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APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

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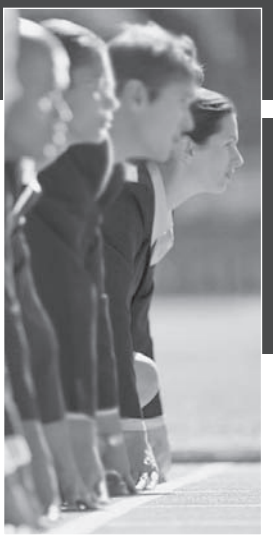

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VOLUME 12 ▪ 2007

Appeal: Review of Current Law and Law Reform is published annually by:

APPEAL PUBLISHING SOCIETY
University of Victoria, Faculty of Law
P.O. Box 2400
Victoria, British Columbia
Canada V8W 3H7

Telephone: (250) 721-8198
Fax: (250) 721-6390
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THE POLITICS OF POVERTY:
WHY THE CHARTER DOES NOT PROTECT WELFARE RIGHTS

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CITED: (2007) 12 Appeal 1-9

Canada's *Charter of Rights and Freedoms* ("*Charter*") contains no explicit right to welfare;[1] yet in recent years, the *Charter* has become a principal site of struggle for state support of persons in poverty. Those who advocate recognition of an entrenched right to welfare argue that, based upon a jurisprudence that identifies human dignity as the fundamental value underlying *Charter* rights and freedoms, it is indefensible to leave the right to basic necessities of life outside the realm of *Charter* protection.[2] This claim is both legal, in that their conclusion is reached through deductive reasoning based upon legal principles such as substantive equality and security of the person, and deeply political, because their understanding of human dignity is informed by their politics. However, the political claim upon which the legal arguments are founded is subsumed within and disguised by court decisions that must be articulated in terms of facts and law.

Welfare rights advocates' conception of human dignity is founded upon a particular understanding of the nature and causes of poverty and the proper relationship between citizens and the state. This conception is out of step with the dominant political consensus. Welfare rights advocates believe that poverty exists because of social and economic factors beyond the individual's control.[3] From this perspective, they argue that the state has a responsibility to provide the resources necessary to ensure that everyone has the means to provide for basic food, housing and shelter, and they seek to strengthen this responsibility by making it a legal obligation.

Though this understanding of poverty may once have been dominant, political trends over the last twenty-five years have influenced Canadians' ideas about poverty and about what the state can or should be expected to do about it. Current welfare policies reflect the presump-

1 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 See Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 C.J.W.L. 185; See also Martha Jackman, "What's Wrong With Social and Economic Rights?" (2000) 11:2 N.J.C.L. 235.

3 I use the term "welfare rights" to refer to an individual's right to sufficient food, shelter, clothing, education, health care, and the corresponding positive obligation on the state to ensure to provide these things directly or sufficient money to buy these things to those who do not have them.

tion that people should be able to provide for themselves, and that if welfare programs are too generous or easily accessible, people will not have sufficient incentive to do so. From this perspective, unconditional welfare rights under the *Charter* are undesirable because they limit government's ability to effectively investigate and police undeserving claims.

Unless this political conflict is resolved in favour of the perspective of welfare rights advocates, legal claims for a *Charter* right to welfare are likely to continue to fail. Moreover, even if these claims were to succeed, they would be unlikely to result in substantial improvement in the material circumstances of the poor in the face of strong opposition from voters and governments. Ultimately, the only guarantee of adequate welfare is popular support, which can be won only if the logic of neo-liberalism is rejected in favour of a perspective that takes into account the structural causes of poverty. I will begin by saying something more about these competing ideological perspectives on the nature of poverty, and move on to consider the role they play in *Charter* jurisprudence on welfare rights. Finally, I will argue that the same factors that prevent the Court from entrenching welfare rights would prevent their realization even if entrenched.

THE NATURE OF POVERTY

Where one falls on the question of whether the *Charter* should protect a right to an adequate level of state support is likely to depend on whether one views poor people predominantly as victims of circumstance, and therefore deserving of assistance, or as being responsible for their own circumstances, and therefore undeserving. Welfare rights advocates generally take the former position. They view poverty as the product of social and economic forces largely beyond the individual's control.[4] Consequently, society, through government, is seen to bear responsibility to alleviate the resulting need in a manner that addresses the physical needs, psychological vulnerability, disengagement from broader society, low self-esteem, and feelings of dependency that accompany it.[5] Though it did not conceive of welfare as an individual right, the Canadian welfare state at one time operated in a manner largely consistent with this view of poverty.

In the decades leading up to the entrenchment of the *Charter*, Canada developed a generous system of social programs informed by reform liberal principles and Keynesian economics.[6] The welfare state was founded upon a "postwar consensus [that] held that the public could enforce limits on the market … and that the national community was responsible for the basic well-being of its individual members".[7] Bruce Porter provides an illuminating comparison of indicators of poverty in pre-*Charter* Canada and today:

> If our parliamentarians at that time had gone to the Parliamentary Library [in 1980/81] to look into the problem of "homelessness" in Canada they would have found only a couple of reports dealing with transient men in larger cities living in inadequate rooming houses. … They would not have imagined that after twenty years of unprecedented economic prosperity, there would be thousands in Canada who sleep on the streets or in grossly inadequate shelters for the homeless. Most parliamentarians would have had no idea what a "food bank" was. The first food bank only opened in Edmonton in 1981. It would have been unimaginable to them that twenty years later three quarters of a million people, including over 300,000 children, would rely every month on emergency assistance from a national net-

4 Carl Wellman, *Welfare Rights* (New Jersey: Rowman and Littlefield, 1982) at 4.

5 Ian Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1 at 8.

6 Reform liberalism is a variant of liberalism that conceives of a larger role for the state in creating equality of opportunity.

7 Janine Brodie, "Restructuring and the New Citizenship" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press) 126 at 130.

> work of over 615 food banks and over 2,000 agencies providing limited emergency food.[8]

The welfare state of the 1970s and early 1980s largely reflected the view of poverty held by welfare rights advocates today, one that conceived of welfare as a societal obligation rather than charity. This is no longer the dominant way of understanding poverty. In recent decades, ideological shifts and government policies have led to an emphasis on the responsibility of individuals for their own circumstances, and suspicion of claims to state assistance.[9]

By the 1980s and 1990s, increasing national debt, recurring budget deficits, economic globalization, and privatization moved to the top of the political agenda. In response, governments cut spending on social programs. The year 1996 witnessed the end of federal funding of provincial programs under the *Canada Assistance Plan* ("*CAP*").[10] Under *CAP*, the federal government paid fifty per cent of the cost of welfare and certain social services on the condition that provinces provided individuals with social assistance sufficient to provide for basic needs regardless of the cause of the need. When *CAP* ended, cash-strapped provinces tightened eligibility requirements and reduced benefits.[11] There has since been significant reinvestment in social programs that have broad middle class support, such as health care, but funding for social programs used exclusively by the poor has not been similarly restored.[12]

Given meagre levels of social assistance, and the imposition of conditions that make it harder to qualify, it is difficult to escape the conclusion that not just governments, but the citizens who elect and re-elect them, hold different opinions about the nature and causes of poverty and about our collective obligations to the poor than they did twenty-five years ago.[13] What has come to be the dominant view of poverty reflects neo-liberal ideas that emphasize individuals' responsibility for their own circumstances and view the state as having a limited role with respect to the provision of financial support. Janine Brodie argues that

> [t]he rights and securities guaranteed to all citizens of the Keynesian welfare state are no longer rights, universal, or secure. The new ideal of the common good rests on market-oriented values such as self-reliance, efficiency, and competition. The new good citizen is one who recognizes the limits and liabilities of state provision and embraces her obligation to work longer and harder in order to become more self-reliant.[14]

From this perspective, welfare cannot be seen as a right, at least for those deemed employable. Welfare rights advocates argue that it leaves "the most vulnerable of our fellow citizens, neighbours, and community members [to] face a political environment that writes off the injustice in their lives as personal failings, as inconsequential, and as of no public concern or responsibility".[15]

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8 Porter, Bruce. "ReWriting the *Charter* at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada," (April 2001) *Plenary Presentation, The Canadian Charter of Rights and Freedoms: Twenty Years Later* Canadian Bar Association, online: Centre for Equality Rights in Accomodation, <http://www.equalityrights.org/cera/docs/charter20.rtf>.

9 Brodie, *supra* note 7 at 133.

10 *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1, as rep. by *Budget Implementation Act,* 1995, S.C. 1995, c. 17, s. 32. This change was effective March 31, 2000.

11 For an extensive analysis of welfare reforms over the 1990s see: "Another Look at Welfare Reform" (Autumn 1997) online: Another Look at Welfare Reform – National Council of Welfare Canada <http://www.ncwcnbes.net/htmdocument/reportanolook/repanolook_e.htm#_britishcolumbia> [Another Look at Welfare Reform].

12 See "Federal Health Investments" (5 February 2003) online: Fact Sheet – Federal Health Investments (2003 Health Accord) <http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2003accord/fs-if_2_e.html>.

13 I do not wish to over-emphasize the significance of this shift. People's perspective on welfare rights will generally reflect the extent they are favourably disposed to a market economy. This was equally true in 1980 as it is today.

14 Brodie, *supra* note 7 at 131.

15 Margot Young, "Section 7 and the Politics of Social Justice" (2005) U.B.C.L. Rev. 539 at 558.

Before proceeding to consider the implications of these political shifts for welfare rights litigation, I note that there is a third perspective that locates hostility to welfare rights not in politics but in an innate human tendency to make distinctions between the deserving and undeserving poor. This position is advanced by Amy Wax, who traces hostility to unconditional welfare rights to "fundamental and innate attitudes, which have evolved over millennia to facilitate group sharing and cooperation".[16]

She begins by drawing an analogy between welfare and nineteenth and early twentieth century private mutual insurance funds in which "workers raised money by collecting a small sum from each individual in the group. Each member then became entitled to draw from the pool of resources upon the occurrence of an event that deprived the person of an independent means of livelihood".[17] Since the success of the fund depended on each member contributing his or her share, rules were required to address the free rider problem. Members who failed to contribute their share were excluded from drawing on the fund in time of need. Wax suggests that similar logic would have operated to exclude free riders in the more informal systems of group cooperation that "may have carried a distinct adaptive advantage" in the period before central government.[18]

It is in these early informal arrangements of group cooperation that Wax locates our propensity to distinguish between deserving and undeserving poor. This propensity may in some respects have outlived its usefulness because legally compelled contribution means that the stability of the system no longer depends directly on excluding all free riders. However, it continues to operate to undermine public support for any welfare program or constitutional protection of welfare rights that is not seen to exclude the undeserving poor. Thus, she argues that constitutional guarantees of welfare rights are futile because there is

> historical evidence suggesting that [they] are ultimately powerless against some entrenched social values to which they are opposed...Although the law's ability to influence attitudes undeniably varies with the attitudes at issue ... deep-seated notions of fairness would appear to be among the least promising candidates for circumvention by law.[19]

Wax makes a persuasive argument regarding the tenacity of the practice of distinguishing between the deserving and undeserving poor. It is not clear, however, that under circumstances of widespread agreement that poverty is a structural and inevitable phenomenon, the fact that a few undeserving individuals also benefit would undermine support for the right itself. However, in the absence of such consensus, it is critical to focus on the political factors that influence where the line between deserving and undeserving poor is drawn.

History reveals that this line is not written in stone. It was present and shifting in the seventeenth and eighteenth centuries; "woodcuts, etchings and engravings [of the period] mirror [a] drastic change in social policy, with the emphasis changing from undiscriminating alms-giving to an enforcement of social discipline via poor relief".[20] It has shifted over the last twenty-five years, and this shift can be seen in the deterioration of social programs over that time. The fluidity of the distinction is also evident in changing views about single mothers. Both Wax and Evans note that whereas single mothers used to be categorized as deserving of state support, society has more recently categorized them as employable and has expected them to undertake

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16 Amy L. Wax, "Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes and the Political Economy of Welfare Reform" (2000) 63 Law & Contemp. Probs. 257 at 263.

17 *Ibid*. at 263.

18 *Ibid*. at 267.

19 *Ibid*. at 291.

20 Robert Jutte, *Poverty and Deviance in Early Modern Europe* (Cambridge: Cambridge University Press, 1994) at 19.

paid work to support themselves.[21] The critical questions, then, are in which direction the line will shift next, and what is the best way to influence that shift in a direction that improves the lot of the poor?

One avenue through which welfare rights activists have attempted to influence this shift is litigation. In particular, they have attempted to expand the interpretation of *Charter* rights to life, liberty, security of the person, and equality to include protection for welfare rights.

SECTION 7

Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[22] Poverty rights advocates take the position that s. 7, and in particular the right to security of the person, should be broadly interpreted to protect the right to social assistance at a level that is sufficient to provide, at the very least, the basic necessities of life.[23] One variant of this argument relies on a disjunctive reading of s. 7 that protects a freestanding right to life, liberty, and security of the person. According to this interpretation, s. 7 imposes a positive obligation upon government to ensure that no one is without those goods and services necessary to survival. Hence, this right would be enforceable even in the absence of a government action that deprives someone of security of the person.[24] A second position contends that once a government has chosen to enact a welfare benefits scheme, it must do so in a manner consistent with security of the person and thus cannot reduce benefits below the level needed to secure the basic necessities of life.[25]

Lower courts have generally been unreceptive to these arguments. For example, in *Masse v. Ontario (Ministry of Community and Social Services)*, the complainants challenged the Ontario government's decision to reduce welfare benefits by 21.6 per cent.[26] They argued that the reduced welfare payments were insufficient to provide for the basic necessities of life and that this constituted a violation of the s. 7 right to security of the person. In finding against the claimants, the Ontario General Division Court held that s. 7 did not impose positive obligations on government and therefore there could be no s. 7 right to an adequate level of social assistance.

The Supreme Court of Canada has also had occasion to consider the question of whether s. 7 imposes positive obligations on government, but has not thus far provided a definitive answer. *Gosselin v. Quebec (Attorney General)* was a challenge to a Quebec program that provided for substantially reduced welfare benefits for persons under the age of thirty, unless they participated in job training, community work, or remedial education.[27] On behalf of 75,000 affected persons, Ms. Gosselin argued that the program constituted a violation of ss. 7 and 15 of the *Charter*. With respect to s. 7, she contended that welfare benefits of $170 per month were insufficient to provide for basic food, clothing and shelter, and that the benefit scheme therefore constituted a violation of the right to security of the person.

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21 Wax, *supra* note 16 at 275, and Patricia Evans, "Single Mothers and Ontario's Welfare Policy: Restructuring the Debate," in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 151-171; See also Another Look at Welfare Reform *supra* note 11, which details changing expectations with respect to mothers on social assistance.

22 *Charter*, *supra* note 1.

23 See e.g. Jackman, *supra* note 2; See also Porter, *supra* note 6; See also Arbour J.'s reasons in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 2002 SCC 84, [*Gosselin*].

24 See Arbour J.'s discussion of the textual interpretation of s. 7 in her dissenting reasons in *Gosselin*, *ibid*. at paras. 334-341.

25 Johnstone, *supra* note 5.

26 *Masse v. Ontario Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, 89 O.A.C. 81 (Ont. Ct. Gen Div.), leave to appeal to Ont. C.A. refused, (1996), 40 Admin. L.R. (2d) 87, leave to appeal to the S.C.C. refused, (1996), 39 C.R.R. (2d) 375 [*Masse*].

27 *Gosselin*, *supra* note 23.

Although Gosselin's s. 7 claim failed because the majority held that there was insufficient evidence to support it, it is important to recognize the Court's implicit acceptance of the legitimacy of a government choosing to define a particular class of persons as undeserving, in this case welfare recipients under thirty who did not participate in job training, community work, or education. However, the Court did not foreclose the possibility that s. 7 might in future be interpreted to impose positive obligations on government. In the majority's reasoning, Chief Justice McLachlin wrote:

> One day s. 7 may be interpreted to include positive obligations. … [T]he *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits". … [I]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. … The full impact of s. 7 will remain difficult to foresee and assess for a long while yet.[28]

Though the scope of s. 7 remains open, the Chief Justice's choice of words suggests that any recognition of a positive legal right to adequate social assistance benefits remains in the distant future. I argue that there will be no such recognition unless Canadians come to view poverty as primarily a product of systemic factors rather than individual choice.

SECTION 15

Subsection 15(1) of the *Charter* provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex age or mental or physical disability.[29]

Though s. 15 has been successfully used to challenge discriminatory treatment of social assistance recipients, courts have generally been unreceptive to the argument that poverty or receipt of social assistance itself constitutes a prohibited ground of discrimination.[30] Thus, s. 15 claims with respect to welfare rights are often linked to an enumerated ground, as in *Gosselin*, which unsuccessfully argued that payment of reduced benefits to persons under thirty constituted discrimination on the basis of age.[31] However, poverty rights advocates argue that s. 15 should provide a right to the basic necessities of life regardless of whether there is any link to an enumerated or analogous ground because poverty is itself an analogous ground that should be recognized as such. In the leading case on the interpretation of s. 15, *Law v. Canada (Minister of Employment and Immigration)*, Iacobucci J. stated the following with respect its purpose:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[32]

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28 *Ibid*. at para. 82.

29 *Charter*, *supra* note 1.

30 See *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 212 D.L.R. (4th) 633 (Ont. Div. Ct.); *Masse*, *supra note* 26; *Polewsky* v. *Home Hardware Stores Ltd.*, (2003), 229 D.L.R. (4th) 308 (Ont. Div. Ct.); See also *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493 (B.C.S.C).

31 *Gosselin*, supra note 23.

32 *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R.497, 170 D.L.R. (4th) 1 at para. 51 [*Law*].

Poverty rights advocates argue that in order for people to participate meaningfully in Canadian society, or to benefit from other Charter rights, they must have access to adequate income, food, shelter, education, and medical care.[33] Where people do not have the means to provide these themselves, the government's failure to do so is construed as a failure to treat them with the dignity and equal concern and respect that s. 15 demands.[34]

Thus, there are solid legal arguments in favour of finding that governments have positive obligations to provide adequate levels of welfare under ss. 7 and 15. However, these arguments rest upon an ideologically informed understanding of poverty that the courts must either reject or accept but can never explicitly confront. As I have argued above, one's position on welfare rights is affected by whether one views poverty as a product of social and economic circumstances or as attributable to choices taken by the individual, a largely political question. Legal arguments in favour of entrenched welfare rights and the court decisions that refuse to recognize them inevitably gloss over this ideological conflict.

Though unacceptable to welfare rights advocates, the political view that has thus far factored into the refusal to read positive rights into the *Charter* is the one most consistent with what is now the dominant view of the nature of poverty. It may also be one that is consciously consistent with democratic values, reflecting the Court's own sense that it does not have the mandate to read rights into the *Charter* that do not have democratic support.

EFFICACY OF ENTRENCHED WELFARE RIGHTS

The political nature of the debate over welfare rights affects not only the likelihood that the Court will recognize positive rights but also the role entrenched welfare rights could play if the courts were to recognize them. If the community does not perceive welfare as a right, it is doubtful that a court pronouncement on welfare rights could stop or reverse their erosion in the absence of a political movement back towards recognizing the social and structural causes of poverty.

There are several compelling reasons to believe that entrenched welfare rights could not play this role. In "The Error of Positive Rights", Frank Cross evaluates the efficacy of a hypothetical constitutional right to welfare in the United States and concludes that it would do little to address the needs of the poor.[35] He argues that it is futile to expect courts to aggressively enforce positive rights in a hostile political climate. He observes that courts are rarely radically out of step with public opinion or the other branches of government and identifies a number of possible reasons for this. First, courts may fear retaliation from Congress. Second, they may restrain themselves out of awareness that they have no power to ensure that their rulings are implemented and out of concern about the effects that legislative non-cooperation may have on their authority. Third, judges are embedded within the wider community and are therefore unlikely to depart significantly from strongly held public opinion.[36] For these reasons he concludes, quoting from Holmes and Sunstein, that "the level of protection welfare rights receive is determined politically, not judicially, whether such rights are officially constitutionalized or not".[37] Cross' arguments here depend on the premise that the political climate is hostile to the

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33 Jackman, *supra* note 2 at 243.

34 It is not clear that the *Law* framework can accommodate this argument. However, there is a compelling argument that government treatment that leaves some individuals without access to basic goods in an area in which a government has chosen to legislate (social assistance) is a violation of section 15 regardless of whether one can identify a comparator group that the law treats differently. See Sophia R. Moreau, "The Wrongs of Unequal Treatment" (2004) 54 U.T.L.J. 291.

35 Frank Cross, "The Error of Positive Rights" (2000-01) 48 UCLA L. Rev. 857.

36 *Ibid*. at 888.

37 *Ibid*. at 889, quoted from Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton & Co., 1999) at 121.

recognition of welfare rights. It could be suggested that Canadians are generally more receptive to social democratic principles and that his arguments therefore do not hold true for Canada. But if my arguments above regarding the shift toward neo-liberal ideology are sound, Cross' arguments will also be applicable in the Canadian context.

Cross goes on to address the potential consequences if the courts were to attempt to vigorously enforce welfare rights. He suspects that a conservative court would be unlikely to interpret positive rights to effect a redistribution of wealth in favour of the poor. He thinks it more likely that it would use positive rights to, for example, strike down minimum wage legislation or collective bargaining laws on the grounds that these lead to unemployment. He is no more optimistic about the outcome under a liberal judiciary. He doubts that judges, who tend to be even less representative of the electorate than legislators, would be sufficiently responsive to the needs of the poor. He also thinks that even if a liberal court were to attempt to advance welfare rights, there would be a significant risk of it doing more harm than good.[38] This is a variant of an argument often presented as a reason why the court should *not* read positive rights into the *Charter*–that courts are institutionally incapable of making the complex policy choices demanded by welfare programming.[39]

Finally, Cross argues that if the courts were to vigorously enforce welfare rights, there is risk of significant public backlash that would ultimately operate to cripple progressive court decisions. In short, if the public has a strong aversion to welfare rights, democratic pressures will prevent their realization. Gerald Rosenberg makes the same argument with respect to equality rights in the United States.[40] In a detailed analysis of whether the U.S. Supreme Court decisions in *Brown v. Board of Education* (*Brown*) played any significant causal role in the desegregation of American schools, he finds that ten years after the decisions, school districts in the Southern states had not taken any substantial steps toward desegregation.[41] He argues persuasively that the real trigger for desegregation was the *Civil Rights Act* passed ten years after the decision in *Brown* in 1964.[42] Rosenberg goes so far as to suggest that by stiffening the resistance of those opposed to desegregation, *Brown* may have even delayed the achievement of civil rights. This leads him to conclude that courts "can almost never be effective producers of significant social reform".[43]

Some might object that the analogy between racial segregation in the United States and poverty in Canada is inappropriate. Not only is neo-liberal aversion to welfare rights less entrenched than the racism behind opposition to equal rights for blacks in the United States, but the flagrant disregard for the decision in *Brown* seems foreign to us. Canadians and their governments have, on balance, been quite comfortable with judicial supremacy and activism with respect to *Charter* rights. However, welfare rights are different from the Court's other *Charter* work for at least two reasons. First, unlike equality or democratic rights, there is no democratic consensus that welfare rights should exist as enforceable legal rights. In this respect, welfare rights in Canada are more analogous to equality rights in the mid-twentieth century Southern states.

Second, welfare rights are different because they are positive rights. In a sense we perceive the state to be acting as our agent when dispensing benefits in a way that we do not with respect to negative rights (in which case we view it more like an adversary). This has important

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38 Cross, *supra* note 35 at 910-920.

39 See F. L. Morton and Rainer Knopff, *The Charter Revolution & the Court Party* (Peterborough: Broadview Press, 2000).

40 Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

41 *Ibid*. at 52; *Brown v. Board of Education*, 347, U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955).

42 *Civil Rights Act of 1964*, 42 U.S.C. §2004 (1964).

43 Rosenberg, *supra* note 40 at 199.

ramifications for the strength of feeling with which we respond to court decisions that do not accord with our own sense of what governments' obligations should be. Moreover, this identification with the state with respect to positive rights probably reinforces the sense that positive rights should entail corresponding obligations on welfare recipients.

For these reasons, it is at least possible that government and public reaction would be similar in principle to the reactions (or non-action) provoked by *Brown*. Recognition of this possibility reinforces the point that a robust welfare state ultimately depends on democratic approval. And to the extent that neo-liberal ideology is responsible for the welfare state's decline, a robust welfare state also depends on reversing that ideological trend. Unless that happens, there is little to be gained from court recognition of a right to state support.

IMPLICATIONS FOR WELFARE RIGHTS LITIGATION

The failure to attend to deeper political and philosophical conflicts in the welfare rights debate causes a sense of disorientation when considering the literature on social and economic rights because those on either side of the debate often do not appear to be engaged in the same conversation. Those who oppose *Charter* protection of these rights base their argument on the grounds of democracy and institutional competence. Those who argue in favour base their claims on deductive reasoning from *Charter* jurisprudence and Canada's international human rights commitments. Both sets of claims are internally coherent, yet they are irreconcilable because they proceed from different assumptions about the nature of poverty. Once we recognize the battle over welfare rights as deeply political, we can see that it is not the role of the courts to resolve the battle by challenging the political consensus.

Even if the courts were to interpret the *Charter* to include welfare rights, in the absence of democratic support welfare rights are unlikely to result in substantial improvement in social programs. It is therefore critical to reassess the value of attempting to realize welfare rights through litigation.

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

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CITED: (2007) 12 Appeal 10-38

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-

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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://californialawyermagazine.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

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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.

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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 personnel[38]

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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 pay[39] 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

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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 Mangers: 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 hiring 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"

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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]

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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.

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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, In.,* [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, In.,* [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-

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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]

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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.nlrb.gov/nlrb/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* action[116] 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

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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

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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 takes 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.

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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 (Berkley: 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] Quebec[141] 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

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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;

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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=storefinderResult&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

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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

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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-

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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. Bhadauria*, [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]

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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' *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-

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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

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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

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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.

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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]

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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> [*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.

IF YOU GO DOWN TO THE WOODS TODAY, ARE YOU IN FOR A BIG SURPRISE?

John Heaney, University of Victoria - Faculty of Law
In the ten years prior to entering UVic law school, John Heaney worked for the B.C. government, the final two as a deputy minister to the Premier. He is currently articling with Arvay Finlay Barristers.

CITED: (2007) 12 Appeal 39-47

INTRODUCTION

More people died harvesting British Columbia's forests in 2005 than in any previous year on record. The year also saw the highest number of compensation awards to forest workers for serious injuries since the provincial worker compensation scheme was established in 1917.

While stakeholders offer a variety of explanations for the record number of fatalities and injuries, all agree that a contributing factor has been the recent transformation of the legal working relationship in the forestry industry. Faced with immense economic pressure occasioned by significant market changes and public demands for greater environmental integrity, most major forest companies have responded by shedding almost all of their woodland employees over the past two decades and replacing them with independent contractors.

Of the 7,000 firms engaged in the timber harvest and related work, more than 95 per cent are small businesses with fewer than twenty employees and almost half are sole proprietorships or one-person corporations. These independent contractors now stand in the shoes of their former employers. They have the greatest responsibility for compliance with safety regulations, and they are now paying the compensation fund premiums to WorkSafeBC that their bosses used to pay.

This paper opens with a statistical picture of the forestry sector and forest worker safety over the past decade. It considers changes in the legal relations between the principal parties and their changing relationship with the law of workplace safety and the economics of accident compensation.

While there is likely no consensus on whether reorganization is the cause of B.C.'s deadliest year in the woods, the provincial safety and compensation regulator appears to acknowledge that a problem exists. A relatively recent WorkSafeBC guideline appears to be designed to allow regulators to interpret B.C. legislation—enacted as it is on the foundation of the employer–employee relationship—in a way that makes licensees[1] as responsible for safety as they were when they actually had woodlands employees working directly for them. Whether WorkSafeBC's Guideline 26.2.1 can bridge that gap, or whether B.C.'s current legislation regulates an industry that no longer exists, is the question at hand.

1 The terms licensee, major forest company and integrated company refer to the large companies holding timber tenures and other harvesting rights who traditionally harvested and processed the bulk of B.C.'s forestry resources.

NATURE AND EXTENT OF THE PROBLEM

The past sixty years have seen major changes in work relationships in B.C. forest harvest operations. Worker tenure has shifted from employment with large firms to either employment with very small firms or, for many, self-employment as a subcontractor. A brief demography of this increasingly atomized industry is a useful introduction to its safety record over the past decade.[2]

According to a 2004 report by the government-appointed Forest Safety Task Force, the roughly 90,000 people who work in B.C. forestry are almost equally divided by the size of the firm that employs them. Roughly 45,000 people work with one of 6,800 small firms employing less than twenty people, while the other 45,000 work for 200 medium and large firms employing twenty people or more.

Of the 45,000 people in small firms, almost all are in woodlands operations, as opposed to the manufacture of forest products, management or related services. About 2700 are one-person corporations or sole proprietorships operated by fallers that constitute almost half of the 6800 small firms. The other 3900 include one-person firms involved in log hauling and forest management, as well as multiple-employee firms of two to nineteen people in forest management, road construction, log hauling and silviculture. The 200 medium and large firms work almost exclusively in the forest product sector, in areas such as lumber, finished products, pulp, and to a lesser extent, paper.

As seen in Figure 1,[3] the record forty-three deaths and 113 serious injuries in 2005 were preceded by two years in which deaths and serious injuries among forest workers declined. However, taking into account the entire past decade, it is the relatively safe results in 2003 and 2004 that are the anomaly—they are the only two years in which fewer than twenty people involved in timber harvesting died on the job.[4]

Figure 1 also presents the results of dividing the number of forestry deaths and serious injuries in each year by the amount of timber the B.C. government reported harvested in that year. The number of deaths does not appear to have an exceptionally strong correlation to the volume harvested—there is a range of over 100 per cent between the lowest and highest values for deaths per unit in the most recent five years. However, the year-to-year changes between the absolute number of deaths and the deaths per volume harvested correlate fairly closely. The number of serious injuries in any year appears to be more closely correlated to the volume harvested, with a smaller range of variance between years with low and high numbers of injuries per volume harvested.[5]

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2 All industry composition figures are presented in or derived from British Columbia, Forest Safety Task Force, *A Report and Action Plan to Eliminate Deaths and Serious Injuries in British Columbia's Forests* (January 2004), online: Forest and Range – Province of British Columbia <http://www.for.gov.bc.ca/bcts/safety/Forest_Safety_Task_Force_Final_Report.pdf> [*Task Force Report*].

3 For the purposes of statistical analysis, the terms forestry, forestry workers, and logging or harvest operations all refer to the people and the process involved when trees are cut, "bucked" (where limbs, rot, other growth removed and cut to size and stacked in preparation for transport), "skidded" to a marshalling point and "hauled" by logging trucks to either a sorting area, a plant where they will be processed or to a point where they will be "boomed" for transport by river to their next destination. While these statistics also reflect fatalities and injuries among other forestry workers involved in "silviculture" (the replanting and tending of new timber stands) or "integrated forest management" (everything from planning logging operations to engineering and constructing logging roads), workers in these areas make up a far smaller percentage of killed or injured forest workers than those in tree falling and other harvest operations.

4 *Task Force Report*, *supra* note 2 at 26.

5 There are a number of possible explanations for why changes in deaths and injuries do not correlate more closely with changes in harvest volumes more closely, including different climatic conditions year to year, shifts in the proportion of harvest work done by people or machines based on market or topographical conditions, and shifts in the proportion of harvest coming from different regions of the province caused by market and international trade conditions.

FIGURE 1
B.C. FORESTRY WORKERS FATALITIES AND SERIOUS INJURIES (2001-2005)

	2000	2001	2002	2003	2004	2005
Fatalities						
Fatalities	21	28	25	15	12	43
Fatalities/Harvest*	.28	.36	.35	.21	.15	N/A
F. Δ% prior year		*+33*	*-11*	*-40*	*-20*	*+158*
F./H. Δ% prior year		+29	-2	-40	-29	N/A
Serious Injuries						
Serious Injuries	94	100	106	80	110	113
Serious Injuries/Harvest*	1.25	1.30	1.48	1.13	1.37	N/A
S.I. Δ% prior year		*+7*	*+6*	*-25*	*+38*	*+3*
S.I./H. Δ% prior year		+4	+14	-24	+21	N/A

* per million cubic metres - Crown and private land

Source: WorkSafeBC "Forest Industry Statistics", BC Forest Safety Council "Serious Injury and Fatality Statistics, 2005"; B.C. Ministry of Forests "2006/07-2008/09 Service Plan: Annual Timber Harvest Crown and Private Land".

Some forest industry workers are more likely to die on the job than others, including those on B.C.'s coast, those in logging and those working for themselves or for small companies. For example, coastal operations (north coast of the mainland and Vancouver Island) resulted in 62 per cent of work-related fatalities in B.C. woods since 1973, while historically cutting 30–35 per cent of the annual harvest.[6] Loggers accounted for 53 per cent of all deaths in 2001 and 2002, with only 15 per cent of deaths attributed to log hauling and 25 per cent to other logging, silviculture, and forest management activities.[7] The number of combined death and injury claims for woodlands workers is proportionately three times greater than their share of all forest industry jobs, and the dollar value of compensation claims paid to loggers four times greater.[8] Finally, two-thirds of those who died in the forest industry worked for small enterprises,[9] either as independent operators or as employees of firms with fewer than twenty employees.

WorkSafeBC, the successor to the B.C. Workers Compensation Board, reports that overall the forest may be a safer place to work than in the past, at least in terms of a forest worker's likelihood of being injured on the job. According to the agency, overall injury claims per 100 person-years fell by 50 per cent between 1993 and 2002.[10]

However, this assessment obscures the fact that 2005 saw the highest number of serious injury claims in history, and the risk of being *seriously* injured in the woods appears to be on the increase. The most recent statistics indicate that the number of serious injuries per 1,000 person-years rose by 23 per cent between 1998 and 2000.[11] As well, the number of non-serious injury claims is likely being suppressed by legal changes which require loggers to pay their own WorkSafeBC premiums, making loggers less likely to make a claim and more likely to go

6 *Task Force Report*, *supra* note 2 at 26; British Columbia, Ministry of Forests, *Budget 2006: Ministry of Forests and Range and Minister Responsible for Housing - 2006/07-2008/09 Service Plan* online: British Columbia Budgets <http://www.bcbudget.gov.bc.ca/2006/sp/for/for.pdf>.

7 *Task Force Report*, *supra* note 2 at 27.

8 *Task Force Report*, *supra* note 2 at 27.

9 *Task Force Report*, *supra* note 2 at 24.

10 *Task Force Report*, *supra* note 2 at 24.

11 *Task Force Report*, *supra* note 2 at 25.

to work injured and unsafe.[12] As with fatalities, two-thirds of seriously injured workers work for themselves or small companies.

Forestry workers not only appear to face an increasing risk of death or serious injury on the job, but their jobs are significantly more dangerous than other jobs in B.C., including those already considered to be high risk. From 1998 to 2002 forest workers were not only ten times more likely to die on the job than all other B.C. workers, but their risk of dying was three times greater than that of workers in other high risk sectors, including construction, wood and paper manufacturing and heavy manufacturing.[13] In the same period, woodlands workers were twice as likely to sustain a serious injury as workers in other high-risk sectors, and in 2002 they were 2.5 times more likely to sustain any injury than all other B.C. workers.

B.C. forest workers also appear to be at significantly greater risk than their counterparts in other jurisdictions. From 1998 to 2001, B.C. had ten times more logging and forestry fatalities than Alberta while harvesting just four times as much timber.[14] The recent B.C. task force on forest safety did not compare B.C.'s current harvest volumes with those of our neighbours in Washington and Oregon, but it did find that, compared to these areas "similar in terrain and timber", B.C. had almost five times as many fatalities as Washington and more than three times as many as Oregon.[15]

LEGAL TRANSFORMATION

While innumerable explanations have been offered for what clearly appears to be a worsening safety record in B.C.'s forests, two trends have been identified as particularly significant. In January 2004, the provincial government received *A Report and Action Plan to Eliminate Deaths and Serious Injuries in British Columbia's Forests* ("*Task Force* Report") from the Forest Safety Task Force it had appointed in the previous year. The Task Force stated that important causes of deaths and injuries include the shift of forest workers from direct employment with licensees and large contractors to a "proliferation of smaller firms and independent owner-operators"[16]—with a concomitant shift of the safety burden from licensees to contractors—as well as economic pressure for "greater productivity and efficiency" which may "colour how employers and senior management answer questions with safety implications".[17]

The legal relations between the major players in forestry operations have evolved from the Company Model (1940s to mid-1980s) to the Major Contractor Model (1980s to mid-1990s) to the Independent Operator Model, under which the most dangerous work in B.C. has been organized since the mid 1990s.[18] The summaries below indicate some of the most important legal rights of workers under each model, as well as the parties' duties to others and to the law.

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12 Western Fallers Association, *A Report on Contributing Factors to Faller Accidents in British Columbia and What Must Be Done to Bring Them Down – A View From The Field* (August 2005), online: Ministry of Forests and Range <http://www.for.gov.bc.ca/bcts/safety/Western_Fallers_Association_Report.pdf> at 51.

13 *Task Force Report*, *supra* note 2 at 26.

14 Alberta, Department of Environment, *State of the Environment – Land* (June 2005), online: Alberta Government <http://www3.gov.ab.ca/env/soe/land_indicators/35_timber_harvest.html>.

15 *Task Force Report*, *supra* note 2 at 28.

16 *Task Force Report*, *supra* note 2 at 32.

17 *Task Force Report*, *supra* note 2 at 33. The Western Fallers' Association ("WFA"), an organization representing subcontractors, pointedly placed the bulk of the responsibility at the feet of licensees and contractors who, according to the WFA, push production past the bounds of safety with an economically insecure workforce stripped of legal protections.

18 Evolution and rough timeline from Western Fallers Association, *supra* note 12.

COMPANY MODEL

For the first forty years of the heavy industrialization of B.C.'s forest sector, large companies harvested pursuant to timber licences granted to them by the provincial government. The licensees were "integrated", in that they both harvested timber and owned and operated the mills that converted raw logs into wood products, pulp and to a lesser extent paper. Provincial legislation placed significant restrictions on the export of raw logs and required companies that wanted to harvest provincial timber to maintain processing facilities appurtenant to the source of public timber. The large capital investment needed to qualify for harvesting rights virtually assured that B.C.'s forest sector would be dominated by a few large companies.

As a consequence of directly employing the vast majority of workers who harvested timber, the integrated companies had common law duties to forest workers as well as statutory duties under the *Employment Standards Act* (*"ESA"*),[19] *Workers' Compensation Act* (*"WCA"*), and the *Labour Relations Code* (*"LRC"*).[20] This direct employment relationship afforded forest workers a measure of protection against some of the causes of workplace injuries and fatalities by regulating the maximum hours employees could be required to work and maintaining a minimum wage per hour or piece; by protecting workers from disciplinary action if they refused to do unsafe work or alerted provincial regulators to unsafe worksites; and by requiring employers to pay into a fund to compensate injured workers in such a way that premiums roughly reflected the company's safety history. Unionized workers also had a legal right to strike if the action was required to protect their health and safety.

MAJOR CONTRACTOR MODEL

It was likely in response to the economic recession and weak commodity prices British Columbia experienced in the mid 1980s that major forest companies began to devolve their harvest operations to logging contractors. Over the course of a decade, the vast majority of forest workers saw their employment shift from the licensees to large logging companies contracted to run the licensees' woodlands operations. Forestry workers continued to be in an employer-employee relationship, though many lost collective bargaining rights as the contractor operations—initially subject to successor provisions in the *Industrial Relations Act*—were decertified.

The essential difference between the first two models is that the licensees were no longer in an employment relationship with woodlands workers as virtually all companies had contracted out their harvesting, hauling, and silviculture operations. Licensees were no longer required to pay compensation fund premiums for these workers. While not entirely immune from the impact woodlands accidents had on premium assessments, as the safety record in the woods had an indirect effect on premiums for wood product operations, licensees no longer suffered a direct financial penalty when fatality and injury claims pushed up compensation premiums for that sector.

INDEPENDENT OPERATOR MODEL

Over the past decade, large forest companies have further removed themselves from woodlands workers and in doing so from legal responsibilities for ensuring a safe workplace and the financial consequences of workplace accidents. At the same time their large logging contractors have also moved to strip themselves of employer responsibilities by requiring forestry workers to accept a new form of tenure as independent subcontractors. In today's forestry op-

19 *Employment Standards Act,* R.S.B.C., c. 113, s. 1.

20 *Labour Relations Code* R.S.B.C. c. 244, s. 1.

erations, most integrated companies contract for harvest operations with a prime contractor, a firm comparable to the large logging contractors of the previous decade. Rather than supplying all of the workers necessary for forestry operations, the prime contractor today contracts with a number of smaller contractors for each of the tasks involved including falling, hauling, engineering, and silviculture. Falling contractors themselves enter into personal services contracts with individual falling subcontractors, who are now required to operate as small corporations or sole proprietorships.

Individual forest workers are now three steps removed from companies that hold the bulk of the harvesting rights in the province, and with whom the provincial government arguably has the greatest leverage and influence. Responsibility for safety is legally divided and diffused among four different "employers", including the individual subcontractor and the top three levels of the chain. The licensees, prime contractors and falling contractors predominantly employ supervisors and contract managers. They have few woodlands workers for whom they must pay compensation premiums and for whose safety they are directly responsible.

One interesting consequence of the new model is that the statutory safety responsibilities of a greater proportion of people performing or directing work in the woods flow from their status as *employers*, not as employees. While the duties of employers are largely aimed at the planning and policy level, employee duties for their own safety and that of others are more detailed and directive.[21] Ironically, even though more people in the workplace are higher up on the *WCA* chain of authority, there are fewer who are subject to explicit requirements for their conduct and job performance.

Finally, and likely the most important difference in the new model is that without an employer, front-line workers no longer enjoy statutory protections that would allow them to refuse to do unsafe work. They cannot strike in the face of an unsafe workplace as they could if they were covered by a collective agreement. They are not protected against discipline or discrimination for refusing to do unsafe work, or for exercising their legal rights as they would be even in a non-union employment situation.

To gain a level of protection comparable to that enjoyed by employees, subcontractors would have to explicitly contract for such provisions with falling contractors.[22] This may be impossible for contractors to achieve on an individual basis. There is no evidence that such provisions exist in logging contracts today.

Even if subcontractors were able to achieve such contract language, they would likely have difficulty enforcing their contractual rights. If, for example, a falling contractor sent a subcontractor home for refusing to do unsafe work, the expense and time involved in pursuing a private law claim might dissuade the subcontractor from starting an action. Furthermore, the effect on their reputation and on the likelihood of securing more contracts would almost certainly be sufficient disincentive.

WORKSAFEBC RESPONDS

Guideline 26.2-1 is the Province's only legal initiative since the Task Force. It appears to be aimed at correcting the regulatory "underlap" that exists due to the disconnect between the current Independent Contractor Model and the regulatory regime built on the employer–employee relationship. The Guideline interprets the *WCA* and the *OH&S Regulation* to mean that licensees still have significant responsibilities for forest worker safety, but is that interpretation accurate?

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21 Compare *Workers Compensation* Act, R.S.B.C. 1996, c. 492, ss. 116 & 117 [*WCA*].

22 Or, for example, a provision that a demand to do work contrary to legislation and standards constituted *force majeure*.

The Guideline first attempts to bring licensees within the ambit of section 115 of the *WCA* and purports to impose the same duties on licensees that the provision imposes on an "employer". Those duties include ensuring the safety of an employer's workers and the safety of "any other workers" at a workplace where the employer's "work" is being carried out.[23] This is problematic as the licensee has no employees at this workplace. Thus, it is highly unlikely that any falling subcontractors in the woods would come under this umbrella.

The Guideline also states, without further elaboration, that "the entire range of activities relating to timber harvesting … should be viewed as the licensee's work".[24] By this, WorkSafeBC attempts to create a duty by establishing that all harvesting is by law the licensee's "work", even if the licensee has no employees present. A closer reading of the Guideline suggests that WorkSafeBC is uncertain if it can enforce this proposition. After asserting that the entire range of harvesting activities is the licensee's work, the Guideline goes on to say that harvesting should also be viewed as the main and falling contractors' work as well as the subcontractor's work. How can the Guideline possibly impose a duty on licensees while diffusing ownership of the work among three or four parties?

Next, the Guideline posits two additional ways of attaching safety duties to licensees. It states that a licensee is an "owner" of the workplace (though admittedly a co-owner along with the Crown) by operation of the *WCA* definition which broadens the normal meaning of the word "owner" to include a "licensee or occupier of lands" that are used as a workplace.[25] However, as might be expected, the safety duties required of a licensee as "owner" of the lands are not the same as those that of a licensee as an employer or site operator.

The "owner" duties only appear to arise when the licensee has knowledge that health and safety may be compromised by the "condition or use of the workplace".[26] The only example provided in the Guideline, hazards created by inadequate construction or maintenance of logging roads, speaks of the owner's duty as one related to the state of the land, and not the pace and safety of the work.

The Guideline finally states that licensees have a duty to coordinate all health and safety activities, and ultimate responsibility to "do everything that is reasonably practicable" to maintain a system that ensures compliance with the law. It does this by first deeming licensees to be the "prime contractor[s]" in forest workplaces, and then by applying the *WCA* provisions on workplaces with multiple employers.[27] Unfortunately, the Guideline has only its earlier contortions to build upon as it tries to construct *this* licensee duty.

Section 118 of the *WCA*, which applies to workplaces where the employees of two or more employers work, puts the responsibility for safety on the shoulders of a single firm designated as the prime contractor. Since practically every faller working in the forest is legally an employer, the first condition—that there be more than one employer at the workplace—appears easy to satisfy. However, making a licensee responsible through designation as the prime contractor is suspect. When interpreting section 115 earlier, the Guideline did not establish that the licensee was, by law, an *employer* at the workplace, but rather that the harvesting was the licensee's "work". This "work" concept does not appear in section 118.

Section 118 also provides that the prime contractor is the person who explicitly contracts

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23 *WCA*, *supra* note 21, s. 115.

24 British Columbia, WorkSafeBC, *Guidelines Part 26 – Inspections and investigations with respect to forestry operations*, online: WorkSafe BC <http://www2.worksafebc.com/publications/OHSRegulation/GuidelinePart26.asp#SectionNumber:G26.2>, [G-26.2-1] at 2.

25 *WCA*, *supra* note 21, s. 106.

26 G-26.2-1, *supra* note 24.

27 *WCA*, *supra* note 21, s. 118.

with the owner of the workplace to be the prime contractor for the purposes of the *WCA*, or, in the absence of such contract, the owner is the prime contractor. One assumes that if it is the practice of licensees to contract with the Crown to be a *WCA* prime contractor at the time they are granted harvesting rights, Guideline 26.2-1 would cite that practice. This means that the licensee's prime contractor duties arise only insofar as the licensee is the "owner" of Crown land through its licence to occupy it. This raises the question of whether the duties, if they arise at all, would apply only on land-based tenures, such as a Tree Farms Licence, and would not apply where numerous companies possess a non-tenure right to harvest from the same lands under, for example, a Timber Sales Agreement.[28]

It appears that the provincial regulator's sole legal response to the deaths and serious injuries in B.C. forests may have no teeth. Perhaps it was not intended to bring about significant change, created as it was in reaction to the *Task Force Report*. The Western Fallers report counted Guideline 26.2-1 as one of the legal measures WorkSafeBC fails to enforce. This assertion appears to be accurate. An exhaustive review of the WorkSafeBC website does not reveal a single example of the Guideline being cited or used to make licensees liable for workplace safety since the Guideline's publication in February 2005.

Perhaps it doesn't matter that the Guideline has no teeth and is not being enforced. Short of being subject to explicit statutory duties enforced with stiff financial penalties, and to legal requirements to pay premiums based on the claims experience for the forestry work done in its name, is any licensee likely to invest the dollars necessary to significantly reduce the number of deaths and serious injuries in the woods?

The legislature could actually do what WorkSafeBC's new Guideline purports to do by amending the *WCA* to make it clear that licensees bear the general duty for safety planning and for regulatory compliance in the woods. A December 2006 coroner's report on a forest fatality made twenty-two forest safety recommendations, including a recommendation to the provincial government "that the language and definitions of the *Worker's Compensation Act* as it relates to owners and timber tenure licensees, supervisors and prime contractors be clarified to address the specified issues of the forest industry".[29] In the minds of the coroner's jury, Guideline 26.2-1 apparently does not bridge the legal gap that has emerged between licensees and workers in the past two decades.

To give legal effect to the Guideline's alleged purpose would also require that the *WCA* be amended to create a financial incentive for licensees to carry out safety responsibilities diligently. This would include requiring them to contribute premiums to the compensation fund in proportion to the people working in areas licensed to them, and varying their assessments based on the claims experience there. This would also have the salutary effect of enabling WorkSafeBC to reduce or eliminate contractor and subcontractor premiums.

The more assessments reflect the claims experience across the sector, and not just the claims of one subcontractor, the easier it will be for subcontractors to make minor injury claims and to avoid unsafe work. Alternatively, or in addition, the *WCA* could be amended to keep contractor and subcontractor premiums at the current level, and create a STIIP-like benefit for all independent operators, administered by WorkSafe BC and funded by contributions to the fund.

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28 See *Forest Act*, R.S.B.C 1996 c. 157, Part 3.

29 *Findings and Recommendations as a Result of the Inquest into the Death of Gramlich, Theodore (Ted) Joseph*, (BC Coroner's Service, December 2006), reprinted in *BC Forest Safety Council's response to the recommendations directed to the Council by the Coroner's Gramlich Inquest*, App. A. at 6–9, online: BC Forest Safety Council <http://www.bcforestsafe.org/content-nav-alerts/alerts-07-01-01-gram_response.pdf>.

CONCLUSION

It may take a number of years to determine if the forty-three work-related deaths and 113 serious injuries that occurred in B.C.'s forests last year were a statistical blip or a new plateau, but it is clear already that such a record is unacceptable. The dangerous nature of timber harvesting is not the issue. It is unconscionable that a job essential to the process of converting public resources into huge wealth remains five to ten times more dangerous than jobs in poorer industries. While better training is an irreplaceable part of protecting lives and limbs, our collective commitment to workers must include accepting a little less wealth as the price of a lot less carnage. Forest workers, like all workers, have a right to as safe a workplace as can reasonably be provided.

The publishing of guidelines claiming that the law does something it does not will not improve the safety record. The law should be amended so that those with the greatest reward from timber harvesting bear the greatest responsibility and have the greatest economic incentive to ensure the safety of those who generate the wealth. The law should ensure that everyone who faces danger working in the forestry industry is able to work at a safe pace, and to refuse to do unsafe work without fear of discipline or economic loss, irrespective of the particular tenure of their employment.

CHILDREN'S VOICES IN ACCESS AND CUSTODY DECISIONS:
THE NEED TO RECONCEPTUALIZE RIGHTS AND EFFECT TRANSFORMATIVE CHANGE

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CITED: (2007) 12 Appeal 48-72

> *"Well, obviously it's just stupid not to ask the kids because the whole thing is about the kids. The whole thing".*
>
> – Belinda, 16 years old [1]

> *"Children speak in a highly distinctive voice, if we dare listen".*[2]

INTRODUCTION

Custody and access decisions have a profound effect on children's lives, and consequently both B.C. and federal statutes direct courts to make custody and access determinations according to the best interests of the child. The B.C. family law system superficially appears child-centric, primarily concerned with the protection and promotion of children's interests during familial breakdown. However, the legal system currently fails to ensure that children have an opportunity to participate meaningfully in custody and access decisions. By neither encouraging nor valuing their voices, the family law system marginalizes and excludes children, contrary to their best interests.

The B.C. family law system cannot achieve "true and complete justice"[3] without meaningful inclusion of children's voices in judicial processes. Achieving such meaningful inclusion requires both the creation of opportunities for children to share their concerns, feelings and interests and a transformative change to the family law system so that children's views can be

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1 Megan Gollop, Nicola Taylor & Anne Smith, "Children's perspectives of their parents' separation" in Anne Smith, Nicola Taylor & Megan Gollop eds., Children's Voices: Research, Policy and Practices (Auckland: Pearson Education New Zealand Limited, 2000) 134 at 155 [Gollop *et al*.].

2 Barbara Woodhouse, "Hatching the Egg: A Child-Centered Perspective on Parents' Rights" (1993) 14 Cardozo L. Rev. 1747 at 1783 [Woodhouse, "Hatching the Egg"].

3 Justice Claire L'Heureux-Dubé, "Children and the Law: Voices Unheard" in *Supreme Court of Canada: Seventh International Appellate Judges Conference and Sixth Commonwealth Chief Justices Conference,* (Ottawa: Minister of Public Works and Government Services, 1996) 135 at 137.

heard. Hearing children demands two fundamental changes. First, it requires that those tasked with listening to children have the training and experience to understand what children say. Second, hearing what children say necessitates valuing a broader array of interests. Children speak in terms of relationships, interdependence and care, and the legal system is unable to hear them so long as it continues to give priority to abstract, individualistic rights.

Although I focus specifically on B.C.'s legislative and judicial context, my argument draws upon literature from Canada, the United States, England, and New Zealand, given that the problem of children's exclusion from meaningful participation in custody and access decisions extends beyond B.C. borders. It stems more broadly from liberal ideology that values autonomous and rational citizens, and promotes and protects the rights the individual. I argue that without reconceptualizing the dominant rights framework, the family law system will be unable to serve children's best interests.

Part I of this article outlines the nature and extent of the problem of children's exclusion, demonstrating that the family law system serves and protects adult priorities at the expense of children's interests. Part II provides several justifications for the inclusion of children's voices and participation in custody and access decisions, concluding with the assertion that although rights are the means to protect and advance children's claims, the dominant rights discourse necessarily excludes children from its ambit. Without reconceptualizing the dominant rights framework, the inclusion of children in the family law system will, at best, be marginal and, at worst, damaging to children and their families. Part III offers a reconceptualization of rights that emphasizes interdependent relationships and caregiving. Part IV discusses how a new conception of rights demands transformative change to the family law system and provides some suggestions in this regard. Part V presents concluding remarks, reiterating why it is important to listen to children in custody and access determinations, and summarizes the transformative change that is required in order to hear what children have to say.

PART I –The Problem of Children's Exclusion

CHILDREN'S VOICES IN B.C. FAMILY LAW PROCEEDINGS

In Canada, custody and access proceedings are subject to concurrent federal and provincial legislation. Married couples can opt to have either the federal *Divorce Act* ("*DA*") or the B.C. *Family Relations Act* ("*FRA*") apply to custody and access determinations on marital breakdown; whereas, common law partners are restricted to the application of the *FRA*.[4] Section 24(1) of the *FRA* makes the best interests of the child the paramount consideration in custody and access decisions.[5] In determining the child's best interests, the court is not obliged to consider the views of the child and will only do so where it is "appropriate",[6] although the *FRA* provides no guidance as to precisely when it is appropriate to hear children's views. Under the *DA*, the court must *only* take into consideration the best interests of the child "as determined by reference to the condition, means, needs and other circumstances of the child".[7] However,

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4 *Divorce Act*, R.S.C., c. 3 (2nd Supp.) [*DA*]. Subsection 2(1) defines spouse as either of two persons who are married to each other. Subsection 16(1) permits a court of competent jurisdiction to make custody and access decisions on application of either or both spouses; *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*]. Subsection 1(1) defines a spouse as a person who is married to another or, for the purposes of custody and access decisions, a person who has been living in a marriage-like relationship with another for two years.

5 *FRA*, *ibid.,* s. 24(1). In determining the best interests of the child the court must consider the following factors: the health and emotional well being of the child including any special needs for care and treatment; if appropriate, the views of the child; the love, affection and similar ties that exist between the child and other persons; education and training for the child; and the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

6 *ibid*., s. 24(1)(b).

7 *DA*, *supra* note 4, s. 16(8).

the *DA* makes no reference to the need to consider children's views in determining what is in their best interest.

Because the legislation does not demand that judges consider and attach weight to children's views, these views may not be heard, or if heard, may not be accorded much, if any, significance. The jurisprudence indicates that courts must consider children's views in three situations: when a material change in circumstances, such as relocation, warrants a variation of an initial custody and access order;[8] in an initial custody and access application where the custodial parent intends to relocate;[9] and if the child is a teenager.[10] In all of these situations, judges use their subjective discretion to decide how they should ascertain children's views and what weight they should attach to them. In the case of teenagers (ages thirteen to eighteen), courts have held that for a custody order to be practical, it must reasonably conform to the teenager's wishes,[11] concluding that there is high risk that a teen will simply not comply with an order that is contrary to his or her wishes. Because it is a matter of discretion as to whether the court will take the views of those children yet to reach their teens into account, only some of these children are able to make their views known and have them considered. Generally, courts are unlikely to consider the views of children aged twelve and under as a determinative factor in custody and access decisions.[12]

In B.C., the court can ascertain children's views in two main ways: legal representation and judicial interviews. The literature and case law frequently refer to three key models of legal representation for children: an *amicus curiae*, who is a neutral officer of the court responsible for ensuring that all relevant information is brought before the judge; a litigation guardian who is appointed to present his or her determination of the child's best interests; and a child advocate who presents and advances the child's wishes and concerns.[13] Additionally, on the court's recommendation, the Attorney General can appoint a lawyer to be a family advocate.[14] Children are not the family advocate's clients; rather the family advocate acts more like a litigation guardian who determines and advances children's best interests.[15] In B.C., superior courts can, through their *parens patriae* jurisdiction, appoint an *amicus curiae*, litigation guardian or child advocate, or recommend that the Attorney General appoint a family advocate.[16]

Judicial interviews provide another method of determining children's views, although the effectiveness of this method is questionable. In *L.E.G. v. A.G.* ("*L.E.G.*"), Martinson J. acknowledges the limitations of judicial interviews as a means to ascertain and serve children's best interests: judges are not trained to interview children in a manner that allows them to assess a child's real wishes; judges lack knowledge of childhood development; they may not be able to

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8 *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

9 *Nunweiler v. Nunweiler*, 2000 BCCA 300.

10 *O' Connell v. McIndoe* (1998), 56 B.C.L.R. (3d) 292 (B.C.C.A.) [*O'Connell*]; *Borgstrom v. Borgstrom*, 2004 BCSC 605 [*Borgstrom*]; *Shanmugarajah v. Shanmugam*, 2005 BCSC 286 [*Shanmugarajah*] .

11 *O'Connell, ibid.* at para. 13; *Shanmugarajah, ibid.* at para. 30; *Borgstrom, ibid*. at paras. 72-77; *L.R.H. v. A.K.H*., 2003 BCSC 1201 at para. 105.

12 See the following cases as examples of judicial discretion leading to divergent results as to whether or not judges seek children's views and if so, what weight, if any, they attach to them: *S.E.D. v. G.S.D*., 2002 BCSC 373; *Sam v. August*, [1998] B.C.J. No. 2879 (B.C.S.C.); *Knitsch v. Knitsch*, [1995] B.C.J. No. 1577 (B.C.S.C.); *Jespersen v. Jespersen* (1985), 48 R.F.L. (2d) 193 (B.C.C.A.); *Innes v. Innes*, 2005 BCSC 771; *Alexander v. Alexander*, (1986), 3 R.F.L. (3d) 408 (B.C.C.A); *C.H.J. v. C.D.J*., 2004 BCSC 692; *Vedo v. Vedo*, [1994] B.C.J. No. 46 (B.C.S.C.); *J.L.S. v. K.J.S*., 2003 BCSC 161; *Tomlin v. Tomlin* (1992), 69 B.C.L.R. (2d) 363 (B.C.S.C.).

13 These three models are summarized well in *Dormer v. Thomas* (1999), 65 B.C.L.R. (3d) 290 (B.C.S.C.) at paras. 44-45 [*Dormer*]; see also Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings* online: Department of Justice Canada <http://dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf> at 2.4.

14 *FRA*, *supra* note 4, s. 2(1).

15 *Gareau v. Supt. of Family and Child Services for British Columbia et al.* (1986), 2 B.C.L.R. (2d) 268 at 271; *Dormer, supra* note 13 at paras. 50, 51.

16 *Dormer, ibid.* at para. 52.

obtain accurate information in one short meeting; and being interviewed in chambers may be a formidable and inherently stressful experience for children.[17]

Although courts appear to have many avenues to ascertain children's views, in reality, this is not the case. Cutbacks to legal assistance for families have resulted in the Attorney General refusing to appoint family advocates despite judges' recommendations. As stated in *D.S. v. P.S.:*

> Unfortunately, as has often been the case in recent years the abdication by the Crown of its moral and ethical responsibility to children by providing assistance to the Court in a family matter where the Court has concluded that a family advocate would be beneficial leaves the Court in the difficult position of trying to ensure the protection of the rights of [children] while at the same time ensuring that the hearing is conducted fairly and impartially for all the parties.[18]

In *L.E.G.*, after speaking about the importance of a child-centred approach and the notion that each child is entitled to individual justice in child custody cases,[19] Martinson J. claims that children are adversely affected by the current climate of scarce resources, which have limited the utility of professional reports, reduced the use of family advocates and strictly curtailed legal aid to parents and children.[20] Martinson J. writes:

> The effect of these cutbacks may be to deny access to justice to families and to deny children the individual justice to which they are entitled. It would be unfortunate if the courts find themselves in the position where judges are resorting to a judge interview because it is the only option available, rather than because it is the method that is in the best interests of the child whose future is at stake.[21]

In B.C., the family law system does not ensure that children have the opportunity to voice their concerns, needs and interests. Although courts must make custody and access decisions in the best interests of the child, judges may not hear children's views or, if heard, may not accord them much, if any, weight. Thus, despite the profound effect that custody and access decisions have on children's lives, children can be peripheral to family law proceedings.

DOES THE FAMILY LAW SYSTEM SERVE CHILDREN'S BEST INTERESTS?

There exists a serious gap between the perspectives of the legal system and those of the children it seeks to serve. In reporting on her twenty-five year longitudinal study on the impact of divorce on children, Dr. Wallerstein claims that the legal system has not succeeded in serving or protecting children's interests.[22] According to Dr. Wallerstein, the children in her study, now adults, would be astonished to hear that anyone in the legal community had considered their best interests.[23] Although the study was based on children's experience of divorce in the United States, L'Heureux-Dubé J. of the Supreme Court of Canada has referred to Dr. Wallerstein's work as elucidating broader trends about the impact of familial breakdown on children and the

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17 *L.E.G. v. A.G.*, 2002 BCSC 1455 at paras. 25, 26 [*L.E.G.*].

18 *D.S. v. P.S.*, 2004 BCSC 354 at para. 112.

19 *L.E.G., supra* note 17 at paras. 39, 42.

20 *Ibid.* at paras. 57, 58.

21 *Ibid.* at para. 59.

22 Judith Wallerstein & Julia Lewis, "The Long-term Impact of Divorce on Children: A First Report from a 25-year Study" (1998) 36 Fam. & Conciliation Courts Rev. 368 at 369.

23 Judith Wallerstein, Julia Lewis & Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York: Hyperion, 2000) at 312 [Wallerstein *et al*.].

law's inadequate response to children's needs.[24]

Although children are arguably the ones most influenced and affected by custody and access decisions, they are, for the most part, rendered invisible and voiceless in legal proceedings. L'Heureux-Dubé J. argues that "adultism"[25] mars the judicial process through its assumptions that children are incapable of voicing their own views, and that their perspectives are less important than those of well-intentioned adults who claim to know what is in children's best interests. L'Heureux-Dubé J. insists that the legal system wrongly assumes that children's claims are better voiced and their interests better served through surrogate representation by parents and/or the state.

It is highly questionable whether parents have the ability to adequately convey children's views and interests during the custody and access disputes that unfold during the tumultuous time of separation or divorce.[26] In a study on children's perspectives of their parents' separation, Gollop, Taylor and Smith found that children did not receive much support during their parents' separation, were not given adequate explanations of what was happening to their families, and that the majority had no input into access and custody determinations.[27] The authors explain that parents, because they are in the midst of pain and upheaval themselves, are unable to attend to their children's best interests.

O'Connor, in her review of research on children's voices in custody and access decisions, is skeptical that either parents or the state can ascertain children's best interests without the opportunity for children to share their perspectives.[28] O'Connor reviews studies that show that parents' capacity to assess their children's needs diminishes during the divorce period; post-parenting agreements frequently ignore children's needs but satisfy those of their parents; separation agreements that work well when children are younger often do not work when children are older, but remain inflexible to suit parents; and courts tend to base decisions more on the quality of parents as individual persons rather than on the quality of the child–parent relationship.[29] Without finding ways to involve children meaningfully, custody and access decisions will continue to reflect adult priorities rather than children's best interests.

The strong judicial trend for joint custody orders[30] serves as a good illustration of how custody law serves adult interests at the expense of children's best interests. Several authors claim that there is no scientific or psychological evidence to conclusively support the notion that joint custody is in children's best interests.[31] Fitzgerald argues that the trend towards joint custody reflects the power of adult lobby groups rather than children's interest.[32] The contemporary prominence and influence of the father's rights movement on custody law provides a specific example of one such lobby group. According to Smart, the fathers' rights movement promotes equal shares, or shared parenting, as being in the best interest of the child and the best way

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24 See for example *Young v. Young,* [1993] 4 S.C.R. 3 at paras. 106-107 and L'Heureux-Dubé J., "A Response to Remarks by Dr. Judith Wallerstein on the Long-term Impact of Divorce on Children" (1998) 36 Fam. & Conciliation Courts Rev. 384.

25 L'Heureux-Dubé *supra* note 3 at 137.

26 Bessner, *supra* note 13 in her introduction.

27 Gollop *et al*., *supra* note 1. The authors' study focused on children and young people's perspectives about their family's efforts to maintain relationships and contact between children and both of their parents after their parents' separation. They conducted interviews with 106 children and young people from seventy-three New Zealand families.

28 Pauline O'Connor, *Voice and Support: Programs for Children Experiencing Parental Separation and Divorce* online: Department of Justice Canada <http://canada.justice.gc.ca/en/ps/pad/reports/2004-FCY-2/index.html> at 34–35.

29 *Ibid.*. at 34–35.

30 See Susan Boyd, *Child Custody, Law, and Women's Work (Oxford: Oxford University Press, 2003).*

31 Pauline Tapp & Mark Henaghan, "Family law: conceptions of childhood and children's voices – the implications of Article 12 of the United Nations Convention on the Rights of the Child" in Anne Smith, Nicola Taylor & Megan Gollop eds. *Children's Voices: Research, Policy and Practices* (Auckland: Pearson Education New Zealand Limited, 2000) 91 at 100. See also Wendy Fitzgerald, "Maturity, Difference, and Mystery: Children's Perspectives and the Law" (1994) 36 Ariz. L. Rev. 11 at 56-59.

32 Fitzgerald, *ibid.* at 58.

to equalize relationships between mothers and fathers.[33] Smart states that in current custody debates, "children are constantly invoked but they are not required to speak".[34]

Courts do not know if children want to be shared equally or how shared parenting arrangements work over the course of childhood because children's views are often not sought. Although equal share arrangements may be politically compelling in that they satisfy the demands of both parents, Smart, in her follow-up study of children who were part of shared parenting orders, found that equal shares may become less ideal for children as their lives change.[35] Smart found that equal sharing could be successful for children provided that: the children were partners in the enterprise; parents kept checking to ensure their children were happy with the arrangements; and parents were willing to consult, be flexible and change arrangements as children matured. In cases where parents were unable to involve their children in the aforementioned ways, shared parenting was not in children's best interests. Smart concludes that striving for principles of political and legal equality between men and women in custody law, which are adult priorities, can be detrimental to children whose needs and interests often go unrecognized.[36]

One of the reasons adult interests and priorities prevail is because the legal system attributes little legal meaning to children's experiences and views. L'Heureux-Dubé J. explains that the voice of those under the age of majority is, in and of itself, considered immature and legally irrelevant.[37] In her view, "children are disabled as a class" because the legal system assumes that children, lacking the requisite cognizance to know what is best for themselves, are legally incompetent to voice their own interests.[38]

Because children have yet to attain full legal personhood, it has been easy for the legal system to define children's needs in terms of adult priorities under the guise of protecting children's best interests. Fitzgerald aptly characterizes children's legally disabled status when she writes:

> We cannot know, finally, how children perceive the world and their place in it, why and how they bond with each other and adults, why their priorities are "childish" and what that means. Unable to understand, we denigrate the child's perspective as uneducated or immature, imagining the child's perspective as an inferior version of our own. Fortified in our superiority, we then feel justified in ignoring children's perspectives and substituting adult purposes for them.[39]

Rather than being in their best interests, ignoring children's perspectives perpetuates a legal system that gives priority to the interests of adults.

Without explicit statutory direction for judges to ascertain children's perspectives and attach significant weight to them, custody and access decisions may be made without a true understanding of the individual child that comes before the court; this is the antithesis of the best interests of the child principle.

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33 Carol Smart, "Equal shares: rights for fathers or recognition for children?" (2004) 24(4) Crit. Soc. Pol'y 484 [Smart, "Equal Shares"]. Smart explains that the fathers' rights movement in England is composed of fathers and/or those who advocate for fathers' rights who believe that the courts lean too much in favour of mothers and give insufficient attention to the significance of fathers in the lives of children after divorce. Although Smart's study is based on the fathers' right movement in England, her study is applicable to Canada where the father's rights movement holds similar beliefs and advocates for joint custody; See Boyd, *supra* note 30, for the influence of the fathers' rights movement on custody and access law in Canada.

34 Smart "Equal Shares", *supra* note 33 at 485.

35 *Ibid*.

36 *Ibid*. at 500.

37 L'Heureux-Dubé, *supra* note 3 at 136.

38 *Ibid*.

39 Fitzgerald, *supra* note 31 at 98.

PART II –The Case for Children's Inclusion

There are several compelling reasons that justify the inclusion of children's voices in custody and access decisions. I organize and discuss these reasons under five headings: the effects on children; changing sociological views of children; principles of equality, dignity and respect; international commitments and the recommendations of domestic law reports; and effective legal decisions.

EFFECTS ON CHILDREN

Excluding children from meaningful participation in custody and access decisions can have a negative impact on them. There is evidence to suggest that children can feel more distressed, insecure, rejected and angry if they are not involved in such decisions.[40] The Special Joint Committee on Child Custody and Access concluded that not involving children in custody and access decisions "could have 'dire consequences' for the child with 'long-term mental health and other negative implications'".[41]

Conversely, involving children in custody and access decisions may lead to positive outcomes for them. Extensive research suggests that perceived control over or involvement in decision making corresponds to positive mental health.[42] Including children's voices in decision making contributes directly to their well-being, adjustment and, by implication, the child's best interests.[43] Referring to sociological evidence, Tapp and Henaghan state that, "[b]eing heard develops feelings of self-esteem, competence and relatedness which are vital to citizens in a democracy and may help children to cope with stressful situations".[44] Self-esteem contributes to developing resilience.[45] Additionally, listening to children and considering their views may help children cope more effectively with divorce or separation.[46]

Including children in custody and access determinations may also increase children's competency and independence. Children can become competent if they are allowed to participate more fully in decisions that affect them; participation may allow maturation as part of a cultural process.[47] Woodhouse argues that including children in decision making, even before they are entirely competent, plays a crucial role in educating children for independence.[48] Underlying this view is a belief that children are not passive objects, but rather, are social actors who can and do participate in constructing their own knowledge.

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40 Joan Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice" (2002) 10 Va. J. Soc. Pol'y & L. 129; *L.E.G.*, *supra* note 17 at para. 20; Gollop *et al.*, *supra* note 1; Christine Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 C.F.L.Q. 153.

41 As quoted by Bessner, *supra* note 12 in her introduction.

42 Kelly, *supra* note 40; *L.E.G.*, *supra* note 17 at para. 20.

43 O'Connor, *supra* note 28 at 27.

44 Tapp & Henaghan, *supra* note 31 at 95.

45 O'Connor, *supra* note 28 at 35.

46 Kelly, *supra* note 40.

47 Carol Smart, "Children and the Transformation of Family Law" (2002) 49 U.N.B. L.J. 137 at 151 [Smart, "Family Law"].

48 Barbara Woodhouse, "Talking About Children's Rights in Judicial Custody and Visitation Decision-Making" (2002) 36 Fam. L.Q. 105 at 119 [Woodhouse, "Children's Rights"].

CHANGING SOCIOLOGICAL VIEW OF CHILDREN

Changing sociological views of childhood similarly suggest that children should be involved in custody and access decisions.[49] Whereas older theories of child development viewed children as progressing through concrete predetermined stages towards rationality, the sociology of childhood views childhood as a social construct, suggesting that how childhood is culturally defined affects children's participation in society, and that adult social power, rather than biology, determines the boundaries between childhood and adulthood.

The sociology of childhood also views children as active in the construction and determination of their own lives as opposed to passive creatures subject to universally predictable stages of development. Rather than conceptualizing children as vulnerable objects of social and legal concern, children are seen as social actors—subjects in their own right. Thus, children's own views and understandings are the key concern rather than those of parents and professionals.

Sociologists are now examining the ways that children construct meaning as active participants in their own development. As Freeman writes, "Our understanding of children as agents will increase the more we give them a voice".[50] In their study of factors important to children after their parents' separation, Gollop, Taylor and Smith conclude that their study "reinforces the view that children's capacity to understand and participate has been underestimated".[51]

The current legal system is based on antiquated notions of child development. Tapp and Henaghan claim that "[t]he legal system's conceptions of childhood have more to do with the needs of the system and society as perceived by adults than with children's rights or current research evidence on children's capabilities and interests".[52] Similarly, Smart asserts that the legal system does not envisage a participating child that can speak for his or herself, but rather views a child as an adult in the making, an object of social concern.[53] Smart claims that this ignores the ways in which children are able to participate in decisions that affect their lives.

From a sociological perspective, increasing children's participation in custody and access decisions by providing opportunities for them to express their concerns, needs and interests assists their development and maturation as responsible social actors. As social actors, children are worthy of being treated by the law as equally deserving of concern and respect.

PRINCIPLES OF EQUALITY, DIGNITY AND RESPECT

Equality, dignity and respect are fundamental values that Canada seeks to protect and promote through its legal regime. As acknowledged by the Supreme Court of Canada, equality has long been an important feature of Western thought "into which [people] have poured the deepest urgings of their heart[s]".[54] The principle of equality rests on the moral footing that fundamental to a truly free and democratic society is the belief that all persons be treated with equal concern and respect.[55] Equality and human dignity are inextricably linked, and the Supreme Court of Canada has held that the purpose of the equality guarantee in the Canadian

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49 This subsection on the sociology of childhood is based on the work of the following authors: Michael Freeman, "The sociology of childhood and children's rights" (1998) 6 Int'l J. Child. Rts. 433; Nicola Taylor, "The Voice of Children in Family Law" (1998) 18 Child. Legal Rts. J. 2; Anne Smith & Nicola Taylor, "The sociocultural context of childhood: balancing dependency and agency" in Anne Smith, Nicola Taylor & Megan Gollop eds. *Children's Voices: Research, Policy and Practices* (Auckland: Pearson Education New Zealand Limited, 2000) 1; Smart, "Family Law", *supra* note 47; Tapp & Henaghan, *supra* note 31.

50 Freeman, *supra* note 49 at 443.

51 Gollop *et al.*, *supra* note 1 at 155.

52 Tapp & Henaghan, *supra* note 31 at 97.

53 Smart, "Family Law", *supra* note 47 at 150.

54 *Law Society B.C. v. Andrews,* [1989] 1 S.C.R. 143 at para. 20 [*Andrews*].

55 *Ibid*. at para. 34.

Charter of Rights and Freedoms ("*Charter*") is to prevent the violation of human dignity.[56] The Court has interpreted s. 15(1) of the *Charter* as recognizing the "fundamental importance and the innate dignity of the individual … [and] the intrinsic worthiness and importance of every individual".[57] Accordingly, the Court has reflected that "[h]uman dignity means that an individual or group feels self-respect and self-worth" and is "harmed when individuals and groups are marginalized, ignored, or devalued".[58] Moreover, the equality guarantee in the *Charter* is concerned with protecting and promoting human dignity in order "to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration".[59]

Children are intrinsically valuable and important members of society who deserve to be treated with equal concern and respect. Family law proceedings harm children's dignity by marginalizing their voice in custody and access determinations. L'Heureux-Dubé J. insists that the legal treatment of children should be about acknowledging children's views and treating them with "equal concern, equal respect and equal consideration".[60] Further, she believes that "the judicial process will not achieve true and complete justice" until it recognizes, through listening to and considering children's views, that children are "worthy of understanding and respect".[61]

Giving children an opportunity to voice their views is a step towards treating them with greater respect. Tapp and Henaghan write that, "if it is the child's well-being that is paramount, at the very least the child deserves to be heard and treated with respect as an individual".[62] According to several authors, children want to be heard in decision making processes that affect them.[63] For example, the vast majority of youth participating in a federal, provincial and territorial study on child custody, access and support wanted services and legislation to provide a way for their voices to be heard in decisions affecting them.[64] Similarly, Kelly points to several studies that support the view that children want to participate in some democratic manner in the divorce process.[65]

Although children want to participate in custody and access decisions, they do not necessarily feel that they should have the ultimate say. In speaking with children about their families after divorce, Smart found that the majority of the children she studied did want a voice in the determinations and did want to understand what was occurring, but did not want to be forced to make custody and access decisions themselves.[66] Smart concludes that children do not assume that having a voice means that they should determine the outcome; what children wanted was recognition, not control. Similarly, in their study of children and adult's views of children's best interests, Thomas and O'Kane asked children aged eight to twelve years to rank,

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56 *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at para. 51 [*Law*].

57 *Vriend v. Alberta,* [1998] 1 S.C.R. 493 at para. 67.

58 *Law*, *supra* note 56 at para. 53.

59 *Ibid.* at para. 51.

60 L'Heureux-Dubé, *supra* note 3 at 138.

61 *Ibid*. at 137.

62 Tapp & Henaghan, *supra* note 31 at 108.

63 Smart, "Family Law", *supra* note 47 at 152; Kelly, *supra* note 40 at 151; Nigel Thomas & Claire O'Kane, "When children's wishes and feelings clash with their 'best interests'" (1998) 6 Int'l J. Child. Rts 137.

64 Custody and Access Project of the Federal-Provincial-Territorial Family Law Committee, *Final Federal-Provincial-Territorial Report on Custody and Access and Child Support: Putting Children First*, online: Department of Justice Canada <http://www.justice.gc.ca/en/ps/pad/reports/flc2002.html> [*Putting Children First]*. This committee was initiated at the request of the Deputy Ministers Responsible for Justice. It consulted with family law professionals, parents, advocacy groups and interested Canadians, conducted extensive research, and engaged in federal, provincial and territorial discussions in order to make recommendations to improve the custody, access and child support regimes in Canada.

65 Kelly, *supra* note 40 at 151.

66 Smart, "Family Law", *supra* note 47 at 152.

in order of importance, a number of reasons why children should be involved in decision making. Children consistently put at the top of their lists: "to be listened to"; "to let me have my say"; "to be supported", and at the bottom: "to get what I want".[67] Interestingly, when social workers completed the same ranking exercise, many put "to get what I want" at the top of their lists.[68] Although adults may perceive that the inclusion of children's voices equates with allowing children to become the decision-makers, it appears that what many children actually want is an opportunity to express their views and be heard, not the power to ultimately make custody and access decisions.

Society's belief in equality and human dignity demands that the legal system accord children equal respect and consideration because of their intrinsic worth and importance. Children are currently marginalized and devalued by a legal system that views their interests and concerns as coterminous with parents and the state, and assumes that children are incapable of expressing their needs, and that adults can better represent their best interests. Children's perspectives are neither more nor less correct than those of their parents; they are however, different, and thus, valuable to the legal system in constructing an accurate picture of what is in the best interests of the children. Woodhouse questions why we should accept that the child's construction of parenthood and family is flawed and the adult's is correct.[69] Similarly, Thomas and O'Kane explain that there exists an unspoken assumption that children's criteria for making decisions are necessarily defective or inferior to those of adults.[70] They claim that adults do not have a monopoly on wisdom, and that there is evidence to suggest that children may be better and more consistent judges than adults of what is important in their lives.

It is possible that the lack of space in the legal system for children's voices is attributable to the reluctance of adults to relinquish power. Tapp and Henaghan question whether our unwillingness to provide opportunities for children's voices to be heard and considered stems from a concern that it will erode adult power.[71] The reason we value, protect and promote equality and human dignity is to prevent the exercise of one group's power to the detriment of another. As Woodhouse articulates, rights and responsibilities replace raw power as a means of ordering social interactions.[72] If the legal system is to reflect the importance of equality and human dignity, it must be more than a vehicle to promote and protect the interests and concerns of powerful adults, and should elicit, consider and value children's voices.

INTERNATIONAL COMMITMENTS AND THE RECOMMENDATIONS OF DOMESTIC LAW REPORTS

Both Canada's international commitments and the recommendations of federal and provincial law reports provide justification for involving children meaningfully in custody and access decisions. Canada is a signatory to the United Nations *Convention on the Rights of the Child* ("*CRC*").[73] According to Article 12 of the *CRC*, children have an internationally recognized legal right to participate in custody and access decisions:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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67 Thomas & O'Kane, *supra* note 63 at 147.

68 *Ibid*.

69 Woodhouse, "Hatching the Egg", *supra* note 2 at 1810.

70 Thomas & O'Kane, *supra* note 63 at 151.

71 Tapp & Henaghan, *supra* note 31 at 91.

72 Woodhouse, "Children's Rights", *supra* note 48 at 120.

73 *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (Ratified by Canada 13 December 1991).

> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[74]

Although the *CRC* makes capacity central to a child's right to have a voice, rather than their inherent worth and value as an individual, by signing the *CRC*, Canada has committed to providing those children who can express their views with the opportunity to have a voice in custody and access decisions.

Additionally, several federal and provincial law reports have recommended that children should be meaningfully included in custody and access determinations. The Special Joint Committee on Child Custody and Access recommended that it is in the best interests of children to have an opportunity to be heard when parenting decisions affecting them are being made. It also recommended that separate counsel for children may be necessary to protect their best interests.[75] The federal, provincial and territorial report on child custody and access, *Putting Children First*, recommended that parents and the courts have access to information on children's perspectives.[76] Similarly, the B.C. Taskforce recommended that family law policy makers carefully consider the findings of the final report by the International Institute for Children's Rights and Development on children's participation in custody and access decisions.[77] It also recommended that the justice system find better ways of determining children's best interests and involving children more meaningfully in family court processes.[78]

The B.C. family law system has not served children well through its exclusion of their perspectives. Both the *CRC* and domestic law review bodies recognize that either children have a right to participate in custody and access decisions or that the best interests of the child principle mandates children's inclusion. Including children in legal processes will expand how the court conceptualizes the issues that come before it, resulting in a more complete legal analysis. Ultimately, a broader legal analysis will result in more effective court orders for children.

EFFECTIVE LEGAL DECISIONS

By listening to and hearing children, courts can learn from children's difference and consequently may make decisions more suited to their best interests. In her interviews with parents and children from divorced families, Smart became acutely aware of how different the experience of the same divorce was for children and their parents.[79] According to Smart, even the most caring parent found it difficult to see the divorce from the standpoint of his or her child.

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74 *Ibid.*, Art. 12.

75 Special Joint Committee on Child Custody and Access, *Recommendations 3 and 4, online:* Department of Justice Canada <http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm>. This Committee, composed of members of the Senate and the House of Commons, examined and analyzed issues relating to custody and access arrangements after separation and divorce. It assessed the need for a more child-centred approach to family law policies and practices.

76 *Putting Children First, supra* note 64, Recommendation 11.

77 This report can be found at <http://www.iicrd.org/familycourt/FinalMCP.htm>. The International Institute for Children's Rights and Development conducted a project that involved: interviews with young people, lawyers, judges and service providers who have experience in B.C. family court processes; a review of research and good practices; identifying existing strengths supportive of young people's meaningful participation as well as the gaps; and suggestions to bridge these gaps.

78 Family Justice Reform Working Group, A *New Justice System for Families and Children*, Recommendation 16, online: B.C. Ministry of Attorney General <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf> [*B.C. Taskforce*]. The B.C. government instructed the Family Justice Reform Group to explore the possibilities for fundamental reform of the B.C. family law system. It examined reports on family law issues conducted over the last three decades in B.C. and elsewhere. The Group concluded that the adversarial system does not work well for families.

79 Carol Smart, "From Children's Shoes to Children's Voices" (2002) 40 Fam. Ct. Rev. 307 [Smart, "Children's Shoes"]. In this article, Smart provides insights into how children she and her colleagues have interviewed in the United Kingdom across a number of projects saw post-divorce family life.

Smart writes that "seen through the eyes of a child, the family can look like a very different place to one presented by a parent. … There are parents' families and children's families and accounts of both are equally valid".[80] Smart insists that the court system must acknowledge that people stand in different relationships to one another within families, and must accord the same legitimacy to children's experiences and perspectives as those of adults.

Feminist legal theory explicitly considers and values diverse perspectives based on the premise that the exclusion of disadvantaged groups has led to bias and incompleteness in legal analysis and legal institutions. As such, feminist legal theory can shed valuable light on the problem of children's exclusion and the importance of including children's perspective in legal decision making. Fineman explains that feminist legal theory challenges notion that the law is a neutral, rational set of rules that is unaffected by the perspectives of those who wield power.[81] As Fineman articulates, excluded groups have different views and experiences that make our consideration and understanding of legal issues more complete and complex. A theory of difference can, on the same basis, make children's participation central to more legitimate and effective legal decisions regarding their best interests.

Many have argued that providing children with opportunities to voice their concerns, interests and needs will expand the relevant issues and enhance the effectiveness of legal decision making.[82] L'Heureux-Dubé J. writes that "children have the right to require of us a better understanding of who they are",[83] just like any other disenfranchised group. If the legal system excludes children's perspectives and experiences, then the court, which aims to protect and serve children's best interest, may make incorrect decisions. In her article on what the 'immigrants of exclusion' can offer the legal system, Menkel-Meadow writes that the

> 'truth' may be found with the statistical 'outliers', that the margin may be the core, the periphery may be the center, and the excluded may be the included. At the very least, the truth as we know it may be much more multifaceted than the 'included' are willing to acknowledge. Previously excluded voices, by providing innovation and change, can counteract the stagnation and bankruptcy of the status quo.[84]

The inclusion of children's voices can challenge legal assumptions and biases about families and thus has the potential to benefit children and their parents. Menkel-Meadow aptly states that "[s]uch is the lesson of the knowledge of exclusion—that each time we let in a new excluded group, that each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing".[85] The inclusion of children's voices may reveal the inadequacies of the current legal framework with respect to family disputes and facilitate more effective decision making.

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80 *Ibid*. at 308.

81 See Martha Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (London: Routledge, 1993) at 24–8, for comments on feminist legal theory.

82 Smith & Taylor, *supra* note 49 at 13–14; Henaghan & Tapp, *supra* note 31 at 85; Freeman, *supra* note 49 at 443; Thomas & O'Kane, *supra* note 63 at 152; Jo Bridgeman & Daniel Monk, "Introduction: Reflections on the Relationship Between Feminism and Child Law" in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 1 at 9.

83 L'Heureux-Dubé, *supra* note 3 at 137.

84 Carrie Menkel-Meadow, "Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law" (1987) 42 U. Miami L. Rev. 29 at 34.

85 *Ibid*. at 52.

RIGHTS FOR CHILDREN

There are strong reasons for providing opportunities for children's voices to be heard in custody and access decisions. Inclusion acknowledges children's ability to construct and convey their understanding and may contribute to positive mental well-being. Society's belief in the innate worth of every person and the importance of according equal value, respect and consideration to every individual demands that the legal system attach greater weight to children's perspectives. Both the international recognition of children's rights to participate in decisions that affect their lives and the potential for children's inclusion to lead to more complete legal analyses and more effective custody and access decisions provide strong legal justifications for children's participation.

Children have a legitimate claim to have their voices heard. Legal rights are the means by which individuals have their claims recognized and protected. Rights, as opposed to interests, provide people with legally enforceable claims from which they are entitled to take action.[86] According to Brennan, at the core of the notion of rights is the idea that rights warrant respect from others and can be the basis for making claims against them.[87] To admit that children have an interest in custody and access proceedings does not ensure that they have any legally recognized claim to have their interests and concerns represented and protected. Thus, the recognition of children's rights is essential to ensuring that the court, in making custody and access decisions, listens to and hears their voices. However, rights, as traditionally conceived, are ill-suited to children who are dependent and still in the process of developing rational capabilities. Herein lies the problem. To be treated with equal concern, respect and consideration requires that children have rights, but the prerequisites for such rights are independence, autonomy and capacity—all attributes that children lack. Rather than admit that children do not have rights, many children's rights theorists have attempted to resolve this problem in either of two ways. Child liberationists claim that there is no difference between children and adults and thus, no difference in the rights to which they are entitled. In contrast, child protectionists insist that children have certain rights, including those protecting welfare, but not others such as agency rights.

Neither child liberationists nor child protectionists provide an acceptable solution because neither takes issue with how the problem is defined. According rights to children so that they can make claims that are as worthy of attention as the claims of adults is only problematic if the legal system conceives rights in a particular way. The dominant conception of rights is the primary problem, and must be critiqued and challenged in order for children's voices to be heard and respected. Including children in our rights discourse both illuminates the narrow and impartial construction of the dominant conception of rights, and expands rights discourse in a manner that benefits children as well as adults. Reconceptualizing rights is a prerequisite to any discussion on how the judicial process can incorporate children's voices. How we conceptualize children's rights affects the solutions we propose to the problem of their exclusion. Without reconceptualizing the dominant rights framework, the inclusion of children will be marginal at best, and at worst damaging to children and their families.

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86 H.T.G. Andrews & Pasquale Gelsomino, "The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View" in Rosalie Abella & Claire L'Heureux-Dube eds., *Family Law: Dimensions of Justice* (Toronto: Butterworths, 1983) 241 at 242–244.

87 Samantha Brennan, "Children's Choices or Children's Interests: Which do their Rights Protect?" in David Archard & Colin Macleod eds., *The Moral and Political Status of Children* (New York: Oxford University Press, 2002) 53 at 54.

PART III –The Reconceptualization of Rights

TRADITIONAL THEORIES OF CHILDREN'S RIGHTS

Western rights have their genesis in liberal theory's fundamental goal to change the status of the individual from a subject of the monarch to an autonomous citizen of the state.[88] The vehicle of individual rights is the means by which citizens restrict the state's authority. Liberal theory considers capacity, reason and autonomy as the necessary attributes of citizenship. To have liberty, one must be able to exercise it; according to liberal theory, this requires rationality and competency.

Traditional rights theorists deny children rights because they feel children lack the reason and freedom to act in accordance with their own will.[89] Through education of their intellect, children's rationality can emerge; thus, liberal theory views children as citizens in waiting, beings who do not yet possess the requisite capacity for citizenship. Liberal theory premises the acquisition of rights on the capacity to reason and compel other citizens and the state to respect one's autonomy. According to Arneil, liberal theory defines children in terms of what they lack and constructs them as the opposite or negative form of adult; thus, children are viewed as "becomings" worthy of protection rather than beings in their own right.[90]

Because the dominant rights ideology denies children rights, theorists have attempted to articulate a rationale for according rights to children. Two principal schools of children's rights theorists have emerged: child protectionists and child liberationists.[91] Child protectionists view children as dependent, vulnerable and in need of protection because of their different physical and mental capabilities. According to child protectionists, children have welfare rights—those that pertain directly to their well-being, such as sustenance, shelter and education—but not agency rights to act according to their own judgment. Brighouse explains that because children lack rational capabilities, authoritative adults are morally charged with discerning and protecting children's best interests.[92] Because children are dependent, vulnerable and incapable, their rights are limited and their views can at most be consultative.

Child protectionists argue that children have an equal right to have their basic interests protected and promoted but do not have an equal voice in matters bearing on their interest.[93] Implicit in this view is the belief that children are persons, but not full ones. Children are persons in that they have moral and legal claims to have their interests and needs met and protected; however, they are not persons in that they are not permitted to exercise the full range of rights and bear the full burden of responsibilities that we accord adults. Schapiro writes, "[f]ull personhood … has to be conceived as a condition of autonomy, a condition in which a creature is fully subject to her own authority, such that her actions and beliefs constitute exercises of that authority".[94] Schapiro justifies society's paternalistic attitude towards children on the basis that children are emerging persons, that childhood is a "condition in which the personhood of the person, her capacity to have a mind and voice of her own, is as yet ill constituted".[95] Given that children are not yet capable of governing themselves in a rational manner, adults are obliged to

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88 See Barbara Arneil, "Becoming versus Being: A Critical Analysis of Child in Liberal Theory" in David Archard & Colin Macleod eds., *The Moral and Political Status of Children* (New York: Oxford University Press, 2002) 70 at 70–71.

89 For an expansion of this argument, see Katherine Federle, "On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle" (1993) 42 De Paul L. Rev. 983 [Federle, "Reconceiving Rights"].

90 Arneil, *supra* note 88 at 71-75.

91 See Bessner, *supra* note 12, at 1.2, and Katherine Federle , "Rights Flow Downhill" (1994) 2 Int'l J. Child. Rts. 343 at 351-352 [Federle, "Rights Flow Downhill"] for an overview of child protectionists and child liberationists' views.

92 Harry Brighouse, "How Should Children Be Heard?" (2003) 45 Ariz. L. Rev. 691.

93 See Tamar Schapiro, "Childhood and Personhood" (2003) 45 Ariz. L. Rev. 575 for an elaboration of this view.

94 *Ibid*. at 588.

95 *Ibid*. at 589.

protect children from their own "cognitive and volitional wantonness".[96]

According to child liberationists, self-determination is the root of children's liberation from oppression, and children's rights can only be realized when children have autonomy to decide what is best for themselves.[97] Child liberationists believe that even young children have the capacity to make decisions. Because it is difficult to draw the line between competency and incompetency, child liberationists subscribe to the view that all children are competent and should have the same political and legal rights as adults.

In addition to these two main camps of children's rights theorists, there are those who situate themselves in between, advocating for a gradualist model of children's rights. Brennan is one such advocate. She explains that there are two types of rights: those that protect choices (agency rights) and those that protect interests (welfare rights).[98] Brennan asserts that because children lack the capacity to reflect critically and rationally on their choices, we rightfully deny them agency rights. Brennan insists that we view children as would-be choosers, who begin as individuals with interests that they are unable to protect and advance to full-fledged autonomous choosers who have the capacity to decide what is best for themselves. Thus, children gradually move from having rights that primarily protect their interests to having rights that primarily protect their choices.

However, child protectionists, child liberationists and those who advocate a gradualist model of children's rights remain embedded in the dominant rights ideology. The notion of capacity as a prerequisite to rights is the central organizing principle of both traditional liberal theorists as well as children's rights theorists.[99] According to liberal theory and children's rights theorists, a full-fledged rights-holder is an autonomous, rational and thus, competent individual who can compel performance of his or her right. Child protectionists deny children rights on the basis of their incompetency and child liberationists accord children rights because they are conceived as competent. In her gradualist model, Brennan relies on capacity to determine when children can acquire rights to protect their choices. If rights are contingent on a particular characteristic, such as capacity, then having rights is an exclusionary practice; claims made by those without the requisite capacity need not be recognized nor protected.[100] Consequently, it is logical to conclude that children do not have equal rights, and are not full legal persons because of their diminished capacity. By emphasizing capacity as being central to full-fledged rights recognition, children's rights theorists do not question the legitimacy of the dominant rights discourse and do not provide a convincing rationale for the protection and promotion of children's interests.

As discussed, a rights discourse that rests on a central premise of capacity results in children's exclusion from the legal system as persons in their own right. Thus, it is necessary to reject capacity as an organizing principle of rights if children's rights are to have meaning and value. In defining rights in terms of individual autonomy, rationality and competence, traditional rights discourse—of which children's rights theorists are a part—favours certain attributes to the exclusion of others and thus offers varying, socially selected degrees of legal protection. Because traditional rights discourse, by definition, excludes children, some have argued that a child-centric family law system should emphasize responsibilities rather than rights.[101] However, because rights are the primary means by which the justice system recognizes and protects interests, rights remain important to children. If we want to take children's needs and interests

96 *Ibid*. at 590.

97 See Bessner, *supra* note 13 at 1.2.

98 Brennan, *supra* note 87.

99 Federle persuasively articulates this argument in Federle, "Reconceiving Rights", *supra* note 89, and Federle, "Rights Flow Downhill", *supra* note 91.

100 Federle makes this point in Federle, "Rights Flow Downhill", *supra* note 91.

101 See e.g. Katharine Bartlett, "Re-expressing Parenthood" (1988) 98 Yale L.J. 293 and Woodhouse I, *supra* note 2 at 1842.

seriously and have the legal system recognize their claims equally with other moral claims, it is necessary to make claims in the language of rights.[102] Rather than dismiss rights as the domain of autonomous and competent actors, we must expand our conception of rights to recognize and value other attributes.

EXPANDING OUR CONCEPTION OF RIGHTS

A new conception of rights has the potential to not only benefit children, but also adults as it seeks to accord moral and legal significance and value to a broader array of human characteristics. Minow states that developing a theory of children's rights holds promise for a new conception of rights generally.[103] Unlike Minow, I do not intend to develop a theory of children rights, rather I argue for a broader reconceptualization of rights *generally*, not just for children specifically. As noted above, attending to the voices of excluded groups can "offer new ways of knowing"[104] that can benefit the legal system as a whole. By focusing on children's voices, our rights discourse can be expanded and enriched.

Gilligan's work on psychological theory and moral development provides an apt illustration of how attending to excluded voices can enrich our current ways of knowing.[105] Gilligan found that the emphasis of male perspectives in psychological theory and moral development, and the accompanying omission of women in existing models of human development, has led to a limited conception of the human condition. Gilligan argues that the silence of women in the "narrative of human development"[106] distorts its stages and sequences. According to Gilligan, two different moralities emerge from studying male and female development: the morality of rights with its emphasis on individuals and separation; and the morality of responsibility with its emphasis on connection and relationships. Gilligan argues that by favouring one morality at the expense of the other, our conception of adulthood is out of balance in that it favours separateness of individuals over connection with others, and the autonomous life of work over the interdependence of love and care.[107] Gilligan claims that including women in the study of human development changes the entire account, broadening our understanding of human development, which is beneficial to males and females alike.[108] Similarly, including children in our rights discourse can expand our conception of rights in a manner that benefits both children and adults. Rather than speaking of a specific category of children's rights, it is important to reconceptualize rights more generally, to change the entire account so that rights protect and promote a broader array of attributes.

Feminist scholarship also has much to offer a new, more inclusive conception of rights because it has brought to light diverse perspectives that have questioned the presumed neutrality of legal analysis and institutions. Many feminists have criticized the liberal construction of the individual, autonomous, rational rights-holder as giving greater weight to certain characteristics, frequently associated with males, and making invisible other attributes, mostly associated with females.[109] Through a feminist lens, it becomes apparent that the rhetoric of traditional rights discourse is problematic because it excludes relationships, interdependencies and care in

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102 Arneil, *supra* note 88 at 86.

103 Martha Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" in Rosalind Ekman Ladd ed., Children's Rights Re-visioned: Philosophical Readings (Belmont: Wadsworth Publishing Company, 1996) 42 at 44.

104 Menkel-Meadow, *supra* note 84 at 34.

105 Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1993).

106 *Ibid*. at 25.

107 *Ibid*. at 17.

108 *Ibid*. at 25.

109 Minow, *supra* note 103; Bridgeman & Monk, *supra* note 82; Gilligan, *supra* note 105; Bartlett, *supra* note 101.

favour of separate, autonomous, capable individuals.[110] Instead of an individual conception of rights that preserves distances between people, I advocate a collective conception of rights that permits and promotes relationships.

If we begin with children as they are, not as "constructed reflections of an adult citizen",[111] the central issue is not authority, status or rights traditionally conceived, but rather care. Gilligan popularized the notion of an ethic of care. She argues that justice requires not only an ethic of rights but also an ethic of care where relationships, interdependency and caring are valued and protected. She writes:

> The morality of rights is predicated on equality and centered on the understanding of fairness, while the ethic of responsibility relies on the concept of equity, the recognition of differences in need. While the ethic of rights is a manifestation of equal respect, balancing the claims of other and self, the ethic of responsibility rests on an understanding that gives rise to compassion and care.[112]

Interdependency and the need for care are central to children's lives. Children do not "identify the family as a site of legal rights, they [see] it—to varying degrees—as an arena of emotions, care, security, closeness and love".[113] Because children depend on families for physical and emotional well-being, focusing on children highlights the importance of interdependent relationships and the primacy of care and responsibilities.

For children, respect, interdependence and reciprocity of concern are central to family life.[114] Smart's research on children's perspectives of their families leads her to conclude that:

> 'Family' represents a constructed quality of human interaction or an active process rather than a thing-like object of detached social investigation. If we see family in this way, and certainly the children we interviewed seemed to, it is hard to see the wisdom in seeking to resolve family strike through the simple regulation of space and time rather than emphasizing the qualities of relationships.[115]

Viewed in this way, families are organisms.[116] Caregiving in families is supported by relationships of mutuality and interdependence. A concern with relationships focuses attention on attachment, connection and interdependence between children and adults.[117] From an ethics of care perspective, the resolution of family law problems depends on contextualizing the dispute in terms of responsibility and caring, which involves addressing the concerns and attending to the needs and interests of all those involved.

Legal theory that is inattentive to the relationships of care and connection between people cannot adequately address the issues families face. Woodhouse writes that "[l]aw tends to displace a child's concrete experience of care with an adult's abstract conception of right".[118] For

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110 See Minow, *supra* note 103 at 50–52, for an elaboration of this argument.

111 Arneil, *supra* note 88 at 88.

112 Gilligan, *supra* note 105 at 164–165.

113 Smart, "Equal Shares", *supra* note 33 at 499.

114 Hilary Lim & Jeremy Roche, "Feminism and Children's Rights: The Politics of Voice" in Dierdre Fottrel, ed., *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (Cambridge: Kluwer Law International, 2000) 51 at 72 [Lim & Roche, "The Politics of Voice"]. In their article, Lim and Roche refer to research conducted in the United Kingdom that supports this point.

115 Smart, "Children's Shoes", *supra* note 79 at 317–318.

116 Woodhouse, "Hatching the Egg", *supra* note 2 at 1761.

117 Bridgeman & Monk, *supra* note 82 at 15, similarly articulate this point.

118 Woodhouse, "Hatching the Egg", *supra* note 2 at 1810.

family law to respond effectively to children, the law must take seriously the activity of caregiving and the interdependencies between family members. Law needs to reconceptualize parenthood from entitlement to responsibility, autonomy to connectedness, and self to others.[119] The best interests of the child principle should be primarily concerned with how the interests of the parent and the child link together in relationships.[120]

Focusing on children highlights the importance of placing moral and legal value on relationships, interdependence and care. Traditional rights discourse's concern with individual autonomy ignores the interdependencies of family relationships, and consequently, does not enable the protection and promotion children's best interests. As Woodhouse states, "[w]e encourage families in trouble to atomize into units with independent claims of right, rather than coalescing around children's concrete needs".[121] A child-centred perspective would place children, not parents, firmly at the centre of moral and legal concern and would evaluate parents' authority and obligations through the lens of children's needs and experiences.

Although attaching moral and legal significance to relationships, interdependency and care is essential to promoting and protecting children's best interests, it is equally imperative that the legal system be attuned to power dynamics within familial relationships. An emphasis on interconnectedness without a concomitant assessment of power will be inadequate to protect and promote children's interests.[122] The legal system denied equal rights to other excluded groups, such as women and minorities, because it constructed them as lacking capacity.[123] Historically excluded groups succeeded in their rights claims by reconstructing themselves from weak, incompetent individuals in need of protection to competent, autonomous actors worthy of rights. Children cannot redefine themselves as equally competent to adults so "powerful elites"[124] decide which children's claims will be recognized.

In this way, feminist concerns about the importance of relationships and interdependence can also mask the power that women hold over children. The feminist argument that adults are also interdependent misses a fundamental distinction between the different relationships that adults and children have, namely, that children have no choice because of their incapacity and immaturity, and thus, need adults to care for them. An account of rights that emphasizes interdependent relationships without an assessment of power is a sophisticated version of rights discourse that still places capacity at the centre.[125] It is necessary to reconceptualize the meaning of having and exercising rights so as not to disadvantage children. This requires a need to recognize the state of being itself, and not simply capacity, as significant for rights protection.

A conception of rights that does not sufficiently attend to power may disadvantage children. Guggenheim's endorsement of framing claims on children's behalf in terms of their interests rather than their rights demonstrates this point.[126] Guggenheim argues that adults will never give children anything adults do not want them to have so it is more effective for child advocates to focus on children's interests rather than suggest that adults are obliged to give rights to children. Rather than challenge a conception of rights that privileges powerful adults, Guggenheim accepts that the legal system will always be adult-centric and that the best strategy for getting legal and political systems to respond to children's claims is to pursue the protection and promotion of those interests that most closely align with adult interests and values.

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119 Bartlett, *supra* note 101 at 298–300.

120 *Ibid*. at 302–304 for an elaboration of this argument.

121 Woodhouse, "Hatching the Egg", *supra* note 2 at 1812.

122 Federle, "Rights Flow Downhill", *supra* note 91 at 364 –367, makes a compelling argument in this regard.

123 *Ibid*. at 357-360; Bridgeman & Monk *supra* note 82 at 13.

124 Federle, "Rights Flow Downhill", *supra* note 91 at 365.

125 Federle, "Rights Flow Downhill", *supra* note 91 at 361–362.

126 Martin Guggenheim, "Maximizing Strategies for Pressuring Adults to do Right by Children" (2003) 45 Ariz. L. Rev. 765.

As I have argued, such an approach is problematic in the family law context as it has led to the valuing of adult priorities over children's best interests.

Rights have value because they can mitigate the exclusionary effects of power through access to legal and political structures.[127] By making legal and political claims, individuals can challenge structures as hierarchical and inequitable which may, in turn, provoke an institutional response that redistributes power and alters existing hierarchies. According to Federle, "rights flow downhill", in that rights shift control and power away from those who have it and towards those that do not, and thus, equalize relationships. Federle states:

> To have rights, then, is not dependent upon the capacity to exercise or assert them; rather, these rights prohibit those who already have power from exerting it. In this sense, rights tied to power create zones of mutual respect for power that limit the kinds of things we may do to one another.[128]

From this perspective, rights are essential to children because they provide them with the power to command respect.

Although a new conception of rights must recognize and value relationships, interdependency and care, it must also hold the state of being itself, rather than capacity, as the central organizing principle for rights protection. Focusing on children's existence, as they are with their different needs and concerns, rather than on their incapacities and dependencies, has the potential to shift power from adults to children and redirect the orientation of the current adult-centric legal system to one that is centered on children's best interests. A legal emphasis on interdependent relationships must also account for power dynamics that hierarchically structure familial relationships.

However, feminists have only partially engaged the concept of children's rights.[129] This lack of engagement can be attributed to concerns that children's rights may threaten women's autonomy by tainting them with children's dependence; that legal protection of children has been a way to control women; and that the father's rights movement has appropriated children's rights rhetoric.[130] These concerns demonstrate that familial relationships can and have been used to control women and children to serve patriarchal interests.

The legal system can threaten women and children's well-being through a rights discourse that emphasizes interdependent relationships without being attuned to the ways in which power privileges certain family members over others. Because of women's disproportionate responsibilities in caregiving, it is impossible to elevate the status of children without carefully attending to the history of women's status, recognizing that the work of childrearing is still gendered, and empowering children's caregivers.[131] It is important to be attentive to how children's rights may serve and protect certain powerful interests and marginalize and devalue other interests. For example, the father's rights movement has utilized the rhetoric of children's best interests to advance the political and legal interests of fathers.[132] A conception of rights that does not accord value to relationships, interdependence and caring and does not place sufficient emphasis

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127 Federle, "Rights Flow Downhill", *supra* note 91 at 365.

128 *Ibid*. at 366.

129 Hilary Lim & Jeremy Roche, "Feminism and Children's Rights" in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 227 [Lim & Roche, "Feminism and Children's Rights"]; Michael Freeman, "Feminism and Child Law" in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 19; Lim & Roche, "Feminism and Children's Rights", *supra* note 114.

130 See Lim & Roche, "The Politics of Voice", *supra* note 114 and Lim & Roche, "Feminism and Children's Rights", *supra* note 129.

131 Boyd, *supra* note 30 at 3.

132 Smart, "Equal Shares", *supra* note 33.

on the exercise of power in families risks marginalizing the needs and concerns of children and their primary caretakers.

Thus, listening to and hearing children's voices requires a reconceptualization of rights that attaches value to relationships, interdependence and care, and emphasizes the significance of being, rather than that of capacity. The dominant rights framework protects and promotes the interests of rational, autonomous, capable individuals, and because children are unable to fit in this framework, they are excluded from equal rights protection. Although children's rights theorists attempt to create a space within the dominant rights ideology for children's rights, they remain firmly embedded within the dominant rights framework and its central organizing principle of capacity. In order for the legal system to equally promote and protect children's interests, it is necessary to redefine rights so that the state of being itself is significant and that relationships, interdependence and care have moral and legal value. A rights discourse that emphasizes interdependence and care must also be attuned to relationships of power in order to protect and promote children's needs and concerns and those of their primary caregivers. A new conception of rights demands fundamental change of the B.C. family law system. Only through valuing relationships, interdependencies and care will the legal system be able to hear what children say.

PART IV – Moving Towards Child-Centric Family Law

This section will discuss how a new conception of rights demands transformative change to the family law system in order to provide meaningful solutions to the problem of children's exclusion. It is not my intent to make specific recommendations, such as statutory amendment, but rather, to suggest more broadly what family law in B.C. could look like if guided by a new conception of rights. Including children's voices in family law proceedings not only requires creating the space for them to speak, but also demands more substantive change so that what they say can be heard.

THE NEED FOR TRANSFORMATIVE CHANGE

Meaningful incorporation of children's voices into family law processes will require transformative change. If we do allow children to speak and actually attempt to hear what they are saying, it will be harder to find solutions.[133] Including children's perspectives in a meaningful way will alter the entire family law process. However, feminist and critical race scholars have argued that access to processes of power does not necessarily ensure substantive equality.[134] Similarly, merely including children's voices will not result in the substantive change that is required to actually hear and value what they are saying. If children speak in terms of relationships, interdependence and care, their voices will be difficult to hear in legal proceedings that determine and enforce individual, autonomous rights. Adult interests will continue to take priority unless the system itself undergoes transformative change.

Simply increasing children's involvement in a legal process that is itself flawed will not result in custody and access decisions that are in children's best interests. Smart is hesitant to increase children's participation in legal processes merely because of our discomfort with their exclusion.[135] She claims that we may need to look at solutions outside of legal forums. Smart argues that a rights framework is problematic because it translates personal and private matters into legal language; reformulates the issues into those relevant to law, not to ordinary people;

133 Smart, "Children's Shoes", *supra* note 79 at 309.

134 Fitzgerald, *supra* note 31 at 91.

135 Smart, "Family Law", *supra* note 47 at 153.

places people in opposition to one another; and removes and isolates individuals from the familial context during the dispute, but forces them to re-enter that context once the dispute is settled. Smart's concerns illustrate that it may be harmful to insert children into an adversarial family law process that is inherently flawed. However, the new conception of rights that I have introduced would require changes to the family law process itself, making it more suitable for children specifically, and families generally.

HEARING CHILDREN'S VOICES

If rights discourse valued interdependent relationships, then custody and access determinations could focus on the quality of relationships as expressed by children and their parents. Boyd's preference for a primary caregiver presumption as opposed to a legal preference for joint custody can be attributed to a desire to have the law recognize and value those "who take responsibility for care for children, largely women", rather than emphasize "paternal claims to care about children".[136] According to Boyd, privileging actual relationships of care in legal decision making benefits children and their primary caregivers, who are predominantly women. Similarly, Fineman's mother/child dyad metaphor refashions conceptions of family and intimacy by making caregiving and nurturing the core family relationship rather than the sexual relationship between parents.[137] By constructing caregiving as the central unit of concern, Fineman claims the law will emphasize relationships of caregiving which will result in legal decisions that better support and advance children's interests.

Both Boyd and Fineman state the need for the law to recognize, promote and protect actual relationships of care. As Woodhouse articulates, a child-centred perspective would expose the fallacy that children can thrive while their caregivers struggle.[138] If the law valued and focused on interdependent relationships, it would be clear that caregivers' needs cannot be severed from those of their children. Boyd points to studies that demonstrate that a child's well-being is intimately connected to the well-being of the child's custodial parent.[139] Both the mother/child dyad and the primary caregiver presumption seek to protect and promote interdependent relationships to ensure children's well-being.

It is not obvious, with either the primary caregiver presumption or the mother/child dyad, how family law processes would seek out and hear children's voices in custody and access decisions. Without explicitly creating a space for children's perspectives to be voiced and heard, there remains a risk that the legal system better recognizes and protects a primary caretaker's needs and interests but still does not sufficiently consider children's needs. Despite the correlation between a caregiver and a child's well-being, the reasons for including children remain.

In order for the legal system to serve children's best interests, it must value and support relationships of care as well as children's voices. Children must acquire legal standing in family law disputes because standing is the law's primary mechanism for hearing and valuing different perspectives.[140] However, the establishment of legal standing for children would require a fundamental restructuring of legal conflicts. Such a restructuring could benefit both children and their caregivers. For example, if children involved in family law disputes had separate le-

136 Boyd, *supra* note 30 at 157.

137 Fineman, *supra* note 81. Fineman uses the metaphor of the mother/child dyad to emphasize the nurturing unit of the caretaker. She argues that family law's focus on the sexual affiliation between parents, rather than the nurturing relationship between parent and child, deflects serious attention away from children. In her metaphor, the child represents all forms of inevitable dependency—the ill, elderly, disabled, and children. The mother stands for caregivers, who can be male and female alike.

138 Woodhouse, "Hatching the Egg", *supra* note 2 at 1824.

139 Boyd, *supra* note 30 at 132.

140 See Fitzgerald, *supra* note 31 at 99–109, for an elaboration of how according legal standing to children could result in tremendous change to family law.

gal representation, it could relieve parents from the responsibility of promoting children's best interests.[141] Free from asserting the best interests of the child, parents could voice their own perspectives and experiences. According to Fitzgerald, parents could voice their hopes and concerns for their child as well as their own personal needs, the depth of the bond they share with their child and the personal effect that separation would have on them as parents. Fitzgerald aptly states:

> If the law paid attention to and valued family members' own perspectives, the law might learn to value familial bonds. Courts would entertain, not abstract adult rights or vague state interests, but children's and parents' experience as family members and their very identities as children and parents. Were the law to entertain and value familial bonds, then our jurisprudence of personhood could broaden to include parents in their identities as parents and children in their identities as children. Indeed, under such a broadened view of personhood, children and parents define one another, unable to secure their identities without relationship with each other.[142]

Fitzgerald's quote highlights how a reorientation from individual rights to rights that protect and promote interdependent relationships can assist the court in seeking resolutions that are most likely to preserve familial bonds. The B.C. family law system needs to recast family disputes so the court can hear, from children and their parents, the core issues of custody cases: love, loss, and family relationships. The court can then weigh the relative strengths of and threats to family bonds and make custody and access determinations that respect and promote interdependent relationships and caregiving.

Often those against increasing children's involvement in custody and access decisions argue that children should not have the responsibility of deciding their parents' dispute. However, the inclusion of children's voices does not mean that children should become the decision-makers. Woodhouse claims:

> Asking the child question, listening to children's authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide. They are strategies to ensure that children's authentic voices are heard and acknowledged by adults who make decisions. The hard choices … call for hard listening to children's needs and experiences.[143]

Judges, not parents or children, are the ultimate decision-makers who must ascertain and consider both parents' and children's perspectives in order to make a fully informed decision. Rather than placing the burden of decision making on children's shoulders, increasing opportunities for children to voice their views enables judges to make decisions in children's best interests. Additionally, seeking children's views on their needs, concerns and interests does not necessarily involve asking a child which parent they would prefer to live with. As Thomas and O'Kane acknowledge, it is important to take into account the emotional context of children's wishes and feelings, and to work with children in a process of explanation and reassurance, rather than simply asking them to make a choice.[144]

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141 For more information on the advantages and disadvantages of separate legal representation for children, refer to: Bessner *supra* note 13 at 2.0; O'Connor, *supra* note 28 at 53-55; Andrews & Gelsomino, *supra* note 86; Nicola Taylor, Megan Gollop & Anne Smith, "Children and young people's perspectives on their legal representation" in Anne Smith, Nicola Taylor & Megan Gollop eds. *Children's Voices: Research, Policy and Practices* (Auckland: Pearson Education New Zealand Limited, 2000) 110 [Taylor *et al.*]; William Keough, "The Separate Representation of Children in Australian Family Law: Effective Practice or Mere Rhetoric?" (2002) 19 Can. J. Fam. L. 371.

142 Fitzgerald, *supra* note 31 at 104–105.

143 Woodhouse, "Hatching the Egg", *supra* note 2 at 1840-1841.

144 Thomas & O'Kane, *supra* note 63 at 152.

REPRESENTATION OF CHILDREN'S INTERESTS

Several authors have discussed various ways to represent children's interests in the court system.[145] It is beyond the scope of this paper to engage fully with this debate; however, it is important to make a few key points. A welfare model of legal representation, where a lawyer defines and promotes children's best interests, is outdated and unaccountable to children. A guardian *ad litem* and a family advocate operate from the premise that children are under a legal disability, and that adults must determine and represent children's best interests to the court. Both of these methods perpetuate an adult-centric family law system that, as I have argued, serves adult priorities over children's best interests.

Unfortunately, determining what form of legal representation can best bring children's views to the court returns to a discussion of children's competency. However, if one starts from the premise that children are not legally disabled due to their incapacity, but have rights that protect them as full persons and that recognize and value their relationships and need for care, discussions of competency do not threaten children's interests. By involving other professionals such as social workers, and by training lawyers in child development, it will be possible to assess, on an individual basis, whether a child is capable of communicating his or her views.[146] If so, the courts should appoint a child advocate to represent those views. If, however, the child is unable to do so, an *amicus curiae* should gather relevant information to bring forth the child's perspective.

Effective legal representation of children will require more than just appointing lawyers to children.[147] B.C. should develop criteria for the selection, training and remuneration of child advocates in recognition of the different skill set required to work with and for children. In order to prevent the influence of adult parties, the B.C. government should increase legal aid to fund child representation. Additionally, Bessner recommends the establishment of an ombudsperson or child advocacy office that is responsible for informing children of their rights to a lawyer and coordinating training for lawyers. There is also the need for a special code of ethics and a code of practice for lawyers working with children. Taylor, Gollop and Smith, based on their interviews with children and their lawyers about the effectiveness of legal representation, present an insightful draft code of practice for lawyers who work with and for children.[148]

MEDIATION

Although some of the aforementioned changes may contribute to a more child-centric model of family law, many have criticized the inability of an adversarial process to deal effectively with family disputes.[149] Indeed, the recent B.C. Taskforce recommends that the province move the family justice system from an adversarial framework to one where mediation and other consensual processes such as collaborative family law are the standard rather than "alter-

145 Refer to note 140; See also *Putting Children First*, *supra* note 64, Recommendation 11.

146 At the Office of the Children's Lawyer in Ontario, lawyers and social workers work collaboratively in order to ascertain children's views and advocate on their behalf. See Rachel Birnbaum & Dena Moyal, "How Social Workers and Lawyers Collaborate to Promote Resolution in the Interests of Children: The Interface between Law in Theory and Law in Action" (2003) 21 C.F.L.Q. 379.

147 See Bessner, *supra* note 13 at 2.7 and 2.8, for detailed recommendations in this regard.

148 Taylor *et al*., *supra* note 140 at 132. Taylor *et al.* interviewed twenty New Zealand children ages eight to fifteen and twelve lawyers that were appointed to represent them in order to acquire qualitative research data on the effectiveness of legal representation for children. Their research supported the following proposed recommendations for a draft code of practice for child advocates: involve children in deciding upon an appropriate time and setting for meetings; meet with the child; explain the role of a lawyer and define the lawyer-client relationship in language that the child will understand; explain the limits of confidentiality and the fact that information shared by the child will be made available to others; explore options for resolution and explain the implications of each possibility; regularly inform children as cases progress; put children's views before the court; debrief children and advise them of the outcomes of cases; and inform children that they can contact their lawyers if future problems arise.

149 See e.g., Gregory Firestone & Janet Weinstein, "In the Best Interests of Children" (2004) 42 Fam. Ct. Rev. 203.

native" dispute resolution ("ADR") mechanisms.[150] Although children's involvement in mediation and other consensual processes is a topic unto itself, given ADR's increasing prevalence in resolving family law disputes and the potential for ADR to be more attentive to relationships among family members, it is important to make a few brief remarks.

Children's participation in mediation is contested.[151] For example, Emery argues that it is in children's best interests not to be included in mediation because it places children in the middle of their parents' dispute and burdens children with the responsibility of making adult decisions.[152] Others speak to the benefits of including children in mediation, including improved understanding, improved relationships with parents, enhanced feelings of competence and self-determination, and increased ability of parents to make decisions in their children's best interests.[153]

As with children's involvement in legal processes, the question that should be asked is how mediation can be structured in a way to create space for children to express their views without conveying to children that they are responsible for making the ultimate decision for their families. Children can be involved in mediation in ways that do not harm them.[154] Including children in ADR processes can assist parents to better understand how their marital dispute affects their children. By listening to children's perspectives, parents can make informed custody and access decisions that can better serve their children's interests.

PART V – Conclusion

By excluding children from meaningful participation in custody and access decisions, the B.C. family law system serves and protects adults' concerns rather than children's interests. The inclusion of children's voices in custody and access decisions is justifiable on several grounds: increased participation is likely to have positive effects on children; children are social actors who construct their own knowledge; principles of equality, dignity and respect demand that children have the opportunity to voice their views; international commitments and the recommendations of domestic law reports support the inclusion of children's perspectives; and the incorporation of children's voices will result in better legal decisions.

In order for the legal system to accord moral and legal significance to children's claims on par with that of adults, it is necessary to frame children's claims in the language of rights. However, the dominant conception of rights as the domain of independent, autonomous and capable individuals necessarily excludes children because of their dependence and maturing capacities. Thus, if family law processes are going to serve children rather than marginalize them, a new conception of rights is required. A new conception of rights that places being, rather than capacity, at the centre and emphasizes interdependence, relationships and care while attending to power dynamics within families, will better protect and promote children's interests.

Meaningful incorporation of children's voice into family law processes will demand transformative change. Merely increasing children's participation into a family law system that is flawed will not result in custody and access decisions that are in children's best interests. Legal standing for children will not only create the space for children to express their views but will

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150 *B.C. Taskforce*, *supra* note 78.

151 O'Connor, *supra* note 28 at 40–47; Ernest Sanchez & Sherrie Kibler-Sanchez, "Empowering Children in Mediation: An Intervention Model" (2004) 42 Fam. Ct. Rev. 554 [Sanchez & Kibler-Sanchez].

152 Robert Emery, "Children's Voices: Listening—and Deciding—is an Adult Responsibility" (2003) 45 Ariz. L. Rev. 621.

153 *B.C. Taskforce, supra* note 78 and Melissa Schoffer, "Bringing Children to the Mediation Table: Defining a Child's Best Interests in Divorce Mediation" (2005) 43 Fam. Ct. Rev. 323 [Schoffer].

154 See Sanchez and Kibler-Sanchez, *supra* note 151; O'Connor, *supra* note 28 at 40–47; and Schoffer, *supra* note 153, for ideas on how to include children in mediation in beneficial and productive ways.

also allow parents to convey their perspectives and experiences. However, effective legal representation requires that lawyers are sufficiently trained to work with children and that codes of ethics and practice guide lawyer's actions. Mediation can provide an effective way to resolve family disputes outside the adversarial system. Children can and should be involved in mediation so that custody and access decisions can reflect their interests and concerns.

Children not only require the space to express their views but they need trained professionals and a legal system that values interdependence, relationships and care so that those in the legal system can hear what children say. The inclusion of children's voices will better enable courts to make custody and access determinations in the best interests of the child.

ARE MEN WHO HAVE SEX WITH MEN SAFE BLOOD DONORS?

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CITED: (2007) 12 Appeal 73-89

Donating blood is an intimate act that exemplifies altruism. However, not everybody is privileged with the opportunity to save another's life in this manner. To maintain the safety and integrity of the blood system, the Public Health Agency of Canada has regulated the selection of donors by Canadian Blood Services ("CBS") and Héma-Québec ("HQ"). Individuals have been categorically disqualified from donating blood on the basis that they belong to groups that are at high risk of having transfusion-transmissible viral infections.[1] Since 1983, men who have had sex with men ("MSM") even once since 1977 have been deferred for life from donating their blood.[2] The extremely high prevalence of HIV/AIDS in the gay community in the 1980s and the lack of a test to detect the presence of the virus in donated blood justified the MSM policy. The lifetime deferral of MSM has remained intact despite enormous advances in HIV/AIDS testing and decreasing rates of HIV/AIDS infection in the gay community. The World Health Organization has recommended that blood collection agencies balance public health needs with human rights concerns.[3] Opponents of the MSM policy argue that gay men are being discriminated against on the basis of their sexual orientation. Calls have been made to change the lifetime ban to either a one or a five-year deferral period. Other critics, such as the Canadian AIDS Society, would rather have blood agencies screen donors through the lens of high-risk sexual behaviour.[4] While safety is CBS' and HQ's primary responsibility, there is undisputable evidence to show that the lifetime deferral of MSM is in breach of the equality rights of gay men under s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[5] MSM donors are subject

1 Steven Salbu, "AIDS and the Blood Supply: An Analysis of Law, Regulation, and Public Policy" (1996) 74 Wash. U.L. Q. 913 at 947.

2 Michael Belli, "The Constitutionality of the 'Men Who Have Sex With Men' Blood Donor Exclusion Policy" (2003) 4 J.L. in Society 315 at 338; Canadian Blood Services, *Record of Donation*, online: Canadian Blood Services – Société canadienne du sang – Donor Questionnaire <http://www.bloodservices.ca/centreapps/internet/uw_v502_mainengine.nsf/page/ROD%20Questionnaire> [*Record of Donation*].

3 Francine A. Hochberg, "HIV/AIDS and Blood Donation Policies: A Comparative Study of Public Health Policies and Individual Rights Norms" (2002) 12 Duke J. Comp. & Int'l L. 231 at 236-37. I would like to extend a note of caution regarding this source. Even though the article was published in 2002, the author used data regarding HIV infection dating to 1988. These statistics, as will be shown later in this essay, have changed drastically.

4 Interview of Paul Lapierre, Executive Director of the Canadian AIDS Society (26 May 2005).

5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), [*Charter*], 1982, c. 11.

to a "zero tolerance" policy. Compared to the lifetime deferral of MSM, people who have paid money or drugs for sex or had sex with someone whose sexual background they did not know are deferred for only one year.[6] This differential treatment places an increased burden on gay men and cannot be rationally justified. Like risks must be treated alike.[7]

PAST NEGLIGENCE – A BRIEF BACKGROUND TO THE MSM BAN

On May 30, 2005, the Canadian Red Cross ("Red Cross"), the predecessor of CBS and HQ, publicly accepted responsibility for its role in distributing infected blood products in the 1980s and early 1990s.[8] Roughly 1,200 Canadians were infected with HIV and more than 25,000 with Hepatitis C through tainted blood.[9] This apology came eight years after Krever J., in the *Commission of Inquiry on the Blood System in Canada*, and Boirns J. in *Walker Estate v. York Finch General Hospital* concluded that the Red Cross had acted inappropriately compared to its American counterparts.[10] The Red Cross had asked prospective donors whether they were in good health. This did not effectively deter infected donors from giving blood.[11] In the US, where the Food and Drug Administration ("FDA") regulates blood products, donor screening specifically targeted those who were at high risk of being HIV carriers even before the scientific community drew the link between HIV and AIDS, and understood that the virus was transmitted through blood.[12] An editorial in the *American Journal of Public Health* in May 1984 outlined the ideals behind the cautionary principle that would later be adopted by the Red Cross:

> The incomplete state of our knowledge must not serve as an excuse for failure to take prudent action. Public health has never clung to the principle that complete knowledge about a potential health hazard is a prerequisite for action. Quite the contrary, the historical record shows that public health's finest hours have often occurred when vigorous preventive action preceded the crossing of every scientific "t" and the dotting of every epidemiological "i."[13]

Nevertheless, only once conclusive evidence existed would the Red Cross consider adopting similar measures to the FDA's.[14]

In the 1980s, gay men were crucial to the donor pool. They were supportive of blood

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6 Record of Donation, *supra* note 2.

7 Since 2002, the Public Health Agency of Canada has amended its previous ban on sperm donations from MSM and men over forty. The new regulations allow the use of a known donor's semen provided it is subject to freezing and quarantine controls to reduce the risk of infection. It does not matter if the known donor is a MSM or over forty. Donations from known donors are now subject to the same tests as anonymous donations. *Jane Doe v. Canada (Attorney General)*, [2003] 68 O.R. (3d) 9 at paras. 10-11.).

8 Ken Kilpatrick & Colin Freeze, "Red Cross Pleads Guilty, Offers Apology in Blood Scandal" *The Globe and Mail* (31 May 2005), online: globeandmail.com <http://www.theglobeandmail.com/servlet/story/LAC.20050531.BLOOD31/>.

9 David Harvey, "David, Goliath and HIV-Infected Blood" (1996) 2 Canadian HIV/AIDS Policy & Law Newsletter; CBC News, "Ontario Court Approves Hep-C Settlement" 10 November 2000, online: Ontario court approves hep-C settlement <www.cbc.ca/story/canada/national/1999/09/22/blood990922.html>.

10 Clive Savage, "The Americans Had It Right" (1998) 8 Health Law.

11 John Jaffey, "Supreme Court of Canada Rejects Red Cross Appeals in Two Tainted-Blood Cases" (2001) 20 The Lawyer's Weekly.

12 Savage, *supra* note 10; Belli, *supra* note 2 at 322; The 1983 exclusion of "sexually active homosexual or bisexual men with multiple partners" was changed by the Office of Biologics to "males who have had sex with more than one male since 1979, and males whose male partner has had sex with more than one male since 1979". This revision meant to capture those men who did not consider themselves as being homosexual yet who engaged in high-risk sex with other males. The focus on prospective donors was to be placed on behaviour rather than on stereotypes. Salbu, *supra* note 1 at 949.

13 Horace Krever, *Commission of Inquiry on the Blood System in Canada: Final Report* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 295.

14 *Ibid.* at 226.

drives to an extent unparalleled by other groups.[15] For this reason, the Red Cross hesitated to exclude them when AIDS was first recognized.[16] Not until March 10, 1983, did the organization ask gay and bisexual men, as well as Haitian immigrants, to abstain from giving blood. At the time, 61 per cent of AIDS cases were among homosexual men and 37 per cent in Haitian immigrants.[17] As the Red Cross had anticipated, the two communities were outraged. Human rights complaints were filed on behalf of both groups.[18] In addition to the Haitians who launched complaints with the Quebec Human Rights Commission, the Haitian Red Cross lodged a grievance on their behalf with the League of Red Cross Societies. Accusations of racism struck the Red Cross hard, as it prided itself on its humanitarian and non-discriminatory image.[19] Nevertheless, after consulting with the Red Cross, leaders of the gay community quietly endorsed its request for voluntary self-deferral of persons at high risk of infection. Haitian Canadians were placated after the Red Cross stressed that it was only Haitian *immigrants* who were asked not to donate.[20] Everybody recognized that AIDS was going to be a national and international epidemic for years to come. Since blood transfusion remained critical in saving lives and no cure or test existed for HIV/AIDS, banning high-risk groups of transfusion-transmissible viral infections was the only means available for maintaining the integrity of the blood supply.[21]

CANADIAN BLOOD SERVICES AND HEMA-QUEBEC: SAFETY IS PARAMOUNT

Learning from the tragedy of the past, preserving a positive public image no longer takes precedence over the need for safe blood. CBS has pledged that: "Our primary objective is to ensure the safety of the blood system".[22] CBS' Public Relations Manager explained that the organization "approaches the issue of blood donors from the recipient's point of view. The recipient should have the right to the safest blood possible and that overrides any perceived entitlement to donate".[23] As the Canadian Hemophilia Society noted, it is the recipient who bears 100 per cent of any risk.[24]

Screening procedures implemented by CBS and HQ succeeded in reducing the possible spread of transfusion-transmissible viral infections. Dr. Mindy Goldman, Executive Medical Director responsible for donor and transplantation services at CBS, stated that: "The frequency of diseases in the general population is higher than it is in our donor pool".[25] It is uncertain which particular questions on the donor questionnaire are responsible for the current degree of risk in the blood system.[26] CBS and HQ ask prospective donors the following:

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15 Hochberg, *supra* note 3 at n. 68 cited Melinda Tuhus, "Supplies of Blood Fall as Demand Increases" *N.Y. Times* (29 October 2000), 14CN at 3.

16 *Ibid.* at 244.

17 Andre Picard, *The Gift of Death: Confronting Canada's Tainted-Blood Tragedy* (Toronto: HarperCollins Publishers, 1995) at 73; Krever, *supra* note 13 at 231.

18 Picard, *supra* note 17 at 74.

19 Krever, *supra* note 13 at 233.

20 *Ibid.* at 234.

21 Kevin Hopkins, "Blood Sweat and Tears: Toward a New Paradigm for Protecting Donor Privacy" (2000) 7 Va. J. Soc. Pol'y & L. 141 at 143-44.

22 Interview of Elaine Ashfield, Legal Counsel for Canadian Blood Services (27 May 2005).

23 Interview of Derek Mellon, Public Relations Manager for Canadian Blood Services (24 May 2005).

24 Canadian Hemophilia Society, "CHS Policy on Blood, Blood Products and their Alternatives", online: Canadian Hemophilia Society Policy on Blood, Blood Products and their Alternatives <http://www.hemophilia.ca/en/1.2.1.php#19>; The American counterpart of the CHS, the National Hemophilia Foundation, stated that while screening procedures must err on the side of caution, there is currently no position regarding the MSM ban. Interview of Glenn Monas, VP Public Policy of the National Hemophilia Foundation, 13 May 2005.

25 Interview of Dr. Mindy Goldman, Canadian Blood Services, Executive Medical Director (31 May 2005) [Goldman]; See also A. Farrugia, "The Mantra of Blood Safety: Time for a New Tune?" (2004) 86 Vox Sanguinis 1 at 2.

26 *Ibid*.

FIGURE 1
CANADIAN BLOOD SERVICES DONOR QUESTIONNAIRE

RECORD OF DONATION
ANSWER YES OR NO TO QUESTIONS 1 THROUGH 13

1. a) Are you feeling well today?
   b) Do you have a cold, flu, sore throat, fever, infection or allergy problem today?
2. a) In the last 3 days have you taken any medicine or drugs (pills including Aspirin or shots), other than birth control pills and vitamins?
   b) In the last 3 days have you had dental work?
3. In the past week, have you had a fever with headache?
4. a) In the last 3 months have you had a vaccination?
   b) In the last 3 months have you taken Accutane for skin problems?
5. a) In the last 6 months have you been under a doctor's care, had surgery, taken Cyclomen (Danazol)?
   b) If female, in the last 6 months have you been pregnant?
   c) In the last 6 months have you taken Proscar, Avodart (Dutasteride), Propecia or Methotrexate?
6. a) In the last 12 months have you had a tattoo, ear piercing, skin piercing, acupuncture, electrolysis, graft, injury from a needle, or come in contact with someone else's blood?
   b) In the last 12 months have you had a rabies shot?
   c) In the last 12 months have you had close contact with a person who has had hepatitis or yellow jaundice?
7. a) Have you ever taken Tegison or Soriatane for skin problems?
   b) Have you ever taken human pituitary growth hormone, human pituitary gonadotrophin hormone (sometimes used for treatment of infertility or to promote weight loss)?
   c) Have you ever received a dura mater (brain covering) graft?
8. Have you ever had:
   a) yellow jaundice (other than at birth), hepatitis or liver problems?
   b) epilepsy, coma, stroke, convulsions or fainting?
   c) heart or blood pressure problems or heart surgery?
   d) cancer, diabetes, ulcerative colitis or Crohn's disease?
   e) kidney, lung or blood problems?
   f) Chagas' disease, babesiosis or leishmaniasis?
9. a) Have you ever had malaria?
   b) In the last 3 years, have you been outside Canada, other than the U.S.?
10. a) Have you spent a total of 3 months or more in the United Kingdom (England, Northern Ireland, Scotland, Wales, the Isle of Man, or the Channel Islands) since January 1, 1980?
    b) If you have been in the United Kingdom since 1980, did you receive a blood transfusion or any medical treatment with a product made from blood?
    c) Have you spent a total of 3 months or more in France since January 1, 1980?
    d) Have you spent a total of 5 years or more in Europe since January 1, 1980?
11. Are you aware of a diagnosis of Creutzfeldt-Jakob Disease among any of your blood relatives (parent, child, sibling)?
12. Have you ever had an AIDS (HIV) test other than for donating blood?
13. In the past 12 months, have you been in jail or prison?

FIGURE 1, CONTINUED
CANADIAN BLOOD SERVICES DONOR QUESTIONNAIRE

I have answered all questions truthfully. I understand that to make a false statement is a serious matter and could harm others. I understand the procedure and side effects and complications associated with my (whole blood), (plasmapheresis), (cytapheresis) donation. I have read and understand the information on how the AIDS

(HIV) virus may spread by donated blood and plasma. I agree not to make a donation if there is a chance this might spread the AIDS (HIV) virus. I agree to the testing of my blood for hepatitis, syphilis, AIDS (HIV), HTLV and other factors as required for the safety of the blood recipient. I understand that Canadian Blood Services (CBS) is currently evaluating a new, unlicensed test for the West Nile virus, called nucleic acid testing (NAT). I have been provided with and understand information regarding the use of these tests on my blood donation. I understand that my positive test results on any of these tests will be given to me in confidence, that they will be reported to Public Health if required by law. I agree to donate blood for use as decided by CBS. I agree to call CBS if after donating I decide my blood should not be used.

STOP HERE

14. a) Do you have AIDS?
    b) Have you ever had a positive test for HIV or AIDS?
15. Have you used cocaine within the last 12 months?
16. Have you ever taken illegal drugs or illegal steroids with a needle even one time?
17. At any time since 1977, have you taken money or drugs for sex?
18. Male donors: Have you had sex with a man, even one time since 1977?
19. Have you ever taken clotting factor concentrates for a bleeding disorder such as hemophilia?
20. Have you had sex with anyone who has AIDS or has tested positive for HIV or AIDS?
21. Female donors: In the last 12 months, have you had sex with a man who had sex, even one time since 1977 with another man?
22. Have you had sex in the last 12 months with anyone who has ever taken illegal drugs or illegal steroids with a needle?
23. At any time in the last 12 months, have you paid money or drugs for sex?
24. At any time in the last 12 months, have you had sex with anyone who has taken money or drugs for sex?
25. Have you had sex in the last 12 months with anyone who has taken clotting factor concentrates?
26. In the last 12 months, have you had or been treated for syphilis or gonorrhea?
27. In the last 12 months, have you received blood or blood products by transfusion for any reason, such as an accident or surgery?
28. In the past 12 months, have you had sex with someone whose sexual background you don't know?
29. a) Were you born in or have you lived in any of the following countries since 1977: Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon, Niger or Nigeria?
    b) If you have travelled to any of those countries since 1977, did you receive a blood transfusion or any medical treatment with a product made from blood?
    c) Have you had sexual contact with anyone who was born in or lived in these countries since 1977?

The Record of Donation closely follows the recommendations made by the Canadian Standards Association, which advocates deferring individuals as follows:[27]

FIGURE 2
CANADIAN STANDARDS ASSOCIATION CRITERIA

5.3.9.2 – Following persons shall be **indefinitely deferred**:

a) persons who have taken illegal drugs by injection;
b) persons who received money or drugs in exchange for sex at any time since 1977;
c) men who have had sex with another male, even once, since 1977;
d) persons who received plasma-derived clotting factors for a bleeding disorder;
e) persons who have had sex with an HIV-infected person;
f) persons who are at risk of having acquired HIV infection in countries where circulating strains are sometimes not detectable by current screening tests.

5.3.9.4 – Following persons shall be **deferred for 12 months**:

a) persons who have resided in the household of, or had sexual contact with, an individual with viral hepatitis unless there is proof of vaccination;
b) persons who have been confined in a correctional facility for more than 48 successive hours;
c) persons who have taken illegal steroids by injection;
d) women who have had sex with a male who has had sex with another male, even once, since 1977;
e) persons who have had sex with a person who has used illegal drugs or illegal steroids by injection;
f) persons who have had sex with a prostitute.

5.3.9.5 - Following persons shall be **deferred for 6 months**:

a) persons who have had a tattoo;
b) persons who have had body piercing;
c) persons who have had acupuncture or electrolysis;
d) persons who have had mucous membrane exposure to blood;
e) persons whose skin has been penetrated with non-sterile instruments or equipment contaminated with blood or body fluids;
f) persons who have used intra-nasal cocaine;
g) persons who have had a sexual encounter with someone whose sexual background they are unsure of;
h) persons who have had sex with an individual who has received plasma-derived clotting factor concentrates.

27 Canadian Standards Association standards are minimal standards. CBS and HQ have at times implemented tougher criteria in selecting donors. For example, while the Canadian Standards Association suggests that persons who have a tattoo or have had body piercing be deferred for six months, CBS and HQ defer these individuals for twelve months. It is of also of interest to note that Health Canada representatives sit on the Canadian Standards Association committee in charge of blood procedures. Goldman, *supra* note 25.

WHY MSM ARE DEEMED HIGH-RISK DONORS

According to Dr. Goldman, "HIV/AIDS, hepatitis, and syphilis are the main reasons justifying the exclusion of MSM".[28] Window period donations and administrative mishandling of blood products are the two greatest threats to the safety of the blood system.[29] Window period donations are those made by individuals who carry infectious diseases yet do not display any signs or symptoms of an illness. Additionally, the transfusion-transmissible viral infection cannot be detected. The viral load is so small that no test is sensitive enough to be able to alert CBS or HQ of its presence.

Administrative errors occur when tested blood has been shown to carry a transfusion-transmissible viral infection, yet for some reason, the blood is not removed from the system and ends up transfused. These clerical mistakes occur more frequently in non-automated blood collection centres such as hospitals. Since HIV is transmitted with a 90 per cent success rate during blood transfusions, compared to 0.1 per cent to 1 per cent during vaginal or anal intercourse, preventive measures must be implemented.[30] To address these two sources of risk, categorical exclusion policies have been adopted.

Categorical exclusions are effective means of ensuring the safety of the blood supply so long as there are gaps in the process. The more accurate post-collection blood screening becomes, the lower the benefit of categorical exclusion. When there is a strong correlation between class membership and transfusion-transmissible viral infections, highly accurate stereotypes can be an efficient means of disqualifying donors. This approach is legitimate only when the risk of a targeted group exceeds the risk of the population at large. Small or illusory differences do not warrant the exclusion of a class of individuals particularly when the demand for blood products is barely being met with current supply. Deferring all sexually active gay men becomes less rational as the incidence of HIV among all other groups continues to increase more rapidly than the incidence of HIV among male homosexuals.[31]

As testing procedures have enjoyed enormous scientific advances, the window period for detecting HIV/AIDS has decreased. On March 2, 1985, the FDA approved an enzyme-linked immunosorbent assay test ("ELISA") to detect AIDS.[32] ELISA was designed for maximum sensitivity to eliminate virtually all infected blood from the blood pool.[33] On April 30, 1987, the Western Blot test was combined with the ELISA test. When used together, the two tests were believed to be 99 per cent to 100 per cent effective.[34] Beginning in 1999, nucleic acid testing ("NAT") has further reduced the risk of transfusion transmission of HIV to about one unit per 4.7 million donations. As a result, the window period has decreased from a period of six to eight-weeks to nine to eleven days.[35]

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28 MSM is a population that is known to carry other viruses such as HHV-8, CMV, EBV, HHV-6, HSV-1/2 but it is not clear whether transfusion of blood from carriers will be transmitted to recipients of blood products. Goldman, *supra* note 25; Interview of Dr. Jeannie Callum, Sunnybrook and Women's College Health Science Centre, 30 May 2005 [Callum]; John C. Flynn, *Essentials of Immunohematology* (Philadelphia: W.B. Saunders Company, 1998) at 168.

29 Krever, *supra* note 13 at 32; Ana Sanchez *et al.*, "The Impact of Male-To-Male Sexual Experience on Risk Profiles of Blood Donors" (2005) 45 Transfusion 404 at 405 [Sanchez]; John G. Culhane, "Sexual Orientation: Law & Policy: Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools" (2005) 24 St. Louis U. Pub. L. Rev. 129 at 143.

30 Hochberg, *supra* note 3 at 235.

31 Salbu, *supra* note 1 at 952–53.

32 Hopkins, *supra* note 21 at 151.

33 Belli, *supra* note 2 at 355.

34 Hopkins, *supra* note 21 at 151; Hochberg, *supra* note 3 at n. 35; Belli, *supra* note 2 at 335 cited Kathryn W. Pipelow, "AIDS, Blood Banks and the Courts: The Legal Response to Transfusion-Acquired Disease" 38 S.D.L. Rev. at 13.

35 Hopkins, *supra* note 21 at 151; Christopher D. Pilcher *et al.*, "Acute HIV Revisited: New Opportunities for Treatment and Prevention," (2004) 113 J. Clinical Investigation 937 at 937; Belli, *supra* note 2 at 337; Salbu, *supra* note 1 at 931; CBS estimated that the window period decreased from forty-two days in the 1980s to thirteen days through NAT. Canadian Blood Services, "Nucleic Acid Amplification Testing for HIV", online: <http://www.bloodservices.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/PDF/$file/scientific_document.pdf>.

To date, MSM represent the largest category of individuals who have been diagnosed with AIDS on a cumulative basis. Seventy per cent of all reported AIDS cases since 1979 have been in MSM.[36] However, the trend in yearly infection rates has changed drastically since AIDS first emerged. From a high of 78 per cent prior to 1994, MSM represented 34.6 per cent of AIDS diagnoses in 2003. Over the same period of time, heterosexual exposure increased from 10.6 per cent to 44.7 per cent respectively.[37] The use of cumulative statistics skews the risk presented by MSM to the blood supply. Since ELISA, Western Blot, and NAT can now detect HIV antibodies nine to eleven days after infection, there is no need to consider those who were infected in the past. The risk of window period donations relates solely to those who have recently contracted HIV. As for administrative errors, as more and more blood collection centres become automated, the risk of accidental release will also be greatly reduced.[38]

PAST ATTEMPTS TO MODIFY THE LIFETIME DEFERRAL OF MSM

The closing of the window period with the implementation of NAT, as well as new research by the FDA into blood-bank error rates, prompted the American Association of Blood Banks and the America's Blood Centers to favour a one-year deferral for MSM in a September, 2000 FDA Blood Advisory Committee meeting.[39] The American Red Cross opposed the American Association of Blood Bank's joint proposal with the America's Blood Centers. Dr. Dayton, on behalf of the American Association of Blood Banks, argued that should MSM be deferred for a period of five years, the deferral would be so far outside the window period of false negative tests that the change would not introduce any new cases of infection.[40] Nevertheless, the Blood Advisory Committee voted 7–6 against the implementation of a five-year deferral period for MSM.[41] The American Red Cross stood firm on its zero tolerance approach and insisted that it would not support introducing any risk, however small, to the blood supply.[42] Dr. Farrugia of the Australian Commonwealth Department of Health and Ageing lamented this decision, citing compelling research suggesting the risk was minimal and the change was desirable in terms of increasing the number of blood donors.[43]

Even though it is not clear whether the FDA vote generated any reaction in Canada, the razor-thin margin revealed that consensus is absent on the issue of MSM donors.[44] The division in the U.S. was replicated in Canada at a public meeting organized by CBS and HQ in 2002. After various stakeholders in blood products met to discuss the current policies of CBS and HQ, the expert panel failed to recommend any changes since no agreement for modifications could be reached. Dr. Goldman believes that blood policy "is not carved in stone. It should be revisited every once in a while because there is no absolute scientific proof".[45]

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36 Public Health Agency of Canada, *HIV and AIDS in Canada: Surveillance Report to June 30, 2004*, online: Public Health Agency of Canada <www.phac-aspc.gc.ca/publicat/aids-sida/haic-vsac0604/pdf/haic-vsac0604.pdf> [PHAC].

37 *Ibid*. at 4.

38 Belli, *supra* note 2 at n. 147ff.

39 Sanchez, *supra* note 30 at 405; Belli, *supra* note 3 at 343; J.P. Brooks, "The Rights of Blood Recipients Should Supersede Any Asserted Rights of Blood Donors" (2004) 87 Vox Sanguinis 280 at 281.

40 Culhane, *supra* note 30 at 135.

41 Belli, *supra* note 2 at 343.

42 Culhane, *supra* note 30 at 135; Belli, *supra* note 2 at 346 cited U.S., Food and Drug Administration, Blood Products Advisory Committee 67th Meeting, Section II, *Deferral, as Blood or Plasma Donors, of Males Who Have Had Sex With Males* (14 September 2000), online: Blood Products Advisory Committee <http://www.fda.gov/OHRMS/DOCKETS/AC/00/backgrd/3649b1.htm> at 226.

43 Farrugia, *supra* note 25 at 2.

44 Goldman, *supra* note 25.

45 *Ibid.*

SCIENTIFIC UNCERTAINTY REGARDING MSM RISK

A review of scientific journal articles regarding the risk posed by MSM donors reveals scant data and much doubt. Professor Culhane of the Widener University School of Law contends that the MSM ban is far too broad and cannot be justified by any reasonable reading of the scientific literature.[46] The latest article on the subject, published in March 2005, admitted that: "The paucity of data on [MSM] … has made it difficult to assess the implications for the blood supply of changing this policy".[47] The study, however, found a higher prevalence of unreported deferrable risks [48] in MSM donors than those who did not disclose having had sex with another man. The authors relied on an anonymous mail survey sent to individuals who donated blood from April through October of 1998. Unfortunately, the wording of the questionnaire prevented the authors from determining whether the higher prevalence of unreported deferrable risks found among donors disclosing past MSM activity represented ongoing risk activities that would increase the probability of disease transmission or whether those unreported deferrable risks occurred a long time ago and would no longer affect the health of the donor. Moreover, it was not possible to compare the sample of MSM donors in the survey (who had lied when donating blood) with the general MSM population because the general MSM population did not donate due to the deferral policy.[49] Dr. Sanchez concluded that "no evidence supported changing the current MSM policy to permit donations from [MSM] within the past 5 years. For donors with a more remote history of [MSM], the findings were equivocal. A better understanding of the association between male-to-male sex and other unreported deferrable risks appears needed".[50] The inherent flaws in Dr. Sanchez's study suggest that the only undisputable finding made is that those who lie about their MSM status are significantly more likely to lie about other unreported deferrable risks when they donate blood.

Research used by the FDA in its Blood Advisory Committee meeting held in 2000 had estimated that introducing a five-year deferral period for MSM would lead to an additional 1.78 HIV-infected units released in the blood system each year.[51] The source of these 1.78 units were as follows: 1.3 units would come from small, non-automated blood collection systems that erroneously release tainted blood, 0.4 units would come from highly automated blood centres, and the remaining 0.08 units would come from pipetting related errors. Hospitals that processed roughly 10 per cent of transfused blood produced over 80 per cent of mistakes caused through mishandling.[52] The mistakes made on the part of the blood collection agencies that have tested blood for HIV/AIDS, received a positive result, yet failed to prevent the release of the infected blood, are used as justification for excluding all MSM donors.[53]

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46 Culhane, *supra* note 30 at 130.

47 Sanchez, *supra* note 30 at 405.

48 Unreported deferrable risks were defined as transfusion-transmissible viral infection risk behaviours that would have deferred a prospective donor from giving blood if reported during the screening process. Unreported deferrable risks for men included: having a positive HIV test, been diagnosed with AIDS, used injected drugs or illegal steroids [IDU], was born in a country where HIV-1 Group O viruses are endemic; since 1977, had sex with a man or has taken money or drugs for sex; in the past year had sex, with a prostitute, with an IDU, or with a recipient of clotting factor concentrates; or in the past year, had a positive test for syphilis, was treated for syphilis/gonorrhoea, had a blood transfusion, received a transplant, was struck by a sharp instrument or a needle that contained someone else's blood, or was jailed for seventy-two continuous hours. Sanchez, *supra* note 30 at 406.

49 *Ibid.* at 404-405, 410-11.

50 Sanchez, *Ibid.* at 404. Dr. Sanchez wrote: "Unlike men with recent male-to-male sex experiences, screening tests results for donors who last engaged in male-to-male sex more than five years ago were comparable to those of male donors not reporting male-to-male sex although the prevalence of UDRs was significantly higher". *Ibid,* at 409–10. They were two to six times more likely to report other UDRs than men who did not acknowledge a prior male-to-male sexual encounter. *Ibid.,* at 410.

51 Belli, *supra* note 2 at 345-6, n. 147; Culhane, *supra* note 30 at 135.

52 Belli, *supra* note 2 at 345-6.

53 *Ibid.* at 346.

While nobody would like an additional 1.78 individuals to be infected with HIV, these infections must be compared to the current rate of transfusion-transmitted HIV. Each year, there are over 12 million blood transfusions in the U.S. [54] According to the Center for Disease Control, 134 individuals were infected with HIV in 2003 from blood transfusions—donations overwhelmingly made by non-MSM donors.[55] It is not clear whether these transfusions took place in the U.S. or elsewhere.[56] According to Dr. Germain, the risk that HIV-positive blood would be released if a one-year deferral of MSM were implemented was found to be one unit every sixty-nine years in Quebec, one unit every sixteen years in the rest of Canada, and one unit every 1.1 years in the United States.[57] He concluded that "the incremental risk of a revised deferral policy for MSM would be very low, although not zero".[58] Dr. Callum from the University of Toronto stated: "A one-year deferral period for MSM will protect [recipients of blood products] from HIV".[59] The current donor deferral policy tolerates a wide range of risks associated with heterosexual sex while it imposes a zero-tolerance attitude towards MSM regardless of the risk associated with individual behaviour.[60]

THE QUESTIONNAIRE – HOW EFFECTIVE IS IT?

Dr. Farrugia believes that "the sensitivity and specificity of the current donor selection processes are relatively poor".[61] Not even Dr. Goldman knows which questions are responsible for the reduced rate of transfusion-transmissible viral infections in the donor pool compared to the rate of infection in the general population.[62] The current questionnaire, in particular the MSM question, is deficient in three ways. First, it does not screen for the precise behaviours that increase the likelihood that an individual will have a transfusion-transmissible viral infection. Second, data shows that donors are lying when answering the questionnaire. Third, leaving "sex" undefined is not sound policy.

Paul Lapierre, Executive Director of the Canadian AIDS Society, has opposed the MSM deferral policy and would rather have blood collection agencies screen donors on the basis of safe sexual practices.[63] At the Blood Advisory Committee meeting, Dr. Valleroy stressed that current practices provide false comfort. HIV-infected blood donors are giving blood. The use of broad classifications based on irrelevant categories ought to be reformulated to ask individuals about their behaviour in a private and supportive setting. Then, if a sufficiently specific risk exists, potential donors should be encouraged to return if and when the window of infection has closed.[64] However, the FDA, CBS, and HQ oppose departing from categorical exclusions and moving towards an assessment of a prospective donor's sexual behaviour. The FDA wrote, "Although a potential individual donor may practice safe sex, persons who have participated in high-risk behaviours are, as a group, still considered to be at increased risk of transmitting

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54 Hopkins, *supra* note 21 at 156.

55 Center for Disease Control, HIV/AIDS Surveillance Report: Cases of HIV Infection & AIDS in the US (2003), online: Centre for Disease Control and Prevention <http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2003report/pdf/2003SurveillanceReport.pdf> at 35-36.

56 Interview of Dr. Heather Hume, Executive Medical Director, Canadian Blood Services (3 June 2005).

57 M. Germain *et al.*, "The Risks and Benefits of Accepting Men Who Have Sex With Men as Blood Donors" (2003) 43 Transfusion 25 at 28.

58 *Ibid,* at 29.

59 Callum, *supra* note 29. Dr. Callum also noted that a one-year deferral period for MSM would not protect recipients from "all the other viruses [other than HIV]". However, Dr. Goldman's comment at *supra.* note 29, conflicts with Dr. Callum's statement.

60 Culhane, *supra* note 30 at 135.

61 Farrugia, *supra* note 25 at 2.

62 Goldman, *supra* note 25.

63 Lapierre, *supra* note 4.

64 Culhane, *supra* note 30 at 146–7.

HIV".[65] When confronted with the possibility of screening donors on an individual basis, for example by screening for high-risk sexual behaviour, Dr. Goldman responded as follows:

> The screening process of donors is not the same thing as an individual risk assessment of the person. The screening process is done on 850,000 people a year with CBS and 250,000 with HQ. It is meant to be as standardized as possible because donors already tell us the questionnaire is too long. … As a result, what you end up with are questions that are trying to get at a simple answer. You are not refining your approach to an individual assessment of risk. Obviously there is a huge difference between people who have experimented with MSM or were intravenous-drug users once, 20 years ago, versus somebody who shot up yesterday. But we are not trying to assess individual risk but to have a streamlined approach so that we can say an individual is in a high-risk category and defer them. And that's that.[66]

In countries such as France, where donors are interviewed by medical doctors, Dr. Goldman conceded that in such a situation, it is appropriate to gauge the true risk posed by an individual.[67] The length and complexity of the current questionnaire, as well as the fact that nurses in Canada do not receive training as extensive as that given to doctors, yet are involved in screening donors, mitigates against refining the deferral categories.

Even more troubling than the existence of irrelevant categories is the fact that some donors are intentionally, others unintentionally, answering the questionnaire falsely.[68] Intentional errors may arise from individuals wishing to avoid the stigma associated with AIDS and homosexuality. Some respondents may worry that the information being collected will not be kept confidential and may be used in a discriminatory way against them in the future.[69] Others, like Kyle Freeman, allegedly make negligent misrepresentations because they believe the question is irrational, hurtful, and unconstitutional.[70] Anecdotal reports of donors being encouraged to lie about their sexual background in the context of blood drives abound.[71] Despite the finding by Dr. Sanchez and Dr. Soldan that 2.4 per cent to 5 per cent of donors lie about their MSM status, Dr. Callum doubts that "we have an accurate assessment of the number of donors who lie at the time of donation".[72]

The vagueness of the MSM question: "Male donors: Have you had sex with a man, even one time since 1977?" leaves it up to the donor to determine what "sex" means. It is foreseeable that some donors would assume that the question is concerned with only the riskiest behaviour—unprotected (perhaps passive) anal intercourse.[73] The 1970 Kinsey Institute Survey found that 20 per cent of American men have had male-to-male sex, but that only 7 per cent engaged in gay sex after age nineteen.[74] Perhaps those who had sex as adolescents do not consider, or would be ashamed to believe, that their previous experience constitutes "sex". Ultimately, different sexual activities carry different risks. Leaving "sex" undefined renders the usefulness of the question doubtful. As Dr. Goldman noted, "The questionnaire is a relationship of trust between the donor and the blood supplier. It is only as good if the donor understands

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65 *Ibid.* at 132 n. 17.

66 Goldman, *supra* note 25.

67 *Ibid.*

68 Salbu, *supra* note 1 at 954.

69 *Ibid.* at 955.

70 *Canadian Blood Services v. Freeman* (4 November 2004), Ottawa 02-CV-20980 (Ont. Sup. Ct.).*

71 Brooks, *supra* note 40 at 282.

72 Sanchez, *supra* note 30 at 406; Callum, *supra* note 70; K. Soldan and K. Sinka, "Evaluation of the De-Selection of Men Who Have Had Sex With Men From Blood Donation in England" (2004) 84 Vox Sanguinis 265 at 265.

73 Culhane, *supra* note 30 at 136-7.

74 Sanchez, *supra* note 30 at 410.

what they are answering about and giving truthful responses".[75]

WHAT IS THE HARM IN EXCLUDING INDIVIDUALS WHO POSE LITTLE IF ANY RISK?

In the twentieth century alone, homosexuals were worked to death in concentration camps, driven to suicide by psychiatric treatments, endured medical experimentation, and have been, and continue to be, imprisoned in various parts of the world.[76] Although being excluded from the donor pool pales in comparison to these horrors, given the current state of knowledge on the risks of transfusion-transmissible viral infections, the decreased length of the window-period, and the increasing automation of blood testing, the deferral of MSM for life can only be explained by apathy, homophobia, and misconceptions regarding the role of MSM in Canada's tainted blood scandal.

Homophobia is the root cause of chronic stress associated with having to cope with social stigmatization.[77] The physical and psychological harassment against homosexuals has been documented extensively.[78] More than 25 per cent of gay males have been verbally abused, a further 20 per cent have been physically assaulted, 17 per cent reported property damage, 12 per cent have had objects thrown at them and 5 per cent have been spat upon. All of these actions were motivated because of the perpetrators' hatred of homosexuality.[79] Additional studies show that homosexuals are more likely to resort to drugs and suffer from increased rates of depression.[80] For instance, 25 per cent of the Canadian population smokes compared to 40 per cent of homosexuals.[81] In Ontario, 1.3 per cent of the population used crack/cocaine over the past year and 12.4 per cent used cannabis. Of gay men, 4.8 per cent and 45.6 per cent used these drugs respectively.[82] In light of the heated debate regarding same-sex marriage, it may seem that attitudes towards homosexuality have improved. However, in a poll conducted by Leger Marketing in May 2005, half of all Canadians surveyed agreed that homosexuality is "an abnormal condition".[83]

Equality for Gays and Lesbians Everywhere asserted that the current practices of CBS and HQ promotes homophobia and undermines the confidence of Canadians in the equity, effectiveness, and safety of the blood system.[84] Heterosexuality has been designated as "safe" while homosexual acts have been depicted as carrying "dangerous" risks.[85] This stereotyping has been consistent with art, mainstream media, and biomedical discourse that blame gay men

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75 Goldman, *supra* note 25.

76 Vanessa Baird, *Sex, Love & Homophobia: Lesbian, Gay, Bisexual and Transgender Lives* (London: Amnesty International, 2004) at 13.

77 Christopher Banks, *The Cost of Homophobia: Literature Review of the Economic Impact of Homophobia on Canada* (Saskatoon, Saskatchewan: Gay and Lesbian Health Services, 2001) at 17.

78 Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39 at para. 5 cited Report of the Parliamentary Committee on Equality Rights, *Equality for All* (Ottawa: Queen's Printer, 1985) at 26; Jurgens at note 44.

79 Jeffrey Keller, "On Becoming a Fag" (1994) 58 Sask. L. Rev. 191 at nn. 32-35.

80 Banks, *supra* note 78 at 18.

81 *Ibid.*, at 26.

82 Ted Myers & Dan Allman, "Ontario Men's Survey" online: Ontario Men's Survey <www.mens-survey.ca> at 61 [OMS]; Canadian Centre on Substance Abuse, *Canadian Addiction Survey: A National Survey of Canadians' Use of Alcohol and Other Drugs – Prevalence of Use and Related Harms* (Ottawa: Canadian Centre on Substance Abuse, 2004), online: Canadian Centre on Substance Abuse < http://www.ccsa.ca/NR/rdonlyres/B2C820A2-C987-4F08-8605-2BE999FE4DFC/0/ccsa0048042004.pdf > at 3.

83 Ben Thompson, "Canadian Gay Marriage Bill Heads to Summer Vote" (2 June 2005), online: Gay News From 365Gay.com <http://www.365gay.com/newscon05/06/060205canadaMarry.htm>.

84 David Garmaise, "Blood Donor Screening Practices Criticized" (2002) 6 Canadian HIV/AIDS Policy & Law Review.

85 Joe Rollins, "AIDS, Law, and the Rhetoric of Sexuality" (2002) 36 Law & Soc'y Rev. 161 at 177; Belli, *supra* note 2 at 329.

as both the source and carriers of AIDS.[86] Krever J. noted that AIDS has been described as the "gay plague".[87] The stigma, shame, and marginalization of both AIDS and homosexuality have prevented the implementation of rational policies. Behaviours, which can transmit diseases, have been confused with identity categories, which are irrelevant.[88]

The public perception of AIDS has not been well served by the current MSM policy. Thirty per cent of individuals surveyed by EKOS Research Associations believed that HIV/AIDS is mostly a gay person's disease. Twenty-five per cent believed it is mostly a drug user's disease, and a further 38 per cent believed it is mostly a third world disease.[89] Even more lamentable is the unfortunate division of HIV-positive individuals as "guilty" or "innocent". Liberal Member of Parliament Roseanne Skoke viscerally stated in 1994 that "[T]here are those innocent victims that are dying from AIDS … and then there are those homosexuals that are promoting and advancing the homosexual movement and that are spreading AIDS".[90]

THE LIFETIME DEFERRAL OF MSM IS UNCONSTITUTIONAL

The most serious allegation made against the MSM policy is that, as it stands, it is contrary to the principles of the Canadian Constitution. A constitutional analysis of the validity of the MSM ban will proceed in three steps. First, it must be determined whether CBS and HQ fall under the jurisdiction of the *Charter*. Second, a violation of s. 15(1) of the *Charter* must be proven. Third, provided that a *Charter* right has been breached, the infringement must shown to be unreasonable and not justifiable in a free and democratic society under s. 1 analysis.

Section 32 of the *Charter* states:

> This Charter applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament.[91]

In *McKinney v. University of Guelph,*[92] the Supreme Court of Canada ("SCC") outlined a test used to identify if the *Charter* applies to a non-governmental body. If an entity acts pursuant to statutory authority, furthers a government objective, and promotes a broad public interest, or if the legislative, executive, or administrative branch of government exercises general control over the entity, then the actions of that body are subject to *Charter* review. Since donated blood is a drug pursuant to the regulations established under the federal *Food and Drugs Act,*[93] CBS and HQ must acquire an Establishment Licence issued by the Health Products and Food Branch Inspectorate of the Public Health Agency of Canada. To qualify for a licence, certain regulations must be followed. The organization of CBS and HQ is such that there is ample government oversight in terms of the classification of appropriate donors. Moreover, CBS and HQ, by running Canada's blood system, fulfil a mandate that promotes the broad public interest. For these reasons, the two organizations are subject to the provisions of the *Charter*.

Section 15(1) of the *Charter* states:

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86 Rollins, *supra* note 86 at 177; Martin Schwartz, "Gay Men and the Health Care System," *Health Care for Lesbians and Gay Men: Confronting Homophobia and Heterosexism*" ed. by K. Jean Peterson (New York: Harrington Park Press, 1996) at 25.

87 Krever, *supra* note 13 at 202.

88 Rollins, *supra* note 86 at 169.

89 Public Health Agency of Canada, *HIV/AIDS: An Attitudinal Survey – Perceptions of Risk* (2003), online: Public Health Agency of Canada <www.phac-aspc.gc.ca/aids-sida/hiv_aids/attitudinal_survey/3_risk.html>.

90 Ralf Jurgens, "Legal and Ethical Issues Raised by HIV/AIDS: Literature Review and Annotated Bibliography" (1995) Canadian AIDS Society at n. 47.

91 *Charter, supra* note 5, s. 32.

92 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

93 Food and Drugs Act, R.S., c.F-27.

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[94]

The purpose of s. 15(1) is to prevent discrimination against groups suffering social, political, and legal disadvantage.[95] In *R. v. Turpin,* Wilson J. wrote, "the guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others".[96] Any law that imposes a stricter standard on one group of individuals than on another will violate the principle of equality.[97]

Iacobucci J. outlined the SCC's s. 15(1) equality analysis in *Law v. Canada*. To find a breach of s. 15(1), a purposive and contextual, rather than a mechanical and formulaic, approach towards equality was adopted. A claimant must first establish that a law or policy imposes differential treatment either in purpose or effect. Second, this differential treatment must be based either on an enumerated or analogous ground. Third, a claimant has the burden of proving that the differential treatment is discriminatory in that it imposes a burden or withdraws a benefit. This has the effect of demeaning the claimant's human dignity.[98]

In the framework of blood donations, MSM satisfy all three criteria to establish a breach of equality. An affirmative response to Question 18[99] on the Record of Donation leads to a lifetime deferral for MSM. The justification for this policy is that they are a high-risk group for the transmission of HIV/AIDS, hepatitis, and syphilis. These are the same reasons for the one-year deferral of female donors who have had sex with a man who has had sex, even one time since 1977 with another man, of individuals who have paid money or drugs for sex, or people who have had sex with someone whose sexual background they did not know. Presumably, a heterosexual female can have unsafe sex with hundreds of people and still donate. Perhaps she will have to wait a year. MSM, however, are barred from donating for their entire lives. The policy enforced by CBS and HQ imposes differential treatment on MSM.

The differential treatment between MSM and non-MSM donors is based on the analogous ground of sexual orientation. Courts have recognized the historic disadvantages endured by homosexuals in cases such as *Vriend v. Alberta,*[100] *Halpern v. Canada*[101] and *Egan v. Canada*.[102]

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94 *Charter, supra* note 5, s. 15(1). Note that the *Canadian Human Rights Act,* R.S. 1985, c. H6 also applies to the screening policies implemented by CBS. The Canadian Human Rights Commission has not yet dealt with the MSM issue however, the Commission des droits de la personne in Quebec, the British Columbia Council of Human Rights, and the Ontario Human Rights Commission have. In 1995, the Quebec Commission held in *J.R., M.N. v. Canadian Red Cross Society* (21 June 1995), Montreal MTL 7482/MTL 7483 (Commission des droits de la personne et des droits de la jeunesse), that donating blood was a juridical act under CCQ 1806, that blood drives were a service ordinarily offered to the public, and that the MSM policy discriminated on the basis of sexual orientation. Nevertheless, the fact that the rate of HIV infection in MSM in 1994 was 69.4 per cent, justified their exclusion. Likewise, the British Columbia Council of Human Rights found in *Robb Stewart v. Canadian Red Cross Society* (10 May 1995), Victoria 940467 (British Columbia Council of Human Rights), that because MSM was a reported risk factor in 77 per cent of adults AIDS cases in Canada in 1994, and that there was a forty-five day window period, their exclusion was legitimate. In *Cloutier v. Canadian Blood Services* (17 December 2003), Toronto GSEA-566SX5 (Ontario Human Rights Commission), the Ontario Human Rights Commission refused to deal with the MSM issue since it deemed it did not have the proper jurisdiction.

95 Ryder, *supra* note 79 at para. 80.

96 *R. . v. Turpin*, [1989] 1 S.C.R. 1296 at 1329.

97 Ryder, *supra* note 79 at para. 80.

98 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

99 Record of Donation, *supra* note 2, Question 18 states: Male donors: Have you had sex with a man, even one time since 1977?

100 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*].

101 *Halpern v. Toronto (City)*, (2003) 65 O.R. (3d) 161 [*Halpern*].

102 *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*].

In these SCC judgments, to hold sexual orientation as an analogous ground meant that an individual's choice of a partner, be it heterosexual or homosexual, along with any lawful activity within that relationship, was protected. The first case to find discrimination on the basis of sexual orientation was *Veysey v. Commissioner of Correctional Services*.[103] Dubé J. held that persons who deviated from sexual norms "have been victimized and stigmatized throughout history because of prejudice, mostly based on fear and ignorance".[104] Question 18 specifically targets male homosexuals by deferring any men who have had homosexual sex from the donor pool.

The MSM policy has the effect of infringing on the dignity of MSM by perpetuating homophobic beliefs and burdening gay men with the stigma of HIV/AIDS. Dignity has been defined by the SCC as encompassing notions of self-respect and self-worth. It is concerned with both physical and psychological integrity and empowerment. Dignity does not relate to the status of an individual in society, rather it is concerned with the manner in which a person legitimately feels when confronted with a particular law. Unfair treatment founded on personal traits which do not relate to individual needs, capacities or merits derogates from the principle of dignity. The marginalization of people is to be avoided.[105] In *Halpern*, the Ontario Court of Appeal recognized that denying homosexual couples the right to marry propagated the view that same-sex couples were unable to form lasting and loving relationships. For this reason gay partnerships were not worthy of the recognition and benefits enjoyed by married couples. In the same vein, the exclusion of MSM from the donor pool helps foster the distorted image of HIV/AIDS held by Canadians as not being a disease that affects heterosexuals. After being bombarded with ads meant to raise awareness of blood drives and encourage people to donate blood, gay men are turned away and asked never to come back. Gay men are not worthy of having the privilege of saving the life of another in need.

Section 1 of the *Charter* states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[106]

Provided that a breach of s. 15(1) is found by a court, the state has the burden of justifying the infringement through s.1. In *R v. Oakes*,[107] a two-part test was developed to help the court determine whether a violation of a right is constitutional. First, the state must prove that the purpose of the law is pressing and substantial. Second, the means of achieving that goal must be reasonable and demonstrably justified, and in proportion to the importance of the objective. This criterion is met if the measure is rationally connected to the objective, if the least restrictive means were used, and if there is proportionality between the effects of the measures and the objective attained. The more severe the deleterious effects, the more important the objective and positive effects must be.[108]

The state could easily justify an equality breach on the first prong of the *Oakes* test but the MSM policy would not pass judicial scrutiny under the second prong. The MSM deferral is not rationally connected to the objective, the least restrictive means are not used, nor is there proportionality between the effects of the ban and the objective attained. Having collectively suffered through the tainted blood scandal, it is clear that the purpose of the Record of Dona-

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103 *Veysey v. Canada (Commissioner of Correctional Services*), (1990) 29 F.T.R. 74 [*Veysey*].

104 Ryder, *supra* note 79 at para. 126 cited *Veysey* at 78.

105 *Law*, *supra* note 99.

106 *Charter, supra* note 5 at s. 1.

107 *R* . v. *Oakes* [1986] 1 S.C.R. 103.

108 *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

tion is to ensure a safe blood supply. Since there is no cure for HIV/AIDS or for hepatitis, this purpose is both pressing and substantial. It is extremely questionable whether the MSM ban is rationally connected to the objective of a safe blood supply. MSM are not any more susceptible to contracting or transmitting HIV than heterosexuals, nor is HIV infected blood any more dangerous to the blood pool if it comes from a MSM or from a heterosexual. HIV tests do not more accurately detect HIV in heterosexuals than in MSM.[109] With new rates of HIV in MSM falling to 34.6 per cent and rising to 44.7 per cent in heterosexuals in 2003,[110] the evidence strongly suggests that the lifetime deferral of MSM is an artifact of a policy that was too exclusionary to begin with, but is now being used to justify the status quo.[111] The current donor selection process discriminates against MSM because of improper handling of blood products by hospitals, not because of HIV rates or the nine to eleven day window period. Rather than addressing the origin of the error in negligent handling, the FDA, CBS, and HQ choose to instead ostracize MSM.[112]

In the event that a court finds a rational connection between the MSM ban and the objective of ensuring a safe blood supply, the MSM ban also suffers from the fact that the least restrictive means are not used nor do the advantages gained outweigh the deleterious effects. Status-based stereotypes suffer from the inevitable possibility that exceptions to the generalizations made will occur. HIV is transmitted through high-risk sexual practices. Banning donations from all MSM presumes that the majority of gay men practice unsafe sex.[113] Homophobia and the mistaken beliefs regarding HIV/AIDS by the Canadian public are fuelled by the irrational stance adopted by blood collection agencies. Moreover, the policy prevents gay men from demonstrating that even though they may have had sex once since 1977, that they pose no additional risk to the blood supply than heterosexual donors because they practice safe sex, are in a monogamous relationship, etc.[114]

The use of irrelevant categorical exclusions by CBS and HQ is contrary to the holding of the SCC in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* ("*Grismer*").[115] The Government of British Columbia had previously banned all persons with homonymous hemianopia from driving, through a blanket prohibition. This particular medical condition results in a lack of peripheral vision. In *Grismer,* the issue was not about whether unsafe drivers should be permitted to drive. Rather, it was about giving those who pose a potential risk an opportunity to prove through an individual assessment that they can drive. False assumptions regarding the effects of disability on individual abilities must not be allowed to prevail.[116] Governments are permitted to regulate an activity on the basis of risk, but they cannot deny a license to an individual because of discriminatory assumptions founded on stereotypes of disability.[117] The blanket exclusion of people with homonymous hemianopia, just as the lifetime deferral of MSM, imposed a standard of perfection which is not the standard applied to people without a disability or, in the context of the blood supply, heterosexuals.[118]

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109 Belli, *supra* note 2 at 372.

110 PHAC, *supra* note 37 at 32.

111 Culhane, *supra* note 30 at 136.

112 Belli, *supra* note 2 at 374.

113 Salbu, *supra* note 1 at 954.

114 *Ibid.* at 40; According to the OMS, *supra* note 83 at 12, the rates of MSM having unprotected sex is increasing. These findings were based on a survey of roughly 5,000 gay and bisexual men, 70 per cent of whom were recruited in bars and 10 per cent of whom were recruited in bathhouses. These statistics should not be used against MSM because of the biased sample.

115 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*].

116 *Ibid.* at para. 2.

117 *Ibid.* at para. 1.

118 *Ibid.* at para. 35.

McLachlin J. held that "Evidence that a particular group is being treated more harshly than others without apparent justification may indicate that the standard applied to that group is not reasonably necessary".[119] Dr. Callum, Dr. Farrugia, and Dr. Germain, all agree that a one-year deferral of MSM would pose very little risk to the blood supply.[120] Dr. Sanchez was more vague, and said that a five-year deferral of MSM would likely be safe.[121] Given the current leniency given to heterosexual donors, it is time that CBS and HQ treat like risks alike.

TIME FOR CHANGE

The lifetime deferral of MSM contrasted against other categories of heterosexual donors is irrational, harmful, and unconstitutional. While a right to donate blood has not been recognized by courts or legislatures in the United States[122] or in Canada such a right has been upheld by the Human Rights Commission in South Africa, where heterosexual transmission of HIV is more common than homosexual transmission.[123] In no way does this essay argue that a right to donate blood exists. Safety must be the top priority. However, CBS and HQ cannot legitimately continue to enforce a standard of perfection on gay men and a dramatically lower standard for heterosexuals.

When the AIDS crisis first erupted, the FDA was right to permanently exclude all sexually active gay men from donating blood since AIDS disproportionately affected that community. With the enormous advances made in HIV testing, the increasing automation of blood processing and the epidemiological data on the spread of HIV in communities other than MSM, the lifetime deferral of MSM is nothing short of discrimination. Unsupported by convincing research, the MSM policy is based on unfounded assumptions and continues to stigmatize the gay community.[124] Gay men are not all dangerous carriers of HIV/AIDS. Moreover, the policy serves only to exacerbate the critical shortage of blood available for transfusions.[125]

If CBS and HQ desire to serve their mandate legally, they would at the very least modify the lifetime deferral of MSM to a one-year deferral period. The blood supply would be better served, however, with a screening process that assesses the true risk posed by an individual by determining whether they practice safer sex.

ACKNOWLEDGEMENTS

This research would not have been possible without the help and support of numerous individuals. Prof. Colleen Sheppard graciously agreed to supervise and provide comments on my work. Dr. Jeannie Callum and Dr. Mark Lomaga dedicated much of their time to explain and give their insights into the scientific literature. Mr. Nick Peters researched the internal structures of CBS, HQ and the Public Health Agency of Canada. Last and most important, I must thank my loving friends and family. It was they who stood by me as I struggled to come to terms with my homosexuality.

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119 *Ibid.* at para. 31. Provided that a court found a rational connection between the MSM ban and the safety of the blood supply, moving to the least restrictive means analysis, the maintenance of the status quo would be contingent on CBS and HQ showing that accommodating blood donations from MSM would amount to undue hardship.

120 Callum, *supra* note 60; Farrugia, *supra* note 25 at 2; Germain, *supra* note 58 at 25.

121 Sanchez, *supra* note 30 at 404.

122 *Raso v. Moran*, 551 F. Supp. 294, 297 (D.R.I. 1982).

123 Brooks, *supra* note 40 at 284.

124 Culhane, *supra* note 30 at 130.

125 *Ibid.*

GENERATING A GREEN TAX POLICY FOR RENEWABLE ELECTRICITY IN CANADA

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CITED: (2007) 12 Appeal 90-111

INTRODUCTION

Recent federal governments have been committed to policies reducing Canada's green house gas emissions through the promotion of green energy development.[1] Tax measures have been a vital instrument in working towards these policies. However, while recent tax measures have achieved a more level playing field between fossil fuel and green energy project development, they have proven insufficient to mitigate the primary obstacles to green energy market growth—significantly higher up front capital investment requirements and consequent higher financing risks and costs. This paper asserts that if tax instruments are to result in meaningful market growth for green energy, they must be developed out of a market transformation perspective which addresses these barriers. In doing so, this paper examines: (1) the recent tax policies of the Department of Finance ("Finance") within the context of the federal governments' broader sustainable development policies; (2) environmental market perspectives and economic frameworks in which tax measures can function as economic instruments to encourage the development of green energy; and (3), in light of these environmental policies and market perspectives, the tax instruments that have been introduced by Finance and the extent to which they have reached their objectives.

PART I - Sustainable Development and Green Energy Policies

In 1995, the federal government began implementing a broad governance policy of sustainable development. Providing a legislative foundation for these policies, the government

1 It is helpful to distinguish between renewable and green energy. The term "renewable energy" is generally used to refer to electricity produced from sources "that can be reasonably replenished within a human lifetime by either natural means [including include wind, solar, hydro, geothermal, biomass and ocean energy (tidal and wave)] or human assistance [e.g., replanting of crops used for biofuels]". "Green energy" is generally used to refer to environmentally optimal electricity produced from natural sources of wind, solar, hydro (small-scale run-of-the-river), geothermal, and ocean (tidal and wave) energy. While there is disagreement as to whether large-scale hydro should be viewed as green energy (as it has been increasingly associated with negative ecological and socioeconomic impacts), for the purposes of this paper it will be excluded. The same is true of biomass, which is a carbon fuel emitting GHGs. Organization for Economic Co-operation and Development/International Energy Agency, *Energy Market Reform: Power Generation Investment in Electricity Markets* (Paris: OECD/IEA, 2003), online: Organization for Economic Co-operation and Development/International Energy Agency <http://www.iea.org/dbtw-wpd/Textbase/publications/free_new_Desc.asp?PUBS_ID=1202> [OECD, "Energy Market Reform"].

amended the *Auditor General Act* to define "sustainable development" as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[2] The following year, the government outlined its sustainable development policy as a three-fold integration of economic growth, social well-being and environmental protection.[3] Renewable energy and energy conservation were stated to be "key components of the federal government's climate change and sustainable development priorities".[4]

Implementing its sustainable development policy on the international stage, the federal government became a signatory to the Kyoto Protocol ("Kyoto") in 1997. Under Kyoto, Canada committed itself to reducing its greenhouse gas ("GHG") emissions to 6 per cent below 1990 levels by 2008–2012. In practice, this commitment is much larger than it first appears. At the time of signing, Canada's GHG emissions were already 13 per cent above 1990 levels, and had risen to almost 24 per cent above 1990 levels by the time the federal government ratified Kyoto in 2002.[5] Without increased government measures, Natural Resources Canada estimates that Canada's GHG emissions will increase to 26 per cent above 1990 levels by 2008–2012.[6] The OECD International Energy Agency ("IEA") estimates this figure to be almost 34 per cent.[7]

It is generally agreed that reducing GHG emissions from fossil fuels[8] will require a dual supply and demand approach: a reduction of energy demand (by reducing consumption through the development of more efficient energy technologies) and an increase of non-GHG-emitting energy production. In November 2002, one month before its ratification of Kyoto, the federal government released its "Climate Change Plan for Canada" containing over ninety federal and provincial programs aimed at reducing GHG emissions in Canada through the dual supply and demand approach.[9] A fundamental objective of this plan was the development and commissioning of green energy through the Wind Power Production Incentive ("WPPI"). The WPPI allocated $260 million over fifteen years through feed-in tariffs[10] with the goal of installing 1000 MW of wind farms.[11]

The Climate Change Plan of Canada was superseded in 2005 by a new plan entitled "Mov-

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2 *Auditor General Act* RSC 1985, c. A-17, s. 2. This definition of sustainable development, as well as the long title of the Act, "An Act respecting the office of the Auditor General of Canada and sustainable development monitoring and reporting", were added by amendment in 1995 (SC 1995 c.43).

3 Canada, House of Commons, *Keeping a Promise: Towards a Sustainable Budget* , The Federal Government Response to The Eighth Report of the Standing Committee on Environment and Sustainable Development, (Ottawa: Department of Finance, July 1996), at 5.

4 Canada, House of Commons, *Sustainable Development Strategies: Using the Tax System and Managing Office Solid Waste*, Chapter 3, Report of the Commissioner of the Environment and Sustainable Development to the House of Commons (Ottawa: Public Works and Government Services, 2004), at 3–6 [Public Works, "Using the Tax System"].

5 Canada, House of Commons, *Government Support for Energy Investments*, Chapter 3, 2000 Report of the Commissioner of the Environment and Sustainable Development (Ottawa: Office of the Auditor General of Canada) online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/domino/reports.nsf/a1b15d892a1f761a852565c40068a492/6fd57c4419eb02f9852568e9004d6ee9?OpenDocument> at 5 [Auditor General].

6 *Ibid.*

7 Organization for Economic Co-operation and Development, *Energy Policies of IEA Countries: 2004 Review* (Paris: OECD, 2004) online: International Energy Agency – Energy Publications <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1465> at 122 [OECD, "Energy Policies"].

8 The main source of GHG emissions in Canada (and elsewhere) is the production and consumption of energy derived from fossil fuels, as demonstrated by the top three GHG contributing sectors: transportation (25 per cent), fossil fuel production and distribution (19 per cent), and electric power generation (17 per cent). See David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 84.

9 Canada, Department of Finance, *Sustainable Development Strategy 2004-2006* (Ottawa: Department of Finance, March 2004) at 19 [SDS 2004-2006].

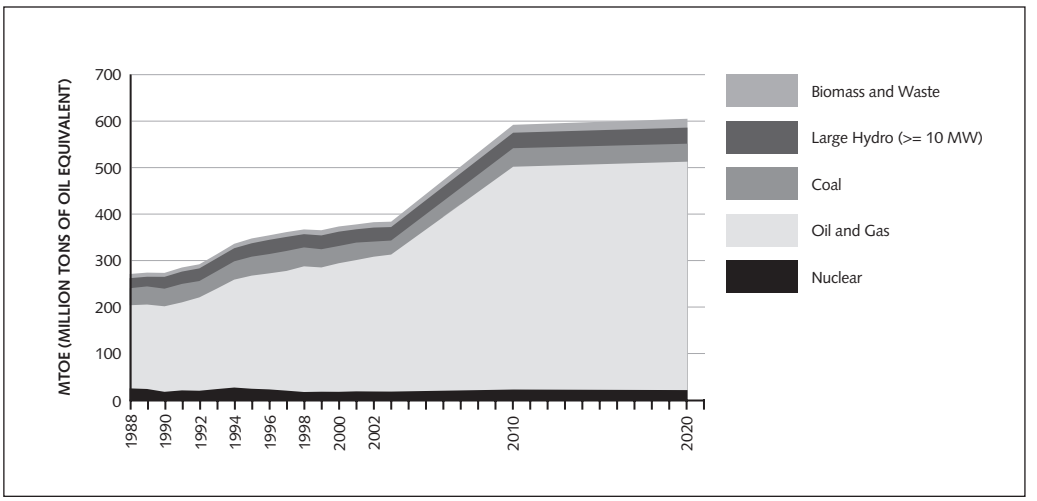
10 While there are several types of feed-in tariff mechanisms, those introduced by the federal government have taken the form of a premium paid by the government on the market purchase price of electricity purchased by electricity utilities from green power producers, generally on a kilowatt per hour basis, thereby enabling green energy producers to bid more competitively against non-renewable energy producers.

11 Canada, Natural Resources, *Wind Power Production Incentive* (Ottawa: Natural Resources Canada, 2002), online: Canadian Renewable Energy Network <http://www.canren.gc.ca/app/filerepository/B13F241FE43A4584A993B21ECEFB9ADD.pdf>.

ing Forward on Climate Change: A Plan for Honouring our Kyoto Commitment". The plan quadrupled the WWPI, allocating $920 million over fifteen years to increase the generating capacity of wind farms by 4,000 MW, and established the Renewable Power Production Incentive, providing $97 million over five years to increase the generating capacity of run-of-the-river hydroelectric, biomass, and tidal installations to 1000 MW.[12] The current government cancelled both of these plans in 2006, launching a new ecoENERGY Renewable Initiative program in 2007. The ecoENERGY Initiative allocates $1.5 billion over the next ten years to increase the generating capacity of renewable energy installations by 4,000 MW through feed-in tariffs for renewable energy projects.[13]

Despite the positive steps taken by these programs, the IEA projects that by the year 2020 green energy sources will account for only 0.08 per cent of Canada's total energy production.[14] While this represents a market growth of 60 per cent over green energy's current share of Canada's total energy production (0.05 per cent), it remains well below the amount needed to significantly offset GHG emissions. As illustrated in Figure 1, whereas combustible energy is projected to continue to account for over 90 per cent of Canada's energy production in 2020, green energy production remains invisible.[15]

FIGURE 1
TOTAL CANADIAN ENERGY PRODUCTION FROM 1988-2003 WITH PROJECTIONS TO 2020 [a]



[a] Derived from data supplied by the Organization for Economic Co-operation and Development/International Energy Agency, *Energy Policies of IEA Countries* (Paris: OECD/IEA, 1988–2005), online: International Energy Agency – Energy Publications <http://www.iea.org/dbtw-wpd/Textbase/publications/index.asp>.

12 Canada, Natural Resources, *Backgrounder: Wind Power Production Incentive* (Ottawa: Natural Resources Canada, December 2005), online: Natural Resources Canada News Room - Backgrounder - 2005/12a <http://www.nrcan.gc.ca/media/newsreleases/2005/200512a_e.htm>.

13 Canada, Natural Resources, *Backgrounder: ecoENERGY Renewable Initiative: Increasing Canada's Renewable ecoENERGY Supplies* (Ottawa: Natural Resources Canada, February 2007), online: Natural Resources Canada News Room - Backgrounder 2007-01-19 <http://www.nrcan.gc.ca/media/newsreleases/2007/200702a_e.htm>.

14 Calculated from data provided by Organization for Economic Co-operation and Development/International Energy Agency, *Energy Policies of IEA Countries: 2005 Review* (Paris: OECD/IEA, 2005), online: International Energy Agency – Energy Publications <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1803> at 431 [OECD, "Energy Policy Data"].

15 *Ibid.*

The continuing dominance of fossil fuel production is explained at least in part by Canada's energy policy. As a member of the IEA, Canada's energy policy seeks to balance environmental protection with energy security and economic development—collectively referred to as the "3Es".[16] The rapid growth in energy demand experienced by IEA countries, including Canada, has made this balance increasingly difficult, often resulting in priority given to energy security and economic development.[17] The IEA estimates that global energy demand will increase by 1.7 per cent per year over the next three decades requiring US$10 trillion of investment in the electricity sector alone.[18]

As public purses do not have such resources, IEA countries have agreed that mobilizing private investment "will require the lowering of regulatory and market barriers and the creation of an attractive investment climate".[19] While this policy appears to be succeeding in addressing energy security concerns, the increased competition for project investment capital has created difficulty for green energy projects to acquire financing. In the deregulated European electricity markets, renewable energy projects have had tremendous difficulty securing project financing, as lenders have been unwilling to bear the higher risks inherent in renewable projects.[20] Lenders that have agreed to take on certain risks have generally insisted on relatively high debt to equity ratios and significantly shorter loan maturities as compared with large fossil fuel power project financings.[21]

Noting that energy security objectives may also conflict with sustainability goals of reducing GHG emissions, the IEA has stated:

> These goals can be both complementary and contradictory. More secure energy would normally promote long-term economic development, but can involve higher costs. And higher energy consumption associated with economic growth can increase pollution. Devising policies that strike the right balance between the "3Es" and that embrace cost-effective approaches to achieving them are, and will remain, at the heart of the IEA's mission. … How to meet climate change and sustainable development objectives while enhancing the security of energy supplies and economic and social development.[22]

Renewable energy is increasingly being considered by policy-makers as "striking the right balance" between energy and environmental objectives.[23] Canada's National Round Table on the Environment and the Economy has identified numerous economic, social, and environmental benefits that Canadians will gain from the development of green technology (in addition to the resulting reduction in GHG emissions), including development of new energy resources, reduced health care costs, increased competitiveness of the domestic renewable industry, and

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16 OECD, "Energy Policies", *supra* note 7 at 39.

17 Organization for Economic Co-operation and Development, *Mobilising Energy Technology: Activities of the IEA Working Parties and Expert Groups* (Paris: OECD, 2005) online: International Energy Agency – Energy Publications <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1514> at 9 [OECD, "Mobilising Energy"].

18 OECD, "Energy Policies", *supra* note 7 at 34–5.

19 *Ibid.* at 35.

20 Peter Gish, "Project Financing of Renewable Energy Projects in Europe: An Improving Market," (1999) 22 *Suffolk Transnational Law Review* 405–440.

21 *Ibid.* at 426.

22 OECD, "Energy Policies", *supra* note 7 at 39.

23 Organization for Economic Co-operation and Development, *Renewable Energy: Market and Policy Trends in IEA Countries* (Paris: OECD, 2004) online: International Energy Agency – Energy Publications <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1263> at 37 [OECD, "Renewable Energy"].

the creation of new jobs.[24]

PART II - Green Market Policies and Tax Instrument Rationales

While IEA members agree that green energy must be made economically competitive in order for the IEA to achieve both environmental and energy security objectives,[25] there is no consensus as to how to do so. "Just as all markets are exceedingly varied and complex, apparently so are the instruments that might be used to frame or modify those markets".[26] However, nearly every IEA member country has developed tax measures of one sort or another as an economic instrument to improve green energy markets.[27]

An inherent advantage of tax measures when compared to other economic instruments is their capacity to be broad performance-based measures which leave market choices to participants and avoid the risks associated with instruments that pick winners.[28] Moreover, tax measures have a greater capacity to provide a comprehensive approach to achieving multiple objectives, resulting in lower administrative costs and less piecemeal results.

Environmental tax measures are broadly categorized as either environmental taxes or tax expenditures. Environmental taxes have been defined as a tax whose base "is a physical unit (or a proxy for it) of something that has a proven specific negative impact on the environment, when used or released".[29] Environmental tax expenditures, on the other hand, are generally thought of as "deliberate departures from otherwise applicable taxes in order to encourage the [environmentally positive] activity at which the incentive is directed".[30] The development of tax measures in either category has generally occurred according to three market perspectives: (1) reducing market inefficiency barriers, (2) encouraging research, development and deployment, and (3) creating market transformation.[31]

2.1) MARKET EFFICIENCY PERSPECTIVE

The market efficiency perspective views the adoption of green energy, as with any market decision, as an economic process involving decisions between investors and consumers.[32] Where the prices of goods and services accurately reflect their real costs and benefits, these

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24 National Roundtable on the Environment and the Economy, *State of the Debate: Economic Instruments for Long-term Reductions in Energy-based Carbon Emissions* (Ottawa: National Roundtable on the Environment and the Economy, 2005) online: National Roundtable on the Environment and the Economy <http://www.nrtee-trnee.ca/eng/programs/current_programs/EFR-Energy/EFR-SOD-Report/Full-Report/200507-EFR-SOD-FullReport_Introduction_E.htm> at 16–9 [National Roundtable].

25 OECD, "Mobilising Energy", supra note 17 at 35.

26 Ryan H. Wiser, *The Role of Public Policy in Emerging Green Power Markets: An Analysis of Marketer Preferences* (Berkeley: Environmental Energy Technologies Division, Ernest Orlando Lawrence Berkeley National Laboratory, 1999) online: Environmental Energy Technologies Division, University of California <http://eetd.lbl.gov/ea/EMS/reports/44178.pdf> at 33.

27 It is beyond the scope of this paper to evaluate the suitability of these various instruments to Canada's economy, and so they are not listed here. An excellent overview of the various tax measures employed by each OECD member country is provided by the OECD in *Renewable Energy: Market and Policy Trends in IEA Countries* (OECD, "Mobilising Energy", *supra* note 17). The IEA also maintains an updated online database at: International Energy Agency <http://www.iea.org/textbase/pamsdb/grlist.aspx?by=policy>. An excellent database on state, local, utility, and selected federal incentives in the United States is published online by The Database of State Incentives for Renewable Energy (DSIRE) online: Database of State Incentives for Renewable Energy <http://www.dsireusa.org/>.

28 National Roundtable, *supra* note 24 at 26.

29 David G. Duff, "Tax Policy and Global Warming" (2003), vol. 51, no. 6 *Canadian Tax Journal*, 2063-2118, 2068.

30 *Ibid.* at 2078.

31 Organization for Economic Co-operation and Development/International Energy Agency, *Creating Markets for Energy Technologies* (Paris: OECD/IEA, 2003) online: International Energy Agency – Energy Publications <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1100> [OECD, "Creating Markets"].

32 *Ibid.* at 12.

transactions will result in an optimal allocation of capital.[33] Accordingly, this perspective seeks to identify and correct economic barriers which prevent markets from efficiently allocating the costs and benefits involved in any given transaction.[34] The two main market barriers identified under this perspective are (1) energy externalities and (2) non–level playing fields as a result of uneven government subsidies.

2.1.1) Energy Externalities

> [Externalities] occur in a market transaction if any of the costs or benefits involved in it are not accounted for in the price paid for the product that is exchanged. If there are costs that are external to the market (i.e., the buyer does not pay some of the costs incurred in producing the product), a negative externality occurs. If there are external benefits, a positive externality occurs.[35]

Where product externalities are not properly accounted for in unit prices, markets fail to allocate distributed costs and benefits, thereby creating inefficiencies and resulting in market failure.[36] Economic instruments may correct this failure by internalizing externalities in unit prices, thereby enabling consumer preference to reflect actual costs and benefits, and resulting in greater market efficiency.

As concerns green energy, the market efficiency perspective aims to provide market participants with "a policy framework that provides a basis to select the best energy choice at the optimal price while internalizing externalities related to energy security, environmental protection and economic development".[37] Economists generally agree that the most effective instrument by which to accomplish this internalization is a carbon or CO_2 tax imposed on the unit price of carbon goods, whereby the external costs incurred as a result of GHG emissions and other pollution are internalized in the unit price of the carbon.[38] In addition to market efficiency, a carbon tax has also been rationalized as "compensating owners of the 'environmental commons' for the environmental injury they cause and to minimize future harm".[39]

While externalities and injury caused by carbon combustion are difficult to calculate with certainty, it seems to be a general principle that "some level of environmental taxation may be more likely to promote economic efficiency than no tax at all".[40] Moreover, a nominal amount may be necessary in light of the inability of economic analysis to "determine whether environmental costs should be measured by an affected population's willingness to pay to be free from environmental harm (which assumes a polluter's right to pollute) or its willingness to accept a payment in order to suffer the harm (which assumes a basic right to be free from pollution)".[41]

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33 *Ibid.*

34 *Ibid.* at 83.

35 *Ibid.* at 67.

36 Julia Reinaud, *The European Refinery Industry Under the EU Emissions Trading Scheme: Competitiveness, Trade Flows and Investment Implications* (Paris: IEA Publications, November 2005) online: International Energy Agency – Energy Publications <http://www.iea.org/dbtw-wpd/Textbase/publications/free_new_Desc.asp?PUBS_ID=1577> at 3.

37 OECD, "Renewable Energy", *supra* note 23 at 38.

38 "Taxes on energy or energy-related CO_2 emissions were first adopted in a number of northern European countries in the early 1990s. Such taxes are now found in Austria, the Czech Republic, Denmark, Estonia, Finland, Germany, Italy, the Netherlands, Norway, Sweden, Switzerland, and the U.K.". Lynn Price,Christina Galitsky & Jonathan Sinton, *Tax and Fiscal Policies for Promotion of Industrial Energy Efficiency: A Survey of International Experience* (Berkeley: Environmental Energy Technologies Division, Ernest Orlando Lawrence Berkeley National Laboratory, September 2005) online: Environmental Energy Technologies Division, University of California <http://repositories.cdlib.org/lbnl/LBNL-58128/> at 5 [Price, Galitsky, & Sinton].

39 Duff, *supra* note 29 at 2069.

40 *Ibid.* at 2077.

41 *Ibid.* at 2071.

Whichever measure is utilized, studies have indicated that carbon taxes "generally achieve their objective of reducing emissions" by reducing demand for the product taxed.[42]

But what of its effect on green energy development? Theoretically, if energy prices more accurately reflected actual costs of consumption, fossil fuel would cost more and the price of green energy would be more competitive, thus resulting in green energy gaining market share.[43] However, this will only be the case where consumers have the choice to choose green energy as an alternative. As most green energy is electrical, and as electrical generation is controlled by tendering processes under provincially regulated utilities in Canada, a carbon tax on end-use consumers will have little impact on green energy demand.

Thus, a carbon tax will only result in green energy market growth through tax shifting, whereby revenue generated from the tax is earmarked for green energy development, or other environmentally beneficial projects. For example, a carbon levy imposed on gasoline sales might be dedicated to funding green energy projects—or tax expenditures to promote such projects. Such shifting has been criticized as illegitimate under a market efficiency perspective, under the assumption that it will result in a distortion of green energy price signals and thereby contribute to market inefficiencies.[44] However, this criticism fails to take into account that whereas a carbon tax internalizes the negative externalities resulting from fossil fuel consumption, a dedicated use of the revenues to facilitate market deployment of green energy internalizes the positive externalities resulting from green energy consumption—namely the displaced costs of GHGs. This internalization of both positive and negative externalities through carbon tax shifting has been described as realizing "double dividends"—reduced consumption of fossil fuels and an increased production of green energy.[45]

2.1.2) Un-level Playing Fields

Playing field inefficiencies do not involve externalities, but rather focus "on direct project revenues and costs from the perspective of the investor".[46] A market playing field is uneven where the costs of goods and services are subsidized through government expenditures in an uneven manner such that profit margins fail to reflect the costs of production thereby resulting in inefficient allocations of capital investment. However, rectifying an uneven playing field is not as simple as removing uneven subsidies. The inefficient allocation of project capital results in an entrenched market advantage for the previously subsidized producers which remains well after the original subsidies have ceased. This entrenched advantage is a result of existing projects with lower financing costs, more developed technology, and entrenched consumer preferences.

Within the Canadian tax system,

> [t]he relative tax treatment of competing energy investments is a long-standing policy issue. At its core is the perception that the tax system, through a variety of incentive provisions, favours non-renewable energy investments, chiefly in oil and natural gas, to the detriment of renewable energy and energy efficiency investments.[47]

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42 Price, Galitsky & Sinton, *supra* note 38 at 6.

43 OECD, "Creating Markets", *supra* note 31 at 65, 84; and Duff, *supra* note 29 at 2079.

44 *Ibid.*

45 The concept of "double dividends" has more commonly referred to tax shifting whereby the revenues from a carbon tax are used to reduce other taxes such as income taxes. However, as the subject of this paper is tax measures which will encourage the growth of green energy, this paper focuses on the concept of earmarking revenues for green energy.

46 Canada, Natural Resources Canada, *The Level Playing Field: The Tax Treatment of Competing Energy Investments* (Ottawa: Natural Resources Canada, 1996) online: Natural Resources Canada <http://www.nrcan.gc.ca/es/ep/efd/lpf-toc.html> at 5 [NRCan, "The Level Playing Field"].

47 *Ibid.* at 3.

In contrast to the double dividend afforded by carbon tax shifting, tax instruments which are preferential to oil and gas result in double costs to consumers: first in the provision of tax expenditures, and second in bearing the negative externalities produced both at the time of the subsidies and as a result of the entrenched market advantage.[48] Further, to the extent that the government introduces additional tax expenditures in order to level the playing field, taxpayers may in effect bear the cost of subsidizing two industries with no net effect.[49]

2.2) RESEARCH, DEVELOPMENT AND MARKET DEPLOYMENT PERSPECTIVE

Whereas the market efficiency perspective adopts a narrow approach to identifying market barriers as impediments to market efficiency, the research, development, and deployment ("RD&D") perspective adopts a broader approach, identifying barriers as anything that inhibits market expansion of green technology.[50] These may include institutional, financial, and social barriers. Further, whereas environmental tax measures under the market efficiency perspective are limited to efficiency objectives, measures under the RD&D perspective aim to transform market decisions by encouraging "economic actors to adopt more environmentally sensitive alternatives" through the promotion of "environmental awareness and shared responsibility for creating a better environmental future".[51] This rationale allows tax instruments to take into account "factors other than marginal costs and benefits" in their development and serve to promote awareness "through conveying information about environmentally harmful activities, fostering different attitudes regarding their costs and benefits, and encouraging alternative activities with less deleterious environmental consequences".[52]

While acknowledging that market efficiency objectives alone may be insufficient to achieve sustainable market patterns, influencing market behaviour must nonetheless be balanced with efficiency concerns. Illustrating this balance, the RD&D approach aims to create a "virtuous cycle" between the laboratory and the market, whereby the "learning" that occurs in one arena reinforces the "learning" that occurs in the other.[53] It has been consistently demonstrated that the benefits incurred from subsidized research and development, namely increased technological capacity and decreased technological costs, are amplified through incentives which encourage their market deployment.[54] Subsidized deployment serves to further reduce technological costs through increased economies of scale in equipment production and installation, and increased RD&D performance gains through "learning by doing".[55]

Within both the laboratory and the market, the RD&D approach identifies institutional barriers such as

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48 Petition from Mr. Charles Caccia, c/o Institute of the Environment, Friends of the Earth Canada, Pembina Institute for Appropriate Development and Sierra Legal Defence Fund to the Auditor General of Canada, "respecting federal tax and other subsidies to the oil and gas industry that undermine government spending and regulations aimed at complying with the Kyoto Protocol and fighting climate change", October 3, online: Sierra Legal <http://www.sierralegal.org/reports/oilgas-AGPetition-oct0305.pdf> at 35 [Petition].

49 For example, the Pembina Institute has claimed, "[i]t makes absolutely no sense for the Government to use our taxes—and almost nothing but our taxes—to reduce CO_2 emissions and, at the same time, use even more of our taxes to provide massive subsidies which increases them". *Ibid.,* citing Jim McNeill, *The Art of the Possible: Environmental Sustainability through a Political Glass, Darkly*, speech at the University of Ottawa, May 5, 2005.

50 OECD, "Creating Markets", *supra* note 31 at 19.

51 Duff, *supra* note 29 at 2070.

52 Duff, *supra* note 29 at 2077, 2075.

53 OECD, "Creating Markets", *supra* note 31 at 42.

54 Market evidence demonstrates that the rate at which "the cost of using a new technology falls and its technical performance improves as sales and operational experience accumulate". The implantation of this cycle through economic instruments in a 77 per cent reduction in photovoltaic modules in Japan and a 50 per cent cost reduction for wind turbines in Germany. Duff, *supra* note 29 at 53–4.

55 National Roundtable, *supra* note 24 at 98; See also OECD, "Creating Markets", *supra* note 31 at 46.

> market acceptance and demand, permitting and community acceptance, intermittency of the resource, proximity of resources to transmission grids, insufficient transmission capacity, dearth of resource mapping, lack of engineering standards and national technical rule making, shortages in trained technical labour, and a wide variety of policies and regulations that, inadvertently perhaps, give preference to other technologies.[56]

Theoretically, Canada's energy market deregulation should provide increased opportunity to overcome these barriers through "[a]ccelerated technological progress due to an infusion of entrepreneurial dynamism and increased competition".[57] However, this green dynamism is limited by increased competition for investment capital from investors who seek to maximize returns on investment. Canadian investment surveys have confirmed what would reasonably be expected: energy investors prefer incumbent technologies with established track records and quicker payback periods.[58]

The inability of green energy to satisfy the investment criteria of energy investors is largely the result of six financial barriers:

1. higher capital costs;
2. market structures which divorce consumer preference and technological development choices;
3. uncertainties in respect of market subsidies
4. difficulties attracting capital given the inherently higher investment risks involved in green technology;
5. disproportionately higher financing costs as a result of these increased risks; and
6. market preference for incumbent technologies.

2.2.1) Higher Capital Costs

In respect of the first barrier, while renewable energy projects are able to tap into virtually free fuel sources, their high up-front capital costs make it difficult to access these inexpensive resources. This high capital cost translates into higher prices for green electricity. Green generation costs are generally on par with the wholesale prices charged by incumbent electricity providers (see Figure 2). Thus, in order for renewable energy projects to generate competitive retail electricity, they must be able to directly sell their electricity to customers.[59] However, the structure of electrical utilities in Canadian provinces generally prohibits this possibility. Further, insofar as market restructuring achieves its objective of lowering energy prices, the challenge for green sources to generate competitively priced electricity will only increase.[60]

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56 National Roundtable, *supra* note 24 at 55.

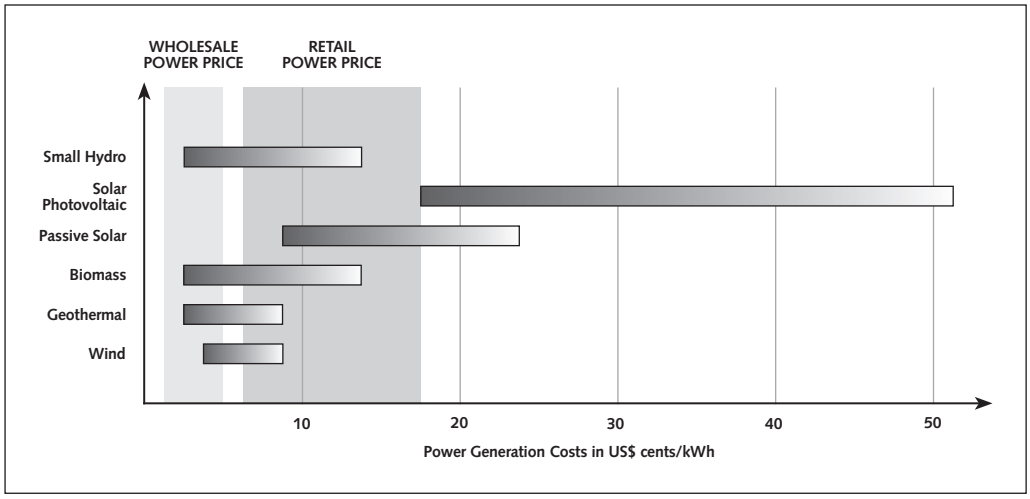
57 Organization for Economic Co-operation and Development/International Energy Agency, *Toward a Sustainable Energy Future* (Paris: OECD/IEA, 2001) 102, online: International Energy Agency – Energy Publications <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1119> [OECD, "Energy Future"].

58 Auditor General, *supra* note 5 at 5.

59 "Except for large hydropower and combustible renewables and waste plants, the average costs of renewable electricity are not widely competitive with wholesale electricity prices. However, depending on the technology, application and site, costs are competitive with grid electricity or commercial heat production". OECD, "Energy Policies", *supra* note 7 at 61.

60 Dallas Burtraw, Karen Palmer & Martin Heintzelman, *Electricity Restructuring: Consequences and Opportunities for the Environment* (Washington: Resources for the Future, 2000) at 20, online: Resources for the Future <http://www.rff.org/Documents/RFF-DP-00-39.pdf)>.

FIGURE 2
COST COMPETITIVENESS OF RENEWABLE POWER TECHNOLOGIES – 2004 AVERAGE [b]



Note: Cost calculation is based on system investment needed (capital cost is based on discount rate of 6% and amortization period of 15-25 years and power output. Lowest cost range to optimum conditions (i.e., proven technology, optimal plant size and design, and high availability of system and resources. Source: NET Ltd. Switzerland

[b] Figure provided by Organization for Economic Co-operation and Development, *Renewable Energy: Market and Policy Trends in IEA Countries* (Paris: OECD, 2004) online: International Energy Agency <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1263> at 62.

2.2.2) Market Structures as Barrier to Consumer Preference

The customer disincentive of higher retail prices for green energy might be offset in part by customer preferences to secure the positive externalities of green energy. However, only in Alberta and Ontario do retail customers currently have the capacity to enter into power-purchase agreements with different providers and thereby express market preference for green energy. Moreover, even in these markets, consumer choice is limited to electrical companies that have already gained access to the electrical grid. As discussed above, access remains controlled by provincially owned or regulated utilities, and thus end-use customer demand has limited ability to exert economic market influence on technology decisions in respect of grid level generation capacity. Within Canadian energy markets, the real customers of green energy are in effect the provincial regulators and utilities. As end-use consumers are unable to exert market demand for green energy, these utilities have limited economic incentive to tender green generation when less expensive electricity can be generated from non-green technologies.[61]

2.2.3) Uncertainty with Respect to Market Subsidies

Some governments have attempted to address this issue by introducing various feed-in subsidizations to utilities, whereby governments subsidize the difference between the market price of non-green and green energy thereby enabling publicly owned or regulated utilities to efficiently tender green energy (these mechanisms are discussed below). Such was the case with the WPPI of the previous federal government and the proposed ecoEnergy Renewable Initiative of the current government. However, where the duration and application of such mechanisms cannot be guaranteed, these subsidizations may introduce additional uncertainty and increased investment risk for green investment.

61 Auditor General, *supra* note 5 at 3–21.

2.2.4) Higher Investment Risk

Even where such subsidization mechanisms are secure and result in utility demand for green energy, investors in green generation projects will remain concerned with "the profitability of the investment against the risk to the capital employed".[62] These risks differ with various electrical generation technologies (see Table 1).[63] In respect of newer commercially unproven technologies, investors will face increased risks concerning "product quality, process reliability, maintenance needs and general uncertainty about the performance of a new technology".[64] Commercially proven green technology such as solar and wind generation has "some very attractive low-risk characteristics, including very short lead times, no fuel costs or emissions, and low operating costs (hence little effect should these costs escalate)".[65] However, these risks must be balanced against the uncertainty of open market electricity prices, which will have an increased adverse effect on capital-intensive green projects.[66]

> Technologies which have a higher specific investment for capacity even though they may have relatively low fuel costs (wind, nuclear) are more greatly affected by this risk because there is less they can do to respond [compared to fossil fuel generation projects]. Thus, although high capital cost and low fuel cost technologies will likely be competitive in the short-run and therefore produce electricity, they will be more exposed to cover capital employed. A firm reliant on such technologies may find itself in financial difficulties if prices slump for a prolonged period.[67]

TABLE 1
COMPARISON OF RISK CHARACTERISTICS BY GENERATING TECHNOLOGY [c]

TECHNOLOGY	UNIT SIZE	LEAD TIME	CAPITAL COST/KW	OPERATING COST	FUEL COST	CO_2 EMISSIONS	REGULATORY RISK
Clean Coal & Gas Turbines	Medium	Short	Low	Low	High	Medium	Low
Coal	Large	Long	High	Medium	Medium	High	High
Nuclear	V. Large	Long	High	Medium	Low	Nil	High
Hydro	V. Large	Long	V. High	V. Low	Nil	Nil	High
Wind	Small	Short	High	V. Low	Nil	Nil	Medium
Solar	V. Small	V. Short	V. High	V. Low	Nil	Nil	Low
Fuel Cells	Small	V. Short	V. High	Medium	High	Medium	Low

[c] Table provided by Organization for Economic Co-operation and Development/International Energy Agency, *Energy Market Reform: Power Generation Investment in Electricity Markets* (Paris: OECD/IEA, 2003) online: International Energy Agency – Energy Publications <http://www.iea.org/dbtw-wpd/Textbase/publications/free_new_Desc.asp?PUBS_ID=1202> at 32.

2.2.5) Higher Financing Costs

These increased risks and cost-disincentives result in green project financing disadvantages "by the contracting and financing structures expected in a world of vigorous retail competition".[68]

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62 OECD, "Energy Market Reform", *supra* note 1 at 35.

63 *Ibid.* at 12.

64 National Roundtable, *supra* note 24 at 36.

65 OECD, "Energy Market Reform", *supra* note 1 at 33.

66 National Roundtable, *supra* note 24 at 55.

67 OECD, "Energy Market Reform", *supra* note 1 at 28–9.

68 Leanne Sereda, "Renewable Energy — Tax Developments and Opportunities" (2000) 13 *Petroleum Tax Journal 1* para. 38 [Sereda].

> [I]ncreased investment risks and a scarcity of long-term contracts will probably result in shortened investment horizons, reductions in debt maturity, increased equity requirements, and larger debt and equity risk premiums. Although these changes will affect all electric generating sources, they will have a differentially large impact on technologies, such as RETs [renewable energy technologies], that have high capital costs (and therefore larger financing requirements).[69]

2.2.6) Market Preference for Incumbent Technologies

Finally, with respect to the sixth barrier, existing energy developers may prefer incumbent technologies over new technology, as investment in developing the latter carries "learning" risks. Investors will be uncertain as to the return on learning investments and that "some or all of the benefits of its learning investments can end up being captured by its competitors".[70]

In summary, even where an energy market provides an even playing field between competing technologies and efficiently allocates externalities, the above six financial barriers will likely create market inertia with respect to green investment growth. Effective market deployment tax instruments will thereby need to do more than create a level playing field, but ensure that the above six financial barriers are mitigated so as to provide sufficient incentive for developers to invest in green growth.

2.3) MARKET TRANSFORMATION PERSPECTIVE

In contrast to the market deployment perspective, the market transformation perspective "focuses on the outcome to be achieved and then runs the logic back through all the factors that would be necessary to attain that outcome".[71] Accordingly, the market transformation perspective shares the same tax rationale as the RD&D perspective—to encourage market participants to adopt more environmentally sensitive alternatives. However, under a transformation perspective, policy instruments are designed through a private-sector business perspective which

> focuses on what needs to be done in practical terms to build markets for new energy technologies. It is concerned with the behaviour and roles of market actors, how their attitudes guide decisions and how these attitudes can be influenced … [and] considers the distribution chain from producer to user, focuses on the role of the actors in this chain in developing markets for new energy technologies, and applies the tools of the management sciences.[72]

This objective-oriented approach will likely result in different economic instruments than those employed by a market deployment economist seeking to balance market transformation with economic efficiency. "The straight forward principle is first to develop an understanding of the buyer-relevant characteristics … of the technologies being promoted and the workings of the markets that will potentially be transformed; and then to identify strategies that would help to boost the positive attributes … and overcome the negative ones".[73]

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69 *Ibid.* at 38.

70 OECD, "Creating Markets", *supra* note 31 at 58.

71 *Ibid.* at 12–3, 19.

72 *Ibid.* at 12.

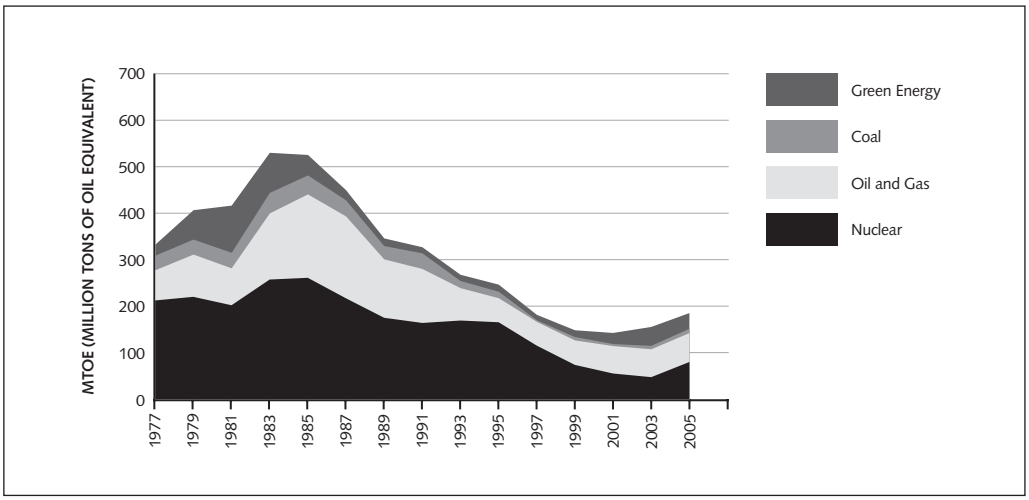
73 *Ibid.* 85–6.

PART III - Response of Canadian Tax Policy

It is beyond the scope of this paper to conduct a thorough analysis of government subsidization of Canada's energy market. However, some basic figures can help to illustrate the subsidization disparity between fossil fuel and renewable energy development. Between 1996 to 2002, the federal government provided nearly $8 billion in tax expenditures to the oil and gas industry while allocating less than $6 billion in total expenditures, tax and otherwise, for all climate change action programs.[74] The 2005 Budget projected only $295 million in tax expenditures between 2005 to 2009 towards both energy efficiency initiatives and renewable energy generation equipment.[75] It is difficult to estimate what percentage of this $6 billion was allocated through tax expenditures, however, in light of the 2005 Budget projections, the percentage is likely quite low. The imbalance of these figures has led the Pembina Institute to conclude that "the government's tax subsidies to the oil and gas industry indirectly promote GHG emissions and thereby undermine—even outweigh—its own spending to reduce those very emissions in the fight against climate change".[76]

The federal government's direct spending on energy research and development since the 1970s exhibits the same imbalance. Of the nearly US$ 8.79 billion (2002 prices and exchange rates) directed towards energy RD&D, only 7.4 per cent was directed towards renewable energy.[77] While this uneven subsidization began to level off by 2002, fossil fuels continue to receive more federal research and development investment than renewables (see Figure 3). While Figure 3 does not represent tax expenditures, tax policies must nonetheless take these expenditures into account in formulating measures that will ensure sustainable energy development.

FIGURE 3
CANADIAN GOVERNMENT RD&D EXPENDITURES, 1977–2005 [d]



[d] Derived from data supplied by the Organization for Economic Co-operation and Development/International Energy Agency, *RD&D Budgets,* online: International Energy Agency <http://www.iea.org/>.

74 Petition, *supra* note 48 at 31.

75 Canada, Department of Finance, 2005 Budget, Annex 8: Tax Measures: Supplementary Information at 1.

76 Petition, *supra* note 48 at 2.

77 OECD, "Renewable Energy", *supra* note 23 at 182.

These issues have not been lost on Finance, which, under the *Auditor General Act*, is required to develop a "Sustainable Development Strategy" ("SDS") every three years.[78] In 1997, Finance released its first SDS, stating that "the concept of sustainable development implies the desirability of moving in two basic directions: closer integration of economic, social and environmental objectives; and intergenerational equity".[79] Finance's first step in this direction was the 1996 report *Renewable Energy Strategy*, jointly released with Natural Resources Canada. The report outlined a strategy of "enhancing investment conditions, supporting technology research and development, and developing markets for renewable energy technologies".[80] In the same year, Finance introduced a number of tax measures under the *Income Tax Act* ("the Act")[81] designed to enhance investment in the renewable energy market. The two main measures introduced were (1) a new Canadian Renewable and Conservation Expenses ("CRCE") available for intangible expenses incurred during the pre-development phase of renewable energy projects, and (2) a relaxation of the specified energy rules which had limited the deduction of accelerated capital cost allowances ("ACCA") arising from renewable energy assets to the income earned from those assets.

Finance's current SDS (2007–2009) outlines a target to "[e]xamine potential changes to the tax system to assist the Government in meeting its environmental objectives, including proposals received from responsible policy departments and external stakeholders".[82]

3.1) FINANCE'S RD&D PERSPECTIVE

In developing green energy tax measures, Finance has adopted an RD&D approach, attempting to balance efficiency concerns with the need to provide incentives for green investment and consumption decisions. Finance's 2004–2006 SDS states that:

> economic instruments have the potential to change the way producers and consumers make choices in relation to investment and consumption decisions, for example. In addition, market-based mechanisms can help achieve environmental objectives at a lower cost than policies that rely strictly on regulatory approaches because decentralized decision making by affected firms, organizations and individuals will generally lead to the allocation of scarce resources in a more efficient manner.[83]

Illustrating this policy, the CRCE provisions promote market efficiency by providing a more level playing field between competing energy investments, while the ACCA provisions attempt to provide an incentive to energy developers to develop green energy projects.

Both the CRCE and ACCA target technologies are provided for under the meaning of "prescribed energy conservation property" as set out under Class 43.1 and 43.2 in Schedule II of the Act.[84] Class 43.1 paragraph (d) includes equipment that is part of an electrical generation project whose energy source is solar, wind, geothermal, small-scale hydro (defined as less than 15 MW), and biomass (all of which are green energy sources, with the exception of biomass).

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78 *Auditor General Act*, *supra* note 2 at section 24(1).

79 Canada, Department of Finance, *Sustainable Development Strategy* (Ottawa: Department of Finance, December 1997) at 35.

80 Natural Resources Canada, "Federal Actions on Climate Change – Next Steps: Renewable Energy" *Release*, December 12, 1996 online: Natural Resources Canada <http://www.nrcan.gc.ca/media/archives/ newsreleases/1996/1996117e_e.htm>.

81 Unless otherwise stated, statutory references in this paper are to the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.) as amended [the Act].

82 Canada, Department of Finance, *Sustainable Development Strategy 2004-2006* (Ottawa: Department of Finance, March 2004) online: Department of Finance Canada <http://www.fin.gc.ca/susdev/sds2007_1e.html#2.2> at 3a.1.

83 SDS 2004-2006 *supra* note 9 at 44.

84 Regulation 8200.1 provides that "For the purposes of subsection 13(18.1) and subparagraph 241(4)(d)(vi.1) of the Act, prescribed energy conservation property means property described in Class 43.1 or 43.2 in Schedule II".

The remaining paragraphs of Class 43.1 include equipment that is part of an electrical generation or co-generation system that uses fossil-fuel, biomass, or waste-fuel with a heat-rate loss of not more than 6,000 BTU per kWh of generated electricity, or 6,750 BTU in the case of combined-cycle projects. Class 43.2 includes new equipment that is acquired between February 22, 2005 and December 31, 2011 and which is part of an electrical generation project which uses either: (1) fossil fuel, biomass, or waste-fuel as provided under paragraph (b) of Class 43.1 with a high-efficiency heat-rate loss of not more than 4,750 BTU per kWh of generated electricity; or (2) green energy sources as provided for under paragraph (d) of Class 43.1.

Class 43.1 was introduced in 1994, and is continually updated by Finance in consultation with the Department of Natural Resources ("NRCAN"), who in turn conducts regular consultations with the renewable energy sector to ensure the inclusion of new and rapid advancements in technological efficiencies.[85] The prescribed energy conservation property excludes used property in order to endure that the tax instrument targets the most efficient technology available. Subsection 13(18.1) of the Act provides that the NRCAN's publication *Technical Guide to Class 43.1* shall apply conclusively with respect to engineering and scientific matters for the purpose of determining whether property meets the criteria set out in Class 43.1.

3.2) MARKET EFFICIENCY MEASURES

3.2.1) Failure to Internalize Energy Externalities

In respect of creating a more efficient market through the internalization of energy externalities, the federal government stated in 2002 that it would "promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment".[86] However, Canada has not and is unlikely to adopt a broad-based energy or carbon tax in light of the fact that (1) certain energy-intensive regional economies would be disproportionately affected, and (2) higher energy costs would likely have an adverse effect on the competitiveness of Canadian manufacturers and producers on international markets.[87]

In place of such a tax, under its Climate Change Plan for Canada, the previous federal government proposed a tradable emissions permit system for Large Final Emitters ("LFE") set to commence in 2008, targeting mining and manufacturing, oil and gas, and thermal electricity sectors.[88] Under the program, LFEs would have been required to meet their individual target obligations through emission reductions, and would be liable to the government for emission units equal to any shortfall in the form of credits that will be tradable in a carbon market.[89] The value of credits was proposed to be determined by individual industries, up to a maximum of $15 per tonne of CO_2.[90] While the LFE system would likely have resulted in reduced GHG emissions, it is unlikely that it would have been as effective as a broad carbon tax imposed on energy consumers.

The current federal government has abandoned the LFE proposal, introducing instead

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85 Canada, Department of Finance, "Tax Topics: Report #1569" *Release*, April 4, 2002 at 3.

86 Public Works, "Using the Tax System", *supra* note 4 at 3–6.

87 National Roundtable, *supra* note 24 at 21.

88 Notice of intent to regulate greenhouse gas emissions by Large Final Emitters, Can. Gaz. 2005. I. online: CEPA Environmental Registry - Summary of Comments Received on the Notice of Intent to Regulate <http://www.ec.gc.ca/ceparegistry/documents/part/GHG_noi_resp/GHG_noi_resp.cfm>.

89 *Ibid.*

90 Organization for Economic Co-operation and Development/International Energy Agency, *Energy Policies of IEA Countries: Canada, 2004 Review* (Paris: OECD/IEA, 2004) online: International Energy Agency – Energy Publications <http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1468> at 62 [OECD, "Energy Policies Canada"].

"Canada's Clean Air Act", which consists of proposed amendments to the *Canadian Environmental Protection Act*, among others.[91] No carbon tax is included, nor are any firm targets or objectives provided, other than a notice of intent to discuss reducing GHGs between 45–55 per cent by 2050.[92] It is not clear how such a reduction would be accomplished.

3.2.2) Creating a Level Playing Field – Canadian Renewable and Conservation Expenses

Developers of non-renewable energy projects have long been able to claim intangible expenses incurred in determining the existence, location and extent of mineral, oil and natural gas resources under the three categories of Canadian exploration expense ("CEE"), Canadian development expense ("CDE") and Canadian oil and gas property expense ("COGPE"). These expenses are included in the taxpayer's cumulative CEE[93] and are fully deductible in the year they are incurred, subject to certain limitations.[94] Further, a company which is a "principle-business corporation" ("PBC") may renounce its CEE pool, or a portion thereof, in favour of shareholders with whom it has entered into a flow-through share ("FTS") agreement.[95] An FTS agreement will generally obligate the corporation to incur and renounce specified CEE expenses, which the shareholder may deduct against their own income once renounced.

A PBC is defined as including a corporation whose principal business is, (1) the generation of energy using property described in Class 43.1 of Schedule II to the Income Tax Regulations,[96] or (2) the development of projects for which it is reasonable to expect that at least 50 per cent of the capital cost of the depreciable property to be used in each project would be the capital cost of property described in Class 43.1.[97] "Principal" is generally viewed to be "the most significant business activity of a corporation when considering such factors as capital invested, time spent, revenue generated, etc".[98]

The FTS mechanism was designed to benefit junior resource companies who are otherwise unable to utilize income tax deductions for exploration and development as a result of having no taxable income during development stages by making the deduction available to potential investors. This benefit is intended to ameliorate a development company's limited access to non-equity financing as a result of the high risk of resource development.[99]

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91 *An Act to Amend the Canadian Environmental Protection Act*, R.S.C. 1999, c. 33, the *Energy Efficiency Act* and the *Motor Vehicle Fuel Consumption Standards Act* [*Canada's Clean Air Act*].

92 Notice of intent to develop and implement regulations and other measures to reduce air emissions, Can. Gaz. 2006. I. 3359. Proposed elements of the regulatory approach online: Canada Gazette <http://canadagazette.gc.ca/partI/2006/20061021/pdf/g1-14042.pdf>.

93 *Income Tax Regulations*, C.R.C., c. 945 s. 66.1(6).

94 *Ibid.* s. 66.1(2) or (3).

95 Renunciation may be made under either subsection 66(12.6) or 66(12.601). The qualifications of a flow-through share, including a flow-through share agreement are provided under subsection 66(15).

96 Paragraph 66(15)(h).

97 Paragraph 66(15)(i)

98 Serada, *supra* note 68 at 18.

99 Canada, Department of Finance - 1996 Budget, Environment: Incentives to Invest in Renewable Energy at 2.

TABLE 2
NON-RENEWABLE CEE, CDE AND COGPE TAX EXPENDITURES [e]

EXPENDITURE	1996	1997	1998	1999	2000	2001	2002
CDE, CEE & COGPE (in millions)	721	568	375	703	1,052	1,144	1,035

[e] Amy Taylor, Matthew Bramley and Mark Winfield, Government Spending on Canada's Oil and Gas Industry: Undermining Canada's Kyoto Commitment (The Pembina Institute for Appropriate Development, January 31, 2005) online: Pembina Institute <http://www.pembina.org/publications_search_newsitem.asp ?id=181&section=>.

Under the 1996 Budget, the federal government introduced the CRCE as a fourth category, under which developers can claim intangible costs incurred from determining the existence, location and extent of renewable resources—which according to Finance are "similar to those incurred by junior resource companies".[100] CRCE are deemed to be a CEE, and thus enjoy a similar tax treatment.[101] Moreover, whereas junior resource companies developing conventional energy projects may not deduct CEEs to create a loss,[102] renewable energy PBCs may deduct their total CRCEs irrespective of whether or not a loss is created (unless such expenses have been renounced in favour of flow through shareholders).[103]

In order for an expense to qualify as a CRCE, at least 50 per cent of the capital cost of the cost of the depreciable property to be used in the project must fall under Class 43.1 or 43.2.[104] Subject to specified exclusions, these expenditures can include the following:[105]

- pre-feasibility and feasibility studies for suitable sites and potential markets;
- costs necessary to determine the extent and location of the energy resource, including development and maintenance costs for site access and temporary roads;
- negotiation and site approval costs, including regulatory and environmental compliance expenses;
- site preparation costs not directly related to equipment installation;
- service connection costs incurred in order to transmit power to the power purchaser; and
- the cost of acquiring and installing test wind turbines (similar to the deduction allowed for an exploratory well of a new oil field[106])

By developing the CRCE, the federal government stated that it was ensuring "that costs in the renewable energy and energy conservation sector receive tax treatment similar to costs in

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100 *Ibid.* note 99 at 2. Finance stated in its Tax Expenditures Notes (2000), "The renewable energy and energy conservation sector faces difficulties in financing intangible costs. The Canadian Renewable and Conservation Expenses (CRCEs) address this concern by providing them with improved access to financing in the early stages of their operations when they may have little or no income to utilize the [class 43.1 and 43.2] income tax deductions related to these expenses". Canada, Department of Finance, Tax Expenditures: *Notes to the Estimates/Projections, 2000* (Ottawa: Department of Finance, 2000) online: Department of Finance Canada <http://www.fin.gc.ca/toce/2000/taxexpnot_e.html> at 78 [Notes to the Estimates].

101 Paragraph (g.1) of the definition of "Canadian exploration expense" in subsection 66.1(6).

102 *Ibid.* s. 66.1(2).

103 *Ibid.* s. 66.1(3); Corporations who are PBCs under paragraph (h) or (i) of the definition of "principle business corporation" in subsection 66(15) are excluded from subsection 66.1(2), and are included in subsection 66.1(3).

104 Regulation 1219. The CRA's interpretation of this definition can be found in *Income Tax Ruling* 2005-0143071E5, November 10, 2004 at 4.

105 This summary list is provided in Sereda, supra note 68 at 17.

106 OECD, "Renewable Energy", *supra* note 23 at 193.

the non-renewable energy sector".[107]

> This initiative will help level the playing field between energy investments. It will provide Canada's renewable energy sector with better access to capital which will in turn help the industry attain its potential for jobs and growth. In addition, new investment in renewable energy will expand domestic and international markets for wind, solar, small hydro and other renewable energy products and expertise.[108]

The conclusion that the CRCE helped create a level playing field was in large part based on the findings of the Department of Natural Resources 1996 report *The Level Playing Field: The Tax Treatment of Competing Energy Investments*.[109] Prior to the introduction of CRCE, the report concluded that,

> while the playing field is not level, the variations, with the exception of the ethanol and energy efficiency projects, are not large. The level of tax support provided to energy supply investments (i.e., oil and gas and renewable energy projects) varies relatively narrowly, between 5 and 20 per cent of capital costs. The initiatives announced in the 1996 Budget will assist in a further leveling of the field.[110]

This conclusion was reached based on a strict analysis of the financial uplift provided by tax incentives to various types of energy projects. The uplift was calculated by analyzing energy projects according to energy source, and measuring each project's relative tax burden "under the current system when compared with a neutral tax system (absent any incentives)".[111]

Using a different methodology, a subsequent report from the Commissioner of the Environment and Sustainable Development ("CESD") supported the conclusions of the Department of Natural Resources. Its *2000 Report on Energy Investment* examined how the tax system treats marginal investments, which are "investments that just meet the investor's acceptable rate of return" likewise concluding that the difference in tax treatment was relatively narrow.[112]

However, neither of these reports addressed the fact that investment limitations imposed by the alternative minimum tax ("AMT") fundamentally prevents the CRCE from leveling the playing field. In calculating a taxpayer's AMT, a flow-through shareholder may only deduct CRCE expenses which have been renounced in their favour against income "that can reasonably be considered as attributable to the production of petroleum, natural gas and minerals".[113] In other words, since flow-through CRCEs may only be deducted by investors against income derived from fossil fuel production, the CRCE FTS mechanism prevents investors from making fully green investment choices. Insofar as investment in green energy mandates investors to invest in non-renewable energy, it is difficult to view the CRCE as having leveled the playing field. One can imagine that a far more effective green tax mechanism would be to limit the deduction of CEE expenses from income derived from the production of green energy.

Further, it should be noted that the introduction of the CRCE did not aim to immediately

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107 Canada, Department of Finance, "Enhancements to Renewable Energy Tax Incentives," *Release*, no. 2002-063 and backgrounder, July 26, 2002 at 2.

108 Canada, Department of Finance, "New Tax Measures for Renewables and Energy Conservation" *Release*, June 27, 1996 at 1.

109 NRCan, "The Level Playing Field", *supra* note 46.

110 *Ibid.* at 4.

111 Auditor General, *supra* note 5 at 3–18.

112 *Ibid.* at 3–18,19.

113 Subsection 127.52.(1)(e), (e.1). This interpretation has been affirmed by the CRA in *Income Tax Ruling* 2002-0166845, January 28, 2003.

level the playing fields, as the FTS "look-back" rule only became applicable to the CRCE in 2002, long after it had been introduced for other CEEs and six years after CRCE was introduced. The "look-back" rule treats certain CEEs renounced in the first sixty days of a calendar year as having been renounced on the last day of the preceding year.[114] This rule provides for flexible financing, as a PBC may renounce the look-back expense before actually incurring it (although any amount renounced and not incurred before year end will be subject to a Part XII.6 tax).[115] Finance has not given a reason as to why the look-back rule was not extended to CRCE, despite the fact that the CRCE was introduced as a means to level the playing field by improving renewable projects' access to capital.

3.3) MARKET DEPLOYMENT INCENTIVES

3.3.1) Canadian Renewable and Conservation Expenses

While the CRCE was introduced to ostensibly level the playing fields between conventional and renewable energy sources, it is more properly understood as a market deployment incentive for green electricity generation. However, the effectiveness of the CRCE as a market deployment instrument is also limited. First, the CRCE only addresses the financing costs and barriers associated with the relatively minor initial project development stage, and not the more burdensome financing costs and barriers associated with project development (as discussed above). Any resulting investment advantage for renewable developers is heavily outweighed by the much larger financing costs and risks that the renewable project will incur during project development. Insofar as project development financing costs remain a market barrier to renewable projects, they will continue to increase investment risks in renewable development companies and make renewable projects less profitable, more than offsetting the benefit that the flow-through CRCE achieves. The extent to which the ACCA deals with these remaining barriers will be discussed below.

Second, by limiting the issuance of FTS to PBCs, the measure will not apply to corporations who wish to develop onsite renewable energy projects to supply their energy needs. The unique capacity of renewable technology to provide end-use onsite electricity generation provides recognized environmental benefits that should be included within the CRCE. This is particularly the case in light of the fact that on-site green installation is often the only way that end-use consumers can exercise a green energy market choice in Canadian markets.

3.3.2) Accelerated Capital Cost Allowance

The capital cost allowances (CCA) for most capital classes are determined according to an accounting concept of depreciation, whereby the base rate of depreciation is determined in respect of the asset's usable life.[116] The default classes for most electrical generation equipment are generally classes 1, 2, or 17, which provide for a maximum CCA rate of 8 per cent.[117] Certain end-use consumer generation equipment enjoys a 20 per cent CCA under Class 8.

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114 Subsection 66(12.66); An excellent summary of the mechanical application of FTS is provided by Angelo F. Toselli, "Flow-Through Shares: An Update" (1997) 10 *Petroleum Tax Journal* 1.

115 This tax will be deductible by the PBC corporation under paragraph 20(1)(nn) in the taxation year it becomes payable. Thus, the Part XII.6 tax effectively functions as a "quasi-interest charge". Serada, *supra* note 68.

116 "In computing income from a business or property, no deduction is permitted on account of capital and no allowance is permitted in respect of depreciation except as expressly permitted by part I of the Act. …Paragraph 20(1)(a) permits a discretionary deduction of a portion of the capital cost of property, as is allowed by regulation. The type of property and the portion of its cost that can be deducted is prescribed under part XI of the regulations. The maximum rate of CCA for each class of property is prescribed by regulation 1100(1)". Stephen J. Fyfe, Craig J. Webster & Laura M. White "The New Electricity Market: Financing Options," in *Report of Proceedings of Fiftieth Tax Conference*, 1998 Conference Report (Toronto: Canadian Tax Foundation, 1999), 10:1–39 [Fyfe, Webster & White].

117 Notes to the Estimates, *supra* note 100 at 77.

From 1972 to 1993, certain renewable energy technologies enjoyed an ACCA of 50 per cent under Class 34. In 1988 Class 34 deductions became subject to "specified property energy" rules[118] which limited deductions to the amount of income generated from Class 34 property[119] except where such property was used by taxpayers to produce energy for the purpose of gaining income from their business.[120] This mechanism provided an incentive for the development of renewable energy projects, both as an electricity generation business and as an onsite energy supply for existing businesses.[121]

In 1994, Finance replaced Class 34 with Class 43.1, which reduced the ACCA to 30 per cent but expanded the range of qualifying specified energy property.[122] In 1996, concurrent with the introduction of the CRCE, the specified property energy rules were amended to exclude mining, manufacturing, and processing businesses from its application.[123] This amendment created "a significant planning opportunity in the deregulated electricity market where industrial users of electricity may take an equity position in new projects".[124]

In December of 2005, Finance introduced CCA Class 43.2, under which certain high-efficiency technologies otherwise included under Class 43.1 will again enjoy an ACCA of 50 per cent.[125] Class 43.2 is currently scheduled to apply only to assets acquired on or before December 31, 2011, after which time all specified renewable energy will again fall under Class 43.1.

Many observers have noted that the ACCA provides "a clear tax incentive to building, owning, and operating a project that qualifies under class 43.1".[126] However, the extent to which this is the case is unclear.[127] Class 43.2 does not provide for a greater ACCA than was provided under Class 34 between 1972 to 1993. Moreover, the current specified energy property restrictions, though relaxed, remain more restrictive than the restrictions applicable between 1972 to 1988. Accordingly, there is little evidence to suggest that the current ACCA mechanism would be any more effective as a market deployment incentive than the previous mechanism under Class 34.

It might be argued that the recent decentralization of certain provincial electricity markets, which now allow for greater private investment in green generation equipment, will result

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118 Subsection 1100(24); Subsection 1100(26) of the Regulations provided that corporations whose principal business was the sale, distribution or production of electricity and various other energy products were exempt form the application of subsection 1100(24).

119 "The specified energy property rules were introduced in 1988 in response to certain capital market transactions that used leverage financing for power projects and passed through the 50 per cent class 34 CCA deduction to passive investors who would recover the cost of their investment in a very short time". *Income Tax Ruling,* supra note 113 at 11. See also OECD, "Creating Markets", *supra* note 31 at 19; Public Works, "Using the Tax System," *supra* note 4 at 1.

120 Subsection 1100(25).

121 Regulation 1219, *supra* 104 at 3. This interpretation has been affirmed by the CRA.

122 Class 34 was amended effective February 21, 1994 to apply only to assets purchased or subject to an agreement to purchase before that date. The specified energy rules were concurrently amended to include Class 43.1 in their application. Sereda, *supra* 68 at 8.

123 Subsection 1100(24).

124 Fyfe, Webster & White, s*upra* note 116.

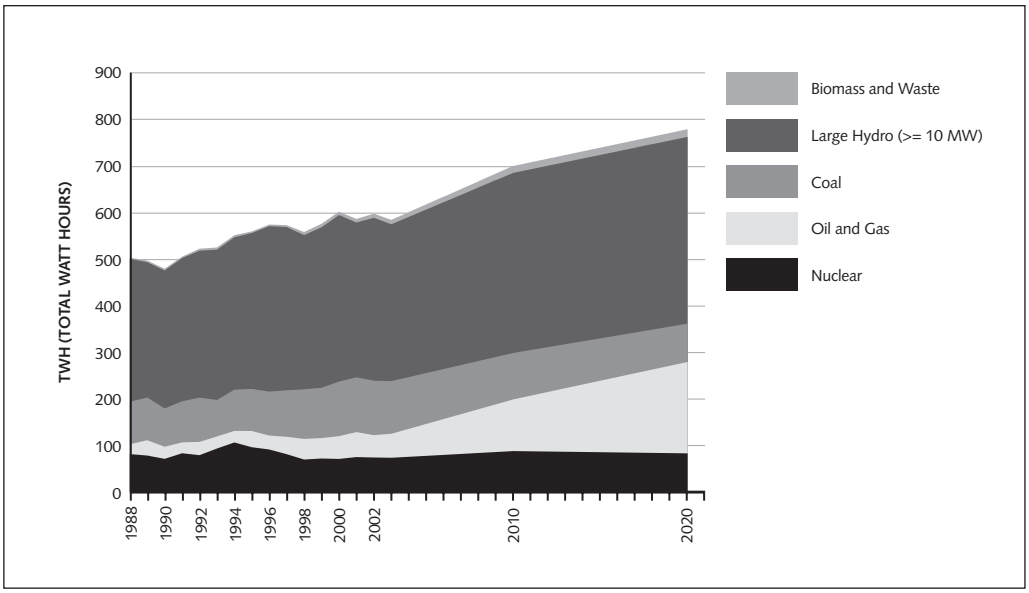
125 Depreciation under Class 43.1 and 43.2 is calculated on a decline-balance basis, subject to the 50 per cent rule in subsection 1100(2), whereby only half of the asset cost is available in the year the asset is acquired. Accordingly, the effective CCA rates for Class 43.1 and 43.2 assets in the year they are acquired is 15 per cent and 25 per cent.

126 Fyfe, Webster & White, *supra* note 116.

127 Finance does not provide ACCA tax expenditure estimates in respect of accelerated write-offs for non-renewable or renewable energy assets for reasons of data limitations. See response of James M. Flaherty, Minister of Finance, dated May 31, 2006, to Petition No. 158 "Subsidies to the oil and gas industry and federal efforts to address climate change" brought by Mr. Albert Koehl under the Auditor General Act, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/domino/petitions.nsf/viewe1.0/EF2D9AAC9909E75F852571D9005E0D68>.

in the ACCA to be more effective under Class 43.2 than under Class 34.[128] Such investment is made even more likely given the substantial decrease in renewable technology costs since 1994. However, as illustrated in Figure 4, relatively few investors have chosen to defer their taxable income through Class 43.2 ACCA deductions. Despite the fact that the current electrical capacity of Canadian wind farm installations has increased over 1,000 per cent since the year 2000, and is set to continue strong growth,[129] its overall market share is projected to decrease as a result of even greater growth in oil and gas installations. Green energy accounted for only 0.3 per cent of electricity generation in 2005[130] and is projected to account for only 0.2 per cent in 2020.[131] As with green energy's share of total energy production, this figure is too small to be displayed in Figure 4, and well below any amount needed to seriously offset GHG emissions.

FIGURE 4
CANADIAN ELECTRICITY PRODUCTION FROM 1988–2003, WITH PROJECTIONS TO 2020 [f]



[f] Derived from data supplied by the Organization for Economic Co-operation and Development/International Energy Agency, *Energy Policies of IEA Countries* (Paris: OECD/IEA, 1988 - 2005) online: International Energy Agency – Energy Publications <http://www.iea.org/dbtw-wpd/Textbase/publications/index.asp> at 431.

This suggests that the costs and risks of green investment with an ACCA tax deferral still outweigh the advantages of investing in fossil fuel energy projects without an ACCA. While the ACCA is not available to non-renewable projects, such projects have much less need for them. Accordingly, investors will generally prefer a project with lower capital expenses and thus a quicker profit turn-around.

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128 Note that while electricity companies were exempt from the specified energy property rules, and could thus deduct the ACCA amounts against income from other electricity sources, few such electricity companies existed, as most energy was generated by Crown corporations, which were exempt from tax.

129 Canadian Wind Energy Association, "Canada's Current Installed Capacity" (January 2007) online: Canada Wind Energy Association <http://www.canwea.ca/images/uploads/File/Fiche_anglais_-_January_2007.pdf>.

130 Organization for Economic Co-operation and Development/International Energy Agency, Monthly Electricity Statistics, October 2006 (Paris: OECD/IEA, 2005) online: International Energy Agency <http://www.iea.org/Textbase/stats/surveys/mes.pdf>.

131 OECD, "Energy Policy Data", *supra* note 14 at 433.

PART IV - Conclusion: The Need for a Transformation Perspective

The displacement of GHG emissions through the displacement of non-renewable energy production with green energy generation is not an option if global warming is to be decelerated. This displacement will require private capital investment, which will require market incentives. Canada's tax instruments aimed at market efficiency, level playing fields, and market deployment through the removal of investment barriers have failed to significantly alter energy consumption or investment choices, and have thus fallen short of their capacity to reduce GHG emissions.

In respect of investment choices, while the introduction of the CRCE has helped level the playing field in terms of tax expenditures relative to market share, the historical subsidies provided to the oil and gas sector have resulted in a secure market incumbency which investors are reluctant to pass over—and which, in fact, they cannot pass over if they wish to utilize flow-through CRCE deductions. Moreover, the CRCE provides an incentive only in respect of the capital expenditures of pre-development project phases, which, while high, are relatively minor to the capital requirements of green energy projects. While the ACCA provisions provide for full deductibility of development costs, this deduction serves only as a tax deferral which fails to mitigate the security risks of lenders in a capital-intensive energy project.

In respect of consumption choices, the absence of a carbon tax to internalize the negative externalities of fossil fuel consumption has resulted in the growth of actual consumer spending on fossil fuels rather than beginning to reflect stated consumer preferences for clean energy. However, given the disparate regional effects that such a tax would have, together with the limited capacity of most provincial utility markets to accommodate the exercise of green consumer choices, it is difficult to envision the implementation of a carbon tax in Canada for some time.

It is a general principle that "[q]uantifying the contribution of each policy and measure is a prerequisite for any cost-effective approach in climate change mitigation policy".[132] Contribution cannot be measured without targets to measure against. However, Canada's sustainable development policies have not set clear targets regarding renewable or green electrical generation, nor has Finance "clearly stated what it is trying to achieve with [its tax] commitments, in terms of the performance that is targeted or is expected to occur".[133] The only way in which the Canadian tax system is going to provide sufficient incentive to overcome existing financial and market barriers and achieve market share growth is to design tax measures out of a market transformation perspective that sets objective market targets for green energy.

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132 Dean Anderson, "Progress Towards Energy Sustainability in OECD Countries," (HELIO International, 1997) online: Helio International <http://www.helio-international.org/Helio/anglais/reports/ oecd.html#indicators>.

133 Public Works, "Using the Tax System," *supra* note 4 at 3–1.

REGIONAL SELF-GOVERNMENT, MANTARIO OR CANADA'S 11TH PROVINCE?

AN ANALYSIS OF SELF-DETERMINATION FOR NORTHWESTERN ONTARIO

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CITED: (2007) 12 Appeal 112-144

> *"The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada."*
>
> – Supreme Court of Canada, 1998[1]

> *"[S]overeignty is no value in itself. It's only a value insofar as it relates to freedom and rights, either enhancing them or diminishing them."*
>
> – Noam Chomsky[2] "Control of Our Lives" Lecture, February 26, 2000.

Canada is often described as a nation of nations, because of its geographic size and cultural diversity. By making Canada a federal state, the drafters of the *Constitution Act*, *1867* sought to balance regional interests with the desire to create a strong, united country. However, after more than a century of constitutional litigation, attempts at constitutional reform, and federal-provincial power-sharing arrangements, the proper balance is anything but clear.

The same tensions exist within many provinces. Unlike provinces and the federal government, sub-provincial entities such as regions, municipalities, and cities have no constitutionally guaranteed powers, and sometimes regional grievances are even more pronounced than provincial complaints against the federal government.

One such region is Northwestern Ontario. Professor Livio Di Matteo, a Lakehead University economist and leading authority on Northwestern Ontario, defines Northwestern Ontario

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1 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 85 [*Secession Reference*].

2 Noam Chomsky, "Control of Our Lives" (Lecture delivered at the Kiva Auditorium, Albuquerque, New Mexico, 26 February 2000), online: Z Communications <http://www.zmag.org/chomskyalbaq.html>.

as the territory covered by the Kenora, Rainy River and Thunder Bay census districts.[3] Using this definition, Northwestern Ontario runs from the Manitoba border, east to the Wawa area and north to Hudson Bay and James Bay.[4] This appears to be the most commonly accepted definition of the region, though different organizations have used different definitions for administrative purposes.[5]

From the time Northwestern Ontario was annexed to Ontario to the present day, many Northwesterners have felt alienated and neglected by Southern Ontario. Though all of Ontario's northern regions have been said to experience a certain degree of alienation relative to the economically and politically dominant South, Di Matteo *et al*. note that "this alienation is often more keenly felt in the northwest portion of the province rather than the northeast, which is immediately adjacent to the south".[6]

As a result, since its annexation to Ontario, groups in Northwestern Ontario have alternatively called for the region to be granted some type of regional autonomy, become a separate province, join with the northeast to create a province of Northern Ontario (under various names, such as Algoma, Huronia or New Ontario), or join Manitoba (to form a province of "Mantario").[7] Recently, the region's severe economic decline has fuelled the latent desire of many in the region for such political change.[8] Many Northwesterners feel that Ontario has failed to respond adequately to this decline. In a recent *Economist* article, Di Matteo suggested that support for separation from Ontario is at an all-time high.[9] However, to my knowledge, this support does not extend to the creation of an independent country of Northwestern Ontario.[10]

The proposed alternative governance structures are all technically possible. First, regarding regional autonomy, the City of Toronto recently gained broad powers of regulation, the ability to engage in inter-governmental relations, and increased fundraising capabilities through Ontario's passage of the *Stronger City of Toronto for a Stronger Ontario Act*.[11] Di Matteo has suggested that if Toronto can gain increased regional powers, not only could Northwestern Ontario gain the same, but that it would be irresponsible not to give similar grants of power to the Northwest.[12] He notes that "[c]reating what amounts to regional government for Toronto without creating regional governments in the rest of the province is asymmetrical federalism at its worst".[13] Second, provisions for creating new provinces and for redrawing provincial boundaries are contained in Part V of the *Constitution Act*, *1982*.[14] Subsection 42(1)(f) provides that,

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3 Livio Di Matteo, J.C. Herbert Emery & Ryan English, "Is It Better to Live in a Basement, an Attic, or to Get Your Own Place? Analysing the Costs and Benefits of Institutional Change for Northwestern Ontario," 32 (2006) 2 Can. Pub. Policy at 174 [Di Matteo, Emery & English].

4 See Appendix A – Figure 1.

5 The Ontario government uses the same definition of Northwestern Ontario, online: MAH - OnRAMP - Northwestern Ontario <http://www.mah.gov.on.ca/userfiles/HTML/nts_1_17375_1.html>. Parks Ontario uses a slightly different definition of Northwestern Ontario, drawing the region's southeastern border at Marathon and the northeastern border due north from Highway 11 east of Longlac. See Appendix A – Figure 2.

6 Di Matteo, Emery & English, *supra* note 3 at 174.

7 Gordon Brock, *The Province of Northern Ontario*, (Cobalt: Highway Book Shop, 1978) at 72 [Brock].

8 See e.g. "The Lumberjacks Are Not OK" *Economist* (9 March 2006), online: Fissiparous Canada: The lumberjacks are not OK <http://www.economist.com/World/na/displayStory.cfm?story_id=5609889> [The Economist].

9 *Ibid*. Note that Di Matteo himself favours regional autonomy within Ontario over separation from Ontario.

10 Note that the term "sovereignty", as it appears in this paper in the context of Northwestern Ontario self-determination, will refer to the sovereign right of people to control their future, as contemplated in the *Secession Reference*, *supra* note 1 and not to political independence.

11 *Stronger City of Toronto for a Stronger Ontario Act,* S.O. 2006, c. 11 [*City of Toronto Act*].

12 Livio Di Matteo, "The Northern Ontario Party?" *Northern Ontario Business* (December 2005), online: Northern Ontario Business - The Northern Ontario Party? <http://www.northernontariobusiness.com/regionalReports/ThunderBay/12-05-party.asp>.

13 *Ibid.*

14 *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

in order to create a new province, resolutions must be passed by the Senate, House of Commons and two-thirds of the legislative assemblies of provinces that have at least 50 per cent of the population. Subsection 43(a) requires that any change to boundaries between provinces must be approved by the Senate, House of Commons, and the legislative assemblies of the provinces to which the alteration of boundaries applies.

This essay will address three major questions. First, I will examine the historical issues surrounding Northwestern Ontario's accession to Ontario. Second, I will look at the issues, historical and contemporary, which have led to calls for Northwestern Ontario regional autonomy and/or provincial realignment. Third, I will address the question of whether Northwestern Ontario has a right to self-determination, based on international and domestic law and Canadian political history.

PART I: Northwestern Ontario's Accession to Ontario

From Confederation to the late 1880s, the Dominion of Canada and Ontario fought an often-fierce political, legal and sometimes physical battle for control of Northwestern Ontario. Though the federal government and Ontario provided a wealth of legal arguments to support their cases, their motivations were far more economic and political than legal.

In Ontario's case, from the 1850s onwards, many influential Torontonians believed that Ontario's economic future depended on its annexation and conquest of the Northwest. In December 1856, publisher, politician and future Father of Confederation George Brown stated in his newspaper, *The Globe*, "[l]et the merchants of Toronto consider, that if their city is ever to be made really great—if it is ever to rise above the rank of a fifth rate American town—it must be by the development of the great British territory lying to the north and west".[15]

Viewing the north as a vast, untamed *terra nullius*, Ontario considered it vital to acquire the Northwest as an agricultural frontier and a source of natural resources.[16] The discovery of Silver Islet, which from 1870 to 1884 was the richest silver mine in the world, spawned further interest in the region. Ontario Premier Oliver Mowat sought to emulate European leaders who were acquiring new territories in Africa and Asia, and American politicians who believed that expansion and settlement west to the Pacific Ocean was part of America's "manifest destiny".[17] During this era, "maps made heady reading which showed the doubled area of Ontario with appended comment suggesting that, were it not for the obstruction of malevolent forces in Ottawa and other provinces, Ontario would be fulfilling its manifest destiny".[18]

The federal government of John A. Macdonald also wanted to open up the frontier for settlement and development. However, for various reasons, Macdonald opposed Mowat's plans. Control of Northwestern Ontario was part of a larger provincial rights struggle;[19] while Mac-

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15 Randall White, *Ontario 1610-1985* (Toronto: Dundurn Press, 1985) at 110 [White].

16 Di Matteo, Emery & English, *supra* note 3 at 175. See also H.G. Nelles, *The Politics of Development* (Toronto: Macmillan, 1974) [Nelles].

17 See Michael T. Lubragge, "Manifest Destiny: The Philosophy that Created a Nation", online: From Revolution to Reconstruction: Essays: Manifest Destiny: The Philosophy That Created A Nation <http://www.let.rug.nl/usa/E/manifest/manif1.htm>.

18 Kenneth MacKirdy, "National vs. Provincial Loyalty: The Ontario Western Boundary Dispute, 1883–1884" 11 (1959) 3 *Ontario History* at 194 [MacKirdy].

19 For a detailed analysis of the boundary dispute's significance in federal-provincial relations, see Chapter 3 of J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study of Dominion-Provincial Relations, 1867–1896", in *Three History Theses* (Toronto: Ontario Department of Public Records and Archives, 1961) at 1 [Morrison].

donald sought to create a strong federal government, exercising federal disallowance powers[20] and pursuing other centralist policies, Mowat advocated for increased provincial powers and suggested that "the Provincial Governments of all parties should always diligently watch over and maintain the rights of the Provinces".[21] By opposing Mowat's expansionism, Macdonald was likely sending a message to Ontario that Canada, and not any one province, would determine the nation's geographic future. On a similar note, if Ontario gained control of the Northwest, Macdonald feared that the balance of Confederation would be tipped and that Ontario's power would rival even that of the federal government. Balance of power considerations also applied at the interprovincial level. Christopher Robinson, counsel for the Dominion in the 1884 Judicial Committee of the Privy Council ("J.C.P.C.") arbitration of the boundary dispute (which will be discussed later), stated that "Confederation was formed under a great deal of difficulty, and it is carried on under some difficulty".[22] Specifically, Macdonald knew that if Ontario got its way, Quebec would be opposed to Ontario being larger than it was when it entered Confederation, and that Manitoba would lose land that it desired, and even "required"[23] for its future growth. With this in mind, Macdonald sought to quell interprovincial rivalries by opposing Ontario's expansionist plans. A final reason for Macdonald's position was that the Dominion would control Northwestern Ontario's resources if the territory were either part of Manitoba or a Crown Territory.[24] Given Northwestern Ontario's immense natural resources, this is perhaps the most logical of Macdonald's reasons. Allocation of lands and the resources they contained was an extremely important political issue post-Confederation.[25]

After Confederation, Manitoba became the third player in the boundary dispute. Section 1 of the *Manitoba Act*, passed in May 1870, provided that Her Majesty the Queen "by Order in Council … admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, [and that] there shall be formed out of the same a Province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba".[26] Originally, Manitoba was known as the "Postage Stamp Province", because it was only about

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20 Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 90. Hogg notes that "[t]he federal power to disallow provincial statutes was frequently exercised by the dominant federal government in the early years of confederation". However, he goes on to say "modern development of ideas of judicial review and democratic responsibility has left no room for the exercise of the federal power of disallowance" and suggests it is obsolete as an instrument of federal policymaking.

21 White, *supra* note 15 at 164.

22 Legislative Assembly of Ontario, *The Proceedings Before The Judicial Committee of Her Majesty's Imperial Privy Council of the Special Case Respecting the Westerly Boundary of Ontario* (Toronto: Warwick and Sons, 1889) at 399.

23 *Ibid*.

24 Morris Zaslow, "The Ontario Boundary Question," in Profiles of a Province: Studies in the History of Ontario (Toronto: Bryant Press Ltd., 1967) at 112 [Zaslow].

25 Nelles, *supra* note 16 at 2.

26 *Manitoba Act, 1870*, 33 Vict., c. 3, s. 1 (Canada). I would argue that the *Manitoba Act*'s wording is incorrect, and that Rupert's Land and not the North-Western Territory covered all of modern-day Manitoba. Rupert's Land and the North-Western Territory were geographically separate. The former consisted of lands within the Hudson Bay drainage basin, which covers all of Manitoba, along with much of modern-day Northern Ontario, most of Saskatchewan and part of Southern Alberta. The North-Western Territory consisted of lands to the north and west of Rupert's Land, which lay within the Arctic and Pacific drainage basins. For more information, see Library and Archives Canada, "The North-Western Territory and Rupert's Land", online: Library and Archives Canada <http://www.collectionscanada.ca/confederation/023001-2994-e.html>. Both territories were property of the Hudson's Bay Company and were admitted to Canada in June 1870 with the passage of the *Rupert's Land and North-Western Territory Order*.

Adding to the confusion is the fact that some sources use "North-Western Territory", "Northwest Territory" and "Northwest Territories" interchangeably (for example, see "Atlas of Canada – Territorial Evolution 1870", online: Natural Resources Canada <http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1870/1>). However, the three regions were distinct entities. The Northwest Territory was a region south of the 49th parallel, ceded to Britain by France in the 1763 Treaty of Paris, and which later became the American states of Ohio, Illinois, Michigan, Wisconsin, Indiana and Minnesota (source: "History – Northwest Territory," online: MariettaOhio.info: History: Northwest Territory <http://mariettaohio.info/history/northwest/index.php>). The Northwest Territories was the name given to the sections of Rupert's Land and the North-Western Territory controlled by the federal Crown after being admitted to Canada in 1870.

33,280 square kilometres,[27] surrounded by the Northwest Territories. Rapid population growth, combined with other limitations inherent in a small, landlocked territory, led to calls by the Manitoba government for its borders to be expanded by the federal government. As early as 1873, Manitoba was lobbying for territorial expansion that would give it control of much of Northwestern Ontario, including a much-coveted port facility at the Lakehead.[28]

The fourth party to the dispute, and arguably the most influential, was the British Crown. In many ways, Canada was still effectively a colony until well into the twentieth century,[29] and the admission of new territories to Canada was an area over which the British Crown had particular influence. Section 146 of the *Constitution Act*, *1867* provides that:

> It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council … on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.[30]

Even after Rupert's Land became a Dominion territory, Clement writes that the order of legislative hierarchy in the acquired territory was 1) the Imperial Parliament; 2) the Canadian Parliament and 3) the Lieutenant-Governor of Manitoba, who was appointed to oversee the Northwest Territories.[31]

The one party not yet mentioned is, of course, the people of Northwestern Ontario. By 1867, Ontario had granted 35,000 acres of land to homesteaders in the region of modern-day Thunder Bay, and municipal institutions had been established by the province at Prince Arthur's Landing (now Thunder Bay North). However, Ontario, Manitoba and the Dominion largely ignored the inhabitants of Northwestern Ontario during the territorial dispute. In fact, it appears that many Northwesterners, such as M.P. Simon Dawson, opposed the Northwest being part of Ontario.[32] Dawson had moved to the Northwest after he was hired by the federal Department of Public Works to construct a road between the Lakehead and the Red River Settlement, and his concern for the future development of the region is said to be what inspired him to enter politics.[33] He served as Member of Parliament for the Algoma riding (which covered all of modern-day Northern Ontario) provincially between 1875 and 1878 and federally between 1878 and 1891. During this time he lobbied for Northern Ontario to be a separate province, both as an independent M.P. (until 1887) and as chairman of the parliamentary committee that examined Ontario's boundary claims in 1880.[34] However, the creation of a northern province

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27 Association of Manitoba Land Surveyors, "Manitoba's Boundaries", online: Manitoba Land Surveyors <http://www.amls.ca/>.

28 *Ibid.* Di Matteo,Emery & English note that "in 1905, while introducing a series of resolutions calling for the northern extension of the province's boundaries Manitoba's Attorney General C. H. Campbell made reference to the award of 1884 and how it had deprived Manitoba of its 'own port facilities' at the Lakehead." See Livio Di Matteo, J.C. Emery & Ryan English, "Is it Better to Live in a Basement or an Attic? Analysing the Costs and Benefits of a Union of Northwestern Ontario and Manitoba" (2005) at 10, online: University of Calgary <http://econ.ucalgary.ca/fac-files/jche/wp-11-05.pdf>.

29 Many historians have argued that Canada did not become fully independent until 1931, when the *Statute of Westminster* provided that Imperial laws would not extend to a dominion unless "it is expressly declared in that Act that the dominion has requested, and consented to, the enactment thereof", *Statute of Westminster*, 1931 (U.K.), 22 Geo. 5, c. 4, reprinted R.S.C. 1985, App. II, No. 27, s. 4.

30 *Constitution Act*, *1867* (U.K.) 30 & 31 Vict., c. 3, s. 146.

31 W.H.P. Clement, *The Law of the Canadian Constitution*, 3rd ed. (Toronto: Carswell, 1916) at 853 [Clement].

32 Elizabeth Arthur, "Dictionary of Canadian Biography Online (Simon Dawson)", online: Dictionary of Canadian Biography Online <http://www.biographi.ca/EN/ShowBio.asp?BioId=40790>. Arthur notes that "the eastern part of the riding had never been caught up in the boundary dispute".

33 *Ibid.*

34 *Ibid.*

appears never to have been seriously considered by the authorities responsible for its future. Rather, the three disputing parties saw Northwestern Ontario as virgin territory ripe for political division, and conveniently ignored the presence of a settler population and, of course, the region's large Aboriginal population.

Most modern sources agree that at Confederation, most of Northwestern Ontario was owned by the Hudson's Bay Company ("H.B.C.") as part of Rupert's Land.[35] Zaslow notes that "[c]ontemporary maps, notably the famous Arrowsmith map of 1857, showed the limits of the Province of Canada as being the "height of land" separating the Great Lakes and St. Lawrence drainage basin from that of the rivers flowing into Hudson and James Bays".[36] By the same token, the Atlas of Canada's map of Canada in 1867 shows Ontario's Northwest border as corresponding to the boundary of the St. Lawrence drainage basin.[37] In an earlier constitutional law text, Clement also notes that, "speaking roughly, the country known [as Rupert's Land] comprised the territory watered by streams flowing into Hudson's Bay".[38]

However, even before Canada came into existence, there were challenges to this interpretation. In 1857, the Canadian Commissioner of Crown Lands, Joseph Cauchon, began to develop a case against the H.B.C. claim to all lands outside the height of land. Cauchon argued that, after the Seven Years' War, Canada had acquired more land from France than previously thought. This was because French exploration and fur trading activity in Northwestern Ontario had given France title to unoccupied H.B.C. lands.[39] Cauchon also argued that the H.B.C. Charter did not give it automatic title to land, but rather, that sovereignty was based on settlement and occupation. Finally, he argued that legislation had extended Canadian sovereignty over the Company lands over the previous century.[40] Ironically, the same arguments were raised by Ontario post-Confederation, in its claim to the Northwest.[41]

In 1868, the Imperial Parliament in Great Britain passed the *Rupert's Land Act*.[42] This empowered the Crown to negotiate the entry of Rupert's Land into Canada and provided that Canada would have governmental authority over the territory after it was acquired. The admission of Rupert's Land to Canada in 1870, by way of an Imperial Order-in-Council, forced all parties to strive for a solution to the boundary question, in order to decide to whom the new territory would be assigned.[43] In September 1872, the Dominion and Ontario appointed boundary commissioners to determine Ontario's western border. The Canadian representative argued that the border lay to the east of Prince Arthur's Landing (longitude 89° 9′ 30″ west), which would have excluded all of modern-day Thunder Bay.[44] The Ontario representative suggested that Ontario's boundary lay at the northwest angle of Lake of the Woods (longitude 95° 13′ 48″ west).[45]

Both interpretations were likely based on the 1774 *Quebec Act*.[46] After the 1763 *Treaty*

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35 See map of Rupert's Land, online: University of Calgary <http://www.ucalgary.ca/applied_history/tutor/imagealta/rup-map2.jpg>.

36 Zaslow, *supra* note 24 at 107.

37 See Appendix A – Figure 3.

38 Clement, *supra* note 31 at 848.

39 This included La Vérendrye's 1731–1739 expedition from Montreal to the Missouri River via Northwestern Ontario, and the construction of forts at Abitibi (Zaslow, *supra* note 21 at 108).

40 Zaslow, *supra* note 24 at 108.

41 Legislative Assembly of Ontario, *supra* note 22 at 19.

42 *Rupert's Land Act,*1868 (U.K.) 31-32 Vict., c. 105.

43 *Imperial Order In Council Respecting Rupert's Land and the North-Western Territory*, 1870 (bound with the *Statutes of Canada*, 35 Vict., 1872 at 63).

44 Zaslow, *supra* note 24 at 108.

45 *Ibid* at 109.

46 *Quebec Act*, *1774* 14 Geo. 3, c. 83.

of Paris assigned all French territories which lay within modern-day Canada (along with the Northwest Territory and certain others) to Britain, the *Quebec Act* created the original province of Quebec out of the former French colony. Upper and Lower Canada were later carved out of this territory, only to be rejoined to form the Province of Canada in 1840. The *Quebec Act* stated that the northwest boundary between the British and French colonies ran as follows: "along the bank of the [Ohio River], westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay".[47]

Two wildly different interpretations of the above provision emerged. Ontario argued that the *Treaty of Paris* set the border due north from the source of the Mississippi, at Lake of the Woods. Canada and Manitoba took the position that the *Quebec Act* intended the border to be due north of the junction of the Mississippi and Ohio rivers. It is unclear where the drafters of the *Quebec Act* intended the northwest border to be. However, note that the source of the Mississippi was not discovered until 1832, when Henry Rowe Schoolcraft and his Ojibwa guide Ozawindib correctly identified Lake Itasca (in what is now north-central Minnesota) as the river's headwaters.[48] This would suggest that if the *Quebec Act*'s drafters intended the border to have any precision, the correct legislative interpretation was that of the Dominion and Manitoba.

In 1873, the Macdonald Conservatives lost the federal election to Alexander Mackenzie's Liberals. The following year, Ontario and Canada agreed to appoint a board of arbitrators to decide on the boundary. Di Matteo *et al*. question this board's neutrality, noting that Mackenzie was openly supportive of Ontario's claims, and that "the Board did not have a single representative from either Manitoba or the District of Keewatin".[49]

Also in 1874, an agreement was struck between the Dominion and Ontario to enact a temporary border. In 1872, Ontario agreed to a request by the federal Department of Public Works to pay for construction at Prince Arthur's Landing and to set up a police force there. Of course, Ontario questioned why it was asked to pay for infrastructure in an area that the Dominion claimed was outside of Ontario's borders. In response to Ontario's concerns, after taking power the Mackenzie Liberals struck an interim agreement with Ontario to extend the province's northwestern borders even beyond the St. Lawrence drainage basin.[50] Zaslow writes:

> The agreement continued for four years until the three arbiters (none of whom had been designated to the original panel) met for three days in Ottawa, August 1-3, 1878, and issued their decision, unaccompanied by supporting reasoning or explanations. The award was wholly in the province's favour. On the west it gave Ontario the line of the Northwest Angle [from Lake of the Woods]; and on the north the English and Albany Rivers, the coast of James Bay east to the meridian of Lake Temiskaming, thence south to that point and along the Ottawa River.[51]

The arbitration decision was issued shortly before Mackenzie's Liberals were defeated by the Macdonald Conservatives in 1878, and Mackenzie did not have time to implement its find-

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47 *Ibid*, s. 1.

48 MSNBC.com, "River's headwaters were devilishly hard to find"" online: Mile zero: The river's elusive source - The Mighty Miss <http://www.msnbc.msn.com/id/5539776/>.

49 Di Matteo, Emery & English, *supra* note 3 at 25.

50 Government of Ontario, *Documents Respecting the Northern and Western Boundaries of Ontario* (Toronto: Hunter, Rose and Co., 1878) at 347: "Provisional Conventional Boundaries of Ontario, 1874". See also Atlas of Canada - Territorial Evolution, 1874 online: Natural Resources Canada – Atlas of Canada <http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1874/1>; See also Appendix A – Figure 5.

51 Zaslow, *supra* note 21 at 109.

ings.[52] Because the decision was non-binding and Macdonald opposed its findings,[53] the new government ignored it. Macdonald himself suggested that the arbitrators acted with "utter disregard to the interests of the Dominion as a whole".[54] Manitoba was similarly disappointed by the decision, as it had been lobbying for territorial expansion for several years.

Consequently, in a legislative *tour de force*, the re-elected Macdonald Conservatives passed *An Act to Provide for the Extension of the Boundaries of the Province of Manitoba* ("*Manitoba Boundary Act*") in 1881.[55] Manitoba passed similar legislation authorizing the Dominion to expand its borders.[56] This statute expanded Manitoba's boundaries to the "westerly boundary of the Province of Ontario".[57]

The exact location of this boundary was and still is unclear, though most sources place it at or near present-day Thunder Bay. MacKirdy suggests that "[i]f the extreme claim of the Dominion government were upheld the boundary of Manitoba would extend to Lake Superior, embracing the present Lakehead ports".[58] Zaslow also suggests that the *Manitoba Boundary Act* would have taken away the port facilities[59] of what is now Thunder Bay. Brock, somewhat confusingly, provides one map which outlining the boundary "advocated by the Government of Canada" which places the Lakehead in Manitoba, and another map, from 1881, which has a different western boundary.[60] White argues that "[f]or Macdonald, Ontario's northern boundary was the height of land that marked the Hudson Bay watershed, while its western boundary ended some half a dozen miles west of Fort William".[61] White's interpretation probably would have denied Manitoba access to Lake Superior at modern-day Thunder Bay, though the other interpretations of the *Manitoba Boundary Act* would have given Manitoba lake frontage. Interestingly, the Atlas of Canada's 1881 map of Canada does not acknowledge the shrinking of Ontario's borders, but mentions simply that "Manitoba is enlarged in 1881 by extending its boundaries westward, northward and eastward".[62] With respect, I think that the Appendix A – Figure 6 depiction of the "Disputed Area" is incorrect, and the Disputed Area should be extended to the east of modern day Thunder Bay.

Any boundary at or near modern day Thunder Bay would put territory which was outside the Hudson Bay watershed in Manitoba, even though Ontario had established settlements at the Lakehead before 1881. Referring to the Dominion's assertion of the same borders in 1872 (as mentioned earlier), Zaslow notes that "as this would have removed the Lakehead centres of Fort William and Prince Arthur's Landing, over which the sovereignty of the old province of

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52 Morrison, *supra* note 19 at 97.

53 *Imperial Order In Council, Embodying Her Majesty's Decision*, August 11, 1884: "Legislation by the Dominion of Canada, as well as by the Province of Ontario, was necessary to give binding effect as against the Dominion and the Province to the Award of the 3rd August, 1878, and that, as no such legislation has taken place, the Award is not binding".

54 Cited in John Burchill, "The Rat Portage War", online: Winnipeg Police Service :: UD :: The Rat Portage War <http://winnipeg.ca/police/history/story13.stm> [Burchill].

55 *An Act to Provide for the Extension of the Boundaries of the Province of Manitoba, 1881* 44 Vict., c. 14.

56 *Ibid.*, at s. 1.

57 *Ibid*.

58 MacKirdy, *supra* note 18 at 195. For the benefit of readers from outside Northwestern Ontario, note that until Thunder Bay was created by the amalgamation of Port Arthur and Fort William in 1970, the Thunder Bay area was colloquially known as the Lakehead. In 1970, a referendum was held to determine the name of the new city, and voters were asked to choose between "Lakehead", "The Lakehead" and "Thunder Bay". Though a majority preferred either "Lakehead" or "The Lakehead" as the new name, the vote split between those two options, and "Thunder Bay" was the winner. Many older people from the Thunder Bay area still refer to the city and its surrounding area as the Lakehead, and this author has always had a preference for the Lakehead name.

59 Zaslow, *supra* note 24 at 113.

60 Brock, *supra* note 7 at 10, 12.

61 White, *supra* note 15 at 165.

62 Atlas of Canada – Territorial Evolution, 1881, online: Natural Resources Canada – Atlas of Canada <http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1881/1>. See also Appendix A – Figure 6.

Canada had never been challenged, this was clearly unacceptable to Ontario".[63]

The Ontario government was outraged by the *Manitoba Boundary Act*. Coming on the heels of the federal government's decision to disallow Ontario's *River and Streams Act*, Mowat saw the boundaries legislation as an attempt by Macdonald to assert federal dominance over Ontario and to punish the province for electing his political arch-rival.[64] Many Southern Ontarians also believed that the *Manitoba Boundary Act* was influenced by Quebec, which feared Ontario's expansion.[65] Consequently, Ontario chose to ignore the *Manitoba Boundary Act* and argued that the 1878 arbitration award should stand. In 1882, the Ontario legislature approved a reference to the J.C.P.C. regarding the boundary, but agreed that the federal government's claim was "unfounded"[66] and that in the interim, the disputed area should be under Ontario's jurisdiction.[67]

As a result, the Dominion, Ontario and Manitoba all sought to assert jurisdiction over the disputed area. Between 1881 and 1884, parts of Northwestern Ontario resembled the Old West, with no effective government and "potentially dangerous elements" drawn to the region by construction, logging, prospecting and other opportunities available in a booming frontier economy.[68] Because of its close proximity to Manitoba, Rat Portage (now Kenora) was the centre of conflict between the three parties. In May 1881, when Ontario Magistrate W.D. Lyon attempted to hold court in Rat Portage, his bailiff was arrested and imprisoned by federal agents.[69] In another case, Manitoba Constable Patrick O'Keefe seized four barrels of moonshine, but when he brought the offending substance back to his office, he was arrested by Dominion agents for having possession of liquor in the jurisdiction of a federal public work. When he went to trial, O'Keefe waited until the federal magistrate left the bench, then charged him with possessing the same alcohol. Subsequently, a Manitoba magistrate fined his federal counterpart $100.[70]

Historian Alexander Begg describes the following scenario:

> One day a Manitoba constable would be arrested for drunkenness by an Ontario constable, the next, Manitoba would reciprocate by arresting an Ontario official, or this dull routine would be enlivened by an assault on a newspaper correspondent, or the apprehension of one of the magistrates on some trumped-up charge, to be followed by a general swearing out of information and wholesale arrests all around the official circle. While these interesting proceedings commanded the strict attention of the magistrates and police, it may be imagined that the gamblers and whisky pedlars enjoyed complete immunity, for it was next to impossible for a constable, zealous as he might be in the discharge of his duty, to observe the actions of evil-doers, while he himself was a fugitive from justice, engaged in dodging a warrant for his own arrest.[71]

Despite the comedic ridiculousness of the situation, Evans notes that "the series of arrests and counter-arrests which ensued [regarding liquor licences] did end the lengthy impasse on

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63 Zaslow, *supra* note 24 at 108.

64 A. Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992) at 158–159 [Evans].

65 *Ibid*.

66 Journals of the Assembly, (1882), at 154–156.

67 Evans, *supra* note 64 at 161.

68 Zaslow, *supra* note 24 at 111.

69 *Ibid.* at 112.

70 *Ibid*.

71 Alexander Begg, *History of the North West* (Toronto: Hunter, Rose and Co., 1894–95) at 79.

the boundary question".[72] Fearing that the situation in the North was getting out of control, in December 1883, Manitoba Attorney General and Rat Portage M.L.A. J.A. Miller agreed with Oliver Mowat to submit the boundary dispute to the J.C.P.C. for arbitration.

Miller had to persuade Macdonald to submit to J.C.P.C. arbitration, even though Parliament had approved a resolution in April 1882 calling for the Supreme Court of Canada or the J.C.P.C. to address the boundary question. The major sticking point was interim control of the disputed lands. While Ontario demanded full control of the disputed territory pending a final decision, the Dominion resolution called for the territory to be administered by a joint commission appointed by the Ontario and federal governments.[73] There were also issues surrounding which boundaries were to be determined.[74] Originally, the parties had agreed to refer the northern border question to the J.C.P.C. along with the other questions because Mowat wanted a final resolution to all of his province's border issues. On March 7, 1884, Alexander Campbell, a cabinet minister and top advisor to John A. Macdonald, wrote to Mowat "I am also very glad personally to be able to say that we are ready to agree to the reference of the Northern and the remainder of the Western boundary to the same tribunal at the same time".[75] However, the northern border reference was withdrawn at the last minute, presumably because Macdonald thought that a single reference would resolve the issue in the Dominion's favour.[76] However, despite their disagreements on the questions to be addressed by the J.C.P.C., by 1884 all three parties had agreed to send the case to the Law Lords ("*Ontario Boundary Case*").[77]

The J.C.P.C. decision in 1884 apparently put an end both to the aforementioned lawlessness and chaos in Rat Portage and to the aspirations of Manitoba and Canada to extend the former's territory eastward. The Dominion, Manitoba and Ontario agreed to submit three questions. These were: 1) is the 1878 award binding; 2) if the award is not binding, then what is the true boundary between Manitoba and Ontario; and 3) whether federal and provincial legislation would suffice to give the decisions legal effect (as per the *British North America Act, 1871*)[78], or whether a new Imperial Act would be necessary.[79] On the first question, the 1878 award was held to be non-binding. However, on the second question, its results were upheld. Regarding the third question, the Law Lords stated:

> [W]ithout expressing an opinion on the sufficiency or otherwise of concurrent legislation of the Provinces of Ontario and Manitoba, and of the Dominion of Canada (if such legislation should take place), their Lordships think it desirable and most expedient that an Imperial Act of Parliament should be passed to make this decision binding and effectual.[80]

Unfortunately, neither the arbitrators' award nor the J.C.P.C. decision provides reasons. Zaslow and others have suggested that the "surprising"[81] result was due to Ontario's superior research, organization and advocacy.[82] Evans writes that "[a]s senior counsel for Ontario, [Oliver Mowat] had prepared the case for his province with minute care, using skillfully the mass of evidence in the acts, charters, commissions, proclamations, treaties and maps which he

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72 Evans, *supra* note 64 at 172.

73 Morrison, *supra* note 19 at 150.

74 *Ibid.*, at 154–158.

75 *Ibid.* at 157.

76 *Ibid* at 158.

77 *Ibid* at 173.

78 *British North America Act, 1871* (U.K.), 34–35 Vict., c. 28.

79 Legislative Assembly of Ontario, *supra* note 23 at 2.

80 *Imperial Order In Council, Embodying Her Majesty's Decision*, August 11, 1884, s. 4.

81 Zaslow, *supra* note 24 at 113.

82 *Ibid*.; Evans, *supra* note 64 at 173.

had been collecting for over a decade".[83] Note that Ontario produced at least two volumes of documentary information relating to the boundary,[84] while it appears that neither the Dominion nor Manitoba had done such research. MacKirdy goes so far as to suggest that Manitoba was relatively uninterested in Northwestern Ontario, as it was "preoccupied with wheat land" and it did not want to acquire vast territories over which it would have to administer without the corresponding access to resource revenues.[85] I disagree with this assertion, and would note that, as mentioned earlier, Manitoba had been lobbying Ottawa for territorial expansion since 1873 and desired access to the Great Lakes. I would also note that Manitoba was the only party to send militia to the disputed area. In 1883, Manitoba dispatched sixty armed men from the Winnipeg Field Battery to Rat Portage to keep the peace during the provincial elections.[86] Additionally, after Ontario authorities arrested a group of Manitoba police and burned down the Manitoba jail during the Rat Portage War, Manitoba Premier John Norquay personally led an expedition of Manitoba police to the town and arrested those thought to be responsible.[87] However, I would agree with MacKirdy insofar as Ontario had spent more time and effort preparing its case.

Though it is difficult to determine which arguments were the most persuasive, both parties' arguments may be grouped into two major categories: arguments advocating for a particular interpretation of the *Treaty of Paris*, and arguments surrounding the assertion of sovereignty (or lack thereof) by various parties. First, in support of his interpretation of the *Treaty of Paris*, Mowat cited the *Quebec Act*, *1774*, and suggested that its plain language and its purpose (namely, to transfer French territories to the British Crown) advocated for the Ontario interpretation. Additionally, according to Morris Zaslow, the Ontario interpretation had been accepted in the 1783 *Treaty of Versailles*.[88]

Second, Ontario argued that the H.B.C. had failed to assert sovereignty over its lands, and that "the grant [of lands, in the 1670 Charter incorporating the Hudson's Bay Company, by King Charles II] was to be commensurate only with their actual appropriation or possession".[89] Ironically, these were the same arguments raised by Joseph Cauchon for Canada in its dispute with the H.B.C. over control of Rupert's Land. Consequently, Mowat argued that Upper Canada stretched to the Rocky Mountains,[90] by virtue of French fur trade operations in the west[91] and the H.B.C.'s failure to assert control of its territory beyond the perimeter of Hudson Bay.[92] However, acknowledging that awarding Ontario most of modern-day western Canada would be "inconvenient",[93] Mowat was perfectly happy to accept the arbitrators' award of 1878.[94]

Manitoba's strongest argument also related to sovereignty; namely, the 1818 decision of the courts of Lower Canada in *De Reinhard's Case*.[95] In this case, the defendant was charged

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83 Evans, *supra* note 64 at 172.

84 See Government of Ontario, *Statutes, Documents and Papers Bearing On The Discussion Respecting the Northern and Western Boundaries of the Province of Ontario* (Toronto: Hunter, Rose and Co., 1878); see also Legislative Assembly of Ontario, *Correspondence, Papers and Documents of Dates from 1856 to 1882 Inclusive, Relating to the Northerly and Westerly Boundaries of the Province of Ontario* (Toronto: C. Blackett Robinson, 1882).

85 MacKirdy, *supra* note 18 at 195–196.

86 Burchill, *supra* note 54. This area is part of the Canadian Shield and could not be characterized as "wheat land".

87 Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Peguis, 1972) at 155.

88 Zaslow, *supra* note 24 at 112.

89 Legislative Assembly of Ontario, *supra* note 23 at 54.

90 *Ibid*. at 45.

91 *Ibid.* at 88–97.

92 *Ibid.* at 53.

93 *Ibid.* at 33.

94 *Ibid.* at 77.

95 Reproduced in the Legislative Assembly of Ontario, *supra* note 23 at 207.

with a murder that occurred in the disputed territory. The court held that it had jurisdiction because the murder was not committed in Upper Canada.[96] Therefore, Manitoba and Canada argued that Ontario had no claim to the disputed territory, because Ontario was formed from what had originally been Upper Canada. This "finding of law", as it was subsequently deemed in *McLennan's Case*, was never overturned nor challenged. However, Ontario alleged that *De Reinhard* was bad law because it had never been cited, and because it had been referred to England for interpretation. Apparently no opinion was provided by the English authorities regarding the verdict in *De Reinhard's Case*.[97]

However, Zaslow and others have argued that Manitoba and the federal government discredited their case by claiming land commonly assumed to be part of Ontario, in the St. Lawrence drainage basin west of the junction of the Ohio and Mississippi rivers. Counsel for Manitoba, Mr. D. McCarthy, was forced to concede that that "up to the height of land—that is between Lake Superior and the height of land—Upper Canada *did* exercise jurisdiction".[98] When asked if any act of Parliament referred to the "height of land", McCarthy stated that "there was a treaty with the Indians in 1850, and that treaty took in all the land".[99] Most certainly McCarthy was referring to the Robinson-Superior Treaty, which covers lands up to the southern and western border of Rupert's Land and embraces Thunder Bay.[100] Counsel for the Dominion, Mr. Christopher Robinson, concurred with Manitoba's position on the geographical questions.[101] However, though admitting that Canada and later Ontario had controlled lands now claimed by Manitoba, both McCarthy and Robinson argued that the "proper line" was due north from the junction of the Ohio and Mississippi rivers.

It is beyond the scope of this paper to re-argue the *Ontario Boundary Case*, but a few comments should be made regarding the J.C.P.C.'s findings. Morrison points out several flaws with the J.C.P.C.'s description of the awarded territory, which did not conform to the 1878 award even though it claimed to do so. He also argues that the Law Lords exceeded their terms of reference.[102] First, Morrison argues that the following phrase implied giving Manitoba a piece of the United States: "their Lordships find the true boundary between the western part of the Province of Ontario and the *south-eastern part of the Province of Manitoba* to be so much of a line drawn to the Lake of the Woods …[emphasis added]".[103] My interpretation of this statement is that Lake of the Woods marks the southeast corner of Manitoba, and that it is not problematic. Second, Morrison points out that, by ruling on a northern border for Ontario, the J.C.P.C. exceeded the scope of the second reference question, which was "[i]n case the Award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said provinces".[104] Of course, Ontario and Manitoba have never had a northern border, and adjudication of the Dominion-Ontario dispute over Ontario's northern border was not included in the terms of reference. Third, Morrison correctly points out that the J.C.P.C.'s description of Ontario's western border as "a line drawn due north from the confluence of the Rivers Mississippi and Ohio which forms the boundary eastward of the province of Manitoba"[105] is, of course, inaccurate, as that border was proposed by Manitoba and the Dominion,

96 Jurisdiction was granted by the *Imperial Act*, 43 Geo. III, c. 138, to the courts of Lower Canada for crimes committed in "Indian territory".

97 Legislative Assembly of Ontario, *supra* note 23 at 102.

98 *Ibid* at 103.

99 *Ibid*.

100 Appendix A – Figure 4.

101 Legislative Assembly of Ontario, *supra* note 23 at 338.

102 Morrison, *supra* note 19 at 160.

103 *Imperial Order In Council, Embodying Her Majesty's Decision*, August 11, 1884, s. 3.

104 Legislative Assembly of Ontario, *supra* note 23 at 2. Evans notes the same concern (*supra* note 64 at 173).

105 Legislative Assembly of Ontario, *supra* note 23 at 2.

and would run somewhere near the Lakehead.[106]

Aside from ending hostilities in Rat Portage, what was the effect of the *Ontario Boundary Reference*? Needless to say, Macdonald disagreed with the J.C.P.C. decision. Rather than acting on it, he waited for nearly five years before his government finally passed such a resolution calling for Imperial legislation on the boundaries issue. Macdonald took particular issue with its decision on the northern borders, in addition to asserting that the Dominion controlled all resource revenues between the height of land west of Lake Superior and the present-day Manitoba border[107] because Canada had gained title to that land in the Northwest Angle Treaty of 1873. This contention was laid to rest in the 1888 decision in *St. Catherine's Milling and Lumber Company*,[108] in which the J.C.P.C. held that title to the resources of Aboriginal lands acquired by the Dominion via treaties lay in the hands of the provinces under the *British North America Act*, 1867.

In all likelihood, Macdonald was allowed to stall for as long as he did because the J.C.P.C. decision was a recommendation rather than a ruling. Specifically, it stated that "their Lordships think it desirable and most expedient that an Imperial Act of Parliament should be passed to make this decision binding and effectual".[109] However, shortly after the J.C.P.C. issued its findings, an Imperial Order-in-Council was passed, stating that:

> Her Majesty, having taken the said Report into consideration, was pleased by it and with the advice of Her Privy Council to approve thereof and to order, as it is hereby ordered, that the same be punctually observed, obeyed and carried into execution. Whereof the Governor-General of the Dominion of Canada, the Lieutenant-Governor of the Province of Ontario, the Lieutenant-Governor of the Province of Manitoba and all other persons whom it may concern, are to take notice and govern themselves accordingly.[110]

My reading of this Order is that the J.C.P.C. ruling was *ordered* to be carried into execution. Oliver Mowat apparently thought the same, and in 1885, he attempted to go over Macdonald's head by requesting that the Colonial Secretary arrange for Imperial legislation to be passed to implement the J.C.P.C. ruling.[111] However, this request was ignored.[112] It was not until the aforementioned resolution was passed that the Imperial Parliament passed the *Canada (Ontario Boundary) Act* in 1889, which set Ontario's current western border.[113] The province's final border change was made in 1912, when the Dominion handed over its remaining territories south of the 60th parallel to Ontario, Manitoba and Saskatchewan.[114]

In the final analysis, Ontario was very lucky to win control of a vast territory beyond its historical borders. In particular, had Alexander Mackenzie not won the 1873 election and appointed a board of arbitrators who decided as they did, the J.C.P.C. may well have ruled differently given the general reluctance of appeal courts to overturn original decisions. However, full credit must be given to Oliver Mowat for legally and politically outgunning his opponents on this issue. From Confederation onwards, Mowat lobbied hard for Ontario's territorial expansion. Even after the Dominion attempted to strong-arm him out of all of the territory awarded

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106 Morrison, *supra* note 19 at 160.

107 Zaslow, *supra* note 24 at 114.

108 *St Catherine's Milling and Lumber Co v Queen, The (PC (Can)) Privy Council (Canada)* (1888),14 App. Cas. 46 (J.C.P.C.).

109 *Imperial Order In Council, Embodying Her Majesty's Decision*, August 11, 1884, s. 4.

110 *Ibid.*

111 Morrison, *supra* note 19 at 168.

112 *Ibid*. at 169.

113 *Canada (Ontario Boundary) Act*, 1889 52-53 Vict., c. 28 (U.K.).

114 *The Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40.

in 1878, Mowat not only refused to back down, but sent law enforcement officials to the farthest reaches of the Ontario claim in order to assert Ontario's control.[115] His work in researching and personally arguing the boundary case before the J.C.P.C. is fairly unique in Canadian history. Further, he was prepared to pull out of Confederation in order to win the dispute, stating that "if they could only maintain Confederation by giving up half of their Province, then Confederation must go".[116] Though it is unclear why the federal government did not take more forceful measures to enforce the *Manitoba Boundary Act*, a likely explanation is that doing so may well would have led to armed conflict with Ontario and the destruction of Canada. For its part, Manitoba did what it could to assert sovereignty over the western regions of the disputed area, but its physical, political and economic resources paled in comparison to Ontario's.

PART II: Northwestern Ontario Post-Annexation to Ontario

In the early years, Northwestern Ontario was unquestionably a valuable economic acquisition for Ontario. Between 1871 and 1914, Northern Ontario forestry and mining revenues accounted for 25 per cent of Ontario's revenue, despite the fact that the region made up, at most, 10 per cent of Ontario's population.[117] The region's manufacturing sector grew rapidly, and railway construction created employment and opened up new land for settlement.[118]

However, since the 1950s, Northwestern Ontario has grown at a slower rate than the rest of the province.[119] Between 1996 and 2001, the population of Northwestern Ontario fell by 3.8 per cent, a net loss of 9,348 people.[120] The economy throughout most of the region has experienced similar declines. In the second quarter of 2006, the Service Canada Labour Market Bulletin for the region noted that Northwestern Ontario has the highest unemployment rate of any region in the province.[121] This is due in large part to a decline in the forest industry, which forms the core of the region's economy and has lost thousands of jobs across the region in recent months.[122] Over the longer term, other traditional industries such as grain handling, shipbuilding and agriculture have also experienced significant declines.

Not surprisingly, one often hears comments such as the following from Northwestern Ontarians:

> Last August at the Association of Municipalities of Ontario conference in

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115 Some have argued that Mowat was less than successful in asserting control over the western part of Northwestern Ontario, at least in the early years of the Rat Portage dispute. First, Rat Portage incorporated as a Manitoba town in July 1882. Second, in the January 1883 murder trial of Thomas Drewes of Rat Portage, the accused was convicted in a Manitoba court, with no challenge by Ontario to the court's authority. Third, both provinces held elections in Rat Portage on September 28, 1883, and though the Ontario and Manitoba candidates were obviously not running against each other, some argued that because the Manitoba MLA-elect (Attorney-General J.A. Miller) won more votes than his Ontario counterpart, the Manitoba result was more valid (source: Burchill, *supra* note 51). Morrison further argues "that bloodshed and open warfare did not result was due partly to the good sense of officials on the spot, but more specifically to the fact that Ontario did not attempt to press her claims with the degree of forcefulness exhibited by her leaders in their public utterances" (Morrison, *supra* note 16 at 98).

That being said, Ontario's presence in Rat Portage, and its willingness to resist the authority of Manitoba and Dominion agents, was pivotal in forcing Manitoba and later, Canada, to submit to the 1884 J.C.P.C. arbitration, for which Mowat likely believed that he was better prepared and had a good chance of winning.

116 Quoted in Evans, *supra* note 64 at 161.

117 Di Matteo, Emery & English, *supra* note 3 at 175.

118 *Ibid*.

119 *Ibid*. at 4.

120 Ontario Region Census Products, "Population Characteristics for Northwestern Ontario, Economic Region 595, Census 2001" online: Service Canada <http://www1.servicecanada.gc.ca/en/on/lmi/eaid/ore/cen01/no/595pop.shtml>.

121 Service Canada, "Labour Market Bulletin Thunder Bay – Second Quarter 2006", online: Service Canada <http://www1.servicecanada.gc.ca/en/on/offices/0602lmb/thunderbay.shtml>.

122 Ontario Forestry Coalition, online: Ontario Foresty Coalition <http://www.forestrycoalition.com>.

> Toronto, the points of the crisis in the forestry industry were brought to the attention of all delegates. I can assure you that by the end of the conference most people understood the situation; it would appear that further up University Avenue at Queen's Park the message was lost. …
>
> Over the past 12 months the word "separation" has been heard again. Maybe it is time. Maybe Northwestern Ontario should ask Manitoba if we can "get in" or maybe Northern Ontario should say to the rest of Ontario, "We want out" and establish the 11th province.
>
> Yes, I know there are some who will think this a crazy idea, but we cannot be any worse off than we are now.[123]

Though there is frustration with the provincial government's perceived inability and unwillingness to deal effectively with local economic issues, it would be simplistic to dismiss such attitudes as mere irrational frustration. In his 1977 article "Hinterland Politics: The Case of Northwestern Ontario", Geoffrey Weller argues that Northwestern Ontario's economy is based on extraction—of raw materials, people and money—which has caused deep-seated disillusionment amongst Northwesterners.[124] As a "hinterland", Weller suggests that Northwestern Ontario and other regions like it are designed to serve the needs of the "metropolis", namely, Southern Ontario.[125] Weller sets out a model which illustrates how the "economics of extraction" cut to the heart of Northwestern Ontario politics. Though I disagree with some of Weller's conclusions, I believe that the extraction model (reproduced in Appendix B) is extremely useful in understanding the alienation felt by many Northwestern Ontarians, the desire for major political change in the region, and the successes and failures of regional secession movements.

ECONOMICS OF EXTRACTION

Northwestern Ontario's main industries in terms of economic output traditionally have been forestry and mining.[126] Both sectors exist to produce raw materials for outside owners and purchasers, many of which have been based traditionally in Southern Ontario. In addition, people have been a major export for the region; one Government of Canada report notes that "[u]pon graduation, most of the region's best and brightest prospects leave the North, looking for better employment opportunities. This results in an increasingly older regional population and a less skilled work force".[127] Weller also argues that the tourism industry, long touted as the future of the Northwestern Ontario economy, primarily caters to Southern Ontario interests.[128] However, it is important to note that in recent years, increasing numbers of tourists have come from the U.S. Midwest.

Because extractive industries are capital-intensive and often tend to be located in close proximity to their source of raw materials, the region's population has grown more slowly than the rest of the province (and is now, in fact, declining), and is unevenly distributed. Northwestern Ontario's transportation infrastructure has been built around moving goods out to the metropolis rather than moving people and goods into the region. As a result, the region has one

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123 Bill Bartley, "'We Want Out.' Time to Separate?" *Thunder Bay Chronicle-Journal* (28 January 2006).

124 Geoffrey Weller, "Hinterland Politics: The Case of Northwestern Ontario" (1977) 10 Can.J.Pol.Sci. 4 at 732 [Weller, "Hinterland Politics"].

125 *Ibid*. at 731.

126 *Ibid*. at 734.

127 Government of Canada, "Innovation Performance – Northwestern Ontario" (July 2002), online: Government of Canada – Innovation in Canada <http://innovation.gc.ca/gol/innovation/site.nsf/en/in02011.html>.

128 Weller, "Hinterland Politics", *supra* note 124 at 735.

of the world's largest grain handling ports, but it does not have a four-lane divided highway.[129] Weller argues that these phenomena have adversely affected regional cohesiveness. Also, "the fact that many of the industries import most of their managerial staff, pollute the environment, set up company towns, and leave when resources are exhausted"[130] perpetuates the lack of cohesion and causes feelings of alienation and powerlessness. Combined with the fact that most Northwestern Ontario industries are highly sensitive to swings in commodity and energy prices,[131] it is little wonder that the region has a "history of out-migration" and that "dissatisfaction is often marked more by exit rather than voice".[132]

POLITICS OF EXTRACTION

Weller suggests that Northwestern Ontario's economy has created a "politics of extraction".[133] He categorizes the region's political relationship with the South as "politics of futility" and "politics of handouts".[134] The former type of politics refers to pressure to change the hinterland-metropolis relationship and the pressure to obtain services "that come almost as a right in other regions".[135] Weller suggests that the relationship might be changed if Northwestern Ontario developed more heavy industry which would support secondary manufacturing, if freight rates were restructured to minimize the adverse impacts of transportation costs on such industries, and if more white-collar positions were created by government. In 2004, I worked for the City of Thunder Bay's economic development office, and in discussions with numerous local business owners and managers, I often heard the view that Thunder Bay needed more industry, and in particular, manufacturing. However, Northwestern Ontario's distance from major markets, combined with increased foreign competition and high input costs mean that such wishes are highly unlikely to materialize. Countless studies have suggested the need for more value-added forestry investment, with few results.[136] One of the region's few large manufacturers, the Bombardier plant in Thunder Bay, has laid off hundreds of workers in recent years, and may well have shut down entirely had it not landed a recent contract with the Toronto Transit Commission.[137] Although the Ontario government has made some major investments in Northwestern Ontario in the thirty years since Weller's article was published,[138] white-collar job opportunities are few and far-between. Regarding the second component of the "politics of futility", namely the lack of adequate services, Weller notes in a subsequent article that Northwestern Ontario's severe shortage of health care professionals, its lack of a university offering law and doctoral programs, and the plight of the region's large Aboriginal population living on under-serviced reserves.[139] Although some progress has been made since 1977, many Northwestern Ontarians still believe that lobbying the provincial government for economic development assistance or improved service delivery is frustrating at best and futile on average.

The "politics of handouts" may be more of a question of perception than politics. Though

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129 Government of Canada, *supra* note 127. In most parts of Northwestern Ontario, even the Trans-Canada remains a two-lane, undivided highway.

130 Weller, "Hinterland Politics", *supra* note 124 at 737.

131 Geoffrey Weller, "Politics and Policy in the North", in Graham White ed., *The Government and Politics of Ontario, 5th ed.* (Toronto: University of Toronto Press, 1997) at 289–290 [Weller, "Politics and Policy"].

132 Di Matteo, Emery & English, *supra* note 3 at 19.

133 Weller, "Hinterland Politics", *supra* note 124 at 738.

134 See Appendix B.

135 Weller, "Hinterland Politics", *supra* note 124 at 738.

136 See e.g. William L. Lees and Associates, "Economic Contribution of the Primary Forest Products Industry to Northwestern Ontario", online: Boreal Forest <http://www.borealforest.org/blreport.htm>.

137 Made In Canada BIZ, online: Made in Canada BIZ <http://www.madeincanadabiz.com>.

138 For example, note the Ontario government's transfer of certain Registrar-General and Ministry of Education positions to Thunder Bay, along with the construction of the Northern Ontario School of Medicine at Lakehead University.

139 Weller, "Politics and Policy", *supra* note 131 at 290–291.

it would be unfair to demand improved services from the provincial government but then characterize successful lobby efforts as resulting in "handouts", Weller suggests that "it is a feeling on the part of many residents of the region that the whole objective of a great many governmental actions is to keep open the promise of development and, therefore, a change in the basic relationship, but never to undertake actions designed to achieve such a change".[140]

POLITICS OF FRUSTRATION AND POLITICS OF PAROCHIALISM

The consequence of Northwestern Ontario's political and economic relationship with Southern Ontario has been two major political trends within the Northwest: frustration and parochialism. Weller argues that the frustration of many Northwesterners with their subordinate political and economic status, combined with the region's rebellious, blue-collar culture, has manifested itself in political radicalism over the years. Movements such as the International Workers of the World, the Communist Party and various other radical left-wing causes have enjoyed considerable support, and A.W. Rasporich notes that Thunder Bay's diversity of and support for radical left-wing movements has been considerably higher than in most Canadian cities.[141]

Frustration has also manifested itself in what Weller calls "fringe movements", created to bring about change in the region's political status. As noted earlier, Simon Dawson advocated for Northern Ontario to become a separate province from the 1870s onwards. Additionally, in 1911, the Kenora District requested to join Manitoba.[142] The secessionist movements in the late nineteenth and early twentieth centuries were undoubtedly motivated by optimistic views about the region's future, in light of the region's booming economy and rapid population growth.[143] However, from the 1950s onwards, movements such as Hubert Limbrick's "New Province League" and Ed Deibel's Northern Ontario Heritage Party[144] have formed in reaction to frustration and alienation resulting from the region being largely controlled by Southern Ontario. For example, in 1944, the mayors of Port Arthur and Fort William called for the Northwest to join Manitoba, with Port Arthur's Acting Mayor J.E. Fryer stating "[t]he greatest frontier in Canada is being governed by people who don't know and don't care".[145] Similarly, Ed Deibel was inspired to campaign for Northern Ontario to become Canada's eleventh province after Ontario introduced a seven per cent tax on heat and energy in the 1973 provincial budget.[146]

Although these movements attempted to address concerns about Northwestern Ontario's status as a political and economic[147] hinterland, none have ever achieved any significant support at the ballot box. In fact, Northwestern Ontario has generally elected M.P.'s and M.P.P.'s from the governing party, though C.C.F.-N.D.P. candidates have also been elected in disproportionate numbers over the years.[148] Several theories have attempted to explain why a region that often sees itself as alienated would vote for the government responsible for its marginalization. First, in what he referred to as the "politics of colonialism", Rasporich has suggested that Northwesterners have been willing to be bought off by the provincial governments of the

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140 Weller, "Politics and Policy", *supra* note 131 at 743.

141 A.W. Rasporich, "Factionalism and Class in Modern Lakehead Politics", (1974) 7 *Lakehead University Review* at 31–65 [Rasporich].

142 Di Matteo, Emery & English, *supra* note 1 at 176.

143 Weller, "Politics and Policy", *supra* note 131 at 295.

144 For a detailed profile of Ed Deibel and the Northern Ontario Heritage Party, see Brock, *supra* at 5.

145 Time Magazine Archives, "Secession!" (10 April 1944), online: Time Magazine <http://www.time.com/time/archive/preview/0,10987,796542,00.html>.

146 Brock, *supra* note 7 at 36.

147 For example, Deibel called for legislation mandating that half of all raw materials extracted in Northern Ontario be turned into finished products in the North (Weller, "Hinterland Politics", *supra* note 124 at 748).

148 Weller, "Politics and Policy", *supra* note 131 at 293–294.

day, stating that "as in other client-patron types of society, the local tribe was satisfied as long as even the illusion of gift-giving paternalism was evident".[149] Additionally, I would argue that the presence of viable C.C.F.-N.D.P. candidates has decreased support for political realignment by giving voters frustrated with the politics of colonialism the option of electing an opposition party which has often supported major political change.

Further, I believe that the aforementioned lack of cohesion within Northwestern Ontario has made it difficult to organize regional political parties. Cities and towns are separated by vast distances, and due to the nature of the regional economy, many people tend to be transient. In addition, while many secessionist movements rally members of a common ethnic or racial group, the people of Northwestern Ontario, taken as a single group, do not constitute an ethnicity. Finally, after decades of feeling neglected and marginalized, many Northwesterners have either moved on to greener pastures, or turned off politics and resigned themselves to more of the same.

Weller's final observation on Northwestern Ontario regional politics is that the politics of frustration have led to a "politics of parochialism". Because many northerners feel neglected by the South, disproportionate attention has been given to local politics. The most well-known example of this is the ongoing rivalry between the former cities of Port Arthur and Fort William.[150]

Weller concludes his 1977 article by forecasting that Northwestern Ontario's marginalization would likely increase in the years to come, due to the region's decreasing economic significance and proportion of the province's population.[151] Thirty years later, history has, unfortunately, proven him right. According to Weller's model, Northwestern Ontario can never expect to evolve from an exploited hinterland to an economically and politically independent region without major political realignment. The question many Northwesterners are asking now is, will this ever happen?

RECENT DEVELOPMENTS

Over the past year, Northwestern Ontario secession has raised national and international headlines. A March 2006 article in the *Economist* discussed the growth of secessionist sentiment in Northwestern Ontario,[152] and a C.B.C. poll from the same time showed that 72 per cent of Manitobans supported Northwestern Ontario joining their province.[153] Also in early 2006, the Central Canadian Public Policy Trust ("C.C.P.P.T.") was created by a group of regional politicians.[154] The C.C.P.P.T. is now being run as a project of the Northwestern Ontario Municipal Association, and is currently researching alternative governance models for the Northwest.[155]

The 2006 study by Di Matteo *et al*. was done in conjunction with the C.C.P.P.T. It focused on the economic impacts of Northwestern Ontario joining with Manitoba or becoming a separate province. By joining Manitoba, Northwestern Ontario would lose $1,026.53 per capita per year in provincial transfers but would be entitled to federal equalization payments.[156] Manitoba also has higher taxes than Ontario, but has higher program spending. Considering Northwest-

149 Rasporich, *supra* note 141 at 65.

150 Weller, "Politics and Policy", *supra* note 131 at 296.

151 Weller, "Hinterland Politics", *supra* note 124 at 754.

152 The Economist, *supra* note 8; Michelle McAfee, "Study finds political merit, economic tradeoff to creation of 'Mantario'" *Canadian Press* (9 August 2006) [McAfee].

153 CBC Radio-Canada Probe Research Inc. News Release, "Manitobans and the Mantario Question" (March 2006).

154 Duane Hicks, "Majority of Manitobans Would Back Merge with Northwest" *Fort Frances Times* (22 March 2006), online: Fort Francis Times <http://www.fftimes.com/index.php/1/2006-03-22/24860>.

155 E-mail from Tannis Drysdale to Adam Jantunen (May 9, 2006).

156 Di Matteo, Emery & English, *supra* note 3 at 181.

ern Ontario's centre-left voting record, Di Matteo *et al*. note that "[t]he Manitoba spending mix would appear to reflect the demands of 'alienated northerners' suggesting that Manitoba's spending preferences are closer to their own than to the rest of Ontario".[157] The option of creating a new Northwestern Ontario province was also determined to have no major positive or negative economic benefits.[158]

The study found that a merger with Manitoba would benefit Northwestern Ontario politically; if the region joined Manitoba, it would have 16 per cent of the seats in the provincial legislature, compared to its current three per cent share of seats in Queen's Park.[159] Demographically, age distributions in Ontario, Northwestern Ontario and Manitoba are similar, but Northwestern Ontario and Manitoba both have large and growing Aboriginal populations who are increasingly influencing politics and public policy. One-third of Aboriginals in Northwestern Ontario and Manitoba are under the age of age sixteen,[160] and in Northwestern Ontario and Manitoba, Aboriginal people make up 18 per cent and 14 per cent of the provinces' populations respectively. In Ontario, Aboriginals make up just 3 per cent of the population. Considering that Northwestern Ontario's Aboriginal population will continue to increase in absolute and relative terms, any serious discussion of provincial realignment would require Aboriginal participation. For example, a group lobbying for Northwestern Ontario secession would have to include Aboriginal members and take into account issues of particular concern to Aboriginal peoples if it were to have any real public legitimacy and chance of success. During my research, I was unable to find any sources dealing with Aboriginal opinions on Northwestern Ontario secession. This topic should be explored further.

The study offers hope for proponents of secession from Ontario. Co-author Herb Emery summed up its findings by stating "[y]ou have to decide if you want to marry up with someone like you, or someone different from you. … Northwestern Ontario has this problem—they don't really fit with the rest of Ontario that easily, but they look a lot like Manitoba economically".[161] However, it also notes that "there has been little public mobilization toward institutional change".[162] But even before such mobilization occurred, it is necessary to examine whether the people of Northwestern Ontario have the right to determine their political future, and by extension, their economic and cultural futures as well.

PART III: Northwestern Ontario's Right to Self-Determination

This section will address two main questions: who is entitled to self-determination under international law, and who is entitled to self-determination under Canadian law?

Question 1: What does self-determination entail under international law?

The self-determination of peoples is the cornerstone of international law. Though the doctrine of self-determination of nations is commonly thought to have originated with US President Woodrow Wilson's post-World War I advocacy of self-determination of ethnic groups residing in the defeated powers' territories,[163] its origins can actually be traced to the eighteenth

157 *Ibid*.

158 *Ibid*. at 189.

159 *Ibid*. at 178.

160 *Ibid*. at 181.

161 McAfee, *supra* note 152 at 148.

162 Di Matteo, Emery & English, *supra* note 3 at 191.

163 Timothy William Waters, "Indeterminate Claims: New Challenges to Self-Determination Doctrine in Yugoslavia," (2000) 20:2 *SAIS Review* at 118. See also Woodrow Wilson, "President Wilson's Fourteen Points", online: The Avalon Project – Yale University <http://www.yale.edu/lawweb/avalon/wilson14.htm>.

and nineteenth centuries.[164] In *Considerations on Representative Government*, John Stuart Mill stated that "it is in general a necessary condition of free institutions that the boundaries should coincide in the main with those of nationalities".[165] Sections 1 of both the United Nations Covenant on Civil and Political Rights[166] and the United Nations Covenant on Economic, Social and Cultural Rights[167] illustrate the significance of self-determination in international law in stating that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Many modern democratic constitutions reflect the view that self-determination in terms of popular sovereignty is a vital human right.[168] In the seminal *Reference re Secession of Quebec* ("*Secession Reference*"), the Supreme Court of Canada stated that "[t]he existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law".[169]

On the surface, the international law would appear to provide powerful legal ammunition for Northwestern Ontario secessionists. However, in practice, the lofty principles of the aforementioned United Nations covenants have been defined extremely narrowly. According to leading scholar Antonio Cassese, "[s]elf-determination appears firmly entrenched in the corpus of international law in only three areas: as an *anti-colonialist standard*, as a *ban on foreign military occupation*, and as a requirement that *all racial groups be given full access to government*".[170] For all three areas, self-determination is an external right, and for the last area, it is also an internal right.[171] Internal self-determination refers to a people's right to self-determination *within* a state, while external self-determination suggests a right to secession. The Supreme Court of Canada in the *Secession Reference* suggests that "the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination".[172] However, Hannum notes that after 1960, the right to self-determination in international law was largely confined to granting colonies the right to independence.[173]

Daniele Archibugi argues for an expansion of the right to self-determination under international law.[174] In addition to giving colonized peoples the right to form a state, Archibugi notes that self-determination has been defined by sovereigntists the world over as giving the minorities the right to become an autonomous state or join another state. He suggests that this interpretation of self-determination has become more popular since the end of the Cold War and the corresponding rise of hitherto suppressed nationalist movements, even though the international community has not recognized a right to unilateral secession.[175] Archibugi also

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164 Hurst Hannum, "Rethinking Self-Determination" (1993-1994) 34 Va. J. Int'l L. at 3 [Hannum].

165 *Ibid*.

166 *International Covenant on Civil and Political Rights,* 19 December 1966, 999 U.N.T.S. 171.

167 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3.

168 See e.g. Part 2, Section 1 of the *Constitution of the Democratic Republic of East Timor*: "Sovereignty rests with the people, who shall exercise it in the manner and form laid down in the Constitution."

169 *Secession Reference*, *supra* note 1 at para. 114.

170 Antonio Cassese, *International Law*, 2nd ed. (New York: Oxford University Press, 2005) at 61.

171 *Ibid*. at 62.

172 *Secession Reference*, *supra* note 1 at para. 126.

173 Hannum, *supra* note 164. Note also that the Supreme Court of Canada in the *Secession Reference*, *ibid.* at paras. 132-134, stated that the right of peoples to unilaterally secede under international law exists in circumstances of foreign rule or occupation, "alien subjugation, domination and exploitation outside a colonial context," and possibly situations in which people are denied the opportunity to exercise a right of self-determination domestically.

174 Daniele Archibugi, "A Critical Analysis of the Self-Determination of Peoples: A Cosmopolitan Perspective", (2003) 10 *Constellations* 4 at 493. Archibugi suggests that this approach unifies the description presented by Cassese and others, and considers the relationship between internal and external self-determination.

175 *Ibid*. at 496.

suggests that self-determination may refer to a right of ethnic and cultural minorities to certain collective rights within states. He argues that this "meaning of right of peoples concerns not so much international law as internal public law. When internal public law does not provide sufficient protection, minorities can seek protection also in international law and institutions".[176]

However, even if the circumstances in which self-determination rights are available at international law were defined expansively, note that self-determination rights are generally reserved for *peoples*. It is difficult to define what constitutes a "people"; although the Supreme Court of Canada touched on this issue in *Secession Reference* at paras. 123–125, it only notes that a people "may include only a portion of the population of an existing state".[177] Hannum argues that defining a people has objective and subjective components. The objective components such as race, religion, language and ethnicity may be used to define the "self" part of "self-determination",[178] and a person may be part of many different, overlapping groups. In an argument popular with proponents of a narrow definition of self-determination, attempting to categorize a people may lead to infinite fragmentation.[179] The subjective component of determining a people is considering which characteristics are relevant in defining a people for the purposes of self-determination. Friedlander suggests that a people consists of "a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory".[180] That being said, the strongest support for self-determination of peoples in international law has been given to colonies seeking independence. Many former colonies did not consist of a community at all, but rather were comprised of rival ethnic groups with bitter hatreds of one another.[181]

Could the people of Northwestern Ontario use international law assert a right to self-determination? At first glance, the likely answer is "no". Using Cassese's summary of circumstances in which the right to self-determination exists at international law, Northwestern Ontario is neither a former colony, nor under military occupation, nor do its people form a racial group who are denied access to government.

However, international law has been recognized by the Supreme Court of Canada in *Baker v. Canada (Minister of Immigration)* ("*Baker*")[182] as providing a moral framework for domestic decision-making. For the majority in *Baker*, L'Heureux-Dubé J. stated that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review".[183] I would submit that the core values of the aforementioned U.N. covenants are democracy, freedom, and the promotion of human development among the peoples of the world. For political reasons, self-determination rights have been defined narrowly in the international jurisprudence; however, I would argue that the moral rationale underlying section 1 of each of the aforementioned U.N. covenants, and not international legal precedent, should be the focus of any analysis of Northwestern Ontario's right to self-determination.

To this effect, I believe that Archibugi's broad, expansive analysis of self-determination rights would be the most appropriate framework to analyse Northwestern Ontario's right to

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176 *Ibid*. at 499.

177 *Secession Reference*, *supra* note 1 at para. 124.

178 Hannum, *supra* note 164 at 35.

179 For example, see Brian Slattery, "Paradoxes of National Self-Determination" (1994) 32 Osgoode Hall L. J. at 731.

180 Robert Friedlander, "Proposed Criteria for Testing the Validity of Self-Determination as it Applies to Disaffected Minorities" (1975) 25 Chitty's L.J. 335–336.

181 Because most colonial borders did not correspond to the boundaries of the ethnic groups living there, I believe that colonized "peoples" should be substituted for "populations". See Hurst Hannum, "The Right of Self-Determination in the Twentieth Century" (1998) 55 Wash. & Lee L. Rev. at 775 for additional commentary on this topic.

182 *Baker v. Canada (Minister of Immigration)*, [1999] 2 S.C.R. 817.

183 *Ibid*. at para. 70.

self-determination. If Northwestern Ontarians were to make a case for self-determination using international law principles as outlined by Archibugi, such a claim would fall under the third category of self-determination: the right of ethnic and cultural minorities to self-determination within states. This is problematic because Northwestern Ontarians could not be considered a people in the sense envisioned by Wilson, Archibugi and others—namely, an ethnic or cultural group with a defined territorial homeland. If, however, the "community of individuals" standard proposed by Friedlander were used, it might well be possible to establish the existence of a Northwestern Ontario "people". Although as mentioned earlier, the nature of Northwestern Ontario's economy and geography has created extensive fragmentation, I believe that any Northwestern Ontario secession movement would be strengthened immeasurably if it articulated how Northwestern Ontario is a cohesive community based on political, economic and cultural commonalities. Again, this expansive analysis of the international law definition of a "people" is in keeping with the moral values underlying the inclusion of self-determination rights in international law.

Question 2: Who is entitled to self-determination under Canadian law?

As noted above, international law provides a moral rather than legal argument that Northwestern Ontario should have a right of self-determination. However, Canadian legal and political history provides far more support for Northwestern Ontario self-determination. The level to which various groups within Canada are entitled to self-determination has been a perennial theme of Canadian history, and Canada's political development has been heavily influenced by all three types of self-determination described by Archibugi. Canada's independence from Britain is an example of a colony asserting its right of self-determination, albeit in a much more gradual manner than many other colonies. The Quebec sovereigntist movement is an example of certain members of a minority people seeking self-determination via independence.[184] Demands by many First Nations groups for increased autonomy within Canada fit the third description of self-determination; namely, the right of ethnic and cultural minorities to collective rights within a state.

Further, I believe that, within the Canadian context, the right to self-determination has been extended beyond Archibugi's three categories. Specifically, throughout Canadian history, various groups have called for increased autonomy from federal and/or provincial authorities without making a case for ethnic or cultural distinctiveness. Rather, their arguments have been based on regional concerns. As an example, the City of Toronto recently gained increased rights to pursue its political, economic, social and cultural development within the framework of Canada (and Ontario) despite the fact that, far from having a distinctive ethnicity, Toronto is the most ethnically diverse city in the world. When Toronto Mayor David Miller stated that the *City of Toronto Act* recognized Toronto's "uniqueness",[185] he was likely referring to Toronto's unique size, status and public policy concerns as a geographical and political entity, and not to any type of ethnic or cultural uniqueness.

The *Secession Reference* defines internal self-determination as "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state",[186] and Canada's constitutional structure was created because a unitary system was incapable of accommodating the diversity of Canada's population. The primary motivation behind

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184 The *Secession Reference* upheld the traditional international law principle that groups which are not being colonized or under foreign occupation do not enjoy a unilateral right to independence, though the Supreme Court went further than the international law in requiring Canada to negotiate with Quebec should that province vote to secede (*supra* note 1 at para. 92).

185 City of Toronto, "Mayor Miller comments on the introduction of the new City of Toronto Act" (14 December 2004), online: City of Toronto <http://www.toronto.ca/mayor_miller/speeches/cta_remarks.htm>.

186 *Secession Reference*, *supra* note 8 at para. 123.

Confederation was resolving the Canada West–Canada East rivalry. This conflict involved separate peoples who, in the opinion of most of the Fathers of Confederation, deserved separate provinces. However, as discussed in the aforementioned J.C.P.C. arbitration, it was clear from the beginning that having only two provinces for Canada's two main founding cultures was neither feasible nor desirable. As a result, after Confederation, new provinces such as Saskatchewan and Alberta were created not because they possessed distinctive regional cultures, but because the federal government wanted responsive local governments to serve the hundreds of thousands of settlers who migrated there in the early twentieth century.[187] The creation of new provinces after Confederation, despite the fact that they had only recently been settled by non-Aboriginals, may be seen as the earliest precedent for granting self-determination based on regional concerns.

The drafters of the *Constitution Act*, 1867 were aware of Canada's diversity and need for accommodation of competing interests, and I would argue that domestic and Imperial law and policy-making has recognized a much broader right to self-determination than even the most liberal international legal definition. However, even though the Supreme Court of Canada has recognized federalism as a "fundamental and organizing principle of the Constitution", Canada has not always been guided by such principles,[188] After the rebellions of 1837, Upper and Lower Canada were united into one province. This was largely an attempt to make Canada less diverse by culturally assimilating the Francophones of Lower Canada, which made up the majority of that province's population.[189] In 1840, the British Parliament in the Act of Union divided seat totals in the Legislative Assembly evenly between Canada East and Canada West, despite the East having 190,000 more people, in part to ensure Anglophone dominance of the united province.[190] However, although the francophone Québécois refused to give up their culture for the sake of political efficiency, their proportional share of the Canadian population declined. By the early 1850s, Canada West had the larger population. When this happened, radicals in Canada West such as the Clear Grits advocated more extensive democratic reforms, including representation by population in the Legislative Assembly.[191] As a result, in the lead-up to Confederation, the United Province of Canada was wracked with political instability brought about by shaky coalitions between parties from Canada East and West. Historian Randall White notes that "[a]t the bottom of the difficulties was an innate sectionalism that the struggle for responsible government had temporarily papered over".[192] Due to the united Canada's failure to function politically, federalism was seen as the best way to accommodate the diversity of cultures and regional interests that existed at Confederation, in order to create a stable national government and grant certain sections of Canadian society a degree of self-determination.[193]

Federalism has continued to evolve post-Confederation. In the late nineteenth century, the J.C.P.C. expanded provincial powers in a number of decisions.[194] Additionally, with the advent of the modern welfare state, provincial control of social services, licensing, infrastructure, and

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187 Of course, both provinces had large Aboriginal populations with distinctive cultures. However, the Canadian government's political approach to Aboriginals on the Prairies was not to grant them provincial status in light of their ethnic and cultural distinctiveness, but rather, to strip them of rights to land and self-government via treaties, the creation of reserve lands and federal legislation such as the *Indian Act*.

188 *Secession Reference*, *supra* note 1 at para. 32.

189 White, *supra* note 15 at 100.

190 *Ibid*. at 101.

191 The United Province of Canada was formed in response to the report by Lord Durham, which itself was commissioned in response to the rebellions of Upper and Lower Canada. The Durham Report recommended that Upper and Lower Canada be united "as a first step toward the eventual anglicization of the French-speaking population in Lower Canada" (White, *supra* note 15 at 100). In Durham's view, assimilation was the only way to prevent further rebellions by the Québécois against the primarily Anglophone political and economic establishment.

192 *Ibid*. at 117.

193 *Secession Reference*, *supra* note 1 at para. 43.

194 See e.g. *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96 ; *Hodge v. The Queen* (1883) 9 App. Cas. 117.

numerous other areas became much more significant in terms of provincial power. As a result, Canada developed a decentralized federal structure likely unforeseen by Sir John A. Macdonald and the other fathers of Confederation. Non-provincial organizations, such as groups representing Aboriginals, women and minorities, have demanded increased representation and autonomy for their members, with varying degrees of success. Parliament sought to respond to these demands in 1982 with the passage of the *Canadian Charter of Rights and Freedoms*[195] and section 35 of the *Constitution Act*, 1982.[196] More recently, Parliament approved a Bloc Québécois resolution to recognize the Québécois as a nation,[197] creating a precedent which many believe should translate into similar recognition for other groups within Canada.

All of this is to say that if the people of Northwestern Ontario wanted regional autonomy or provincial realignment, their best strategy would be to lobby higher levels of government (namely, Ontario and the Government of Canada) for legal and political change. Di Matteo *et al*. suggests that a Northwestern Ontario regional government can and should gain powers over "economic development, environment and energy, municipal affairs, natural resources, northern development and mines, transportation, culture, and tourism and recreation" and should lobby the Province accordingly.[198]

However, in order to secede from Ontario, other legal procedures would likely have to be followed. A constitutional amendment would be required, as outlined in the introduction to this paper. Of course, given the constitutional amending formula, if Northwestern Ontario sought to secede from Ontario, the latter would have to consent to its own dismantling. This brings up the following question: if a clear majority of Northwestern Ontarians voted in favour of a clear question regarding secession, would Ontario have to honour the results of such a vote by negotiating a constitutional amendment?

In my opinion, the answer is yes. The *Secession Reference* imposes a duty on governments to negotiate secession if a clear majority supports it. Paragraph 92 states:

> The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.[199]

The precise nature of the negotiations was not determined by the Court. However, as Chowdry and Howse note:

> Contrary to expectations … the Court decided that in the event of a yes

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195 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

196 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

197 CBC News InDepth, "Debate: The motions on the Québécois nation", online: CBC News <http://www.cbc.ca/news/background/parliament39/motion-quebecnation.html>.

198 Di Matteo, Emery & English, *supra* note 3 at 190.

199 *Secession Reference*, *supra* note 1 at para. 92.

> vote, the federal government would be under a constitutional duty to negotiate in good faith. The uncertainty of the federal response to a positive referendum result—a source of strategic power for the federal government in the past—has been eliminated.[200]

In other words, good faith negotiations would necessarily have to take into account majority interests, so long as there was a clear referendum question upon which people could vote. If three of Canada's four core values, as identified in the *Secession Reference*, are federalism, democracy, and constitutionalism and the rule of law, good faith negotiations would have to start with the recognition of a clear majority vote in favour of a a clear referendum question. Negotiations would then address not if, but how, secession could be achieved. Such negotiations would likely be easier when dealing with provincial boundary realignment than outright independence. Issues such as border crossings, currency, control of armed forces and other potential sticking points that have arisen relating to Quebec separatism would not apply.

Though the *Quebec Secession Reference* dealt with a province's right to external self-determination, there is no reason why the same "principles of democracy" would not inform a decision by a region to secede from a province but remain in Canada. One might argue that "principles of federalism" only apply to federal-provincial relations, and not to relations within provinces; the fact that most regions and municipalities are, at best, creatures of provincial statute with no constitutional rights might place them at a lower level of the totem pole of Confederation. However, the fact that provincial boundary adjustment was contemplated in the *Constitution Act*, 1982 suggests that regions and their inhabitants were meant to have some constitutional right regarding boundary determinations.

All of this still leaves the question of what, if any, remedy Northwestern Ontario would have if Ontario refused to negotiate secession after a referendum with a clear vote on a clear question, and effectively employed a constitutional veto under section 43(a). In my opinion, the options available to the Northwest would be similar to those used in the post-Confederation boundary dispute.

First, the courts could be asked to adjudicate the matter, much as the J.C.P.C. did in 1884. In my opinion, Northwestern Ontario's best argument is that the amending formula was not intended to be used to subvert the underlying values of the Canadian constitution as recognized in the *Secession Reference*—in particular, democracy and minority rights. If successful, Northwestern Ontario might then apply for an injunction requiring that Ontario negotiate secession, or for an order recognizing and giving legal effect to the referendum results.

Second, Northwestern Ontario could appeal to Parliament to decide the matter. In any event, Canada would have to agree to any boundary adjustment in order for a constitutional amendment to pass. As in international law, a region's claim to sovereignty hinges upon recognition from other parties, and the Government of Canada's recognition of "Mantario" or a "Province of Northwestern Ontario" might be compared to the U.N.'s recognition of a newly-formed state. As evidenced by the Quebec-Labrador boundary dispute,[201] which most would argue was put to rest when Canada enshrined Newfoundland's borders in the Terms of Union after it joined Canada in 1949,[202] recognition by Canada is vital to a province's claim to sover-

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200 Sujit Choudhry & Robert Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13 C.J.L.J. 2 141 at 144.

201 The long-standing dispute between Quebec and Newfoundland over the boundaries of Labrador is described in further detail in St John Chadwick, *Newfoundland: Island Into Province* (London: Cambridge University Press, 1967) at 132–153.

202 For example, Quebec government studied the matter in the early 1970s in the *Commission d'étude sur l'intégrité du territoire du Québec*. According to the Royal Commission on Aboriginal Peoples, "the commission's general conclusion was that, contrary to what many in Quebec felt, no gross legal error had been made by the privy council in its decision and thus no legal option was available to reverse the decision, *particularly when successive governments effectively accepted the boundary as the border between the two provinces* [emphasis added]", online: and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ch/rcap/sg/sj31_e.html>

eignty over a territory.

Conversely, Northwestern Ontario could not assert a right to unilateral withdrawal from Ontario. A referendum process would have to occur, and likely a clear majority would have to approve secession before Ontario allowed it to proceed. The Court recognized that good faith negotiations could break down, and it provides no suggestions as to how such an impasse might be resolved.[203] Cairns states that "the Court indicated that negotiations would be very difficult and that, among other subjects, the position of Aboriginal Peoples, especially in Northern Quebec, and boundaries could be on the table".[204] The same concerns could easily arise in Northwestern Ontario. To avoid such a situation, supporters of Northwestern Ontario secession would have to obtain considerable support from the region's Aboriginal peoples. It would also be advantageous, early in the secession process, to get the Ontario government to agree on Northwestern Ontario's borders, so that Queen's Park might be prevented from arguing that there is not a clear border during post-referendum negotiations.

CONCLUSION

When Northwestern Ontario became part of Ontario, Oliver Mowat's legal reasoning was questionable and the J.C.P.C. decision was surprising. His victory before a tribunal appointed by his political ally, Alexander Mackenzie, may have been the most influential factor behind Mowat's eventual victory on the boundary issue. Certainly it is doubtful that the southeast border of Rupert's Land was hundreds of kilometres farther west than previously thought, and good luck played a key role in Ontario winning the *Ontario Boundary Case*.

That being said, I believe that Oliver Mowat deserves full credit for taking control of Northwestern Ontario by fighting harder for it than either the Dominion or Manitoba. Had Mowat not sent provincial agents to the farthest reaches of his province's claim, not prepared an impeccably researched case with virtually every treaty, law, case, letter and other documentary information relevant to the boundary dispute, and not personally advocated for his province before the J.C.P.C., the result might well have been different.

When Mowat returned to Ontario after successfully arguing the boundary case in London, England, MacKirdy writes that "[r]arely have Ontarians indulged in such blatant manifestations of provincial patriotism".[205] Twelve thousand people marched in a parade marking the occasion in Toronto, and the event was witnessed by nearly 100,000. As part of a triumphant tour, Mowat told a crowd in Niagara Falls, "I rejoice to know that the one great cause, the principal cause of your enthusiasm, is that you love Ontario as I love it".[206]

Northwestern Ontario has never had such a bright, charismatic and passionate advocate for its rights. Should Northwestern Ontario ever hope to secede from Ontario, it will need an equivalent to the man who brought the region into the province in the first place. Such an advocate will need to be aware of the legalities surrounding self-determination for Northwestern Ontario. But more importantly, that person will have to have a passion for the Northwest, as Mowat had for Ontario.

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203 *Secession Reference*, *supra* note 1, at paras. 96–97.

204 Alan Cairns, "The Quebec Secession Reference: The Constitutional Obligation to Negotiate" 10 Constit. Forum 1 26 at 27.

205 MacKirdy, *supra* note 18 at 197.

206 Quoted in MacKirdy, *ibid*.

APPENDIX A: Maps

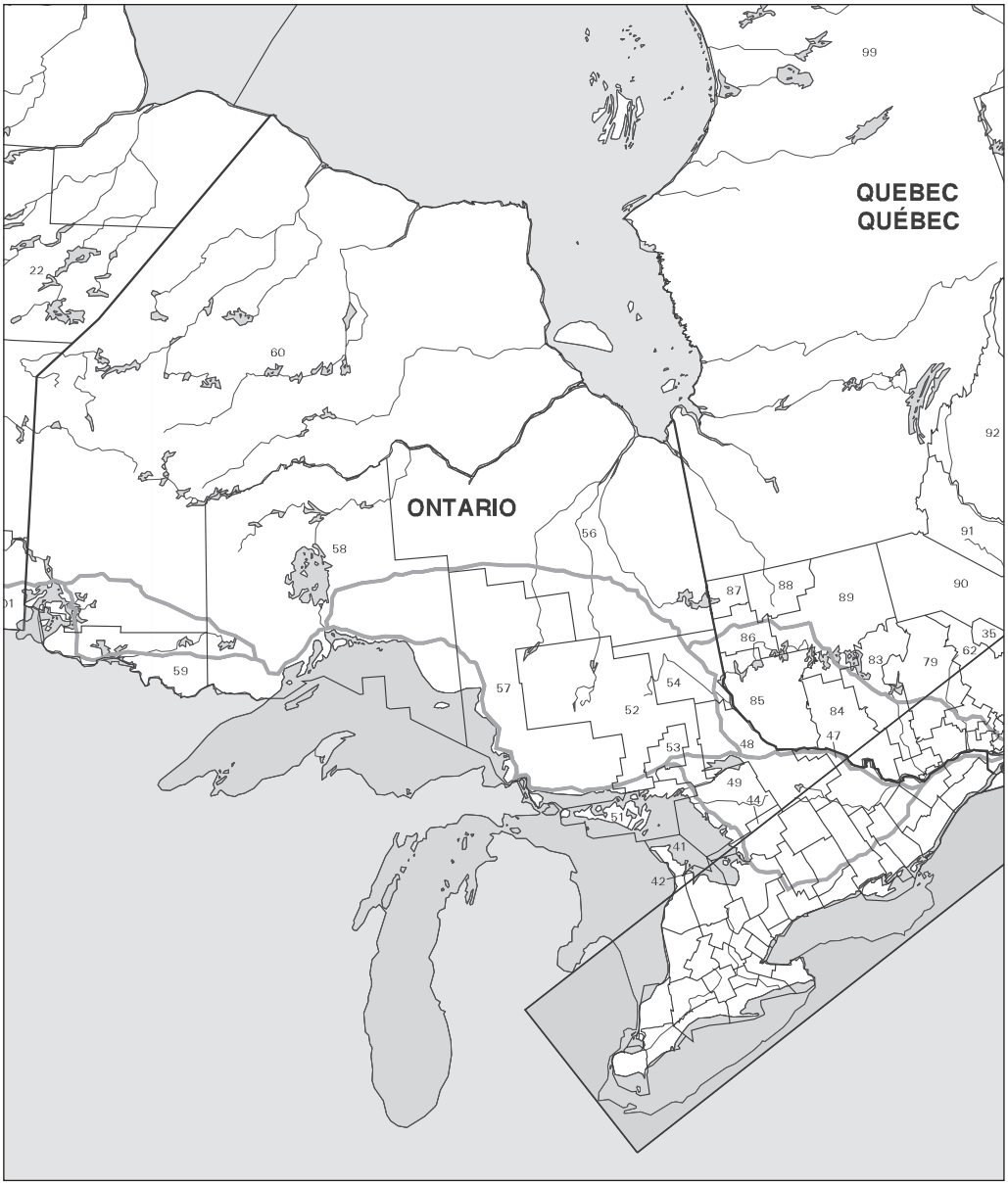


FIGURE 1
MAP OF NORTHWESTERN ONTARIO CENSUS DISTRICTS.
Thunder Bay District is 58, Rainy River District is 59, Kenora District is 60.

Source: Statistics Canada (Unofficial Version)

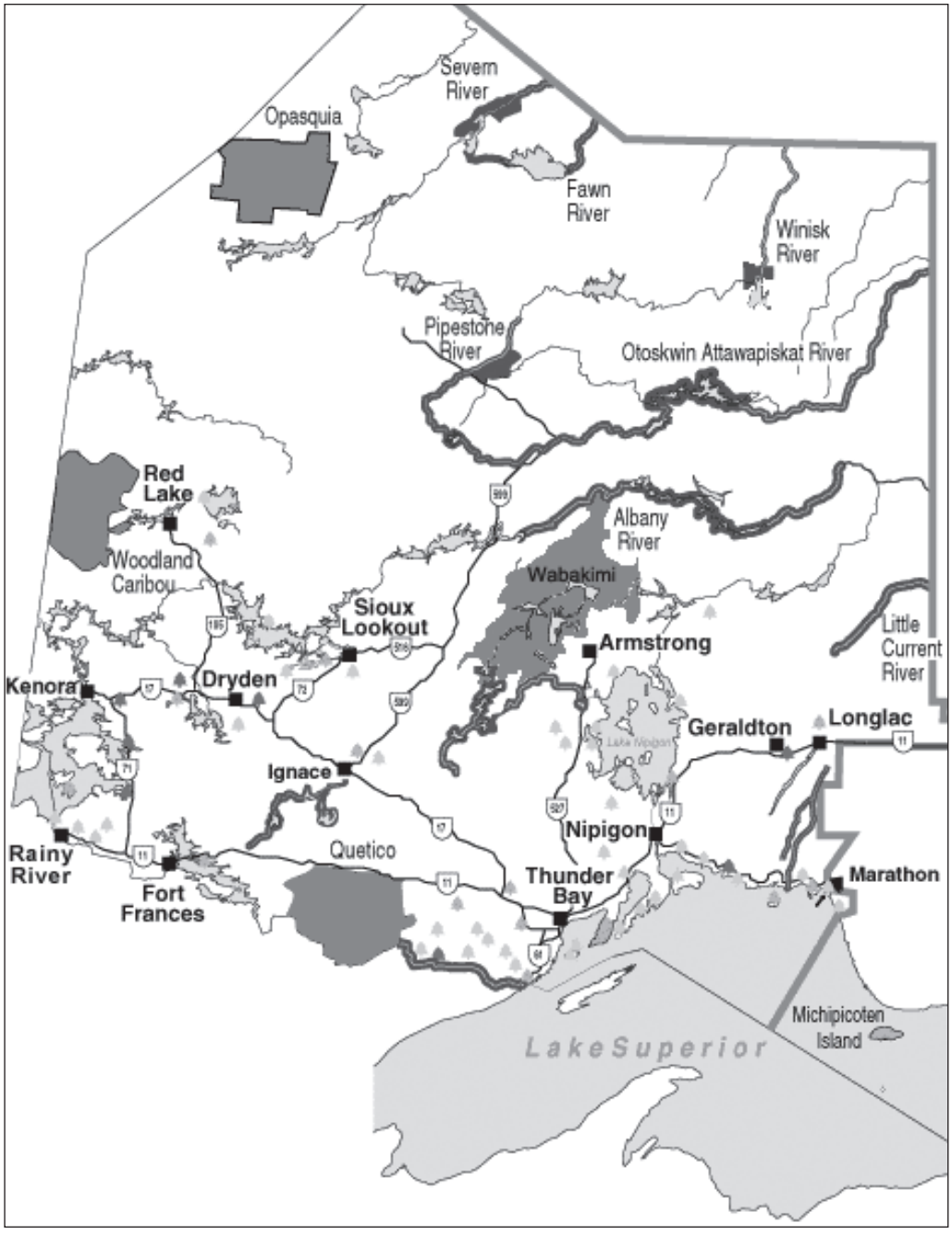


FIGURE 2
ONTARIO PARKS MAP OF NORTHWESTERN ONTARIO.

Source: Queen's Printer for Ontario, 2006 (Unofficial Version)

FIGURE 3
MAP OF ONTARIO, 1867.

Source: Atlas of Canada (Unofficial Version)

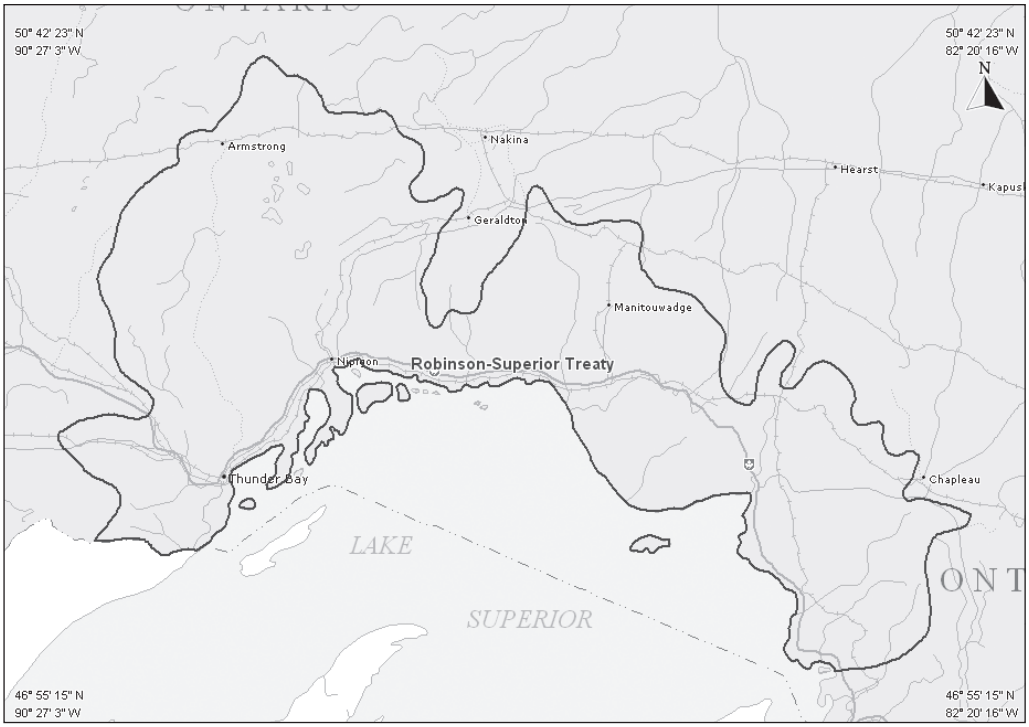


FIGURE 4
ROBINSON-SUPERIOR TREATY AREA.

Source: Treasury Board of Canada (Unofficial Version)

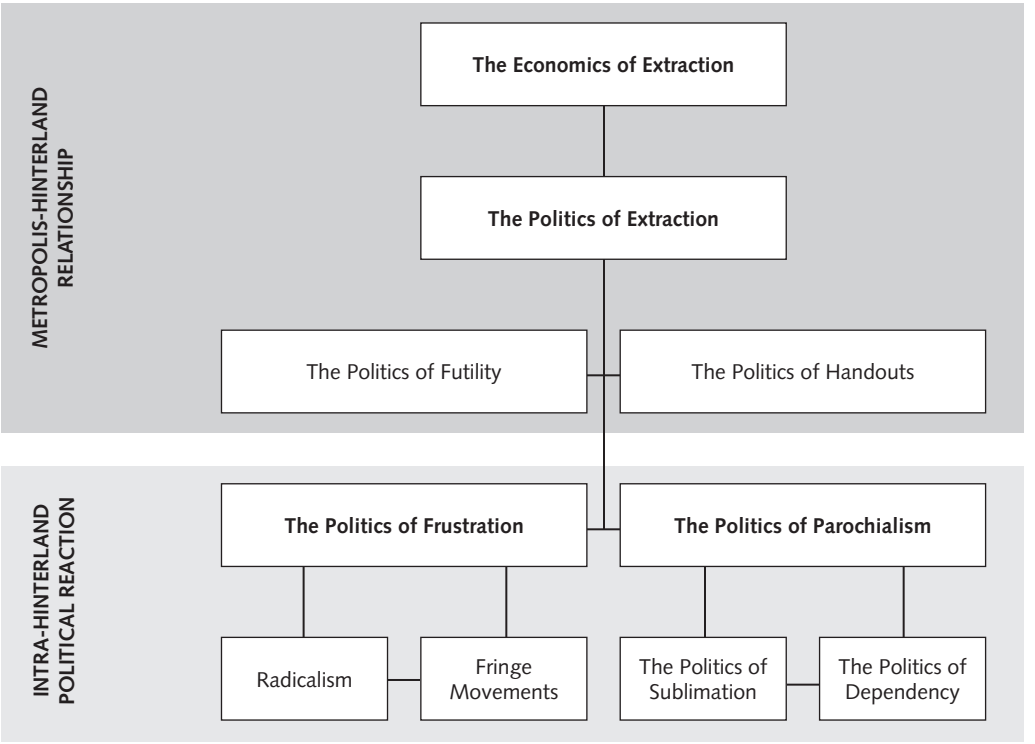
FIGURE 5
MAP OF MANITOBA AND ONTARIO, 1874.

Source: Atlas of Canada (Unofficial Version)

FIGURE 6
MAP OF MANITOBA AND ONTARIO, 1881.

Source: Atlas of Canada (Unofficial Version)

APPENDIX B: Economic and Political Effects of Extraction in Northwestern Ontario



Source: Reproduced from Geoffrey Weller, "Hinterland Politics: The Case of Northwestern Ontario" (1977) 10 Can.J.Pol.Sci. 4

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