employers who employ fifteen or more individuals to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex".¹⁸⁴ We do not have a similar statutory provision in Canada. That is, there is no common legislative regime that prohibits sex-discrimination and applies to all private Canadian employers.¹⁸⁵ Further, there is no common law avenue that fills this statutory void.¹⁸⁶ Therefore, even if the plaintiffs were able to prove that Wal-Mart Canada discriminated on the basis of sex, this would not, in and of itself, be actionable in the civil courts.¹⁸⁷ Despite these problems facing Jane under ss. 4 (a) and (c), in the following pages I identify several possible avenues available for further exploration.

Jane could try to model her argument after those put forward by the plaintiffs in *Kumar v. Sharp Business Forms Inc.* ("*Kumar*")¹⁸⁸ In this successful class proceeding certification claim, the plaintiffs claimed damages for breach of contract on behalf of fifty former and present employees of the defendant. The plaintiffs argued that their employer breached the minimum overtime pay, holiday pay and vacation pay provisions of the Ontario *Employment Standards Act*.¹⁸⁹ Cumming J. held that the statutory mandated employment standards were implied terms of the employment contract and that the breach of contract claim could be brought as a civil ac-

182 *Bayer* (Q.B.), *supra* note 156 at para. 45.

183 The plaintiffs grouped their evidence into three major categories: (1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management. See text accompanying notes 34 to 61 above.

184 Title VII, *supra* note 7.

185 It is beyond the scope of this paper to explore how the following analysis would differ if Jane's employer was covered by the application of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982* [being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11] according to s. 32(1). However, I note that given the *Charter's* equality provision (s. 15(1)) the analysis would differ. This is an area ripe for further exploration, particularly given the prominent case *Hislop v. The Attorney General of Canada*, recently granted leave to appeal by the Supreme Court of Canada, [2005] S.C.C.A. No. 26; [2004] O.R. (3d) 641 (Ont. C.A.); [2004] O.J. No. 1867 (Ont. S.C.J.) (QL) [*Hislop*]. *Hislop* is currently the largest class action judgment in Canadian history with a potential award of \$81 million, as well as the first involving *Charter* issues ("Class-action pioneering firm has new members, new name" (10 February 2004) 23/39 *The Lawyers Weekly*). *Hislop* combines the class action in *Brogaard*, *supra* note 162 with a similar action in Ontario. As noted in regards to *Brogaard*, among the plaintiffs' challenges to the Canada Pension Plan is a s. 15(1) *Charter* equality argument based on sexual orientation grounds.

186 See *Board of Governors of Seneca College of Applied Arts and Technology v. Bhaduria*, [1981] 2 S.C.R. 181.

187 Human rights legislation that contains anti-discrimination and class complaint provisions may also provide a further avenue for a *Dukes*-like action, albeit in a different forum—a human rights tribunal. Saskatchewan serves as a good example of how this might work, as there has been a class complaint similar to *Dukes* based on the Saskatchewan *Human Rights Code*, S. S. 1979, c-24-1. In *Canada Safeway Ltd. v. Saskatchewan (Human Rights Commission)*, [1997] S. J. No. 502 (Sask. C.A.) (QL) [*Safeway*] the cashier group at Safeway was made up of predominantly female whereas the food clerk group was predominantly male—importantly, the cashiers were paid more than the food clerks. The Court of Appeal refused to let the claim proceed as a class complaint; their analysis is rather cryptic but appears to focus on the suitability of the class representative and the union's involvement. However, Jackson J.A., in dissent, would have certified the class based on the "clear questions of law or fact common to the class": Whether these [salary] differences [were] as a result of discrimination prohibited by the Code. With respect to promotion opportunities, the first issue will be whether women have received less opportunity for full-time employment than men and, if so, the next question will be whether this is a result of discrimination prohibited by the Code" at para. 146. Assuming the statistics in Jane's case were identical in terms of the pay and promotion differentials based on sex as in *Dukes*, Jackson J.A.'s dissent in *Safeway* and the existence of provincial human rights legislation across the country could thus provide further viable options for Jane. Further support for this argument is found in *Webb* (Gen. Div.). In *Webb* (Gen. Div.), Brockenshire J. held that although there are regional differences between human rights legislation, such differences were "relatively minor" given the plaintiffs' claims and the fact that the K-Mart employees "were all hired by a national chain which presumably would have national policies relating to employment". See *Webb* (Gen. Div.), *supra* note 149 at 397.

188 *Kumar v. Sharp Business Forms Inc.*, [2001] C.C.S. No. 15551 (QL) (Ont. S.C.J.) (QL) [*Kumar*].

189 R.S.O. 1990 c. E14.

tion pursuant to s. 64 of the Ontario *Employment Standards Act*.¹⁹⁰ Equally important for Jane's case, Cumming J. also held that there were two common issues worthy of certification. First, did the employer breach these implied contractual terms? And second, what are the damages for which the defendant was responsible?¹⁹¹ Applying this reasoning, Jane could bring a claim for breach of contract, arguing that Wal-Mart Canada breached the employment contracts of female employees contrary to the pay equity provision of the Ontario *Employment Standards Act*.¹⁹² Similarly, Jane could argue that Wal-Mart breached s. 82 of the Manitoba *Employment Standards Code*, which prohibits wage discrimination.¹⁹³ There is, however, a problem with these arguments: statutory employment standards are provincial statutes, and vary across the country. In fact, pay equity provisions and prohibitions of wage discrimination are not found in all jurisdictions.¹⁹⁴ This affords Wal-Mart a very strong argument that a national class is not the appropriate class definition. Rather, only those jurisdictions with amenable employment standards legislations could possibly support such an action.

A second avenue possibly open to Jane is outlined in *Franklin et al. v. University of Toronto* ("Franklin"),¹⁹⁵ a class action launched by just over one hundred University of Toronto female faculty members and librarians who claimed "systematic salary discrimination".¹⁹⁶ Gans J. held that the plaintiffs' claims "in terms of an unjust enrichment based upon the alleged breach of the *Employment Standards Act* ... should be permitted to stand".¹⁹⁷ He drew upon the apt comments of Dickson J. in *Pettkus v. Becker* in arriving at this conclusion:

The great advantage of the ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.¹⁹⁸

Therefore, Jane could possibly satisfy the s. 4(a) requirement with a claim for unjust enrichment. A cause of action for unjust enrichment is composed of three elements: (a) the defendant has been enriched; (b) the plaintiffs have suffered a corresponding deprivation; (c) there is no juristic reason for the enrichment.¹⁹⁹ In Jane's case, the third element presents similar obstacles to those outlined in the *Kumar* type analysis above. An employment contract is a juristic reason.²⁰⁰ Therefore, even if Jane could prove that by paying the women less than equal wages for equal work, Wal-Mart Canada saved money at the women's expense, she would still have to show that Wal-Mart Canada breached "some statutory requirement which otherwise rendered the contract of employment unlawful".²⁰¹ A national class would therefore be very difficult to argue. Gans J. raised further obstacles when he refused to certify the action on the grounds that a class proceeding in *Franklin* was not the preferable procedure.²⁰²

190 *Kumar*, *supra* note 188 at para. 36.

191 *Ibid.* at para. 39.

192 R.S.O. 1990 c. E14 at s. 42.

193 *The Employment Standards Code*, C.C.S.M. c. E110.

194 For example, there are no equivalent provisions in Alberta's *Employment Standards Code*, RSA 2000, c. E-9 or British Columbia's *Employment Standards Act*, RSBC 1996, c.113.

195 *Franklin et al. v. University of Toronto* (2001), 56 O.R. (3d) 698 (Ont. S.C.J.) [*Franklin*].

196 *Ibid.* at para. 1.

197 *Ibid.* at para. 27. The British Columbia Court of Appeal cited *Franklin* with approval on this point in *Dorus v. Taylor*, [2003] B.C.J. No. 613 at para. 12.

198 *Pettkus v. Becker*, [1980] 2 S.C.R. 834, quoted in *Franklin*, *supra* note 195 at para. 16.

199 *Peter v. Beblow*, 101 D.L.R. (4th) 621 at 643.

200 *Franklin* *supra* note 195 at para. 20.

201 *Ibid.* at para. 20.

202 *Ibid.* at para. 20.

Finally, given the reliability and interpretation of the statistics would influence a finding of liability, regardless of the cause of action, Jane could try to frame the likely battle of the experts (as evidenced in *Dukes*) as a common factual inquiry perfectly suited to a class proceeding. A similar argument was successfully made in *Bayer*:

A factual inquiry into the nature of the problems caused by the allegedly defective drug is an appropriate common issue ... This is one which can be determined at common issues hearing and which will turn essentially on the evidence of expert witnesses.²⁰³

Section 4(d): Preferable Procedure

Section 4(d) represents the point in the class certification proceeding where the court exercises the most discretion.²⁰⁴ Thus, it is unsurprising that s. 4(d) often also represents the point at which certification often succeeds or fails. In making its determination, the court asks two key questions. The first is whether a class proceeding is the preferable procedure because it constitutes a fair, efficient and manageable way of determining the common issues presented.²⁰⁵ Before unpacking this first question, it is also necessary to recognize that the s. 4(d) analysis is informed by s. 7 of the *CPA*:

The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members; ... and
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

Through s. 7, the legislature has thus provided some further guidance in terms of when fairness and efficiency concerns are met. First, the focus is on the preferability of a class proceeding to address the *common* factual or legal *issues*, not individual claims. The existence of individual issues is, however, not a bar to class certification. Rather, class proceedings may be certified when individual damage assessments are necessary, separate contracts exist and class members claim different remedies pursuant to s. 7. In addition, certification is permissible when different defences in respect of different class members are available.²⁰⁶ The rationale behind allowing claims to progress even where individual issues are present is that “issues of importance ... can be decided once only, thus avoiding possible inconsistency in fact-finding and enhancing judicial economy and the advancement of litigation”.²⁰⁷ In order to address these individual issues, a bifurcated procedure is envisioned:²⁰⁸ first, common issues are addressed; second, individual issues are resolved. Resolving the individual issues may require “careful planning and management”, but Bennett J. of the British Columbia Supreme Court reminds us that their presence is “not a reason to refuse certification”.²⁰⁹ Complexity need not mean unmanageabil-

203 *Bayer* (Q.B.), *supra* note 156 at para. 51.

204 *Ibid.* at para. 15.

205 *Hollick*, *supra* note 158 at para. 28.

206 *Dutton*, *supra* note 143 at para. 43.

207 *Bayer* (Q.B.), *supra* note 156 at para. 69.

208 *Wilson v. Servier Canada Inc. et al.* (2000), 50 O.R. (3d) 219 (Ont. S. C.J.) at para. 113 [*Wilson*]; approved in *Bayer* (Q.B.), *supra* note 156.

209 *Gregg v. Freightliner Ltd.*, [2003] B.C.J. No. 345 (B.C.S.C.) at paras. 85, 93.

ity. Such planning and management referred to by Bennett J. may include the creation of two distinct litigation phases: a liability determination and damage assessment.

It is this bifurcated procedure that Jane would assert is preferable in her case. First, similar to the procedure developed in *Dukes*, the court could first hear arguments and determine whether Wal-Mart Canada was liable. If the plaintiffs were unable to establish a successful claim, the litigation would end. On the other hand, if Wal-Mart Canada was found to be liable, a detailed damage assessment mechanism could be developed. This may require a more individualized assessment; for example, the women could be required to give affidavits detailing their experience in the company, their salaries at various points in their career and whether they wanted to be promoted in their career. These affidavits could then be used to calculate individual damage awards. Or, given the number of possible claims and the time involved in individual assessments, a system similar to the one Jenkins J. developed in *Dukes* could be used: a formula-derived lump sum award made to eligible claimants. Another tool judges have at their discretion in determining whether a class proceeding is manageable is their ability to sub-class or amend the original class definition to exclude certain groups.²¹⁰ Therefore, if Wal-Mart Canada successfully argued that different stores operated under different promotions and salary models (the “every store is an island defence” as argued in *Dukes*), the affected women could be sub-classed or their claims could be hived off from the proposed class definition articulated above.

The second matter before the court during the s. 4(d) inquiry is whether certifying the class would advance the proceedings according to the primary policy factors underlying Canadian class proceedings: access to justice, judicial economy and behaviour modification.²¹¹ Access to justice refers to the fact that many classes are composed of class members who have no feasible alternatives for litigating their claim. That is, in many cases the cost of litigating individual claims would likely exceed recovery. As Brockenshire J. stated in *Webb* (Gen. Div.), “it has now become common knowledge, and the subject of adverse comment, that the costs of civil proceedings before our court have gotten out of the reach of the ordinary citizen”.²¹² Access to justice is a policy factor weighing in favour of certifying Jane's claim because prosecuting “many individual complaints against a large employer which would be prohibitively expensive for the parties”.²¹³ A class proceeding would thus allow the Wal-Mart Canada workers to pool their resources and distribute the litigation costs amongst themselves.²¹⁴ Arguably, class proceedings also represent a better avenue for Wal-Mart Canada than having a spectre of multiple litigation claims hanging over them for years on end.

Judicial economy refers to the fact that aggregating similar individual actions into a class proceeding avoids duplicating factual and legal analysis.²¹⁵ This rationale could also favour certification. Jane could argue that if litigated together, the complex statistical evidence, the need for expert opinions and the numerous intertwined legal issues would save the parties, the court system and society both time and money. Similar to *Dukes*, it would be an unnecessary waste of resources to require numerous small trials when one procedure could resolve the liability question. Resolution for one Wal-Mart female employee is resolution for all.

The third policy rationale underlying class proceedings is behaviour modification. McLachlin C.J.C. in *Dutton* aptly describes how class actions affect behaviour: “[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the

210 *Wilson*, *supra* note 207 at para. 113.

211 *Hollick*, *supra* note 158 at para. 15.

212 *Webb* (Gen. Div.), *supra* note 149 at 394.

213 *Safeway*, *supra* note 187 at para. 142.

214 *Hollick*, *supra* note 158 at para. 15.

215 *Ibid.*

full costs of their conduct”.²¹⁶ Jane could argue that McLachlin C.J.C.’s words ring particularly true for large corporate defendants, such as Wal-Mart Canada. Without a mechanism to hold them accountable, cost-saving practices of not promoting and paying women equally—though harmful and discriminatory—will continue. As I argued in Part II above, certified employment discrimination class actions have the ability to affect positive corporate behavioural changes. Corporate defendants are called upon to “take full account of the harm they are causing, or might cause, to the public”.²¹⁷ Employees and consumers may also be motivated to demand responsible corporate practices when the evidence points to an inference of discrimination and the court decides to certify the claim. As illustrated in *Dukes*, focused media attention on the alleged discriminatory practices is also a serious behavioural modifier in and of itself.

Finally, Martinson J. in *Scott v. TD Waterhouse* (“*Scott*”)²¹⁸ provides a number of additional specific reasons that class proceedings can be advantageous.²¹⁹ Among these advantages are: case management can be accomplished by a single judge; the class is able to attract sophisticated lawyers through the aggregation of potential damages and the availability of contingency fee agreements; a formal notice program alerts all interested persons to the status of the litigation; simplified structures and procedures for individual issues can be designed by the court; the court approves any settlement; and, the limitation period applicable to the claim may be tolled for the entire class.²²⁰ Thus, Jane could incorporate the advantages Martinson J. articulates in *Scott* into her argument, claiming as Jackson J.A. did in his dissenting opinion in *Canada Safeway Ltd. v. Saskatchewan (Human Rights Commission)*, “it is clear that employment discrimination cases are ideally suited to proceeds as class actions”.²²¹ As Jenkins J. aptly stated in *Dukes*,

[i]nsulating our nation’s largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination—simply because they are large—would seriously undermine these imperatives.²²²

Jane *must* argue that Wal-Mart Canada should similarly not be insulated from judicial scrutiny on a national basis. To deny certification would defeat the policy rationales that weigh in favour of certifying a national *Dukes*-like claim: access to justice, judicial economy and behaviour modification.

Section 4(e): Adequacy of the Representative Plaintiff

The final step to determine whether a class should be certified pursuant to s. 4 of the *CPA* focuses attention on the representative plaintiffs. Two questions are asked at this stage. First, does the representative plaintiff fairly and adequately represent the class? Second, does the representative plaintiff have a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding? Very rarely is this inquiry determinative of whether a class is certified; the courts are much more likely to deny certification at ss. 4(c-d) than at this final stage. However, Canadian courts have developed criteria that are assessed, including “the motivation of the representative, the competence of the representative’s counsel, and the capacity of the representative to bear any costs that may

216 *Dutton*, *supra* note 143 at para. 29.

217 *Hollick*, *supra* note 158 at para. 15.

218 *Scott v. TD Waterhouse* (2001), 94 B.C.L.R. (3d) 320 (B.C.S. C.) [*Scott*].

219 See *bid.* at paras. 115–116 for detailed list.

220 Adapted from *Scott*, *ibid.*

221 *Safeway*, *supra* note 187 at para. 145.

222 *Dukes*, *supra* note 3 at 7.

be incurred”.²²³ Representative plaintiffs are meant to “vigorously and capably prosecute the interests of the class”;²²⁴ they should not have, on the common issues for the class, an interest in conflict with the interests of other class members.²²⁵ In many cases the defendants concede that this requirement is met.²²⁶ The critical arguments in Jane’s case rest in the previous s. 4 requirements, and there is no evidence on the hypothetical facts that Jane (*et al.*) would be unsuitable representative plaintiffs.

CONCLUSION

I have maintained throughout this paper that *Dukes*, as a model for employment discrimination class actions, has served as an impetus for progressive social change. Wal-Mart has changed some of its questionable practices and has committed to changing others. Sex discrimination—what it looks like, what the effects are, and who it affects—is being discussed by Wal-Mart executives, employees and national media outlets. Further, depending on future outcomes, the institutional, financial, and educative salutary effects could dramatically increase. I have also attempted to provide some suggestions for further exploration into whether a *Dukes*-like action is sustainable in Canada. Such ground has yet to be broken. This is unsurprising, as there are a number of obstacles facing a similar Canadian action. Yet, this is not to say *Dukes* could not happen here. Rather, class action and employment lawyers across the country will have to put their minds together and brainstorm: What is the likeliest cause of action? How can the issues be argued as common, not individual? What is the most appropriate forum for the action? The complicated interplay between the common law and legislation in this area will have to be creatively mined in order to develop successful arguments.

The impetus for this exploration should not only be the salutary effects already seen and potentially forthcoming in the United States, but also recognition that the policy behind Canadian class action legislation supports such an action. Employment discrimination claims are ideally suited to class proceedings. National employers who have discriminatory practices and policies should not be sheltered from judicial scrutiny, nor should their employees be barred from accessing our justice system. Class proceedings modeled after *Dukes* would facilitate access to justice, maintain judicial economy and modify corporate behaviour. The Manitoba courts have recently analogized a judge’s role in a certification hearing to that of a gatekeeper;²²⁷ the gatekeepers across our country need to open the gates to a *Dukes*-like action. Class action and employment lawyers need to give them the key.

223 *Dutton*, *supra* note 143 at para. 41.

224 *Ibid.*

225 *Bayer* (Q.B.), *supra* note 156 at para. 78.

226 See *Brogaard*, *supra* note 162 at para. 142.

227 See *Bayer* (Q.B.), *supra* note 156 at para. 22: per McInnes J., “[i]n my view the court must fill something of a *gatekeeper function*” [emphasis added]. Similarly see *Bayer* (C.A.), *supra* note 154 at para. 16: per Kroft J.A., “[w]ithout success in that regard, the *gate* to a class action will not open”. [emphasis added].

AUTHOR'S ADDENDUM

On February 6, 2007 the United States Court of Appeals for the Ninth Circuit rendered its decision in the appeal of *Dukes v. Wal-Mart Stores* ("*Dukes Appeal*").¹ The Court reviewed the decision of Jenkins J. regarding class certification for abuse of discretion;² specifically addressing whether the district court correctly selected and applied the criteria of Rule 23.³ In a 2–1 decision, the majority of the Court upheld Jenkins J.'s decision and determined that the district court did not abuse its discretion. The *Dukes* class can therefore proceed to the liability stage of trial, pending a further appeal.

In regards to the Rule 23(a) requirements, neither numerosity nor adequacy of representation was contested by Wal-Mart in the appeal. Commonality, however, was fiercely contested. The Court reviewed the evidence presented by the plaintiffs, consistently rejecting Wal-Mart's arguments and concluded that the evidence "present[s] significant proof of a corporate policy of discrimination and support[s] [the] Plaintiffs' contention that female employees nationwide were subjected to a common pattern and practice of discrimination".⁴ Thus, the district court acted within its discretion. Wal-Mart also raised a general objection to the district court's conclusion that the plaintiffs' evidence satisfies the typicality requirement. On this issue, the Court found that the plaintiffs' claims and representatives are sufficiently typical of the class and therefore the district court acted within its discretion when it found that the typicality factor was satisfied.

Under Rule 23(b)(2) the Court made the relevant findings contrary to Wal-Mart's submissions: (i) Wal-Mart's statistical evidence was rebutted by the plaintiffs in that the plaintiffs' evidence and theories remain viable at the pre-merits stage of the analysis;⁵ (ii) that some of the class members are former Wal-Mart employees does not subordinate the plaintiffs' claim for injunctive relief;⁶ (iii) the potential for a large monetary claim is simply a function of Wal-Mart's size and does not undermine the plaintiffs' claim;⁷ (iv) the jurisprudence, Title VII and due process concerns do not require that the district court afford Wal-Mart the opportunity to present individualized defences or require that individual hearings be held;⁸ and (v) statistical formulas can incorporate information from Wal-Mart's database in order to determine whether employees have been underpaid or denied a promotion.⁹ Thus, the Court held that the "district court acted within its broad discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly".¹⁰

Despite these victories, the plaintiffs were unsuccessful on their cross-appeal. According to the Court, "the district court did not abuse its discretion when it found that backpay for promotions may be limited to those Plaintiffs for whom proof of qualification and interest exists".¹¹

1 *Dukes v. Wal-Mart Stores* (6 February 2007), San Francisco, California 04-16688 (9th Circ.), online: Legal Information Institute <[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/\\$file/0416688.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/$file/0416688.pdf?openelement)> [*Dukes Appeal*].

2 *Dukes Appeal*, supra note 1 at 1341.

3 *Ibid.* 1343.

4 *Ibid.* 1356 [emphasis added].

5 *Ibid.* 1362.

6 *Ibid.* 1363–1364.

7 *Ibid.* 1363.

8 *Ibid.* 1369–1371, 1375–1377.

9 *Ibid.* 1371–1372.

10 *Ibid.* 1379.

11 *Ibid.* 1379.

Kleinfield C.J. dissented in *Dukes Appeal*. He stated:

This class certification violates the requirements of Rule 23. It threatens the rights of women injured by sex discrimination. And it threatens Wal-Mart's rights. The district court's formula approach to dividing up punitive damages and back pay means that women injured by sex discrimination will have to share any recovery with women who were not. Women who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve, and get reinstated or promoted as well. This is "rough justice" indeed. "Rough," anyway. ...¹²

Wal-Mart likely agrees and may appeal the Court's ruling. Yet, there is no question that in the meantime *Dukes Appeal* is a significant milestone for the plaintiffs — one that may, and I hope will increase the progressive social influence that *Dukes* has had thus far.

12 *Ibid.* 1388.